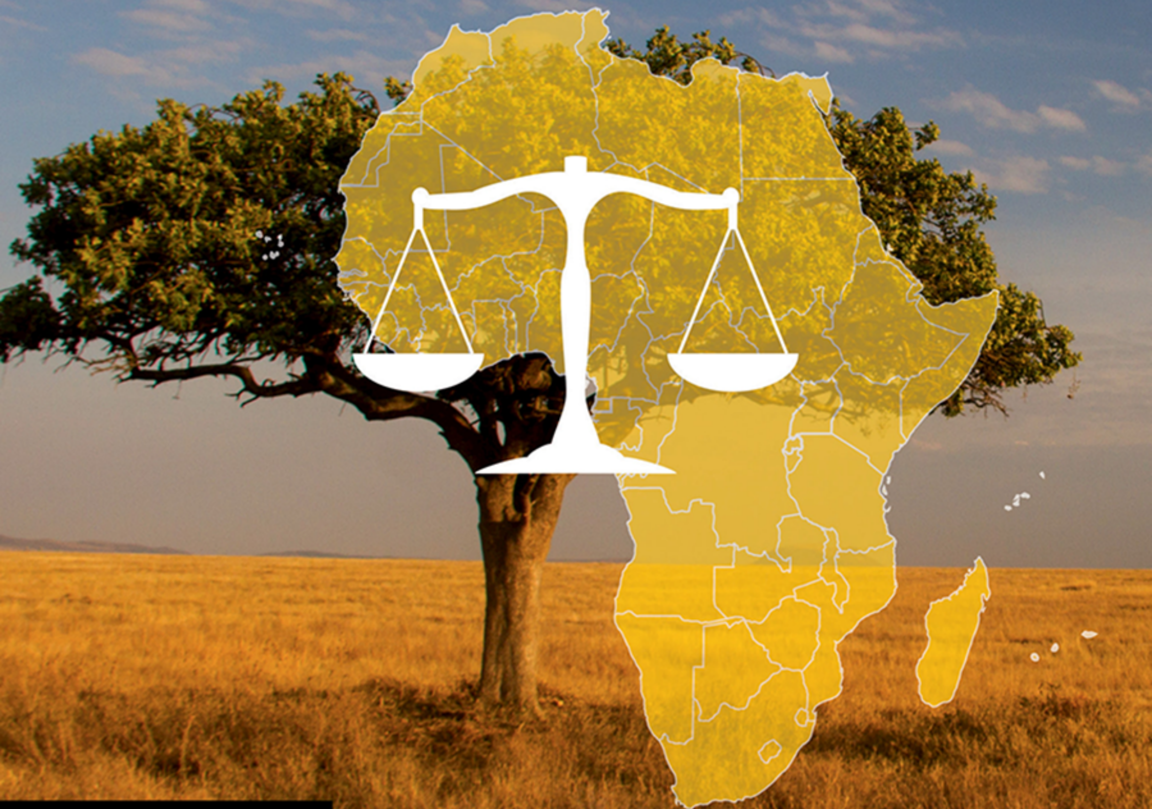
The African Court of Justice and Human and Peoples' Rights in Context

Development and Challenges

Edited by
Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmehielle



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THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT

The treaty creating the African Court of Justice and Human and Peoples' Rights, if and when it comes into force, contains innovative elements that have potentially significant implications for current substantive and procedural approaches to regional and international dispute settlement. Bringing together leading authorities in international criminal law, human rights and transitional justice, this volume provides the first comprehensive analysis of the 'Malabo Protocol' while situating it within the wider fields of international law and international relations. The book, edited by Professors Jalloh, Clarke and Nmehielle, offers scholarly, empirical, critically engaged and practical analyses of some of its most challenging provisions. Breaking new ground on the African Court, but also treating old concepts in a novel and relevant way, *The African Court of Justice and Human and Peoples' Rights in Context* is for anyone interested in international law, including international criminal law and international human rights law. This title is also available as Open Access on Cambridge Core at doi.org/10.1017/9781108525343.

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Preface

On 27 June 2014, the Assembly of Heads of State and Government of the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ('Malabo Protocol'). The Malabo Protocol, which seeks to establish the first-ever African court with a tripartite jurisdiction over human rights, criminal and general matters is aimed at complementing national, sub-regional and continental bodies and institutions in preventing serious and massive violations of human rights in Africa through, among other things, the prosecutions of the perpetrators of such crimes as specified in the statute annexed to the treaty. To date, the Malabo Protocol has only been signed by 11 out of 55 African Union (AU) member states. No states have ratified it. Although, in accordance with its Article 11 and AU treaty-making practice, fifteen such ratifications will be required for the treaty to enter into force. There is no guarantee that the Malabo Protocol will achieve the requisite number of ratifications anytime soon. Especially given that some AU treaties have failed to secure the support they need to enter into force two decades, and in one extreme case, three decades after its adoption. It is indeed noteworthy that, as of this writing, of the six other treaties adopted by the AU Assembly in the same meeting as the Malabo Protocol in June 2014, only one of the agreements has managed to garner seventeen signatures and five ratifications, the highest amongst the seven instruments (though this means that, about four years after its adoption, forty-four of the fifty-five AU member states have elected not to sign it). If the Malabo Protocol achieves the fifteen required ratifications to enter into force in the next ten to fifteen years, it might take years for the AU states to allocate the resources required for the new court to be established so that it can function in accordance with its high ambitions set out in the Statute and Annexure. That said, thirty-three African States are parties to the Rome Statute of the International Criminal Court and given the currently tense relationship between the Hague-based court and the AU, it is possible that

African States may have reason to fast track their signatures and ratifications of the Malabo Protocol in the future thereby bringing it into force sooner than we might otherwise anticipate.

The premise of this book is that the Malabo Protocol, which is one of the most interesting and complex treaties to ever be produced by a regional body for the purpose of creating a regional judicial mechanism, merits serious scholarly inquiry. Part of the reason for this is that while international criminal law has for the last half century only been conceptualized as applicable at the national and international levels, with a variation of 'hybrid courts' mixing the national and international to different degrees to proffer a third enforcement model, if and when it comes to force, the Malabo Protocol would become the first regional criminal jurisdiction capable of prosecuting serious crimes condemned by international law such as genocide, the crime of aggression, war crimes and crimes against humanity. It would also be the first such tribunal to prosecute crimes of particular concern to the Africa region such as unconstitutional changes of government or illicit exploitation of natural resources as well as environmental and other related crimes, including when committed by natural persons as well as corporations. This 'regionalization' and 'Africanization' of international criminal law enforcement possesses serious potential to add to the menu of accountability options available to States in order to more effectively counter serious international and transnational crimes. It is a model that is already apparently generating interest in other regions, such as Latin America, where a project is underway to propose a regional court with jurisdiction over drug trafficking offences under the banner of COPLA – an initiative supported by Argentina and a number of other states.

Though, historically, there have been some tensions between regionalization and universalization in the context of other subfields of international law, such as human rights and trade law, the existence of human rights courts have proven to be effective devices to the process of development and application of a global body of human rights standards at a level that was previously unimaginable. That complex web of human rights commissions and courts in Europe, the Americas and Africa, which now exhibits a multilayered system of norm enforcement coupled with the experimentation with ad hoc criminal tribunals, suggests that it could be worth exploring the potential of an equivalent multilevel system in the field of international criminal law. And that is just what the African Court Research Initiative (ACRI) sought to address when embarking on a four-year, three-phase project to launch a transnational research process that would provide rigorous research about the emergence of new regional mechanisms, while also providing technical assistance to the AU's Office of Legal Counsel and the future court.

This book, which is a key outcome of ACRI's efforts, aims to offer the first comprehensive analysis of the Malabo Protocol with an examination of its human rights, general and criminal jurisdictions. In addition to conducting a widespread critical analysis about the components of the future court, we have also been working on the Elements of Crimes in order to enhance further clarity in what will shape future interpretation and application of the Malabo Protocol for the African Court of Justice and Human and People's Rights. These, along with a range of research studies aimed at uncovering the factors that may delay the ratification of the Malabo Protocol, have allowed us to work on the mobilization of key information related to how the Court should be understood in Africa and internationally.

This volume, which we are pleased to present after about four years of intensive research which took place in Africa and across several other continents, will hopefully advance global scholarly engagement with the substance of the first treaty anywhere in the world to merge general, civil and human rights issues under one roof in what we describe in the introduction to this book as the 'One Court' concept.

As the project took a few years to finish, and benefited from the input and support of many people, we wish to take a few moments to thank some of them. We apologize that space constraints do not permit us to mention everyone here and ask for the understanding of those who might have been omitted. First, since it would not have been possible to convene ACRI's research without the enduring confidence of the African Union Commission, particularly the Office of the Legal Counsel for the robust access to information it granted which helped in making the research and ultimately the book a reality, we are grateful for their support. Connected to the African Union is the strong moral and political commitment from our project partners and fiscal sponsors, the Africa Regional Office of the Open Society Foundation, especially Pascal Kambale and Eleanor Thompson based in Dakar, Senegal. They supported the proposal for our independent academic research project from the first time we raised the idea. As experts on issues of accountability in Africa, they immediately grasped the need for ACRI and its desire to promote strong scholarly engagement with the substance of the Malabo Protocol. To our delight, they never wavered throughout the multi-year phases of the project, even as the project grew to encompass a wider team of authors and many more conferences than the one or two that we initially envisaged. We therefore wish to express our gratitude to them, even as we look forward to our continuing collaboration on the more practical side of ACRI aimed at developing ancillary legal instruments in an attempt to help 'fix' some of the major drafting problems and gaps in the Malabo Protocol.

Second, we are grateful to all our contributing authors. Not only did they accept to write thoughtful and original chapters, but they proved willing to engage with us, whether at the conferences we organized on the subject of the book in Miami, Arusha or The Hague. They also deserve a special medal for their deep generosity in understanding the delays in the sending of the book to publication that arose as a function of the expansion of our initial one-year project to a three- to four-year effort.

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Abbreviations

ACC	African Criminal Court
ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Court on Human and Peoples' Rights
ACJ	African Court of Justice
ACtJHPR	African Court of Justice and Human and Peoples' Rights
ACP	African, Caribbean
AfDBAT	African Development Bank Administrative Tribunal
AFISMA	African-led International Support Mission to Mali
Afr. J. Leg. Stud.	*African Journal of Legal Studies*
AGA	African Governance Architecture
AHRLR	African Human Rights Law Reports
AJIL	*American Journal of International Law*
AMIB	African Mission in Burundi
AMIS	African Union Mission in Sudan
AMISEC	AU Mission for Support to the Elections in the Comoros
AMISOM	African Union Mission in Somalia
Am. J. Int'l. L.	*American Journal of International Law*
ANF	Al-Nusra Front
APC	Armée Populaire Congolais

APSA	African Union's Peace and Security Architecture
ASP	Assembly of States Parties
ATJF	African Transitional Justice Framework
AQIM	Al-Qaeda in the Islamic Maghreb
AU	African Union
AUC	African Union Commission
AUAT	African Union Administrative Tribunal
AUPD	African Union High-Level Panel on Darfur
AUPSP	African Union Protocol Relating to the Establishment of the Peace and Security Council of the AU
AUTJ	African Union Transitional Justice
AUTJF	African Union Transitional Justice Framework
BiH	Bosnia-Herzegovina
Brook. J. Int'l. L.	*Brooklyn Journal of International Law*
CAL	Coalition of African Lesbians
CAR	Central African Republic
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Chi. J. Int'l L	*Chicago Journal of International Law*
CICC	Coalition for an International Criminal Court
CITES	Convention on International Trade in Endangered Species
CNCA	Canadian Network on Corporate Accountability
COE	Council of Europe
CoH	Cessation of Hostilities
Colum. J. Transnat'l L.	*Columbia Journal of Transnational Law*
CPA	Comprehensive Peace Agreement
CRC	Convention on the Rights of the Child 1989
Crim. L. For.	*Criminal Law Forum*
CSAT	Commonwealth Secretariat Arbitral Tribunal
CSO	Civil Society Organizations

DCAF	Democratic Control of Armed Forces
DDPD	Doha Document for Peace in Darfur
DRC	Democratic Republic of the Congo
Duke JCIL	*Duke Journal of Comparative and International Law*
EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECJ	European Coalition for Corporate Justice
ECJ	European Court of Justice
ECOSOCC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EFCC	Economic and Financial Crimes Commission
EHRR	European Human Rights Report
EITI	Extractive Industries Transparency Initiative
EJIL	*European Journal of International Law*
EO	Executive Outcomes
ETS	European Treaty Series
EU	European Union
EWCA	England and Wales Court of Appeals
EWHC	Senior Courts of England and Wales
FAPC	Forces Armées du Peuple Congolais
FATF	Financial Action Task Force
FDS	Ivorian Defence and Security Forces
FNI	Front des Nationalistes Intégrationnistes
FNLA	National Liberation Front of Angola
FPLC	Force Patriotique pour la Libération du Congo
FRPI	Force de Résistance Patriotique en Ituri
GABAC	Groupe d'Action contre le blanchiment d'Argent en Afrique Centrale
GEMAP	Governance and Economic Management Assistance Programme
Harv. Int'l L. J.	*Harvard International Law Journal*
HKCLR	Hong Kong Criminal Law Reports
HRC	Human Rights Committee

Hum Rts. Q.	*Human Rights Quarterly*
IAC	International Armed Conflict
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBA	International Bar Association
ICAR	International Corporate Accountability Roundtable
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICGLR	International Conference on the Great Lakes Region
ICJ	International Court of Justice
ICJ	International Commission of Jurists
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICT	International Criminal Tribunal
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFAD	International Fund for Agricultural Development
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IL	International Law
ILC	International Law Commission
ILO	International Labour Organization
ILOAT	International Labour Organization
IMTFE	International Military Tribunal for the Far East
Int'l Crim. Just.	*International Criminal Justice*
Int'l Crim. L. Rev.	*International Criminal Law Review*

Int'l Rev. Red Cross	*International Review of the Red Cross*
Inter-Am. Ct. H.R.	Inter-American Court of Human Rights
IOM	International Organization for Migration
IRRC	International Review of the Red Cross
ISIL	Islamic State of Iraq and the Levant
J. Crim. L.	*Journal of Criminal Law*
J. Int'l Crim. Just.	*Journal of International Criminal Justice*
J. Int'l. L.	*Journal of International Law*
JCE	Joint Criminal Enterprise
JICJ	Journal of International Criminal Justice
KPCS	Kimberly Process Scheme for the Certification of Rough Diamonds
LEITI	Liberian Extractive Industries Transparency Initiative
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LRA	Lord's Resistance Army
MAES	Assistance Mission to the Comoros
MICT	Mechanism for International Criminal Tribunals
MINUSCA	UN Multidimensional Integrated Stabilization Mission to the Central African Republic
MIOC	Military Observer Mission in the Comoros
MISCA	Africa-led International Support Mission to the Central African Republic
MNC	Multinational Corporations
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MPLA	Popular Movement for the Liberation of Angola
MUJAO	Movement for Unity and Jihad in West Africa
NDEA	National Drugs Enforcement Agency
Neth. Int'l L. Rev.	*Netherlands International Law Review*
NIAC	Non-International Armed Conflict
NIF	National Islamic Front
NGO	Non-Governmental Organization

OASAT	Administrative Tribunal of the Organization of American States
OAU	Organization of African Unity
ODM	Orange Democratic Movement
OECD	Organization for Economic Cooperation and Development
OIC	Organization of the Islamic Conference
OTP	Office of the Prosecutor
PALU	Pan African Lawyers Union
PAP	Pan African Parliament
PCIJ	Permanent Court of Justice
PCRD	Post-Conflict Reconstruction and Development Policy Framework
Penn St. L. Rev.	*Penn State Law Review*
PMSC	Private military and security companies
PNG	Papua New Guinea
PSC	Peace and Security Council
PSNR	Permanent sovereignty over natural resources
PTC	Pre-Trial Chamber
PUSIC	Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo
R2P	Responsibility to Protect doctrine
RCM	Regional Certification Mechanism
RCD-ML	Rassemblement Congolais pour la Démocratie –Kisangani/Mouvement de Libération
REC	Regional Economic Communities
RPE	Rules of Procedure and Evidence
RTI	Radiodiffusion Télévision Ivoirienne
RUF	Revolutionary United Front
SADC	Southern African Development Community
Santa Clara J. Int'l L.	*Santa Clara Journal of International Law*
SC	Security Council
SCC	Supreme Court of Canada
SCO	Shanghai Cooperation Organization
SCSL	Special Court for Sierra Leone
SDNY	Southern District of New York

SERAC	Social and Economic Action Rights Centre
SSRN	Social Science Research Network
StAR	Stolen Assets Recovery Initiative
STL	Special Tribunal for Lebanon
Sydney L. Rev.	*Sydney Law Review*
TCL	Transnational Criminal Law
TDG	Thiodyglicol
TFV	Trust Fund for Victims
TNC	Transnational Corporations
TWAIL	Third World Approaches to International Law
UCG	Unconstitutional Change of Government
UKSC	United Kingdom Supreme Court
UN	United Nations
UNAMID	United Nations African Union Mission in Darfur
UNAT	United Nations Appeals Tribunal
UNCAC	United Nations Convention Against Corruption
UNCLOS	United Nations Convention on the Law of the Sea
UNDT	United Nations Dispute Tribunal
UNEP	United Nations Environmental Programme
UNGA	United Nations General Assembly
UNITA	National Union for the Total Independence of Angola
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office for Drugs and Crime
UNSC	United Nations Security Council
UNTOC	UN Convention against Transnational Organized Crime
UNTS	*United Nations Treaty Series*
UNWCC	United Nations War Crimes Commission
UPC	Union des Patriotes Congolais

UPDA	Ugandan People's Democratic Army
Vand. J. Transnat'l L.	*Vanderbilt Journal of Transnational Law*
Wash. U. Global Studies L. Rev.	*Washington University Global Studies Law Review*
WGAD	Working Group on Arbitrary Detention
WILDAF	Women in Law and Development in Africa
Y.B. Int'l L. Comm'n	*Yearbook of the International Law Commission*

1

Introduction

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

KAMARI M. CLARKE, CHARLES C. JALLOH
AND VINCENT O. NMEHIELLE

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 People's 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 court[6]

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 Dlamani, 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 if Africa' Dar es salaam Tanzania 23 October–5 November 1973. See 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 1981[9] 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 s 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 Hissiéne 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 carryout 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 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 judges[38] 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 Hisséne 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 trisectional 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. ay 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/; Nmehielle, 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 has 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 the 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 systems[113] 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 46A*bis*

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 A*Bis*. 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 46A*bis* 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 46A*bis* aims to provide both immunity *rationae personae* and immunity *rationae materiae*, or only one.[126] An ordinary meaning of Article 46A*bis* 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 rule[141] 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 rule[149] 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 law[151] 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 resolutions[154] 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 impunity[157] – 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/N95/140/97/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.iccnow.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 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 subsided 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/SP1/12/01 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/Acceded 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 trisectional 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 Statue, 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 court[244] 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.

PART I

The Wider Context of Transitional Justice in Africa

2

The Place of the African Court of Justice and Human and Peoples' Rights in the Prosecution of Serious Crimes in Africa

CHARLES C. JALLOH

1. INTRODUCTION

The present enforcement system of international criminal law essentially rests on three main pillars. First, there are prosecutions of international crimes within the *national courts* of the territorial states where the offense occurred. This could be through the regular criminal courts of those states or so-called "hybrid" or "mixed" chambers specifically created for that purpose by the state alone, or with the help of the United Nations (UN), as was the case in Cambodia, Bosnia-Herzegovina (BiH), East Timor, Lebanon, or Kosovo.[1]

Second, there are prosecutions within *international courts*, whether ad hoc or permanent. The former dates back to the Nuremberg and Tokyo International Military Tribunals. Those pioneers were followed more recently by the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), all of which were either created directly as subsidiary bodies of the UN or authorized by its Security Council under its mandate to ensure the maintenance of international peace and security.[2] There is, of course, also the multilateral treaty-based International Criminal Court (ICC), which as of writing, comprises 123 States Parties from all regions of the world and is endorsed in principle by 15 other signatories.

[1] For a discussion of the presumed benefits of such courts, *see* Laura A. Dickinson, *The Promise of Hybrid* Courts, 97 Am. J. Int'l. L. 295 (2003); Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia (Cesare Romano, André Nollkaemper and Jann Kleffner eds. 2004); Sarah Williams, Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues (Michael Bohlander ed. 2006).

[2] For an overview, *see* William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone (2006); *see also* The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law (Charles Jalloh ed. 2014).

Lastly, present international criminal law also contemplates prosecutions within the *domestic courts of third states*. Good examples of the latter include Australia, Belgium, Canada, France, and Senegal, all of which have in the past invoked *universal or quasi-universal jurisdiction* in an attempt to investigate and prosecute so-called core international crimes[3] such as genocide, war crimes, and crimes against humanity.[4] This has occurred despite their lack of any of the usual territorial, nationality or other traditional jurisdictional links to the offenses other than the presence of the accused. These types of prosecutions, along with those in the national courts of the *territorial states*, form part of what the late M. Cherif Bassiouni dubs the "indirect enforcement system,"[5] in contrast to international prosecutions which are part of the "direct enforcement system"[6] of international criminal law.

Each of these direct or indirect enforcement models has its benefits and drawbacks. Generally, national prosecutions within the territorial state are considered ideal on legal, pragmatic or legitimacy grounds. But experience teaches that municipal courts do not always prosecute international crimes for all kinds of reasons. It is often the case that, in some situations, the concerned state and its judicial system may have collapsed or lacks the willingness and/or material ability to investigate or prosecute. Though generally relatively inexpensive, when compared to international trials, national judicial processes can also sometimes be manipulated leading to biased prosecutions.

For their part, for various reasons including the prioritizing of the parochial national over the wider community interest, third party states tend to be hesitant to invoke universal jurisdiction to prosecute foreign officials, or due to immunities, may even be legally barred from doing so—at least while the most senior ranking officials of other states are still holding office. For instance, Belgium, initially exceptional for its enthusiasm in seeking the title

[3] These are the kinds of offenses discussed in Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo* v. *Belgium*), (February 14, 2002), Judgment, I.C.J. Rep. 2002 3. For the distinction between "core" from other international crimes, *see* Chapter 8 (in this volume).

[4] There is a tremendous body of literature on universal jurisdiction. *See*, for a small sample, A. Hays Butler, *The Diplomacy of Universal Jurisdiction: A Review of the Literature*, 11 Crim. L. For. 353 (2000). For challenges, *see* Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. Int'l Crim. Just. 589 (2003); Georges Abi-Saab, *The Proper Role of Universal Jurisdiction*, 1 J. Int'l Crim. Just. 596 (2003); Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l. L. 1 (2011); Luc Reydams, *The Rise and Fall of Universal Jurisdiction*, in The Routledge Research Handbook on International Criminal Law 337 (William Schabas and Nadia Bernaz eds. 2011).

[5] Introduction to International Criminal Law 25 (2nd edn. M. Cherif Bassiouni ed. 2013).

[6] Ibid.

of "European capital of universal jurisdiction,"[7] famously found itself in a legal and political challenge[8] at the International Court of Justice (ICJ) in the *Arrest Warrant* saga when it indicted the then incumbent Congolese foreign minister.[9] Belgium was reminded that, although legal steps to prosecute serious crimes is not necessarily a bad thing, any such initiatives must be scrupulously compliant with customary international law immunities. The ICJ deemed those applicable at the horizontal level as between co-equal sovereigns.[10] Other more recent cases from certain European courts, such as those of France, Spain and the United Kingdom against Rwandese officials based on the universality principle, have been no less controversial.[11] The end result tends to return us to the all too familiar normalcy of impunity.

Against this backdrop, international penal courts have increasingly come to be perceived as a key if not the ultimate solution to the rampant global impunity for atrocity crimes. The few UN international penal tribunals established by states since the end of the Cold War have to date successfully dispensed justice for the specific situations in the former Yugoslavia and Rwanda that they were mandated to address. The same is true of the Sierra Leone Special Court. Nonetheless, international courts also have their own share of challenges. So international criminal lawyers and states are beginning to raise doubts on whether they could be the magic bullet against individuals who perpetrate atrocity crimes.[12] These include issues concerning their costly nature, their generally lengthy proceedings, and their geographic distance and remoteness from the territories and populations in whose name they seek to render justice.[13]

As to the permanent ICC, in addition to some worries about its slow start in terms of completed trials to date as well as other challenges, it may also lack jurisdiction or the resources to start investigations and to prosecute.

[7] Charles Jalloh, *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, 21 CRIM. L. FOR. 63 (2010).

[8] Steven Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L. L. 888 (2003).

[9] For critical remarks, *see* Neil Boister, *The ICJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law*, 7 J. CONF. AND SEC. L. 293 (2002); Antonio Cassese, *When may Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853 (2002).

[10] *Arrest Warrant* case, supra note 3 at paras. 58–61.

[11] *See* Jalloh, supra note 7; *see also* Harmen van der Wilt, *Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States*, 9 J. INT'L CRIM. JUST. 1043 (2011).

[12] Christopher Gosnell, *The Adoption of the Essential Features of the Adversarial System*, in INTERNATIONAL CRIMINAL LAW 332–3 (3rd edn. Antonio Cassese et al. eds. 2008).

[13] Ibid. at 312.

Indeed, even where it does possess the jurisdiction and resources to prosecute, the Prosecutor may decline to proceed because the situation as a whole is of insufficient gravity to warrant international intervention. Where she decides to proceed, say against a sitting Head of State, the ICC may, due to perceptions of selectivity in application of its legal regime, fail to muster the state cooperation required to facilitate the rendering of such persons to answer crimes against humanity and genocide charges. The example of President Omar Al Bashir of Sudan comes to mind.[14]

Furthermore, given the sheer number of global hotspots and the magnitude of the atrocities, the ICC was never intended nor realistically expected to be the sole institutional response to provide criminal accountability.[15] That is largely why the Court was predicated on the complementarity principle, which under Article 17 of the Rome Statute of the ICC requires states to act as the first lines of defense in the battle against impunity.[16] In so doing, states placed the responsibility of prosecutions on themselves, consistent with the principles of sovereignty and international law, while undertaking to be the primary actors to investigate or prosecute Rome Statute crimes. But failing that, given the long history of bloodied wars that leave impunity to roam freely around the world, they envisaged the ICC as a back-up system.

[14] *Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05–01/09, Warrant of Arrest (March 4, 2009). For a discussion of the legal issues that arise, *see* Paola Gaeta, *Does President Al Bashir Enjoy Immunity From Arrest?* 7 J. Int'l Crim. Just. 315, *contra* Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities*, 7 J. Int'l Crim. Just. 333 (2009).

[15] For instance, in Sierra Leone, during that country's conflict it is alleged that there were over 32,000 perpetrators of atrocity crimes. Only nine suspects were successfully prosecuted in the SCSL for international crimes between 2002 and 2013. In Rwanda, 15,286 criminals were tried in the ordinary courts for genocide-related offenses over 17 years, while 1,958,634 people faced some accountability under the traditional *gacaca* traditional justice system in 10 years and the ICTR handled 90 indictees of which 80 cases were concluded cases (also in 18 years). The ICC has been involved with, for example, the Democratic Republic of Congo (DRC) since mid-2004. It has only indicted a handful of Congolese suspects. These includes its first case involving Thomas Lubanga, for a conflict that has claimed well over five million deaths. For meaningful justice to be served in the DRC, it seems obvious that the domestic courts would have to step up to their responsibilities in line with the complementarity principle.

[16] Rome Statute of the International Criminal Court, U.N. Doc A/Conf. 183/9 (1998) [hereinafter Rome Statute]. For in-depth discussions of the challenges of implementation, *see* Linda E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?* 12 Wash. U. Global Studies L. Rev. 451 (2013); Mark S. Ellis, Sovereignty and Justice: Balancing the Principle of Complementarity Between International and Domestic War Crimes Tribunals (2014). As to the challenges of application of Article 17 in Africa in the context of the Kenya Situation, *see* Charles Jalloh, *Kenya vs. ICC Prosecutor*, 53 Harv. Int'l L. J. 269 (2012).

This in practice means that wherever the jurisdiction-bearing state is "unwilling or unable genuinely to carry out the investigation or prosecution,"[17] the ICC could take up that mantle, in behalf of the "international community."[18] This would be the case, at least in respect of a limited group of persons bearing greatest responsibility. Viewed in this wider context, it seems apparent that even in a post-ICC world the impunity gap will be left even larger whenever national court or international tribunal action is unavailable. This irrespective whether for reasons of lack of capacity, political will or other constraints.

Given the presently bifurcated direct and indirect enforcement systems, it seems to be helpful to examine whether international criminal law could benefit from the approach of its sister discipline—international human rights law—to query whether, in addition to the currently available options to prosecute, regional or perhaps even sub-regional courts could also play a useful role in the wider quest to mete out individual criminal responsibility for atrocity crimes. Regional organizations, and their courts, may well offer some of the key advantages associated with national courts and mitigate some of the key disadvantages of international tribunals.

In engaging upon this admittedly preliminary exploration, this chapter will evaluate the work of regional organizations in international peace and security. We focus in particular on ways regional tribunals could supplement the ICC's mandate to prosecute core international and even other serious transnational offenses. An important consideration may be that there are already in place regional human rights courts in Africa, the Americas and Europe, though with varying degrees of effectiveness. Asia and the Middle East, though presently without any human rights courts, could in the future be inspired by the other regions to eventually head in that direction. When they do so, that could make global enforcement of international criminal law through regional courts a potential reality for all regions of the world. In other words, a system of regional criminal law enforcement has the prospect of a universal reach, depending on the progress made toward universalization of regional human rights courts.

The chapter will turn the spotlight on the emerging attempt to regionalize international criminal law enforcement in Africa, the world's second largest continent. This appears fitting for many reasons. Here, we might mention two that immediately come to mind. First, that region has been the source of all but one of the ICC's current situational caseload. Since the States of Africa are presently the main users of the ICC, we might reasonably presume

[17] Rome Statute, art. 17(a).
[18] Rome Statute, preamble, para. 9.

that they are the ones more likely to explore additional institutional mechanisms for the prosecution of atrocity crimes. This appears to be borne out by the practice.

Second, African States have gone furthest in developing their own court with the African Union (AU)'s recently adopted protocol that would create a criminal chamber with jurisdiction over ICC crimes almost as part of the African government pushback against the permanent ICC.[19] The continent's effort, which is the focus of this volume, appears to have been greeted with general skepticism. In such an environment, where the agenda driving the regional criminal court project has been cast into some doubt by the context in which it emerged, what can and should The Hague-based court do to ensure that its work is actually complementary, instead of competitive, with the future African court and others like it that may be established in other regions?

Structurally, the chapter proceeds as follows. Section B will draw from the early experience of the international human rights system to assess whether there could be a place for regional courts in prosecuting international crimes. It will be argued that the ICC should assume a leadership role by cooperating with states and entities wishing to design courts consistent with its own statute. This would be in line with the object and purpose of the ICC and the policy of "positive complementarity"[20] which the Court itself has advanced over the past few years.

Section C of the chapter will assess the form and shape that the AU effort has taken, regrettably without any ICC engagement, partly because of the unfortunate current tension in the relationship between the Court and some of its African States Parties. In section D, we will examine some of the more

[19] *See* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the Assembly of Heads of State and Government of the African Union, Twenty-Third Ordinary Session, Malabo, Equatorial Guinea (June 27, 2014) [hereinafter Malabo Protocol].

[20] According to the ICC, "positive complementarity refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis." *See* ICC, Assembly of States Parties, *Report of the Bureau on Stocktaking: Complementarity: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap* (March 13, 2010), para. 16. The ICC has continued to reiterate in more recent reports its commitment to the principle of positive complementarity, which can equally apply to cooperation with regional bodies. For an early look at the concept, *see* William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 Harv. Int'l. L. J. 53 (2008).

innovative aspects of the regional treaty that AU States adopted in June 2014 for their proposed regional criminal court. It will be shown that the particularities of the African context have led to the inclusion of new offenses and even corporate criminal liability in the Malabo Protocol and that these go beyond what is presently contained in the ICC Statute. The idea seemed to be to address, in addition to the core crimes, pressing governance and transnational concerns facing the Africa region but which the Rome Statute framework did not address. These novel elements seem to strengthen the case for the serious consideration of regional court involvement in prosecuting international crimes.

Finally, just before the conclusion and recommendations, section E takes up some questions that may arise about the legal compatibility of regional prosecution mechanisms with prosecutions carried out by the world criminal court. In particular, I suggest that the complementarity principle, though initially conceptualized vis-à-vis the obligations of States Parties to the ICC, appears flexible enough to successfully regulate the jurisdictional relationship with regional criminal courts. Thus no amendment to the Rome Statute is necessarily required. In the main, my overarching argument is that, much as in the international human rights system which is composed of a multilayered national, regional, and international enforcement system, international criminal law would likely in the future benefit from a similar multilevel system of accountability. Africa's opening of this additional approach to tackle impunity seems to suggest that this development may be hard to resist and perhaps even be inevitable. The last part of the chapter focuses on some of the key challenges that the future court might face.

2. THE EVOLUTION OF UNIVERSAL AND REGIONAL ENFORCEMENT OF HUMAN RIGHTS LAW AND POSSIBLE LESSONS FOR INTERNATIONAL CRIMINAL LAW

A. *International Human Rights vs. Regional Human Rights*

The global community's experience with international human rights law, and international peace and security more generally, support the contention that there have always been some intersections and some tensions between the *universal*, *international*, on the one hand, and the *regional*, *particular* on the other hand. The cognate field of international human rights, though not the only example of the increasing regionalization of international law enforcement, appears to give a useful illustration of that latent antagonism. That tension has been in existence for decades and since at least the adoption of the Charter of the United Nations, which eventually capitulated to

the compromise of coexistence between international and regional arrangements.[21] It would seem, based on that experience, that the lukewarm reception that the African regional criminal court idea has received from the most ardent supporters of the ICC within civil society should not be surprising. Indeed, it may well reflect part of that longer historical trend in international law.

The early days of modern human rights law, which developed dramatically after World War II, apparently reflected similar anxieties about the best way that the international community could give effect to individual rights under international law.[22] There were those who felt that having a purely international system was the best way to guarantee human rights. Another view was that a universal system would be inadequate except if supplemented with regional mechanisms, so long as both worked toward the same goal of protecting fundamental human rights. Dinah Shelton, a leading commentator in human rights law, has identified three main factors that apparently helped to diminish the initial trepidation that the development of regional systems could undermine the creation of an effective *international* human rights system.[23] A review of those three influences appears instructive because they may be helpful to present and future debates about the place of regionalism in the criminal prosecutions of atrocity crimes. The main difference, which must be taken into account in any serious contemporary discussions in the international criminal law arena compared to the human rights system, is that we now have a permanent international criminal court around which regional systems could be anchored.[24]

[21] The text of the United Nations Charter was adopted in 1945 and is a foundational document of modern international law. It can be found online (last accessed 2 February 2019) at www.un.org/en/documents/charter/chapter5.shtml. As to examples of regionalization of international law enforcement, in the areas of money laundering, international fisheries, law, intellectual property, international trade law, among others, *see* William Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 Tex. Int'l L. J. 725, 731–2 (2003).

[22] Philip Alston and Ryan Goodman, International Human Rights: The Success to International Human Rights in Context 889 (2013); The International Dimensions of Human Rights, vol. 2, 451 (K. Vasak and P. Alston eds. 1982).

[23] Dinah Shelton, *The Promise of Regional Human Rights Systems*, in The Future of International Human Rights 351, 356 (B. Weston and S. Marks eds. 1999).

[24] On the other hand, there have been several proposals for a world court of human rights. That has not yet garnered the support of states, even though they seem willing to create a global criminal court after decades of consideration. So, in a way, we are dealing with a role reversal where we have both universal and regional enforcement mechanisms for human rights but states are more willing to create a standing international criminal tribunal court instead of a standing human rights court. Though this will not be pursued here, it may be that the lessons go the other way too, whereby international human rights law advocates could learn from the

First, regional human rights systems reflected in a broad way the emergence of a global human rights movement and norms after World War II. Given the mass atrocities experienced during the war, it was not surprising that the state-driven organizations created afterwards sought to address human rights concerns.[25] This was only natural, as the guarantee of minority rights were felt to be part of what might be required to avoid a return to devastating conflict. In a way, this same rationale helps to explain the emergence of international criminal law, under which it is increasingly accepted that victims' rights to have justice must include some type of accountability for at least the senior perpetrators of heinous international crimes. The success of the Nuremberg trials and endorsement of its principles by the international community made that a serious prospect.[26] Guaranteeing some measure of criminal justice, which in some ways reflects the substantive evolution of human rights law protections including the adoption of key post-war treaties such as that aimed at preventing and punishing genocide, was often seen as part of the panoply of measures required for a return to peace and stability.[27] The genocide convention thus incorporated the idea of a standing international penal tribunal to prosecute such crimes as far back as 1948. Though the notion would take half a century to bear fruit, with the adoption of the ICC Statute in July 1998.

Second, various historical and political factors converged to make the development of regional human rights systems possible and perhaps even inevitable.[28] In the Americas, there was a tradition of regional solidarity to address international issues. This led to the establishment of regional organizations whose founding treaties referred to human rights concerns in their charters and the adoption of instruments such as the American Declaration on the Rights and Duties of Man.[29] The latter preceded the UN's adoption of

experience of international criminal law to advocate creation of an international human rights tribunal. *See* Manfred Nowak, *It's Time for a World Court of Human Rights*, in New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures (M. Cherif Bassiouni and William Schabas eds. 2011).

[25] Shelton, supra note 23 at 353.

[26] 2 *Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, Yearbook of the International Law Commission (1950).

[27] *See* for an argument why criminal prosecutions should be part of the remedy for victims of grave violations, Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 Vand. J. Transnat'l L. 1399 (2002).

[28] Shelton, supra note 23 at 353.

[29] *See* ibid. at 354; for further elaboration of that history, Thomas Buergenthal and Dinah Shelton, Protecting Human Rights in the Americas 37–44 (4th edn. 1995). For the regional instrument, see *American Declaration of the Rights and Duties of Man* (1948), in OAS,

the Universal Declaration of Human Rights.[30] As for Europe, which had experienced the worst mass atrocities in history by that point in the span of just two decades, international human rights norms were seen as requisite components of the rebirth of a new and more democratic and stable region. A regional human rights system was therefore thought to be necessary to help re-establish individual rights and freedoms, and in that way, contribute to helping avoid future conflict and a return to totalitarianism.[31]

In Africa, which had been under the yoke of colonialism for a long period, the ideas of self-determination were central to the struggle by the people of the continent for their fundamental human rights and freedoms.[32] The pan-African struggle for the rights of people and national identity, the continuation of apartheid in South Africa as well as independent Africa's desire to find its place in the world, among other factors, gave increased impetus to governmental concerns about the human rights of African peoples. It would eventually lead to the development of a regional human rights system.[33] The idea of an African Convention on Human Rights was first floated by African jurists in the "The Law of Lagos" in 1961. But the Charter of the Organization of African Unity (OAU) adopted by African States in May 1963 to promote regional integration did not incorporate the proposal.[34] It languished in the margins of Africa-wide government policy until the early 1980s when circumstances were favorable for the adoption of a regional human rights instrument.

It may be that, after about roughly two decades of experience with international criminal law, political pressures toward greater *regional integration* in Europe, the Americas and Africa, might also converge to make the development of regional international criminal law enforcement mechanisms near inevitable. It appears that there is some movement in that direction, although the different regional systems are known to have different levels of engagement on the question of criminal accountability for atrocity crimes. The strength of their cooperation in other areas of common concern, such as on issues of peace and security, economic integration, and free movement of

Basic Documents Pertaining to Human Rights in the Inter-American System, OAS Res. Off. Rec., OEA/Serv. L/V/I.4 Rev. (1965), OEA/Ser.L/VII.92, doc. 31, rev. 3 para. 17, (1996).

[30] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, UN Doc. A/RES/217(III) (December 10, 1948).

[31] Shelton, supra note 23 at 354.

[32] Ibid. at 354–5.

[33] For a comprehensive discussion of the African system, see Frans Viljoen, International Human Rights Law in Africa 420–21 (1st edn. 2007).

[34] See ibid. at 421.

persons, capital, and labor, continues both to widen and deepen. We have seen this evolutionary phenomenon in all the regions. This process may thus eventually give way to greater harmonization of criminal law and procedure over time. If this happens, this might open the door to integration of substantive prohibitions on penal matters into some regional enforcement regime.

In Africa, the generally bad governance and lack of credible justice and access to the rule of law and the numerous conflicts have already necessitated the adoption of a regional anti-impunity stance. Similarly, in the Americas, the regional human rights court and commission have developed an elaborate body of jurisprudence about the duty of states to investigate and prosecute various gross violations of individual rights. The two regional guardians of human rights have therefore assumed a leadership role in defining the right of victims to receive remedies and reparations for violations like torture or disappearances. The human rights mechanisms in the Americas region have frowned upon amnesties as well as monitored countries in order to ensure that States follow through its innovation of a "quasi-criminal jurisdiction" which has led to the prosecutions of over 150 cases at the national level.[35]

For Europe, as the movement toward greater regional integration advances further and further, the free movement of persons has given rise to increased interest in strengthening mutual legal assistance on criminal law matters. We are even beginning to see aspects of harmonization of criminal and procedural laws across European Union Member States in an attempt to act more effectively to curb transnational criminal activity including terrorism.[36] Particularly significant for this argument has been the shift, within the Council of Europe system, toward a sort of "quasi-criminal review"[37] jurisdiction.[38] On the other hand, this process seems to have suffered some setback with Great Britain's recent referendum in favor of exiting from the European Union. Nonetheless, the EU will continue to be a major harmonizer of criminal law policy for the overwhelming number of European States who will continue with the march toward deeper substantive and practical regional integration.

Third, during the development of the core international legal instruments that became known as the International Bill of Rights which undergird the

[35] Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi Criminal Jurisdiction of the Human Rights Courts*, 107 Am. J. Int'l. L. 1 (2013).

[36] Ibid.

[37] Ibid.

[38] *See*, for a helpful discussion of developments in Europe, Giulia Pinzauti, *The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of Kononov v. Latvia*, 6 J. Int'l Crim. Just. 1043 (2008).

global human rights system, the UN did not initially embrace the idea of regional human rights mechanisms. There was an initial perception that human rights protections can be better accorded to individuals at the international instead of the national level. Indeed, in such an environment, there was apparently a tendency to paint regional human rights systems as a "breakaway movement, calling the universality of human rights into question."[39] But circumstances forced a change within the context of the bitter rivalries of the Cold War. The failure over a period of 20 years of the East and West to agree on the modalities for the conclusion of a global human rights treaty, including different conceptions of weight to be placed on civil and political rights and economic, social and cultural rights, ultimately indicated that any international enforcement mechanisms agreed upon would prove to be legally weak.

The desire for binding *judicial* procedures to enforce the human rights of individuals thus came to be seen as more likely to be achieved at the regional instead of international level.[40] This became crystal clear after the adoption of the civil and political rights, and economic, social cultural rights covenants in 1966, both of which did not include strong enforcement systems. It therefore seemed as if the international community acquiesced into the idea of regional human rights regimes to enforce such rights, if that was going to be done through judicial or quasi-judicial process of the kind we see today in regional human rights courts and commissions.[41]

This was so much the case that the UN General Assembly, in 1977, could instead of opposing the move to establish regional human rights courts adopt a resolution urging states to develop suitable regional machinery for the promotion and protection of human rights.[42] Today, though all might agree that they have exhibited varying levels of efficacy, there is little if any doubt that the umbrella of protections we have for individuals are stronger as a result of the multilevel human rights enforcement architecture that developed at the regional and universal levels over the last several decades.

[39] 2 The International Dimensions of Human Rights 451 (K. Vasak and P. Alston eds.1982).

[40] Shelton, supra note 23 at 355.

[41] *See* the International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Treaty Doc. No. 9S-2, 999 U.N.T.S. 171 and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[42] *See* UN G.A. Res. 32/127 (December 16, 1977) (appealing to states in regions of the world where regional arrangements for the protection of human rights do not yet exist to consider agreements with the view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights).

B. *Regionalization Lessons from International Human Rights for International Criminal Law*

Much as the regional human rights systems were "inspired by the agreed universal norms,"[43] international criminal law, at the center of which sits the permanent ICC, could also inspire the prosecution of international and even transnational crimes within regional criminal courts. This makes sense for several reasons, including the links and close relationship between the goals of human rights and criminal law. Of course, the normative legal framework that underpins international criminal law has been in development for several decades with key treaties codifying prohibitions of certain types of conduct as criminal during war,[44] torture,[45] and genocide.[46] Thus, much as in international human rights which also developed a solid corpus of law in the post-World War II period but still generally struggles for stronger enforcement of its edicts through binding judicial process, the more tasking challenging now for international criminal law might be the strengthening of its hodgepodge direct and indirect enforcement systems.[47]

Some of the arguments that have been advanced to justify the existence of regional human rights systems may be helpful in assessing the case for the place of regional courts as an *additional* or *supplementary* means of enforcement of international criminal law. The idea of regional criminal courts could in this context offer some advantages in that it is possible for different regions to have general concerns about atrocities which they share, such as in relation to the heinous crimes of genocide, but at the same time particular issues which could best be accommodated at a regional instead of supra-national level. In this regard, we can recall that it was the push by Trinidad and Tobago for an international mechanism to address drug trafficking which reopened in 1996 the global conversation about the need for a standing international penal court. With that in mind, in the absence of international consensus to include drug trafficking in the subject-matter jurisdiction of the ICC, a regional court

[43] Dinah Shelton et al., Regional Protection of Human Rights 12 (2013).

[44] *See* the 1949 Geneva Conventions (I to IV) and their 1977 Additional Protocols.

[45] *See* the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

[46] *See* the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

[47] In addition to the International Bill of Rights, which forms the bedrock, a substantive number of conventions prohibit discrimination at the global as well as regional levels, and address the rights of women, children, persons with disabilities, torture, refugees, etc.

could serve as a more suitable forum to prosecute such transnational offenses.[48] It is common place that there was no agreement on whether to include that offense at Rome. Nor was there any consensus during the statutory amendments at Kampala. In such a context, the idea of a regional option could mean that the state, whose neighbors might well face the same or similar challenges, would not be left without some type of inter-state cooperation solution. In this way, it might find a to address its core concern as a sovereign wishing to discharge its duty to provide security and good order against drug lords operating within its territory.[49]

Rather than ineffectually act alone, by coming together with countries from the Caribbean and even the Latin America and wider Americas region, Trinidad and Tobago could achieve some of its goals in regulating transnational criminals, say through the expansion of the jurisdiction of the Caribbean Court of Justice or the Inter-American Court of Human Rights (IACtHR) to encompass criminal matters. There is no reason, in principle, why such a criminal jurisdiction could also not include the ICC crimes. Nor is there any reason why it could not include other serious transnational offenses. This is particularly so given the increased interdependence of States and the ability of non-state groups and other actors to more easily cross borders in an increasingly globalized world.

The existence of geographic, historical, and cultural bonds in states of a given region of the world such as Africa or the Americas could imply the existence of common values around which might arise region-specific prohibitions. On the other hand, by accepting the differentiation of regions based on such common characteristics, it could be countered that the notion of *universal international crimes*, in which all of humanity is said to have a vested interest in both prohibition and punishment, could to some extent be undermined. By the same token, this argument should not be overstated, since international criminal law has to date suffered not so much from over-enthusiasm in its application as much as

[48] Trinidad and Tobago, leading a coalition of 16 Caribbean and Latin American States, moved for adoption of a UN Resolution to mandate a study. The initiative is discussed in Summary records of the meetings of the forty-second session, [1990] 1 Y.B. Int'l L. Comm'n 36, UN Doc. A/CN.4/SER.A/1990, at 39. *See also* UN G.A. Res. 44/39, U.N. GAOR, 44th Sess., Supp. No. 49, at 1, UN Doc. A/44/39 (1989). Many years later, upon adoption of the Rome Statute in July 1998, Trinidad welcomed the treaty but expressed disappointment over the non-inclusion of narcotics trafficking offenses and the death penalty.

[49] The country had argued that the transnational drug trade had a devastating effect on its citizens and was a matter deserving international criminalization. It noted that such issues and others of concern to the Caribbean region would be taken up in the future. It resubmitted the proposal again before the Kampala Review Conference, and again failed to garner the support of other states which felt that drugs should be regulated at the national level.

under-enthusiasm in its enforcement. In any event, as international criminal law matures, it seems to be increasingly recognizing that there is at least a proximity difference among victims of such crimes based on their disproportionate direct impact and effects on the people of a given country or region.

Another argument that could favor the expansion of international criminal law enforcement by using regional courts as a site of prosecutions is one of legitimacy. Here, for complex historical and other reasons the decisions of a regional body, such as the AU, would likely be perceived among the African public as more legitimate vis-à-vis those of a more distant court based in the heart of Europe. The perception might be the same in relation to decisions of an EU established court within the European geographic space. The placement of prosecutions within a regional court might therefore help to anticipate and resolve one of the softer but still important concerns about the present trajectory of international criminal law. From that point of view, though unlikely to be a panacea when dealing with recalcitrant governments, it could be that the work of a regional court might generate greater acceptance by a group of states and thereby generate greater pressure for compliance from the countries in a given geographic region. Here, the sometimes rather convenient claims by some African States that the ICC is a neo-colonial Western project and the pushback on some its indictment and other decisions would suggest that there might be important legitimacy gains in having an additional regional forum to prosecute serious international crimes.

A key benefit here, that at least might partly answer some of the present criticisms of the ICC and tribunals not sitting in the *locus comissi delicti*, could be that the justice dispensed in a regional court would be closer to the people in whose name it was rendered.[50] Globally, we now have just over 20 years of experience with international criminal tribunals. As part of this, we have had the ad hoc ICTY, ICTR, and the SCSL, and of course, the permanent ICC itself. In this regard, one of the main lessons that we have learned is about the significance of locating justice closer to the people. That much seems clear from the report of the UN Secretary-General on transitional justice in post-conflict situations, which rightly observed that, to the extent possible, future tribunals ought to be established as close to the concerned victims as possible.[51]

[50] For more on the tension between the AU and ICC, *see* Charles Jalloh, *Regionalizing International Criminal Law?* 9 Int'l Crim. L. Rev. 445, 462–463 (2009).

[51] The Rule of Law and Transitional Justice in Conflict and Post Conflict Situations: Report of the Secretary-General to the Security Council, Doc. S/2004/616, para. 40 (August 23, 2004) (arguing that if security and independence can be adequately secured, there are key benefits to locating tribunals inside the countries concerned, including easier interaction with the local population, closer proximity to the evidence and witnesses, and being more accessible to victims).

Relatedly, the publicity that is generated from such efforts would mean that information about trials can be more widely disseminated in a given region. Here, the experience of the international community starting with the ICTY and the ICTR, and now continuing with the ICC, suggests that—on balance—it is better if the prosecution of atrocity crimes can be localized, assuming security and other such considerations can be resolved. This also ties into the notion that trials closer to the victims and perpetrators would help give more visibility to justice. We saw the value of the latter especially in the context of the SCSL which had the advantage of being located in the country where the crimes occurred. If trials cannot occur in the territorial state, for whatever reason, the regional option may be better over the international. It could potentially even enhance the deterrent value of international criminal trials, assuming that the populations in the affected region are more able to partake in regional accountability efforts.

Finally, there is another more prosaic but perhaps equally important reason why it may be beneficial for a regional organization and its courts to get involved with the prosecution of atrocity crimes. This is because, all things considered, the cost of international justice has been a matter of serious concern for the funding countries since the UN set up the ad hoc Chapter VII tribunals.[52] This so-called "tribunal fatigue"[53] provoked the search for inexpensive tribunal models such as the hybrid SCSL and other mixed models embedded within the national courts of the requesting state.

Besides the possible impact that this could have in strengthening the domestic capacity to prosecute, in such contexts it is likely that a regional court sitting in the same region as the situation country would cost a fraction or at least less of what would be required for such justice to be administered by a distant international court. It may also allow a fairer allocation of the financial burdens for such courts, assuming that the states in a given region might more willingly offer the funding and other resources to enable the establishment of their own regional courts. This also offers additional salutary benefits in terms of reducing the costs of international or regional criminal prosecutions. On the other hand, it might still be the case that such efforts may instead reflect the same pressures if they come to rely on the funding largesse of donors from distant more developed regions.

In a nutshell, in this section I have developed some initial thoughts why, although apparently in its nascent stages, international criminal law could be

[52] *See* David Wippman, *The Costs of International Justice*, 100 AJIL 861 (2006); Stuart Ford, *How Leadership in International Criminal Law Is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 St. Louis U. L. J. 953 (2011).

[53] *See* David Scheffer, *International Judicial Intervention*, 102 Foreign Policy 34, 45 (1996).

moving in the direction of international human rights law toward what may become in the future the partial regionalization of enforcement of its substantive provisions. Going well beyond the present largely direct and indirect penal enforcement systems, through national courts at the horizontal level or international tribunals at the vertical level, it appears that there could be gains from having countries in certain regions come together to achieve economies of scale in carrying out prosecutions of serious crimes. It is submitted that such regimes, where they develop, may help to address some of the actual as well as the perceived shortcomings of centralized international tribunal prosecutions in a single global penal court sitting in The Hague.

Since the present back-up system is anchored by the ICC, which we already have in place and itself is organized around the complementarity principle, whatever develops at the regional level must be guided by and be generally consistent with the obligations assumed under the ICC Statute. The obligations contained in that statute, representing the collective views of many States, whether in terms of definitions of the crimes or general principles of criminal liability at the international level or fair trial guarantees and even core procedural rules derived from it, could serve as a minimum of what the international community would expect for any regional criminal law enforcement system. But the Rome Statute ought to be seen as having established a floor, rather than a ceiling, when it comes to accountability for atrocity crimes. If any region wishes to go further than the provisions of the ICC Statute, then it should be free and indeed even encouraged to do so. For such would no doubt result in better enforcement of international criminal law standards. I have elsewhere suggested that this Rome Statute or ICC Plus should be acceptable. Conversely, adoption of less than what the ICC system provides should not be (i.e. the Rome Statute or ICC Minus).

The next part of this chapter considers how some of these ideas, including the experiences and interactions between the regional and international in the area of human rights law, may be beginning to play out in the practice of one region of the world. Africa is an important place in the present discussion for several reasons. For one thing, though not always successfully, the region is continually experimenting with how best to come to terms with atrocity crimes. For another, the conflicts in the region and the initial wide support for the ICC and self-referrals by African States, among other factors, have led the world penal court to be deeply engaged with questions of criminal justice in it. Later concerns emerged in relation to the Court's practice about the sequencing of global enforcement of justice, in light of ongoing peace initiatives in active conflict situations. These have also fueled various transitional justice policy initiatives in the region, all aimed at what we might call the Africanization of international criminal law.

C. *The Context Giving Rise to Regional Prosecution of International Crimes in Africa*

Despite the experiences that the international community has had with regionalization of aspects of international law, and the possible openness of some to the idea that international criminal law could also be enforced through regional court mechanisms, it seems fair to conclude that there has been a general reaction of suspicion to this development. This harkens back to the early debates about the pros and cons of universalism vs. regionalism in human rights enforcement in the immediate post-World War II period.[54] Today, as back then, there appears to be a widely held perception that regional criminal accountability efforts might undermine the international project. For this reason, among international criminal lawyers, it appears that the decision of African States to adopt a treaty that would establish a regional criminal court with jurisdiction over the same crimes as those presently prosecutable before the ICC stems solely, or mainly, from the tense relationship between the AU and the ICC.[55]

But such a conclusion, though not perhaps unreasonable when viewed in the context of the present ICC–Africa saga, may be historically inaccurate. In fact, a careful historically sensitive analysis reveals that African States have in the past considered the idea of including a criminal jurisdiction within their regional human rights court since at least 1979.[56] That is to say, around 17 years before the Rome Statute. Thus, although the proposal for a standing international penal court is probably older and possibly dates back to the days of Gustav Moynier in 1860s,[57] the global court only materialized when the

[54] *See*, in this regard, Chacha Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights* 9 J. Int'l Crim. Jus. 1067–88 (2011); *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*, An Opinion submitted by the Coalition for an Effective African Court on Human and Peoples' Rights; Darfur Consortium; East African Law Society; International Criminal Law Center, Open University of Tanzania; Open Society Justice Initiative; Pan African Lawyers Union; Southern African Litigation Center; and West African Bar Association. *Contra* Pacifique Manirakiza, *The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa*, in Africa and the Future of International Criminal Justice 375 (Vincent O. Nmehielle ed. 2012).

[55] *See* the argument of Murungu, ibid. at 1080, and the position of African civil society groups, all of whom question the motives of the AU in creating a regional criminal chamber.

[56] See *Rapporteur's Report of the Ministerial Meeting* in Banjul, The Gambia, Organization of African Unity, at para. 13, OUA Doc. CAB/LEG/67/Draft. Rapt. Rpt (II) Rev. 4, reprinted in Human Rights Law in Africa 1999 (C. Heyns ed. 2002) at 65. For commentary, *see* Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 Brook. J. Int'l. L. 1, 4–5 (2004).

[57] *See* Christopher K. Hall, *The First Proposal for a Permanent International Criminal Court*, 322 Int'l Rev. Red Cross 57 (1998).

multilateral treaty which was widely endorsed by African States was adopted at Rome on July 1, 1998.

With that backdrop in mind, in the next section this chapter will show that it was the combination of at least four separate factors that coalesced to result in the June 2014 adoption of a regional treaty that would establish an "African Criminal Chamber"[58] within the African Court of Justice and Human and Peoples' Rights once the requisite number of 15 ratifications from AU Member States are secured. The analysis will reveal that the AU concern about the work of the ICC on the continent, though not the impetus behind the proposal for a regional criminal court, is relevant. Nonetheless, it is pertinent only to the extent that it served as a catalyst for (not the source of) African governments' advocacy for a regional treaty to prosecute crimes under the slogan of "African solutions to African problems."

3. THE LEGAL DUTY OF AFRICAN STATES TO STRENGTHEN REGIONAL COOPERATION TO ENHANCE HUMAN SECURITY IN AFRICA, INCLUDING THROUGH PROSECUTION OF INTERNATIONAL CRIMES

At the broadest level, the first factor that made near inevitable the notion of a regional criminal court in Africa is a much wider one that speaks to the current positioning of the African continent in global affairs. Here, we are referring to the fateful decision after the end of the Cold War by African States to transform Africa's primary regional organization, formerly known as the OAU which had been in existence since May 1963, into what might be termed a human security-centered organization through adoption of the Constitutive Act of the African Union in July 2001.[59]

The decision to establish the AU was motivated by several complex considerations. These included a desire to shift from the logic of the principle of

[58] I note that, in this chapter, I variously refer to the African Criminal Chamber or the African Criminal Court. However, the actual nomenclature of the new court is the African Court of Justice and Human and Peoples' Rights. The criminal chamber (i.e. International Criminal Law Section) will in fact be only one of three sections of the single, wider court. The other two are the General Affairs Section and the Human Rights Section. This merger of three types of jurisdiction into the mandate of a single court is unprecedented in international and regional law. See, in this regard, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, as adopted by the AU Assembly of Heads of State and Government, Malabo, Equatorial Guinea, June 27, 2014. As of writing, in Janauary 2019, only eleven out of fifty-five African States have *signed* the treaty. None has ratified it.

[59] Constitutive Act of the African Union, art. 3, July 11, 2000, 2158 U.N.T.S. 3 [hereinafter Constitutive Act].

non-intervention[60] in the domestic affairs of its Member States, which underpinned OAU policy and action, along with an understandable concern about preserving the territorial integrity of African States. That policy stance, which showed great deference to national sovereignty and rather limited regional level concern about gross human rights abuses within some post-colonial African States, was largely a function of history and where Africa found itself in the aftermath of the defeat of colonialism.

Despite the creation of the OAU, civil wars, bad governance, rampant public corruption, and a weak rule of law continued to plague the continent. This resulted in many countries degenerating into ethnic divisionism and fratricidal wars, and the commission of gross human rights and humanitarian law violations. Much as Europe had suffered the brunt of conflict in the early part of the twentieth century, Africa, as the world's second largest continent with many unstable states seeking to find their own place in the world, became the scene of some of the worst atrocities toward the end of that same century.

The creation of the AU signaled a new type of continental body, legally, politically, and practically. It was to be more proactive in anticipating and addressing the scourge of conflict and commission of gross human rights violations in the region. Indeed, the OAU stance had, though preserving the integrity of the African States effectively, squandered the promising dividends of independence for ordinary people and served as a rather thorny source of insecurity for the continent for several decades. Following the footsteps of Europe and the Americas, African States did start thinking about the need to establish their own regional human rights system in the 1960s. But this idea only matured to governmental endorsement in the late 1970s. This eventually paved the way for discussions and adoption of an African human rights charter, which was heralded for its innovative approach to civil and political alongside economic rights, individual rights, and collective duties.[61]

But the same regional treaty that was greeted with enthusiasm entailed a key difference with other regional systems in that it opted for a *quasi-judicial* instead of *judicial* enforcement system. Specifically, instead of creating a regional rights court as had been done in the Americas and Europe, the main

[60] Ben Kioko, *The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention*, 85 Int'l Rev. Red Cross 807 (2003).

[61] C. Heyns, *The African Regional Human Rights System: The African Charter*, 108 Penn. St. L. Rev. 679 (2004); Fatsah Ougergouz, The African Charter of Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa (2003); Makau Mutua, *The African Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 V. J. Int'l. L. 339 (1995).

enforcement system was to be the African Commission on Human and Peoples' Rights, which would be based in Banjul, The Gambia. Interestingly, the drafters of the African Charter were uncertain that African governments were ready for a binding judicial system that would give effect to human rights as had been the case in the other regions. They nonetheless suggested that a court to complement the commission should be revisited in the future.[62] This occurred almost two decades later. Interestingly, for our purposes here, the Committee of Legal Experts charged with drafting the African human rights charter did briefly consider a proposal by the Republic of Guinea to establish a regional court that would also have *criminal jurisdiction* to judge crimes against humanity in addition to adjudicating claims relating to human rights violations.[63] Nonetheless, despite the Guinean proposal to include crimes against humanity jurisdiction, it was felt that to do so would be premature for two reasons.[64]

First, one of the main concerns that had influenced the proposal for criminal jurisdiction was to address the South African apartheid policy as a crime against humanity. To this proposal, the principal drafter, Kéba M'baye from Senegal, pointed out that "an international penal court" had already been anticipated as an option in the International Convention on the Suppression and Punishment of the Crime of Apartheid even though states could also prosecute such crimes within their national courts.[65] Second, and seemingly more importantly, the UN was already considering the establishment of "an international court to repress crime against mankind."[66] These two factors, according to the main drafter of the charter, militated in favor of shelving the criminal jurisdiction idea for the African human rights court.

In essence, African States had been active in leading the charge to develop a global treaty to criminalize apartheid due to their concern about the racism rampant in South Africa and its pernicious effect on that country's majority black population.[67] They thus put on hold the inclusion of a criminal chamber that would address a crime of particular concern to Africa because

[62] *See Rapporteur's Report*, supra note 56 at para. 116.
[63] Ibid. at para. 117.
[64] Ibid. at para. 13.
[65] Ibid.; *see also* International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 244, *entered into force* July 18, 1976.
[66] Ibid.
[67] It was a proposal by Guinea and the Union of Soviet Socialist Republics that offered the first draft convention on apartheid on October 28, 1971. Other active African State participants were Nigeria and the United Republic of Tanzania.

of the hope for international regulation through a permanent international penal court, which idea was then under consideration at the International Law Commission (ILC). As it would happen, neither the special court to prosecute apartheid as a crime against humanity nor the standing world criminal court they had expected were created for a while. It would take until the adoption of the ICC Statute on July 1, 1998 (i.e. 19 years later) and its entry into force on the same date in 2002 (23 years after the fact), that an international criminal tribunal with jurisdiction over apartheid as a crime against humanity would come into being.

The irony of the present suspicions about the motives of the African States in adopting a legal instrument for a regional criminal court, including among local scholars who are divided over the wisdom of the project,[68] is that a reason why African countries held back on that initial proposal at the time related to a preference for international cooperation for an enduring world criminal court. Yet, from another perspective, this historical experience demonstrated to African States that particular crimes of interest to their continent (e.g. apartheid) would not necessarily generate the same interest in legal prohibition for the rest of the international community of states. The thought that they should instead wait for the global penal court meant that they forewent regional action in favor of international coordination, leading one commentator to speculate that this was a "dupe," and that for African States, the experience was "significant" in affirming lack of global attention to Africa's specific concerns.[69]

But besides the African States' preoccupation with addressing apartheid, which took on renewed urgency after the Soweto Uprising of June 1976, the African human rights system established in the early 1980s has in its application through the *commission* based in Banjul generally fallen short of the achievement of its counterparts in Europe and the Americas. There have, of course, been many significant advances under difficult conditions. But the impact on the realization of the human rights of ordinary Africans as guaranteed under well crafted regional instruments has been far from ideal. The lackluster performance, partly due to the non-binding nature of the commission's legal decisions, inadequate resources, and the lack of political will on the part of African States to actually comply with human rights standards,

[68] *See* Ademola Abass, *The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects*, 60 Neth. Int'l L. Rev. 27–50 (2013).

[69] Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects*, 24 EJIL 933, 937 (2013).

among other factors, would later resuscitate calls for the establishment of an African *Court* on Human and People's Rights.

The protocol for a court, aimed at supplementing the protective mandate of the commission, was eventually adopted in Burkina Faso on June 9, 1998. It entered into force on January 25, 2004.[70] The regional human rights court is presently based in Arusha, Tanzania. But even that institution has, besides the usual start-up problems, failed to receive the strong endorsement of African States. Proof of this can arguably be found in the fact that only over half of African States have ratified its treaty (30 out of 55 states), and of those, an even smaller number of States Parties have, to date, filed the special declarations permitting the court to hear human rights complaints brought by individuals against them (a total of 7 out of the 30 states that already ratified as of this writing).[71]

With this general backdrop in mind, and the explosion of several internecine conflicts on the continent including the 1994 Rwandan genocide and the notoriously brutal conflicts in Liberia and Sierra Leone, it should be no surprise that African States have over the past two decades increasingly turned their minds toward more robust action against those who perpetrate gross human rights violations on the continent. In this regard, the establishment of the AU as a replacement of the OAU had already given rise to the inauguration of various and interlocking institutional mechanisms, forming part of the African Peace and Security Architecture that are all aimed at addressing the prevention and management of conflicts in Africa.[72]

In fact, as part of the growing regional sensitivity against impunity, there was an explicit legal duty in the Constitutive Act of the African Union to take concrete steps against impunity. Under Article 4(o), the AU reaffirmed its commitment to "respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities."[73] The AU further recommitted its members to "respect for democratic principles, human rights, the rule of law and good governance," and the "promotion of gender equality" and "of social justice to ensure

[70] For a critique of the inadequacies of the legal structure for the new court, *see* Makau Mutua, *The African Court Human Rights Court: A Two Legged Stool?* 21 Hum Rts. Q. 342 (1999).

[71] See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Status of Ratifications, (January 28, 2019), www.au.int/en/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_17.pdf.

[72] See, for instance, the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, AU Assembly, 1st Ordinary Sess., July 9, 2002.

[73] Constitutive Act, supra note 59.

balanced economic development."[74] Article 4(h) of the Constitutive Act, which preceded the entry into force of the ICC Statute by a year, goes even further and confers on the AU the legal "right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[75] The logic of all the above provisions, and the various legal instruments and decisions adopted by the AU since it was founded, is that the continental African body can now act, including through the use of military force but also through other measures, in the defense of civilians in the African territory.[76]

It is notable that the protocol establishing the Peace and Security Council of the AU entrusted with the responsibility of preventing and managing conflicts on the continent was adopted in the same month as the Rome Statute entered into force in July 2002. In other words, taken together, whether as specified in the AU's founding treaty from 2000 or the additional instruments adopted since then, the core principles contained in the Constitutive Act have supplied a legal framework, at the regional level, for the operationalization of the Responsibility to Protect in Africa. This norm has also been endorsed by the international community, including through resolutions of the UN General Assembly. But the inclusion of Article 4(h) in the AU's Constitutive Act appears unique as the first serious attempt to ram down the barriers of state sovereignty in a significant way. It creates a regional carveout of a narrow exception to the non-intervention principle and the prohibition on the use of force against other states articulated in Article 2 of the Charter of the United Nations. All in the name of protecting civilians from war crimes, crimes against humanity and genocide.

In addition, since the days of the OAU and now accelerated under the AU, there has been steadily developing a solid body of African human rights treaties and a web of regional obligations that address the specific human rights needs of women and children, prohibition of mercenarism, corruption, dumping of hazardous wastes on the continent, trafficking in drugs and persons, etc.[77] These regional instruments, forming part of African State

[74] Ibid.

[75] Ibid.

[76] *See* supra note 72.

[77] For a discussion of this "public law of Africa" and its influence on the mainstream, *see* Abdulqawi A. Yusuf, *The Public Law of Africa and International Law: Broadening the Scope of Application of International Rules and Enriching them for Intra-Africa Purposes*, in Shielding Humanity: Essays in Honor of Judge Abdul G Koroma 513 (Charles Jalloh and Femi Elias eds. 2015); *see also* Jeremy Levitt, *Africa: A Maker of International Law*, in Mapping New Boundaries in International Law (Jeremy Levitt ed. 2008).

practice, highlight greater preoccupation with public regulation on the continent to address particular problems afflicting the Africa region.

One more specific example might suffice to make the point. This relates to the African Charter on Democracy, Elections and Governance, which was adopted on January 30, 2007 at Addis Ababa, and thereafter obligated the AU and its Member States to take several measures to promote democracy on the continent.[78] First, it not only deemed unacceptable any undemocratic means of acquiring power reflecting the preoccupation with coup d'états that have stunted the growth of democracy on the continent, it also anticipated that the perpetrators of unconstitutional changes of government would be barred from participating in the ensuing election.[79]

Second, and going even further, the AU was under this regional treaty empowered by its Member States to prosecute the perpetrators and also provided for their trial at the regional (Africa) level.[80] This, if only implicitly, suggested that there would eventually be a need to adopt new criminal prohibitions that penalize "unconstitutional change of government" and that there would be some kind of competent regional tribunal to try the offenders. For that reason, the decision to include that offense naturally followed when it was proposed to merge the African Court of Justice and the African Court of Human Rights.

In sum, there is nothing in the text of the Constitutive Act and other AU instruments to make the creation of a regional criminal tribunal incompatible with the objects and purposes for which African States created their regional organization. Indeed, far from being only tied to pushback on the ICC, the AU's legal instruments, starting with its founding treaty and several other treaties developed since then, implied there was already emerging a regional legal sensibility and even obligation that the AU States must take robust measures to address gross rights violations and international crimes committed on the continent. This is further than, at least in terms of the normative architecture, any other region has to date accomplished. Indeed, as Ademola Abass has argued, it cannot be the case that the AU would legislate on crimes that it does not intend for its own court to prosecute.[81] That would simply not make any sense. In any event, action at an Africa-wide level to create a judicial

[78] African Charter on Democracy, Elections and Governance. The treaty entered into force on February 15, 2012. *See* for Status of Ratification the AU website: www.ipu.org/idd-E/afr_charter.pdf.

[79] *See*, inter alia, arts. 23 to 26 of the African Charter on Democracy, Elections and Governance.

[80] *See* art. 26(5), providing that "Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union."

[81] Abass, supra note 69 at 938.

mechanism becomes even more justified considering the unavailability of appropriate national or international judicial forums to prosecute some of the crimes of special concern to Africans.

4. THE HISSÈNE HABRÉ AFFAIR AND THE COMMITTEE OF EMINENT PERSONS' RECOMMENDATION FOR AN AFRICAN CRIMINAL JURISDICTION

The second more immediate factor that gave rise, at the regional level, to the proposal for a standing African Criminal Court (ACC) comes from the AU's initially unplanned role and involvement in the resolution of the issue relating to the trial of former Chadian president Hissène Habré. Contrary to popular belief, the recommendation to create such a regional criminal court originates in a formal proposal that stemmed from the deliberations about the best forum to try him instead of the ICC–Africa problem.

Habré, by way of quick background, was leader of the Central African State of Chad.[82] After he was deposed from power, he fled to Senegal to seek asylum, following a brief stay in Cameroon. He is alleged to have ordered the torture and deaths of many people during his time in power.[83] While in Senegal, which is a party to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[84] some alleged victims of torture under Habré's regime initiated a criminal complaint in 2000 before an investigative judge at the Dakar high court, claiming that he had committed various offenses including crimes against humanity and torture. An indictment was subsequently issued by the Senegalese authorities against Habré. But it was quashed by the Dakar Court of Appeal based on a finding of lack of jurisdiction. A similar complaint against Habré was subsequently filed in Belgium by a different group of victims. Belgium thereafter issued a warrant and request for his surrender for the purposes of trial on charges of torture and crimes against humanity. Instead of turning him over, Senegal approached the AU for assistance after Belgium sought Habré's extradition.

The Assembly, the highest decision-making organ of the AU comprising the sitting Presidents and Heads of Government, adopted a decision in January 2006 in Khartoum in which they tasked the AU Chairperson to constitute a

[82] Details about the Habré matter are summarized in the Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 2012 I.C.J.

[83] Ibid.

[84] Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, adopted by UN G.A. Resolution 30/46; entered into force June 26, 1987.

committee of eminent African jurists to study and present options on what to do with former President Habré.[85] The specific mandate of the Committee of Eminent Persons was to "consider all aspects and implications of the Hissène Habré case as well as the options available for his trial."[86] Additionally, the Committee was to make "concrete recommendations on ways and means of dealing with issues of a *similar nature* in the future."[87] In discharging its duties, the experts were to account for various issues, including jurisdiction over the alleged crimes for which Habré should be tried; need for adherence to international fair trial standards; accessibility of the trial to alleged victims as well as witnesses; the independence and impartiality of the proceedings; efficiency in terms of cost and time of trial; and the prioritization of utilization of an African mechanism.[88]

The Committee examined the specific Habré case as well as the wider question regarding the future should such cases arise again. In relation to the former element, it considered that Senegal was best placed to try the former Chadian president because of its international law obligations under the Convention Against Torture. Or, if Senegal was not able to do so, it pointed out that any other African State party to the Torture Convention could also assert jurisdiction to do so. As a last resort, even an ad hoc tribunal sitting in any African State could be established to prosecute him.[89] On the latter more forward-looking aspect, which is of particular interest here, the legal experts recommended a standing mechanism to deal with the impunity problem in Africa. They observed that the African Court on Human and Peoples' Rights, whose protocol had already entered into force, and the Court of Justice of the AU whose treaty was still under the ratification process, did not provide jurisdiction to hear criminal matters at that time. Therefore, neither of those two institutions could prosecute the Habré case.[90]

The Committee thereafter considered the prospects for the creation of the African Court of Justice and Human Rights based on the project to merge the African Court of Human and Peoples' Rights and the African Court of Justice.[91] The Committee proposed that this new body could be granted

[85] *See* Decision on the Hissène Habré Case and the African Union, Assembly/AU/Dec.103 (VI), para. 2.
[86] Ibid., para. 3.
[87] Ibid., paras. 4 and 5 (emphasis added).
[88] Ibid.
[89] See Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, paras. 27–33.
[90] Ibid.
[91] Ibid.

jurisdiction to undertake criminal trials for crimes against humanity, war crimes, and violations of the Torture Convention in Africa.[92] It also observed that there was room for such a development in the Rome Statute, and considered that this would not be a duplication of the work of the ICC. It emphasized that the text of such a treaty should be adopted through the quickest procedures possible.[93]

At the Assembly's summit in July 2006, at the same meeting in Banjul where the Committee's report had been presented, the AU decided that Senegal should try Habré "on behalf of Africa" with all the guarantees of a fair trial.[94] The AU leadership urged all African States to cooperate with Senegal. It further directed the Chairperson to provide the support necessary to enable the effective conduct of the trial. They also pleaded to the international community to assist with resources, especially those of a financial nature. Senegal thereafter proceeded to make amendments to its law, in July 2008, in which it gave effect to this AU decision by including in its penal code certain international crimes including genocide, war crimes, and crimes against humanity, and providing for their retroactive application. This constituted the domestic legal framework that was intended to enable Habré's trial.

But Senegal, which did not receive the financial support of the AU that had been promised and seemed to be dragging its feet for other more political reasons, did not pursue Habré for trial. It was to take two years more, and a new president in Senegal, for the AU to enter into a bilateral treaty with Senegal to create the Extraordinary Chambers in the Courts of Senegal.[95] In the meantime, planning for the trial had been hastened by Belgium's initiation of proceedings against Senegal at the ICJ in February 2009. Belgium alleged that there had been a failure on Senegal's part to carry out its obligations under the Torture Convention either to prosecute Habré or render him over for trial. The ICJ held that the country was in breach of its obligations to properly investigate and prosecute alleged torture committed by Habré.[96]

The Extraordinary African Chamber, which sat in Dakar and was funded by a mix of African and Western donors, was conferred the jurisdiction to prosecute and try the person(s) most responsible for torture and serious violations of international law committed on the territory of Chad from June 7,

[92] Ibid.

[93] Ibid.

[94] Decision of the African Union on the Hissène Habré Case, Assembly/AU/Dec.127 (VII), and in particular, Doc. Assembly/AU/3 (VII), paras. 1–3; 5(i) and (ii).

[95] *See* Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System, signed August 22, 2012.

[96] *See* Belgium v. Senegal, supra note 72.

1982 to December 1, 1990. President Habré has since faced charges before the tribunal with his trial having opened on July 19, 2015.[97] His case closed on February 12, 2016.[98] The trial judgment was rendered on May 31, 2016. The former Chadian leader was convicted, while charges against up to 27 other alleged accomplices associated with his regime have already been issued by the domestic criminal courts of Chad in N'djamena. Habré's conviction was largely upheld on appeal in April 2017.

To conclude this section, it seems notable that the AU did not immediately endorse the expert committee recommendation to add criminal jurisdiction to the African regional court. Nonetheless, it should by now be uncontroversial that the modern origin of the idea for such extension of jurisdiction was born out of the Habré affair. It can be said to be part of that Chadian case's legacy. No explanation was given by the AU Heads of State for accepting the recommendation relating to the specific case of Habré but not the longer term proposal to create a regional criminal court. It is anecdotally reported that funding constraints played a key role. Yet, as will be seen in the next subsection, developments relating to a separate issue which raised concerns about foreign-administered justice in Africa and against Africans did encourage AU States to revisit the recommendation for a regional criminal jurisdiction.

5. THE "ABUSE" AND "MISUSE" OF UNIVERSAL JURISDICTION

The third factor was not the source of, but did catalyze, AU interest in creating a criminal chamber. This was the indictment of African State officials by the national courts of various European states. These included France, Spain, and Belgium, all of which raised legal and practical concerns for African States with respect to, for example, whether those foreign jurisdictions were complying with customary international law immunities. The practice in this area and how it appears to have even given rise to regional African concerns about the ICC itself has been analyzed elsewhere, so will only be briefly summarized here.[99] A key thing to note about the controversial doctrine of universal

[97] *See* Statement of the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, *Opening of Hissène Habré trial a milestone for justice in Africa–*Zeid. *See*, for more on this, the press release (July 20, 2015), www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16250&LangID=E#sthash.YltBQlkT.dpuf. (stating that the Habré case was "a historic example of regional leadership and willingness to fight against impunity for international crimes").

[98] Thierry Cruvellier, *The Trial of Hissène Habré*, The New York Times (February 15, 2016), www.nytimes.com/2016/02/16/opinion/the-landmark-trial-of-hissene-habre.html.

[99] Charles Jalloh, *Regionalizing International Criminal Law*? 9 Int'l. Crim. L. Rev. 445 (2009).

jurisdiction is that this issue predated the establishment of the Committee of Eminent Persons, which had examined the Habré matter and that then recommended the expansion of the jurisdiction of the African Court to include international crimes.

Let us illustrate with reference to the two most well-known controversies regarding "universal jurisdiction" and African States. The first was the Belgian indictment and the issuance of an arrest warrant for the Congolese foreign minister, Abdulayae Yerodia Ndombasi. This famously led the Democratic Republic of Congo (DRC) to initiate proceedings against Belgium at the ICJ in which the DRC alleged that Belgium had violated its obligations under customary international law. In a much-criticized decision, at least among some commentators who lament the majority's decision not to engage with the universality principle, the ICJ ruled in favor of DRC on February 14, 2002, finding that certain immunities are unopposable before the national courts of states even if they are not available to block prosecutions before certain international criminal courts.[100]

What is significant about the *Yerodia* case, from the perspective of our argument here, is that the African government concern about the possible abuse of the principle of universal jurisdiction by foreign courts had predated even the entry into force of the Rome Statute of the ICC. This of course was the case in relation to individual African States on their own, such as the Congo, not necessarily as part of the regional body we now know as the AU. That said, there is of course much interplay in the two. Once Member States have concerns about certain policy matters, including on foreign policy questions, they raise those issues bilaterally with the other states and at the same time pursue action within regional or international clubs that they are part of as a way of mustering political support. They could thus better identify collective solutions to initially individual problems. We have seen that phenomenon with other African States bringing up issues in Addis Ababa and New York, including on topics of international criminal justice. This, of course, is not unique in international relations.

The perfect example of this is the second round of universal jurisdiction-based indictments. These were against Rwandan leaders and led to a strong reaction from the AU that this constituted a blatant "abuse" of the principle of universal jurisdiction.[101] Certain French and Spanish courts had indicted

[100] *Arrest Warrant* case, supra note 3 at paras. 58–61.

[101] AU and EU Ministers agreed at their Troika Meetings in September and November 2008 to establish an ad hoc technical expert group to clarify the meaning of universal jurisdiction. It was constituted in January 2009 with three independent experts appointed by each side. For the AU, the membership was as follows: Mohammed Bedjaoui, Chaloka Beyani, Chris Maina Peter. The EU appointed Antonio Cassese, Pierre Klein, and Roger O'Keefe. The group was

several high-level Rwandese officials. In the case of the former, this did not include President Paul Kagame, and in the case of the latter, it did. The judges sought warrants for him and 43 others including the Chief of Protocol to the President, Madame Rose Kabuye.[102] This would later lead to a major diplomatic row between Kigali and Paris, especially after Madame Kabuye was arrested in Germany, on a European arrest warrant. The AU subsequently adopted strongly worded resolutions that may have far-reaching implications for the development of state practice respecting universal jurisdiction. Those decisions most notably called for a moratorium on the issuance of arrest warrants against African leaders by European courts; decided to constitute an AU–EU expert group on universal jurisdiction with both African and European experts; and ultimately as of September 2010, seized the UN General Assembly's Sixth Committee of the matter. The Sixth Committee is now undertaking a global study on universal jurisdiction. The study continues as of this writing. In 2018, due in part to the politicization of the topic in the General Assembly and the call of many States for it to assist in bringing greater legal clarity, the International Law Commission added the topic to its long-term program of work based on a proposal of this author.

More pertinent for our purposes tracing the genesis of the criminal jurisdiction for the African Court of Justice and Human and Peoples' Rights, in several later decisions on universal jurisdiction the AU, because of the use of universal jurisdiction against Rwandese officials, directed its commission to explore, in consultation with the Banjul Commission and the African Court, the "implications" of empowering the regional court with jurisdiction "to try international crimes such as genocide, crimes against humanity and war crimes."[103] This decision was further reiterated during their annual 2009 summit in Sirte, Libya.[104] In other words, the African government concern about alleged abuse of universal jurisdiction seemingly returned the AU to more serious consideration of the proposal to endow the African Court,

assisted by a secretariat of in-house counsel comprised of Ben Kioko and Fafré Camara (AU Commission) and Sonja Boelaert and Rafael de Bustamante (EU Commission). *See AU-EU Technical Ad hoc Expert Group Report on the Principle of Universal Jurisdiction*, Doc. 8672/1/09 REV 1, para. 7 (April 16, 2009), www.africa-eu-partnership.org/pdf/rapport_expert_ua_ue_competence_universelle_en.pdf.

[102] For in-depth discussion of that case, *see* Jalloh, supra note 7.

[103] *See* Assembly of the African Union, Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, 12th Ordinary Session, 1–3 February 2009, Assembly/AU/Dec. 213 (XII), para. 9. This decision was reiterated in a subsequent decision of July 2009.

[104] Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.243(XIII) Rev.1.

which had been initially proposed by the Committee of Eminent Persons, with criminal jurisdiction. Needless to say, the recommendation had essentially been initially put on the shelf. The concern about foreign-imposed justice from universal jurisdiction therefore resuscitated it and later bore other implications for the ICC's work on the continent.

The point I wish to make here is that the recent rounds of universal jurisdiction indictments against African leaders in Europe, most of which seemed to have ultimately been withdrawn, sped up urgency in the AU for an African mechanism that will try African crimes on African soil. Again, the fraught ICC–Africa relationship, which is important and will be considered next, played into this. But, by now, it should be apparent that this additional factor was only one of several aspects that seemed to strengthen the African government resolve to add a regional criminal jurisdiction in the AU's future regional court.

6. THE AFRICA–ICC RELATIONSHIP

The final and perhaps most important single concern that led African States to start fast-tracking their plans for the creation of a criminal jurisdiction stemmed from the African government dissatisfaction with the work of the ICC on the continent, and in particular, the activities of the Office of the Prosecutor (OTP) in the Sudan situation. It is widely known that the decision of the ICC Prosecutor to seek an indictment against the Sudanese Omar President Al Bashir in March 2008 provoked a strong reaction from the AU. In its first decision on the matter, the AU expressed grave concern that the delicate regional efforts to make peace in the Sudan may be impeded if not entirely jeopardized by such a move.[105] This same type of stance was taken by the AU Peace and Security Council when the ICC Pre-Trial Chamber (PTC) finally approved the proposed indictment for the Sudanese leader on charges of crimes against humanity.[106] The AU insisted that it was not against prosecution of anyone, but made clear that in light of the then humanitarian catastrophe that was taking place in Darfur, it was opposed to the timing of the prosecution. It felt that this would render it difficult to find a political solution to the conflict in Sudan. An interesting element of this decision was the

[105] Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan (Decision on the Application of the ICC Prosecutor), Assembly/AU/ Dec.221(XII), para. 1.

[106] Communiqué of the 175th Meeting of the AU Peace and Security Council, March 5, 2009, PSC/PR/Comm. (CLXXV) Rev.1, para. 6.

direction that the AU Commission convene a meeting of African States Parties to the Rome Statute so that they could exchange views and develop recommendations on the ICC's work in Africa, especially its action "against African personalities."[107]

From the point of view of escalation of concern in the ICC–Africa relationship, the follow-on step was the AU's request for a deferral of the Sudan situation under Article 16 of the Rome Statute. This request was forwarded to New York. It was later reiterated. The repeated deferral request was implicitly rejected.[108] African States thereafter decided, collectively, that in view of the Security Council's implicit refusal to act to address the African government concern, none of them shall cooperate with the ICC in respect of the arrest and surrender of President Al Bashir.[109] This problematic decision, taken on July 3, 2009 at Sirte, Libya, remains on the AU books to this day. It underscored the African government conclusion that the timing of the indictment was wrong and had resulted in what the AU considered to be negative consequences for peace. However, from the perspective of ICC law, this decision arguably puts individual African States-Parties to the Rome Statute in violation of their obligations under the Rome Statute which imposes a general duty on all ICC States-Parties to cooperate with the ICC.

Besides this far-reaching decision framing the future of ICC–Africa relations in relation to non-cooperation in the Sudan situation, which has frustrated the attempts to have Al Bashir arrested to answer charges, the AU leaders also took another less well-known but equally important step in July 2009. It decided that the jurisdiction of the regional court of the continent should be enlarged to entrust it with the mandate "to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity."[110] Subsequent developments since then, including the issuance of indictments arising from the Kenya Situation, have all fueled the political posturing of African countries, insisting that the continent should develop its

[107] Decision on the Application of the ICC Prosecutor, supra note 42 at para 5.

[108] *See*, for detailed assessment of this issue, Charles Jalloh, Dapo Akande, Max du Plessis, *Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court*, 4 Afr. J. Leg. Stud. 5 (2011).

[109] *See* AU Assembly's Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/13(XIII) (July 1–3, 2009).

[110] Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.243(XIII) Rev.1 para. 5.

own regional criminal justice system to prosecute serious crimes of concern to the continent as a whole.[111]

The upshot of all this for us was that the AU Commission contracted a non-governmental organization, the Pan African Lawyers Union (PALU) located in Arusha, Tanzania, to prepare a detailed study and a draft treaty that would amend the protocol of the Statute of the African Court of Justice and Human Rights. In June 2010, PALU issued its first report and draft legal instrument to the AU Legal Counsel's Office which then requested certain changes. A revised version of the draft treaty was submitted in August 2010 to two validation workshops held in October and November 2010. Legal advisers of African States then held several meetings to consider the draft instrument in March, May, and October/November of 2011, which in turn led to further amendments and adoption of the draft protocol.

Upon approval at the ministerial level, the treaty was then submitted to the AU Assembly in July 2012, and contrary to general expectations that it would be adopted, the Heads of State requested further study of the "financial implications" of the expanded jurisdiction. They also sought clarification of the definition of the novel crime of unconstitutional change of government. A report was subsequently prepared on which further consideration was required, although it glossed over the huge financial costs of international criminal jurisdiction. In the final step, in a May 2014 meeting, the legal advisers of AU States met in the inaugural meeting of the Specialized Technical Committee on Legal Affairs in Addis Ababa where additional amendments to the protocol were made. These were thereafter endorsed by the ministers of justice and then forwarded to the Assembly of Heads of State

[111] Following post-election violence which occurred in Kenya in 2007–2008 in which over 1,300 people were killed, the ICC Prosecutor sought judicial authorization to carry out investigations in Kenya for crimes against humanity. That request was granted by most of the PTC, in March 2010, which was followed by summonses to appear for six high-level Kenyans in December 2010 based on prima facie evidence tending towards crimes against humanity. Four months' later, the judges gave a decision favorable to the Prosecution including in respect of the Deputy Kenyan Prime Minister Uhuru Kenyatta whose charges were confirmed on January 23, 2011. An admissibility challenge was filed by Kenya, which was then rejected by the judges in May 2011 and confirmed three months' later by the Appeals Chamber. The judges committed the suspect to trial and several trial dates were fixed, and after several adjournments were eventually fixed for end of October 2014. Another prosecution request for a subsequent adjournment was rejected by the judges, following which the prosecution withdrew the charges on December 5, 2014, without prejudice. Mr. Kenyatta, running on an anti-ICC platform, had won presidential elections on 10 March 2013. Kenya has contemplated withdrawal from the ICC and is pushing African States towards the idea. *See* for commentary, Charles Jalloh, *Kenya Should Reconsider Proposed Withdrawal from the ICC*, JURIST (September 13, 2013).

which adopted the protocol and opened it for signature on June 27, 2014. As of writing, nine African States have signed the treaty. None has yet ratified it.

A. *Innovations in the Criminal Jurisdiction of the African Court of Justice and Human and People's Rights*

This chapter, when it opened, suggested that one of the potential benefits of having regionalized criminal courts, whether within a human rights court as proposed for AU States or independently as part of a standalone criminal jurisdiction, is that the crimes of special concern to a particular region could be addressed in a way that might not be feasible in an international tribunal. An examination of the Malabo Protocol seems to bear this argument out. Even though the treaty is not yet in force, we can anticipate that based on the treaty-making practice in Africa, we will likely see the achievement of the 15 ratifications required to bring the treaty into force in possibly between the next 5 to 10 years. Of course, if there is serious member state push, it is possible for that to occur sooner as well.

1. Expanding the Scope of International Criminal Law

First, besides the fact that the African Court will have a tripartite jurisdiction over civil, general, and criminal matters, which itself is a first in the history of regional and international criminal courts, the protocol contains an expansive subject-matter jurisdiction over serious international crimes like genocide, crimes against humanity, war crimes, and the crime of aggression. The definitions of these crimes used international instruments, in particular the Rome Statute, as the initial inspiration for the codification. This seems appropriate in the sense that, because the ICC has to date been endorsed by 34 African States, it is important that the AU States reflect the consensus definitions of at least a large part of its 55 Member States and the additional 90 countries from other parts of the world that have joined the ICC. Africa being a part of that wider community should ensure its prohibitions help to solidify that arguably emerging body of law.

Nonetheless, as I further discuss in Chapter 8 of this volume, though the Rome Statute was taken as a starting point, it was rather interestingly, from the perspective of the normative development of a strong corpus of international criminal law, not seen as the be-all and end-all. In other words, African States felt that the definitions of those "core international crimes" could, as appropriate, be supplemented by African States to reflect progressive developments in the law. They also naturally accounted for the specificities of the African context

in fleshing out some of the prohibitions. An example of the former is illustrated by the tweaking of the definition of the crime of genocide. While the definition incorporated into Article 28B of the Malabo Protocol copied verbatim the one contained in Article 6 of the Rome Statute, which itself can be traced back to the widely endorsed 1948 Genocide Convention, AU States decided to add a new paragraph to capture and even expand upon the legacy of the ICTR in the *Akayesu* case in relation to acts of sexual violence by criminalizing "acts of rape or any other form of sexual violence," whenever they are committed in a genocidal context. This codification is an important step forward in the development of the crime and modern international criminal law, especially given the horrific acts of sexual violence in contemporary armed conflicts. It also helps to address a gendered blind spot of international criminal law.

In terms of the latter, another example is the crime of aggression which had not yet entered in force for the ICC. The AU States took the essence of the Rome Statute definition in their criminalization of the crime of aggression in Article 28M. But, here again, they went well beyond it both in terms of the underlying prohibited acts and the persons who can commit the crimes. Though there were other differences in the African definition which could raise questions of inconsistency in the prohibition of aggression vis-à-vis the Rome Statute and other definitions developed under the auspices of the UN, a particularly interesting feature is that the AU version of the offense can be committed not just by a state but also non-state actors. Sayapin discusses these elements in Chapter 11 of this volume.

2. Bridging International and Transnational Crimes

Second, and going much further than the incorporation of certain international crimes into the Malabo Protocol, African States have in their instrument tried to prohibit offenses "of particular resonance on the continent."[112] This means that they have attempted to overcome the barrier, artificially drawn in theory and hard to distinguish in practice, between "international crimes" and "transnational crimes." Thus, in addition to war crimes, genocide, crimes against humanity, and aggression, the Malabo Protocol also contains the crimes of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources. All these crimes are discussed in several standalone chapters of this book.

[112] *See* Pacifique Manirakiza, *The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa*, in Africa and the Future of International Criminal Justice 375, 388 (Vincent O. Nmehielle ed. 2012).

What is particularly intriguing about some of these nine additional offenses is that they extend beyond concern about individuals to also addressing environmental issues such as toxic dumping. There is also the collapsing of what we might consider more political crimes and more economic crimes. The predicate context in which governance deteriorates in a given state and on a path toward open conflict is also addressed through crimes like corruption. Moreover, some of these crimes that have historically been of great concern to Africa such as mercenarism and corruption have not generated significant international attention or interest before African action at their internationalization. It should not be surprising therefore that such crimes are prioritized by AU States within the framework of their regional court, since those kinds of offenses tend to be ignored by international criminal tribunals. For countries like Trinidad and Tobago, that apparently continues to advocate for drug trafficking to be treated as a matter of sufficient international concern to merit inclusion in the subject-matter jurisdiction of the ICC, one could see such an alternative approach as we see in Africa offering a potentially more viable solution. Here, instead of unsuccessfully pushing its efforts for criminalization in The Hague, it could seek a regional convention that prosecutes that same transnational crime within a court or tribunal in the Latin America and Caribbean region.

3. Extending Criminal Liability to Corporations Involved in Atrocity Crimes

A third feature of the AU court's treaty is also very significant considering the link between rights violations and resource driven conflicts: criminal responsibility is not just individual in nature, but also can be invoked in respect of corporate entities. Under this scheme, the executives of multinational corporations can be held individually responsible for participating in the commission of the international and transnational offenses codified in the Malabo Protocol, where those are committed in the territory of an African State party. But the corporations that they run could also be prosecutable – as Kyriakakis discusses in Chapter 27. So, to the extent that they aid and abet or instigate or somehow facilitate the commission of gross international and transnational crimes, they can also be held directly accountable in the States Parties to this regional treaty or in the regional court. This will likely be a controversial feature of the court, especially in the parts of the world from which many corporations that fuel third world conflicts come. On the other hand, one only has to think about the examples of contemporary "resource conflicts" such as conflict oil, conflict diamonds, and so on to note the possible significance of this regional crime in a continent whose many wars are somehow always linked to resource or mineral extraction.

This extension of criminal liability, in recognition of the role played by corporate entities in fueling contemporary conflicts in which atrocity crimes are committed, did in fact lead to a proposal during the Rome conference to include that type of jurisdiction in the permanent ICC. That suggestion apparently failed, due largely to the opposition of some powerful Western States. From the perspective of the developing world, some might perceive this as proof of the predominance of the powerful countries in shaping the form that international law takes to suit their interests. Indeed, as Vincent Nmehielle has argued,

> the inability of international criminal justice mechanisms such as the Rome Statute to address corporate criminal responsibility is indeed a challenge to the credibility of enforcing international criminal law in Africa and in most of the developing world where multinational corporations have not been known to be innocent in allegations of complicity in the commission of atrocity crimes.[113]

Though the parameters of how this corporate criminal liability would work in practice remain to be seen, as with the above discussed and indeed other aspects of the Malabo Protocol, any success in holding corporate or legal persons liable for atrocity or other transnational crimes holds the potential to expand the reach and effectiveness of international criminal law. It will likely spark conversations about the scope and reach of the future of this body of international law in light of the relatively more limited mandate and jurisdiction of the ICC. It could even open the door for other regions of the world, for example Latin America, to potentially use the African Court as a model. To that extent, by unlocking the idea of corporate criminal prosecutions for international and transnational crimes, Africa might well make a useful contribution to the development of international law. For it is plausible, as we have seen in other substantive issue areas, mainstream international law might develop in this direction as well. The ILC's draft convention on crimes against humanity, which was adopted on first reading in the summer of 2017, provides space for liability of legal persons for crimes against humanity in the national jurisdictions of those states that recognize such type of liability.

4. Road-testing the Public Defender Model

Fourth, and turning more to the institutional dimension of the court, it is noteworthy that the Malabo Protocol sought not just to reflect the particular

[113] See Vincent O. Nmehielle, *'Saddling' the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?* 7 AFR. J. LEG. STUD. 7, 30–31 (2014).

African concerns but also some of the best practices in the establishment of international criminal tribunals. As the first regional criminal court, and on top of that, one embedded within the framework of a permanent regional court of justice, it was explicitly determined to follow the pretrial, trial, and appellate chamber structure of the ICC for the International Criminal Law Section of its jurisdiction. It is not certain that this was a wise decision, given the practical limits now evident in that model for the world criminal court. Nonetheless, in addition to the usual organs of prosecutor, chambers, and registry, the ACC would be the first permanent regional tribunal to include a full-fledged defense office organ. This last-minute change, at the proposal of the Office of the Legal Counsel of the AU in the May 2014 Addis Ababa meetings (for which one of the present authors had served as an independent expert), is significant. The inattentiveness to defense needs has been an institutional weakness for modern international courts. This includes at the ICC itself, which does not have a full-fledged defense office. Having such a mechanism essentially ensures that the defense office in the future tribunal will be a more co-equal organ to the prosecution and the other organs of the tribunal. It thereby helps to ensure greater equality of arms between the adversarial parties in the proceedings. Taylor thoughtfully discusses the defense office feature in Chapter 24.

7. THE LEGAL RELATIONSHIP BETWEEN THE AFRICAN COURT AND THE INTERNATIONAL CRIMINAL COURT

In this section of this chapter, we consider a question which tends to lurk in the background of the ongoing debates among ICC supporters about the AU's proposed criminal chamber with jurisdiction to prosecute Rome Statute crimes. That is, the nature of the legal relationship that we can begin to expect between The Hague-based court and its African counterpart if and when the latter's treaty comes into force. The answer to this issue is important, not just for the Africa region but also for the argument made here that regional courts from all parts of the world could potentially become integral to an interlocking web of future enforcement regimes for international criminal law.

A. *The Shared Goals of the ICC and the African Criminal Chamber to Tackle Impunity*

The legal texts of the Rome Statute and the Malabo Protocol both contain jurisdiction sorting provisions that would permit the two bodies to function in a manner that is mutually supportive and complementary of each other. The preambulary provisions of both instruments set out the core purposes of the two tribunals. The ICC Statute affirms, among other things, that "the most

serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." It speaks to a determination to "put an end to impunity for the perpetrators of these crimes and thus to contribute" to their prevention, recalls the "duty of every state to exercise its criminal jurisdiction over those responsible for international crimes," and emphasizes that the ICC "shall be complementary to national criminal jurisdictions." These are the words of the preamble.

For its part, the Malabo Protocol expresses similar sentiments, although in relation to the specific African context. It, among other things, recalls the AU's right to intervene in Member States in grave circumstances where war crimes, genocide, and crimes against humanity have occurred as discussed earlier. It also avers to serious threats to legitimate order in order to restore peace and security, and reiterates respect for some of the core principles contained in the Constitutive Act including the "condemnation and rejection of impunity" generally and in respect of specific crimes such as terrorism and aggression. The preamble further acknowledges that the proposed court can play an important role in securing peace, security, and stability on the continent as well as to promote justice and human rights; and notes that African States were convinced that the adoption of the protocol "will complement national, regional and continental bodies and institutions of human and peoples' rights." It could have mentioned the ICC or any international courts or bodies, but did not do so. Neither, by the same token, did it frown upon them.

B. *Complementarity as a Jurisdiction Regulating Principle*

In addition to expressing the above guiding principles, the ICC Statute explicitly provided in substantive Article 1 that the court has power to "exercise its jurisdiction over persons for the most serious crimes of international concern" and again reiterates that the Court was intended to round out national criminal jurisdictions. This complementarity is given effect in the admissibility provisions, which regulate the ICC's concurrent jurisdiction with its States Parties, and in particular Article 17. The entire scheme rests on the important premise that the Member States enjoy primary jurisdiction and consequently the right to first assert that jurisdiction, whereas the court only has secondary jurisdiction and a right to act as a last resort where certain conditions are met. Thus, the ICC is to deem a case inadmissible before the Court where 1) it is being investigated by a state with jurisdiction and the state has decided not to prosecute, unless that decision to prosecute is a result of unwillingness or inability of the state genuinely to prosecute; 2) where the case has been investigated but a decision is made not to prosecute; 3) the person

concerned has already been tried for conduct which is the subject of the complaint; and finally, 4) the case is of insufficient gravity to warrant further action. What will constitute unwillingness and inability is further fleshed out in two additional paragraphs of Article 17.

Similarly, inspired by Article 17 though not referring explicitly to the ICC Statute or the ICC itself, the Malabo Protocol also considers that it will be guided by the complementarity principle. In the main, with very few changes to the wording, the ACC also establishes that its jurisdiction "shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities."[114] The Malabo Protocol goes on to further reflect the admissibility provisions of Article 17 of the Rome Statute in several subsequent paragraphs of Article 46H.

It does not, however, mention specific international criminal jurisdictions like the ICC. Interestingly, the initial PALU draft contained a specific reference to complementarity with the ICC. But that reference was removed from later drafts, likely due to the fraught political climate between the AU and the ICC at the time. Since the two courts will be operating at a horizontal level, as there is no legal hierarchy between them, this would imply that the two bodies would have to work out in advance how they will relate to each other through some type of relationship agreement and/or through their jurisprudence. Managing this up front would redound to the benefit of both institutions. There is precedent for both institutions entering into relationship agreements or memoranda of understanding. The details, of the type found in Articles 18 and 19 of the Rome Statute, in respect of preliminary rulings regarding admissibility and challenges to the jurisdiction of the African Court by African States Parties, were also not addressed in the Malabo Protocol. Presumably, this is because it was felt that these could be better addressed under the rules of procedure.

Clearly, in respect of both the ICC and the ACC, complementarity is envisaged vis-à-vis the national jurisdictions of states parties to the relevant instrument. Under both, as a general rule, the two entities are secondary back-up systems to those of the Member States which have the first bite at the apple to investigate or prosecute. Where unwillingness or inability are shown, the international or regional jurisdiction would then be triggered. The major difference in the two relates to the African Court's inclusion of regional economic communities in the calculus. This suggests that a double failure is required, to the extent any of those had provided for jurisdiction over international crimes. As no regional economic community has yet had jurisdiction, even though judges of the Economic Community of West African

[114] Malabo Protocol, art. 46H.

States (ECOWAS) Court of Justice have shown interest in advocating for it, we can set aside that discussion for now.

C. *Positive Complementarity for National and Regional Courts*

A legal question arises whether from the perspective of the Rome Statute, the complementarity clauses in the two treaties, both of which contemplate state to court admissibility considerations, can apply to the court of a regional organization. Here, at least two possibilities can be discerned. The first is that we can analyze the complementarity relative to the States Parties of both courts. In this scenario, for all the States Parties of the ICC that also happen to endorse the African Court, the admissibility analysis of complementarity would at the level of the ICC require an examination of whether the state took action to prosecute the Rome Statute crimes. Such an assessment could include whether that was done directly by the state itself, or alternately for example, through a farming out of the work through a self-referral of its own situation to the regional African Court. The question would then arise, where this has happened, whether the regional court's actions amounted to the types of credible or genuine investigations and prosecutions reflecting the kind of active pursuit of the same persons for substantially the same conduct such as to render the situation and cases inadmissible before the ICC.

As a matter of principle, as mentioned above, since the ICC itself including the OTP along with academics have been advocating the policy of proactive or positive complementarity, which basically refers to the court encouraging States Parties as well as non-parties to take effective investigation and prosecution of Rome Statute crimes, it would seem that a flexible reading of the Article 17 requirements would help achieve that goal in the region of Africa. In this way, the ICC, instead of foreclosing the option of regional prosecutions, would support its States Parties and even others to do more to tackle impunity.

Under the ICC Statute, African States, which constitute the largest single regional bloc within the Rome System of justice with 34 members, bear the primary responsibility to prosecute and yet experience serious international or transnational crimes that they are hardly able to prosecute. The over-representation of African States on the ICC situational docket has brought into stark relief the fact that many African States presently lack the substantive capacity to prosecute serious international crimes. The handful that might have capacity such as to fulfill the complementarity requirements might have difficulty adjudicating highly political cases or at least those involving the most powerful government officials.

One could imagine a scenario then, as we see in Uganda for instance, where there might be a preference to use the domestic courts to harass and imprison opposition leaders. One could imagine such a context rising to persecution of a person and say a particular ethnic group, giving rise to the commission of international crimes. In the ICC itself, if we think of the Kenya situation, we can see some of the challenges that might be involved in the investigation and prosecution of incumbent government officials such as the president or his deputy. That experience perhaps underscores the need for a regional instead of solely a national alternative. The regional jurisdiction would, if this argument is right, complement the international court's reach. Under this argument, each of the African States Parties to the ICC, as well as African non-parties, should be positioned to prosecute the core heinous offenses within the Court's jurisdiction as well as become part of the regional and international mechanism.

There is nothing in the Rome Statute, and international law generally, to prohibit them from doing so individually or through a collective such as a regional body like the AU's criminal court. Nor, for that matter, are there any prohibitions for any other regional body in say Europe and Latin America or Asia to come together to do collectively what each of them can do alone. In this way, the states of the region can, in compliance with their obligations under international law, cooperate whether bilaterally or multilaterally to discharge their duty to prosecute core international crimes. The only caveat might be that they must then do so in line with the principles of the Rome Statute which would not accept sham proceedings aimed merely at shielding the accused. On the other hand, in relation to the situations where overlaps of situational and individual jurisdiction arise between the two courts, some sort of jurisdictional coordination will be required. That is where creative interpretation of both the ICC Statute and the Malabo Protocol could offer practical solutions.

The above interpretation, which advocates that complementarity is flexible enough as a jurisdiction sorting concept to admit of regional bodies such as the future African Court in additional to national jurisdictions, is consistent with the views of some of the ICC's Member States. For instance, on March 14, 2014, Kenya proposed, in light of the AU decision to adopt the protocol, an amendment to the Rome Statute that would explicitly mention regional organizations.[115] Though the issue seems to still be under discussion, it appears

[115] The proposal read, as follows, with the bracketed portion being the new text: "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national [and regional criminal] jurisdictions." *See* Kenya: Proposal of Amendments, UN Doc. C/N/1026/2013/TREATIES/XVIII/10 (Depositary Notification).

that there is some who find such amendment unnecessary since the present framework can accommodate such a regional body. Chapter 24 assesses in detail the ACC's complementarity principle.

8. KEY CHALLENGES FOR THE FUTURE AFRICAN COURT

In as much as the preceding sections have suggested that there are good reasons favoring the prosecution of international and other crimes within regional courts such as the proposed African Court, this is only one part of the picture that we must assess. The other half of the story is the fear that such a regional project could undermine, if not imperil, the hard-won achievement of a permanent international penal court. So, while due to space I will not consider all the issues, let us now discuss five major concerns that could give cause for pause in terms of the establishment of a criminal chamber within the African Court of Justice and Human Rights. I will attempt to offer some preliminary reflections that could help alleviate some of these concerns.

A. *Practicality of a Criminal Chamber*

The first issue is one of pragmatics. It can be argued that it is unlikely that the proposed criminal chamber will effectively exercise its jurisdiction over international crimes in Africa. The fact is that, idealism and aspiration aside, there is a history of poor performance by continental African institutions. Naming names can be controversial in this respect, but as an example, we could point to the African human rights system itself. That system, by any measure, is seen as underperforming behind its older and more established European and Inter-American counterparts.

Take, for instance, the work of the African Commission on Human and People's Rights based in Banjul and created by the 1982 African Charter on Human and People's Rights. That body, which was considered innovative for combining notion of rights and duties for the first time in a major human rights treaty, was held up for its promise much like we might do today for the innovations we can discern from the Malabo Protocol. But, the practice of that institution has not matched the initial excitement invested in its promise. There has been, among other things, a woeful lack of money and resources, and various operational difficulties that have limited that body's tremendous promise to guarantee human rights in Africa. On top of that, due to the lack of bindingness of its decisions under its communication procedures, that body's work, while generally important in advancing the cause of human rights on the continent, has been stymied with non-compliance on the part of governments found to have violated the human rights of their citizens.

Relatedly, when the decision was made to improve the Banjul Commission and create a regional court that could enter binding decisions against African State violators of human rights, only a handful of countries have accepted its jurisdiction to hear individual complaints. At last count, there were only seven following the withdrawal of Rwanda's declaration after several cases were failed against it; meaning that the premier human rights court on the continent, has no jurisdiction over the individual human rights concerns of the citizenry of roughly 48 African countries. In fact, only 30 of the 55 AU members have ratified the treaty establishing the human rights court. If we look at the estimated count of the populations of the countries that are covered, and those that are not, we will basically find that of approximately 700 million people, less than roughly 100 million enjoy the protective umbrella of the continent's premier human rights court. It is remarkable that the Court's protective ambit, as limited as that itself could be, excludes approximately 600 million Africans. The end result is that, in well over ten years of its existence, the African Court has so far only had a few cases. Ironically, even the ICC itself has a broader jurisdictional reach in Africa than the Arusha Court, at more than half of the African States Parties.

In the same period, since it was formally established in 1998, the present human rights court has issued only a handful of judgments on the merits. And, even in those instances, it seems uncertain that the countries in issue have implemented those decisions. We also do not appear to have much pressure for compliance from the AU or other African States. On the other hand, as one African commentator who himself has been a member of the Banjul Commission has argued, we must take into account the relative youth of AU institutions starting with the AU itself and its sub-organs and entities such as the Court.[116] The more the AU can strengthen itself, the more likely that its States Parties and sub-regional bodies of African States will become stronger as well. Be that as it may, even if the criminal court is created, it will almost certainly have some of the same organizational start-up problems as we have seen affecting other AU created institutions. Funding constraints will be part of this.

This is only somewhat different, however, from the experiences of the international criminal courts we have had. For example, the ICTY took many years to settle into and even ramp up and then conclude its work. The ICTR, which reflected some of the travails of African institutions in its early years, also took a few years before it could get on track. The SCSL, though it issued its first indictments within six to eight months of the Prosecutor's arrival in Sierra Leone, was only expected to operate for three years. As it closed down it had only

[116] *See* Manirakiza, supra note 113 at 399.

completed about ten cases and operated for nearly a decade and a half. The Cambodia tribunal, for its part, is also notorious for its own manifold problems. In other words, though we might hope for something different, the African and other international precedents do not suggest many reasons to be too confident. The wide jurisdiction and the sheer breadth of the project to merge three courts into one may be innovative, in principle, but does not come without their own major institutional headaches.

Lastly, and even more significantly, what about the ICC itself? It has taken the ICC about ten years to finish its first case from investigations to conclusion in the seminal Thomas Lubanga trial. It also, after so many years, just secured its first acquittal and managed to complete a second case, though with some judicial help to the prosecution through recharacterization of the charges. The first point to take away from this discussion is that there will be problems. The second point is that such problems are not unique to Africa. There, they might be particularly acute, but they do also expose the teething problems associated with the development of such complex institutions on which we often place so many high and unreaslitic expectations.

B. *Lack of Political Will to Prosecute Those Most Responsible for Atrocity Crimes*

This will be another concern. Failure of the AU to cooperate with the ICC through its Sirte July 2009 decision, and in the arrest of Bashir, suggests that the AU will not be willing to punish Heads of States that commit crimes within the framework of a regional court. In fact, on this argument, the inclusion of a clause reiterating the immunity of sitting presidents from prosecution, deputy presidents, and other senior government officials in Article 46A*bis* of the Malabo Protocol, can be seen as proof of the intention to exclude real accountability.[117]

Those in the highest positions of government tend to be the ones implicated in fomenting the violence that in turn often leads to the commission of atrocity crimes. A look at the Sudan and Kenya situations as well as those of

[117] See, for concerns about the wisdom of that provision from a policy level for the stability of African States, Charles Jalloh, *Reflections on the Indictment of Sitting Heads of State and Its Consequences for Peace, Stability and Reconciliation in Africa*, 7 Afr. J. Leg. Stud. 43 (2014). For a detailed argument, finding that the provision is often wrongly assumed to be inconsistent with international law which is not necessarily the case, *see* Chapter 29 of this volume, and also Dire Tladi, *The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff*, 13 J. Int'l. Crim. Just. 3 (2015); Adejoké Babington-Ashaye, *International Crimes, Immunities and the Protocol on Amendments to the Protocol of the Merged African Court: Some Observations*, in Shielding Humanity: Essays in Honor of Judge Abdul G Koroma 406 (Charles Jalloh and Femi Elias eds. 2015).

the DRC, the Central African Republic (CAR), and the various other African situations currently before the ICC, and before that the Rwanda and Sierra Leone conflicts, would bolsters this argument. In other words, from this admittedly skeptical view, there is even risk of political manipulation of any new chamber by self-interested African leaders. This argument again finds some traction in the last-minute AU decision to include a clause conferring temporary immunity for sitting Heads of State and other senior government officials, largely at the behest of Kenya.

But several other factors will be important in a regional criminal justice process in Africa. It may also be that there is reason to be optimistic that we are better off having a regional mechanism as well than if we left prosecutions of international crimes solely to individual African jurisdictions. Political realities and past history suggest that African States, like some others elsewhere, will probably try to influence the work of national justice institutions if they seek to prosecute high-ranking government officials. Similarly, in the same way that international courts are not insulated from the politics of international institutions, it is highly likely that a regional court will have greater independence and impartiality compared to a national court. It might therefore have greater likelihood of non-manipulation by a single state if the cases take place in a regional or international court rather than if prosecutions occurred at the level of the national jurisdiction.

C. *History of Underfunding African Human Rights Institutions*

Third, and leaving aside potential institutional deficiencies and the controversies surrounding immunity, perhaps the biggest constraint that any future ACC will face is a lack of the resources and funding for its effective functioning. This is a significant concern that could stand as a real impediment to the functioning of the criminal chamber. The entirety of the AU receives programmatic support for many activities through donor assistance. And, when it comes to international criminal trials, the AU found it difficult to convince its Member States to marshal the resources necessary for the trial of a single case involving a single person (i.e., Habré in Senegal). If the AU was unable to do more than offer a modest contribution of $1 million of the total funds required to carry out the single Habré trial in Senegal, despite the repeated pledges of some its members to do so, is it realistic or feasible to expect that they will provide the funds required to carry out expensive international investigations and prosecution of crimes across several countries on the African continent? Probably not.

In any event, leaving the Habré case aside in relation to which there was an order for the AU to establish a trust fund to secure reparations for victims which has not been established, the creation of a single regional criminal chamber in Africa does create space for economies of scale. Of course, the unit costs of an

international criminal trial, at least those done in the current ad hoc international tribunals, appear to be roughly in the neighborhood of between $15 and 20 million per trial. Certainly, African States will not at present be willing to pay such high expenditures for a single criminal trial. A more modest and more realistic system will have to be devised. This should consider the cost of justice in the countries of the continent. But, even if the costs of trials are dramatically lower in the future African Court, the reality is that millions of dollars will still be needed if the court is to play a useful role in the fight against impunity across the region. It would seem that it will obviously be better if African States, themselves impoverished, can come together to marshal the resources required to prosecute the international crimes in their own backyards rather than creating ad hoc tribunals such as the Senegal Extraordinary Chambers or trying to do so alone within the framework of their national courts. Nonetheless, in carrying out investigations in situation countries, some of the same types of challenges that the ICC have faced will likely come up also for the African Court so long as it enjoys jurisdiction spanning several African States. These inter-related concerns will have to be addressed if the institution is to be more than a mere paper tiger. The two chapters on the challenges of financing the future court, in Part 4 of this volume, provide a sobering read.

D. *Fear of Undermining the ICC*

A fourth important challenge for the idea of an effective an African criminal jurisdiction is more philosophical. This is the fear that its very existence could undermine the important ongoing work of the ICC on the continent. Indeed, the wider context of establishment leaves the African Criminal Chamber vulnerable to the perception, whether legitimate or not, that it is nothing but a form of political backlash against the ICC.

At the same time, it has been shown that a coming together of different factors has driven the agenda for a regional court. Consideration of the formal AU decisions in which they continue to condemn some of the ICC's actions tend to lend it some credence. And the AU's failure to repeal some of these decisions, including the July 2009 decision on regional non-cooperation taken at Sirte Libya, does not help matters. Nor does the refusal to allow the ICC to open a liaison office in Addis Ababa. All these might suggest that with a regional court in place, there will likely be a shift of cooperation away from The Hague. This is speculative, as it is hard to tell. In the final analysis, what is clear is that there is a need for dialogue and engagement between the AU and the ICC. Recent developments, including the first amicus curiae application by the AU Commission in 2015 in which one of the present author was involved as external counsel to bring the AU's legal concerns to the Appeals Chamber in the Kenyan cases, is a

step in the right direction. This opened the door for the ICC Appeals Chamber to, in turn, invite the AU to participate in recent proceedings concerning Al Bashir and the question of immunity and the duties of states to cooperate in his arrest in 2018. These demonstrate that valid legal concerns raised by AU States will be taken seriously by the judges, and still allows the ICC to exercise its independent judicial-making authority to review politically controversial cases.

E. *Regionalism and Fragmentation of International Criminal Law*

A final argument we could raise against the regional criminal jurisdiction is the notion that regionalism is not a good idea because it might lead to the further fragmentation[118] of international criminal law. To the extent that there is conflict in the norms developed in Africa with those in the ICC Statute, this would be undesirable from the perspective of the goals of African States as well as the development of a universal international criminal justice system. The potential mushrooming of regional and sub-regional courts creates the prospect for courts with distinctive legal bases that could have inconsistent and incoherent legal bases, and apply inconsistent interpretations to decisions adjudicating war crimes, crimes against humanity, genocide, and the crime of aggression. This would threaten the unity of international penal law. On the other hand, the African experiment, by taking as a starting point the Rome Statute and progressively building upon it in most instances, implies that there is a desire to ensure that the obligations assumed by African States are at least compliant with the ICC regime. This might help to maintain greater coherence and perhaps even help to avoid fragmentation of regional and international criminal law.

9. CONCLUDING REMARKS AND RECOMMENDATIONS

This chapter has examined whether there could be a viable place for regional courts in the global struggle against impunity. In this view, much as in the international human rights system that has developed over the last half century, international criminal law—which is still trying to find the best ways to dispense justice on behalf of the victims of atrocity crimes—would likely benefit from

[118] The wider topic of fragmentation of international law, which is beyond our limited scope here, has generated great scholarly interest and even attracted detailed study by the International Law Commission. *C.f.*, Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law. Postmodern Anxieties*? 15 Leiden Journal of International Law 553 (2002). For a careful study, which also discusses the challenge of regionalism in the context of fragmentation of international law, *see* Fragmentation of International Law: Difficulties Arising from the Diversification of International Law Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (April 13, 2006).

regionalization of some of its enforcement of its prohibitions. Each part of that mutually reinforcing enforcement system can play its own role in the fight toward the same goal of combating impunity for serious international crimes. I have suggested in this chapter that, as in the global human rights system, international criminal law could also have at least three layers.

First, consistent with the principles of sovereignty and international law, national courts would continue to act as the first responders to the impunity crisis that we presently face in the international community. In the Africa region, whose overwhelming number are supporters of the Rome Statute for example, the regionalization of the duty to prosecute through an institutional mechanism will help bolster the capacity for countries in the continent to prosecute war crimes, crimes against humanity, genocide, and aggression. Those same national courts would also have jurisdiction over the transnational and other economic offenses that are of particular concern to the African region and that are codified in the Malabo Protocol. By pooling their resources, they would likely be better able to give effect to the fundamental precepts of complementarity and discharge their legal obligations to prosecute.

Second, at the regional level, again as we can tell from the Africa illustration, we could have regional courts endowed with jurisdiction to prosecute the crimes prohibited in the Rome Statute and possibly additional others that have also been condemned by the international community such as torture and terrorism. There is even the possibility, once the regional court door is opened, that we might also see the capacitation of courts embedded in sub-regional bodies such as the East African Court of Justice or the ECOWAS Court of Justice to prosecute such crimes. Other regions and sub-regions of the world might explore this model over time, both for efficiency and other practical reasons. Such a development would seem consistent with the experience of human rights courts, allowing each region of the world the opportunity to give its own unique stamp to the development of a global anti-impunity architecture. There are already strong indications of such potential developments in the Americas region.

Finally, at the international level, we would have an additional back-up system for whenever national courts are unable and or unwilling to prosecute. Here, the ICC will continue in its role as the permanent and premier world criminal court. Its place would be reserved to step in when states, including the ones in the African region, prove to be inactive, unwilling, and/or unable to prosecute the heinous crimes of most serious concern to the international community as a whole, consistent with the complementarity principle contained in the Rome Statute. This role will be crucial when it comes to investigating, trying, and punishing sitting Heads of States, their deputies or

other senior government officials that are, for one reason or the other, not easily prosecutable at the national or regional court level.

A few preliminary recommendations can be developed from the discussion in this chapter. For the ICC, as its current president Judge Chile Eboe-Osuji (Nigeria) seems to have argued in Chapter 28 of this volume, an important one is that the court should keep an open mind toward working with not just states but also regional organizations, as it develops proactive or positive complementarity. This implies a willingness to engage, whether at the organ or ICC level, with initiatives that might be in development in different regions of the world. Such engagement would help to ensure that whatever regional systems are designed will be compatible with the goals of the Rome Statute and the regime that it is developing. The ICC, which will continue to be at the center of that system wherever national or regional action falls short of the expectations of the international community, must recognize that this will be in its long-term interest. It certainly seems obvious that the Court will in any event be unable to fulfill all the hyper expectations created for it in the minds of victims of atrocity crimes around the world.

The type of engagement with African concerns we saw through the 2013 Assembly of States Parties (ASP) debate or the 2017 hosting of joint seminars with the AU, for instance, are all important in creating mutual trust. In turn, that could lead to deeper conversations about how the Court, without transforming itself into a development agency, could work with African States to turn over a new leaf. On the side of the AU, it could continue to encourage its African States Parties and possibly take decisions in that regard to push for a closer dialogue within the ICC States Parties on positive complementarity and an assessment of the implications of regional court jurisdiction. Consideration should also be given to the role the ICC and other international partners, such as the UN, could play in offering technical assistance in anticipation of more signatures and further ratifications of the Malabo Protocol.

To national jurisdictions that are part of the 123 States Parties of the ICC regime, especially those that are struggling to come out of conflict, consideration should be given to collaborating with other states at the regional or even sub-regional level in order to explore the implications of cooperating to give effect to their duties to prosecute war crimes, genocide, crimes against humanity, and the crime of aggression. In a new spirit of mutual accommodation, the ICC could work out how to meaningfully assist its members to put in place things like the proposed criminal chamber to prosecute ICC offenses. As part of that, The Hague court could, whether through its organs or perhaps more appropriate its ASP, convene a discussion with the judges of regional human rights courts and the States Parties to consider options under which

regionalization could be used to help reinforce the difficult mandate it has to fight impunity at the secondary level under the Rome Statute.

For regional organizations and human rights court systems, including those in Europe and the Americas, some consideration could begin to take place on whether and how criminal jurisdiction could be incorporated into their mandates, at least for certain types of core international offenses. To the extent that transnational crimes are of interest, in a particular region, the feasibility and desirability of considering those should be part of that discussion. As would the implications. A key lesson, based on the African experience, is that greater effort must be made to spell out how to resolve conflicts of jurisdictions. This should provide a framework whereby complementarity, rather than competition, is fostered as a central goal. Such is the way we might ensure that there is a unified global regime that works toward the same principal objective of tackling impunity.

To African and global civil society, which as discussed in another chapter have played an important role in advancing international criminal justice through advocacy, recognition should be given to the reality that the ICC was neither designed nor ever intended to be the panacea to the global scourge of atrocity. In that context, while the world criminal court should continue to receive all our support, it is not inconsistent with that support to appreciate that national and regional mechanisms could be other ways to advance the cause of individual criminal accountability and justice for victims of gross human rights violations around the world.

3

Peace and 'Justice' Sequencing in Management of Violence in the Malabo Protocol for the African Court

KAMARI M. CLARKE

1. THE MALABO PROTOCOL: PEACE AND JUSTICE SEQUENCING

One of the central transitional justice debates has been encapsulated by the phrase, 'peace versus justice'.[1] Today, the interplay between 'peace and justice' remains one of the most difficult debates, especially in Africa. Those adopting a more fundamentalist approach to prosecution typically hold the view that retributive justice prevents impunity of the perpetrators through direct punishment, and serves to deter those inclined to commit future atrocities.[2] They typically articulate arguments that insist that: (1) the destabilizing effects of pressing for accountability are overstated and they may in fact prevent further atrocities; (2) the failure to prosecute reinforces a culture of impunity, which has negative long term impacts on peace; (3) international law obliges countries to prosecute war crimes, genocide, and crimes against humanity; and (4) fair trials can assist in acknowledging victims' suffering while at the same time creating a legitimate historical record that protects against revisionism.

On the opposing side, various scholars argue that international criminal tribunals often impede peace settlements and prolong atrocities because leaders facing threats of prosecution no longer have incentives, such as

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[1] The debate has also been characterized as retributive vs. restorative justice, judicial romantics vs. political realists, etc.

[2] T. Muthiri, 'The African Union and the International Criminal Court: An Embattled Relationship?', Policy Brief, *Institute for Justice and Reconciliation* (IRC) (2013), at 2.

immunity, to end atrocities and therefore continue to prolong conflicts to keep themselves in power.[3] By calling into question the meaning of justice, they suggest that justice does not always require prosecutorial action.[4] They typically argue that: (1) prosecutions are an obstacle to peace talks and do not, in fact, act as a deterrent to future atrocities; instead they escalate them; (2) they are expensive and take a long time to complete; (3) they do not necessarily serve the interests of the victims or individual states; and (4) they do not address the root causes of violence.

While these two camps seem to represent opposing ends of the debate, the reality is that there exists no binary choice between peace on one hand and justice on the other.[5] The juxtaposition highlights a 'paradox' rather than a debate.[6] This paradox is important to highlight as the debate is imbued with an artificial division between peace and justice, politics and adjudication. With such a paradox in mind, this chapter explores the way that the Malabo Protocol for the African Court for Justice and Human and People's Rights (African Court) conceptualizes justice through a more gradual approach that is predicated on allowing time for peace building and reconciliation in African transitional justice settings.[7] According to this logic, the false tension between peace and justice is collapsed into a 'transitional justice' strategy that requires a different logic for understanding the development of Africa's justice strategies underway.[8] Making sense of the conceptualization of peace–justice sequencing in the Malabo Protocol for the African Court

[3] P. Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism', 31 *Human Rights Quarterly* (2009) 624, at 625.

[4] H. Cobban, 'Think Again: International Courts' (Foreign Policy), 20 October 2009, available online at: http://foreignpolicy.com/2009/10/20/think-again-international-courts/; E.B. Ludwin King, 'Does Justice Always Require Prosecution? The International Criminal Court and Transitional Justice Measures', 45 *The George Washington International Law Review* (2013) 85; O. Oko, 'The Limits of Prosecutions', (Oxford Transitional Justice Research Working Paper Series), 19 March 2010, available online at: http://otjr.crim.ox.ac.uk/materials/papers/122/Justice_in_Africa.pdf.

[5] See for example, L. Mallinder, 'Beyond the Courts? The Complex Relationship of Trials and Amnesties', *SSRN Electronic Journal* (2011), available online at: www.researchgate.net/profile/Louise_Mallinder/publication/228157753_Beyond_the_Courts_The_Complex_Relationship_of_Trials_and_Amnesties/links/00b7d5333f758b8931000000.pdf; R.H. Mnookin, 'Rethinking the Tension between Peace and Justice: The International Criminal Prosecutor as Diplomat', 18 *Harvard Negotiation Law Review* (2013) 145; T.D. Olsen, L.A. Payne and A.G. Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy', 32 *Human Rights Quarterly* (2010) 980.

[6] N. Eisikovits, 'Peace versus Justice in Transitional Settings', 32 *Quinnipiac Law Review* (2013) 707, at 715.

[7] T. Muthiri, supra note 2, at 2–3.

[8] Ibid. at 717.

involves recognizing that the authors of the protocol saw that the political stakes were higher in transitional contexts, making the conflict between peace approaches and legal justice approaches further pronounced. Yet, this development in the crafting of the Malabo Protocol has also unfolded alongside the profound rise in prominence of international prosecutorial approaches to violence that have led to the re-emergence of the debate concerning whether the interest of justice should yield to the need to secure peace in situations of conflict or transition periods.[9]

The duty in international law to prosecute serious international crimes was first established in a series of treaties recognizing specific atrocities as international crimes that states had a duty to prosecute under international law. The *Convention on the Prevention and Punishment of the Crime of Genocide* (*Genocide Convention*) recognizes genocide as an international crime, imposes individual responsibility, and requires States Parties to try and punish perpetrators of genocide.[10] The Conventions require States to 'search for persons alleged to have committed, or have ordered to be committed … grave breaches [of the *Geneva Conventions*] … and bring such persons, regardless of their nationality, before [their] own courts.'[11] 'Grave breaches' include, *inter alia*, wilful killing, torture or inhuman treatment, biological experiments, and making civilian populations or individual civilians the object of attack.[12] Similarly, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* emphasizes the 'grave nature' of the crime of torture requiring States Parties to prosecute or extradite its perpetrators.[13]

In addition, the duty to investigate and prosecute has been reaffirmed on several occasions by the United Nations Security Council and other UN

[9] I. Bantekas, 'Sequencing Peace and Justice in Post-Conflict Africa', in C. Jalloh and I. Bantekas eds., *The International Criminal Court and Africa* (Oxford University Press, 2017) Chapter 4 91, at 91 [Bantekas].

[10] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

[11] *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Art. 49; See also *Geneva Convention II for the Amelioration of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, Art. 50; *Geneva Convention III relative to the Treatment of Prisoners of War*, 12 August 1949, Art. 129; *Geneva Convention IV relative to the Protection of Civilian Persons in Time of War*, 12 August 1949.

[12] For full list, see International Committee of the Red Cross, 'Grave breaches specified in the 1949 Geneva Conventions and in additional Protocol I of 1977' online at: www.icrc.org/eng/resources/documents/misc/57jp2a.htm.

[13] UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Arts. 4–8.

bodies, as well as international, regional, and national courts in finding amnesties for war crimes and crimes against humanity unlawful.[14] This duty has coalesced in the *Rome Statute of the International Court*, which defines international crimes and emphasizes 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'[15] The duty has been recognized with such a high degree of prevalence that the International Committee of the Red Cross asserts that there is an obligation under customary international law for states to investigate and prosecute international crimes.[16]

The Malabo Protocol, and the eventual effort to extend the criminal jurisdiction of the African Court and bring it into force has raised a new set of issues related to how to address the interplay between various peace–justice dilemmas in post-violence contexts. This debate has been clarified with an articulated framework for Transitional Justice in Africa advocated by the Panel of the Wise and promoted by the African Union. Its relevance is critical in Africa,[17] where a number of states have protested the Prosecutor of the International Criminal Court's (ICC) decision to investigate and issue arrest warrants in the midst of peace talks. However, as developed in the operationalization of the ICC, though the drafters of the *Rome Statute* envisaged the need for the ICC to yield to peace processes through Article 53(2)(c), which requires the Prosecutor to consider whether pursuing a case would be 'in the

[14] See International Committee of the Red Cross, 'Rule 158. Prosecution of War Crimes' online at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 [ICRC Rule 158]; See also I. Bantekas, supra note 10 at 96, footnotes 21–22 for some examples.

[15] *Rome Statute of the International Criminal Court*, preamble, Arts. 5–8.

[16] ICRC Rule 158, supra note 15,

[17] See, e.g., International Peace Institute, *Peace, Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity* (Report of the AU Panel of the Wise, February 2013) at 10–11 [Panel of the Wise]: 'The question of whether peace should take precedence over justice where human rights violations and war crimes have taken place constitutes the core of the debates in the growing field of 'transitional justice,' which includes the complex ethical, legal, and political choices that various actors confront to end conflict, restore peace, and prevent the recurrence of conflict. Africa's multiple conflicts have underscored the dilemma between peace and justice, and have challenged local and international actors to craft solutions that sometimes compromise these values. In recent years, the ability of mediators and other interveners in conflicts to grant immunity has been curtailed by the evolving international legal obligations and the international justice architecture, including the Rome Statute, which prohibits amnesty for crimes against humanity, war crimes, and genocide. Despite these international norms, African states confront difficult choices in the task of balancing the imperatives of justice and reconciliation with the political realities of managing impunity.' Online at: https://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_peacejusticeafrica.pdf.

interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims, and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime,'[18] article 53(2)(c) provides an opportunity for the ICC Prosecutor to consider political matters in the pursuit of justice – especially in relation to ongoing peace negotiations.[19]

However, the ICC Prosecutor has moved away from such an interpretation, taking the position in a 2007 policy paper that the interest of justice 'should not be conceived of so broadly as to embrace all issues related to peace and security' and stating that the 'Office will seek to work constructively with and respect the mandates of those engaged in other areas but will pursue its own judicial mandate independently.'[20] A decade later, it does not appear that the Office of the Prosecutor plans on broadening its position on 'interests of justice.'[21]

However, the emerging African system being led by the AU is distinguishing itself in this regard. There is a vocal insistence that a premature emphasis on prosecutions can frustrate the search for a peaceful resolution, leading to continued conflict that prolongs the misery of affected communities.[22] There is a recognition that a leader – even one compromised by complicity in the perpetration of abuses – may be necessary to bring a faction to the negotiating table, maintain unity, and convince the faction to accept the negotiated resolution to the conflict.[23] The second position is that criminal indictments may undermine the will of such leaders to pursue peace and entrench warring

[18] Art. 53(2)(c); I. Bantekas, supra note 10 at 94.

[19] Ibid. at 94.

[20] Policy Paper, 'The Interests of Justice' (September 2007) at 8 online: www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

[21] B. Sander, 'Is the ICC Reconsidering its Policy on the "Interests of Justice"?' (29 September 2016) online: https://justiceinconflict.org/2016/09/29/is-the-icc-reconsidering-its-policy-on-the-interests-of-justice/ [Sander].

[22] *See* Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 72; *see also* Mbeki and Mamdani, *Courts Can't End Civil Wars* ('To call simply for victims' justice, as the I.C.C. does, is to risk a continuation of civil war').

[23] For example, South Sudan's President Salva Kiir Mayardit has said that to reach peace with Sudan, he needs Sudanese President Omar al-Bashir at the negotiating table, not in a court room at the ICC. T. Mbeki, 'Justice Cannot Trump Peace', *Al Jazeera*, 4 May 2017, available online at www.aljazeera.com/programmes/talktojazeera/2013/11/thabo-mbeki-justice-cannot-trump-peace-201311221065878328 6.html. Speaking about his own country, Mbeki also stated that the idea of prosecuting former President FW de Klerk for apartheid in the 1990s would have been anathema to a peaceful resolution because de Klerk was necessary to lead the white population of the country into a democratic agreement. *Id.*

factions in their positions, complicating peace processes.[24] And third, premature prosecutions may exacerbate atrocities.[25]

A recent study by Michael Broache found that that rumours that a rebel leader in the Democratic Republic of Congo was about to be arrested pursuant to an ICC arrest warrant motivated the leader to foment a new revolt that resulted in 'serious atrocities,' including murder, pillage, and sexual violence.[26] And in Uganda, the issuance of ICC indictments against leaders of the Lord's Resistance Army not only caused a temporary halt to peace negotiations, but was also cited, along with arrest warrants, as the reason a final peace agreement was never signed.[27]

The conflict in Northern Uganda initially began as a rebellion of the Ugandan People's Democratic Army (UPDA), a group of army officers who fled Uganda Kampala in 1986 when President Yoweri Museveni took power

[24] For example, the joint AU-UN mediator on Darfur stated that 'the process to find a political solution to the crisis in Darfur has been significantly slowed and even compromised' by the ICC's issuance of arrest warrant for Sudan's President. P. Worsnip, 'Darfur Mediator Says Bashir Warrant Imperils Talks', *Reuters*, 26 March 2009, available online at www.reuters.com/article/us-sudan-darfur-un/darfur-mediator-says-bashir-warrant-imperils-talks-idUSTRE52P7FO20090326. The African Union likewise has expressed 'grave concern' about the effect of premature prosecutions 'on the delicate peace processes underway in The Sudan,' which are 'undermin[ing] the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.' Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13(XIII) (2009), available online at https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf; *see also* Assembly of the African Union, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan, Doc. Assembly/AU/Dec.221(XII) (2009), available online at https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf.

[25] M. Broache, 'Beyond Deterrence: The ICC Effect in the DRC', *Open Democracy*, 19 February 2015, available online at www.opendemocracy.net/openglobalrights/michael-broache/beyond-deterrence-icc-effect-in-drc; A. Vines, 'Does the International Criminal Court End Conflict or Exacerbate It?', *The Guardian*, 22 February 2016 (observing that 'the ICC can prolong conflict as indicted individuals see no incentive to compromise' and describing the indictment of Charles Taylor as having undermined Liberian peace talks), available online at www.theguardian.com/global-development/2016/feb/22/international-criminal-court-help-to-end-conflict-or-exacerbate-it.

[26] M, Broache, supra, note 26.

[27] Panel of the Wise, Peace, Justice, and Reconciliation in Africa, 48–9; Sarah Nouwen, 'The International Criminal Court: A Peacebuilder in Africa?', in D. Curtis and G. Dzinesa, *Peacebuilding, Power, and Politics and Africa*, 171, 181 (Ohio University Press, 2012) (explaining how ICC arrest warrants in Uganda were 'an apparently insurmountable obstacle to the conclusion of a[peace] agreement').

after a five-year war.[28] The rebellion eventually transformed into a cult-like rebel group known as the Lord's Resistance Army (LRA), led by Joseph Kony.[29] With financial and military support from the Sudanese government, the LRA increasingly began targeting civilians in Northern Uganda, many of whom were from the Acholi tribe, who they perceived to be government supporters.[30] The LRA crimes have been widely documented and include murders, abductions, rapes, forced marriage, and mutilations. In December 2003, the government of Uganda referred the situation to the ICC because it could not arrest the LRA, which was operating from bases in South Sudan.[31] The prosecutor opened an investigation on 29 July 2004, and on 8 July 2005, the ICC issued arrest warrants for five senior members of the LRA.[32]

At the same time, ongoing peace negotiations were also taking place through meetings between Betty Bigombe, an Acholi member and government minister, and the LRA.[33] In 2005, the LRA moved its base to the DRC, pursuant to the signing of the Comprehensive Peace Agreement (CPA) between northern and southern Sudan.[34] In 2006, the LRA and the Ugandan government signed the first Cessation of Hostilities (CoH) Agreement.[35]

The subsequent negotiations lasted two and a half years and were fraught with setbacks. The CoH was continuously breached, the LRA did not honour timelines to meet and disarm, and Kony refused to sign any peace agreement until arrest warrants of the ICC were withdrawn.[36] In response, the Ugandan government provided a variety of alternatives to all of the perpetrators, ranging from blanket amnesties to punishment for only those who committed the most serious crimes.[37] As part of this strategy, the government also raised the issue of a deferral under Article 16. The government promised that it would approach the UNSC to ask for a deferral of the proceedings if and when the LRA signed the final peace agreement.[38] Finally, on 29 June 2007, the government and the LRA signed the Agreement on Accountability and Reconciliation, with an

[28] M. Otim and M. Wierda, 'Uganda: Impact of the Rome Statute and the International Criminal Court', *International Centre for Transitional Justice (ICTJ)*, May 2010, available online at: www.ictj.org/Uganda-Impact-ICC-2010.
[29] Ibid.
[30] Ibid.
[31] Ibid. at 2.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid. at 5; Rashid, supra note 5, at 65.
[37] Rashid, supra note 5, at 65.
[38] Otim and Wierda, supra note 29, at 5.

annex to the agreement signed in February 2008. A final peace agreement was due to be concluded in late November 2008. It was not signed because Kony did not show up at the final signing ceremony.[39]

Based on this and other evidence, scholars have concluded that although judicial action may sometimes have preventive effects on atrocities, it may also 'backfire, generating perverse incentives for leaders to escalate violence.'[40]

By contrast, countries such as Argentina and Guatemala demonstrate the potentially positive power of sequencing. During the transition from military dictatorship in Argentina, for example, the government worked to build a solid foundation for peace by strengthening democratic institutions.[41] Once that foundation was in place, the country's amnesty laws were annulled, permitting victims to seek justice before the courts.[42] Similarly in Guatemala, the 1996 peace accords were accompanied by a national reconciliation law that provided amnesty for most crimes.[43] Instead of prosecutions, the country invested in truth commission, officially known as the Historical Clarification Commission.[44] It was not until 2009 that the Inter-American Commission on Human Rights observed that, under international law, the 1996 amnesty law

[39] Ibid.

[40] Broache, *Beyond deterrence*; *see also* Snyder and Vinjamuri, at 5 (concluding, based on a study of 32 civil wars, that 'the prosecution of perpetrators of atrocities . . . risks causing more atrocities than it would prevent'); H. Carey and S. Mitchell, 'Trials and Tribulations of International Prosecution' 130 (Martinus Nijhoff Publishers, 2013) (noting that indictments by the ICC led to further conflict by emboldening the rebels and inducing Gaddafi to 'fight on'), 312 (violence in the Great Lakes region was 'aggravated and prolonged . . . by international prosecution' while indictments of Sudanese officials led to 'deepen[ed] ethnic cleansing'); Nouwen, *The International Criminal Court: A Peacebuilder in Africa?*, at 182 (describing how ICC charges against individuals in Sudan increased the reluctance of certain rebel movements to engage in peace talks), 187 ('the ICC, operating in ongoing conflicts, is used as an instrument of war, with which to delegitimize and incapacitate enemies, thereby intesnsifying conflict'); D. Rothe and V. Collins, 'The International Criminal Court: A Pipe Dream to End Impunity?' in D. Rothe et al., *The Realities of International Criminal Justice*, 191, 203 (The African Union Series, New York: International Peace Institute, 2013) ('prosecution offers no incentive to end hostilities rather it may well be a major factor in the continuation of and displacement of the conflict').

[41] Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 12.

[42] Human Rights Watch, *World Report, Argentina* (2006) (Argentina's legislature voted to annul the law in 2003), available online at www.hrw.org/world-report/2006/country-chapters/argentina.

[43] C. Evans, 'The Right to Reparation in International Law for Victims of Armed Conflict' 155 (Cambridge University Press, 2012). The national reconciliation law was in addition to an earlier 1986 law that granted amnesty for crimes committed during the administrations of General Óscar Humberto Mejía Victores and his predecessor Ríos Montt. Guatemala, Decree No. 8–86, 10 January, 1986.

[44] Ibid. at 149.

could not be applied to serious human rights violations.[45] Four years later, the Guatemalan Constitutional Court, considering a different but similar amnesty law, held that amnesty decrees do not apply to genocide, crimes against the duties of humanity, and forced disappearances,[46] opening the door to prosecutions.[47]

In keeping with the prioritization of peace and the sustenance of life, the African Union's (AU) Panel of the Wise issued a statement in 2013 that declared that:

> Africa has legitimate concerns and reservations about the modalities of implementing some provisions of the international criminal justice system today, but improving these mechanisms requires adherence to the core principles that undergird international law. In the increasingly fragmented and divisive atmosphere that characterizes the current debates on impunity, striking an appropriate balance between the demands of international law and those of national sovereignty will be one of the hallmarks of African statesmanship.[48]

The Panel recommended the establishment of an 'African Transitional Justice Framework' (ATJF) which, *inter alia* would include a declaration that

> peace, justice, and reconciliation are interconnected, mutually interdependent, and equally desirable. However, it is also equally self-evident that in an on-going conflict the most urgent desire to the affected population is to cease hostilities, restore peace and security. Nevertheless, when stability is restored and victims protected, there is need for concerted action to strengthen institutions, including creating new ones to deliver justice and hold certain categories of perpetrators accountable to consolidate the pursuit of sustainable peace.[49]

The resultant ATJF recognizes that states have a 'positive duty' to satisfy the goals of transitional justice: truth, justice, reparations, institutional reform, and

[45] Case of the *'Las Dos Erres' Massacre* v. *Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R.* (ser. C) No. 211, ¶ 129 (24 November 2009), available online at www.corteidh.or.cr/docs/casos/articulos/seriec_211_ing.pdf.

[46] Guatemala, Constitutional Court, Expediente 1933–2012, Apelación de Sentencia de Amparo, at 5 (2013), available online at https://app.vlex.com/#vid/470258858.

[47] For example, in 2016, a Guatemalan court found two former military officers guilty of crimes against humanity for acts of rape, sexual slavery, and murder. See 'Sepur Zarco: In Pursuit of Truth, Justice, and Now Reparations', *UN Women* (22 October 2017), available online at www.unwomen.org/en/news/stories/2017/10/feature-guatemala-sepur-zarco-in-pursuit-of-truth-justice-and-now-reparations.

[48] Ibid. at 3.

[49] Ibid. at 80.

public accountability.[50] However, the ATJF acknowledges that these goals may be difficult for states to fulfil simultaneously, and recommends that

> states should seek to develop complementary mechanisms sequencing them when appropriate rather than fulfilling certain legal obligations at the expense of others. Fulfilling these positive obligations should take account of broader policy objectives to achieve justice, such as ending the conflict or repression; restoring public order and stability; establishing democratic structures and the rule of law; dealing with the underlying causes of the conflict or repression; ending exclusion and discrimination, achieving equality, repairing broken relationships, obtaining compensation and restitution, rehabilitation, promoting reconciliation and sustainable peace as well as other similar objectives.[51]

According to the ATJF, 'Justice and peace' … should not be seen as conflicting or contradictory forces. Rather, properly pursued, they promote and sustain one another. The question should not be: whether to pursue justice and accountability, but when and how. In reality, this emerging approach to the management of violence in Africa could be seen as being about keeping alive the possibility of justice and accountability and finding the right combination and right sequence in each specific context.'[52] By highlighting the importance of an inter-related justice architecture that includes economic justice, political justice (entailed in constitutional and other legal reforms) and justice for crimes committed from the perspective of criminal and reparative justice,[53] peace is seen as the first measure for the management of violence and the sustenance of life and is understood as establishing the pre-conditions for justice in Africa.

[50] African Union *Transitional Justice Framework (ATJF)* at E.1.1, E.2 available online at: www.legal-tools.org/doc/bcdc97/pdf/ [ATJF].

[51] Ibid. at E.2.

[52] Ibid. at E.3.

[53] See T. Smith, 'Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legality', (2002) 39 *International Politics* 2, 175–92 (making a case for humanitarian intervention in Darfur, noting that legal (judicial) responses have limits and their role should be contextualized); G Musila, 'The role of the African Regional and Sub-Regional Organizations in International Criminal Justice' at 15–17 available at www.ssrn.com (on responses to the Darfur conflict and the role of the AU); see also N. Grono, 'Briefing: The International Community's Failure to Protect', (2006) 105 *African Affairs* 421, 621–31; On humanitarian intervention, see N. Udombana, 'Still Playing Dice with Lives: Darfur and Security Council Resolution 1706' *Third World Quarterly*, Vol. 28 No. 1 (2007) 97–116; D. Kuwali, 'The end of humanitarian intervention: an evaluation of the African Union's right of intervention' Carr Center for Human Rights Policy, Harvard University, www.operationspaix.net/DATA/DOCUMENT/5163~v~The_End_of_Humanitarian_Intervention__Evaluation_of_the_African_Union__8217s_Right_of_Intervention.pdf.

As outlined in page two of the report by the Panel, 'Justice, peace, good governance, and reconciliation. . .thrive where sturdy and stable democratic values and impulses prevail, and where there is a culture of constitutionalism to constrain arbitrariness and abuse of power.' From the violence of traditional empires, to colonial imperial rule, to new domains of territorial, legal, and social reordering, to contemporary postcolonial struggles, this pronouncement highlights a resolve to using politically relevant solutions to addressing violence in Africa. The Malabo Protocol for the African Court is seen as operating within this point of departure in which justice includes peace and is not separate from it. Such a formulation for addressing post-violence justice is emerging within an AU Transitional Justice framework and represents an intertwined conceptualization of justice with its commitments to life as a key locus through which peace–justice sequencing is taking shape.

Thus, the criminal jurisdiction of the Malabo Protocol is seen as one of many components of the AU transitional justice framework. This means that seeing the work of an African court with extended criminal jurisdiction to prosecute a small number of perpetrators deemed most responsible for mass atrocity violence must be seen as one of a range of tools available to intervene in conflict situations and re-establish peace, stability and reconciliation in regions recovering from mass atrocity violence. This approach compares with the debates related to peace–justice sequencing in relation to the rise of the international criminal accountability, especially in the context of the International Criminal Court (ICC), a court established to prosecute crimes committed by those deemed most criminally responsible. However, in contrast, as we shall see in Section two, the second half of the chapter will explore how justice explored through the myriad approaches to managing violence in Africa can be understood both as the application of various peace strategies embedded in larger socio-political architectures.

In examining the nature of the debates related to peace–justice strategies and reflecting on the predominant anti-impunity model being articulated by various prosecutorial mechanisms, this chapter will focus on the design of the African Court infrastructure underway. What we shall see is that the Malabo Protocol is structured to allow for significant nationally driven post-violence forms of closure toward the establishment of peace while also making available of diplomatic processes. One might say that the Protocol for the African Court allows for the frontloading of "political" action through peace–justice sequencing and includes two provisions in the Protocol – Article 34A(1) and Article 29 – that have their own internal mechanisms for the management of violence. Beyond these provisions, the AU transitional justice architecture

privileges sequencing as an important way to conceptualize legal justice within the larger AU Transitional Justice strategy.

The legal issues related to Article 34A(1), 29 are worth highlighting because they underscore the Court's position in the larger African Union framework and set the tone for the ways in which the African Union is likely to relate to the Court more generally. First, the Malabo Protocol amends article 29 of the Statute of the African Court of Justice and Human and Peoples' Rights to permit two additional entities – the Peace and Security Council and the Office of the Prosecutor – to submit cases to the Court on any issue or dispute within the Court's jurisdiction.[54] When combined with the pre-existing provisions in article 29 of the Statute, this would enable three types of entities to have broad access to the African Court on any matter within its jurisdiction: The State Parties to the Protocol, Certain organs of the African Union, namely the Assembly, the Peace and Security Council, the Parliament and Other organs of the Union authorized by the Assembly; and the Office of the Prosecutor.[55]

Second, in Article 34A (1), the revised Statute of the African Court of Justice and Human and Peoples' Rights requires the Registrar of the African Court to notify the Chairperson of the Commission of all criminal cases instituted before it.[56] When combined with article 49 of the Statute, such notice will enable the African Union, a continental intergovernmental body, and its various organs, to submit a request to intervene in a case if the organ believes it has an interest of a legal nature that may be affected by the decision in that case.[57]

[54] Malabo Protocol, Annex art. 15 (amending article 29 of the Statute of the African Court of Justice and Human Rights).

[55] Ibid.; African Union Protocol on the Statute of the African Court of Justice and Human Rights, art. 29, July 1 2008 [hereinafter Merger Protocol], available online at https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights. In addition to these three types of entities, article 29 of the Merger Protocol permits staff members of the African Union to submit appeals of disputes to the Court provided the dispute is within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union. Merger Protocol, art. 29(1)©. These will generally be limited to the terms and conditions of employment of African Union staff.

[56] Malabo Protocol, Annex art. 17 (adding article 34(A)(2) to require the Registrar to give notice to the Chairperson of the Commission of the institution of proceedings before the International Criminal Law Section); Merger Protocol, art. 33(3) (pre-existing provision requiring the Registrar to give notice to the Chairperson of the Commission of the institution of proceedings before the General Affairs section), 34(2) (same with respect to the Human Rights Section). In cases brought before the General Affairs Section, the Chairperson must also ensure that all Member States are notified. Merger Protocol, art. 33(3).

[57] Merger Protocol, art. 49. Member States of the African Union are granted the same right of intervention. *Id.*

What we shall see is that The Malabo Protocol solidifies the status of the African Court of Justice and Human and People's Rights as a key institution in the African Union's larger peace and security architecture. By granting the Peace and Security Council, along with the Assembly and Parliament, the authority to bring, and the possibility of intervening in, a case before any chamber of the African Court, the Malabo Protocol helps to ensure that decisions about whether and when to bring cases before the Court are informed by the African Union's wider efforts to prevent, manage, and resolve conflicts on the Continent.[58] These efforts recognize that criminal prosecutions, though important, are just one of many interventions that must be coordinated and carefully sequenced if there is to be a lasting transformation in countries emerging from mass atrocities. The Malabo Protocol facilitates that coordination and sequencing by providing the chief peace and security institutions of the African Union – the Assembly, the Parliament, and the Peace and Security Council – with a vital role in the initiation and continuation of cases.

The third section works through a number of examples to highlight successful representations of sequencing. What we see in the final section is that there is no single 'one-size-fits-all' approach to sequencing. Rather, a number of considerations should be reflected on that will affect the success of transitional justice/sequencing measures.

2. A DIFFERENTIATED APPROACH TO THE MANAGEMENT OF VIOLENCE

The African continent has experienced some of the worst atrocities of the modern era,[59] forcing its leaders to develop innovative and comprehensive

[58] See African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 2(1), 9 July 2002 (establishing the Peace and Security Council as the 'standing decision-making organ for the prevention, management and resolution of conflicts'), available online at https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union.

[59] See Kofi Annan, Address to the Security Council on The Situation in Africa: the impact of AIDS on peace and security (10 January 2000) ('Out of two dozen or more conflicts raging around the world, roughly half are in Africa.'), www.un.org/sg/en/content/sg/speeches/2000-01-10/address-kofi-annan-security-council-situation-africa-impact-aids; C. Jalloh, 'Regionalizing International Criminal Law', 9 Int'l Crim. L. Rev. 445 (2009) ('The [African] continent has thus become the most conflict affected and conflict prone region in the world.'); Protocol Relating to the Establishment of the Peace and Security Council of the African Union, preamble (expressing 'concern[] about the continued prevalence of armed conflicts in Africa').

institutions and strategies to prevent, manage and resolve conflicts.[60] Historically, the Organization of African Unity (OAU) held a policy of non-interference with the political affairs of other Africa states. However, this left the African continent without resources for managing mass violence crises (citation).

Shaped by constitutive act, the African Union of the post 2004 period has been engaged in shaping a new justice model for Africa that involves ways to operationalize peace and justice interests that directly contravene this model.[61] The African Union's Constitutive Act that transformed the AU from the OAU outlines the existence of seven organs of the Union: The Assembly; Executive Council; Pan-African Parliament (PAP;[62]) The Court of Justice; The Commission; Permanent Representatives Committee; Specialized Technical Committees[63]; the Economic, Social and Cultural Council and Financial Institutions.[64] Article 6 of the Constitutive Act, identifies the Assembly, composed of Heads of States and Government and their representatives, as the apex decision-making body of the Union. It is seen as the de facto executive of the Union. Its functions and powers are often identified as making and monitoring the implementation of the common policies of the Union. The Executive Council is the alternate to the Assembly[65] and both organs are served by the Commission and constitute the AU's executive bureaucracy. The Assembly works closely with the Peace and Security Council (PSC), a fifteen (15) member body elected on a regional basis, which serves as the AU's standing decision-making organ responsible for the maintenance of continental peace and security.[66]

[60] African Union, Panel of the Wise, Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity 27 (2013) ('Since the early 1990s, Africa has served as a vast testing ground for new policies to address impunity, seek truth and justice, and enable reconciliation in fractured societies'), available online at https://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_peacejusticeafrica.pdf.

[61] Ibid.

[62] Article 17 and the Protocol to the treaty establishing the African Economic Community relating to the Pan-African Parliament. On PAP generally, see G. Musila, 'United States of Africa: Positioning the Pan-African Parliament and Court in the Political Union Debate' ISS Paper 142 (2007) [Download].

[63] Arts 14, 15 and16 Constitutive Act

[64] The African Commission on Human and Peoples Rights, though established by a separate instrument, is regarded an organ of the Union, while the African Court on Human and Peoples Rights is to be subsumed in the proposed African Court of Justice and Human and Peoples Rights established by the Malabo Protocol. The Peace and Security Council, another organ of the union was established by a separate instrument, the Protocol Relating to the establishment of the Peace and Security Council of the African Union.

[65] Arts 10–13 Constitutive Act

[66] AU, 'PSC' available online at www.peaceau.org

The AU's PSC, established in 2002, was established as a 'decision-making organ for the prevention, management and resolution of conflicts.'[67] To achieve these objectives, the PSC has a wide mandate to promote peace, security and stability; anticipate and prevent conflicts; promote and implement peace-building and post-conflict reconstruction activities; combat terrorism; and encourage democratic practices, good government, the rule of law, and the protection of human rights.[68] The PSC may also recommend that intervention in a Member State where there are war crimes, crimes against humanity, or genocide,[69] consistent with the Constitutive Act of the African Union.[70] To pursue these objectives, the PSC works closely with other AU and African entities, including the Parliament, Commission, Panel of the Wise, Continental Early Warning System, African Standby Force, and regional mechanisms.[71]

The PSC was established before the creation of the African Court, and well before the proposal to extend its jurisdiction to international crimes, therefore, the PSC does not have an explicit mandate with respect to the African Court or international criminal processes. Nonetheless, combating impunity and ensuring justice for international crimes would certainly fall within the PSC's mandates to encourage the rule of law, protect human rights, and promote respect for the sanctity of human life and international humanitarian law.[72] From its first intervention in Burundi, to recent ones in Kenya[73] Sudan, South Sudan, Mali and Central African Republic, some of the activities undertaken by the AU have attempted to de-escalate conflicts, monitor ceasefires, or negotiate power-sharing agreements following the cessation of hostilities.[74]

[67] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 2(1).
[68] Ibid. art. 3.
[69] Ibid. art. 7(1)(e).
[70] Constitutive Act of the African Union, art. 4(h).
[71] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 2(2), 16, 18.
[72] Ibid. art. 3(f).
[73] On the AU mediation in Kenya, see G. Musila, 'Learning on the Job: The Role of the AU in Transitional Justice in Kenya' available at www.ssrn.com. See also E. Lindenmayer and J. Kaye, 'A Choice for Peace? A Story of Forty-One Days of Mediation in Kenya', *International Peace Institute*, August 2009.
[74] Two key features of these AU peacekeeping missions are worthy highlighting. The first feature of AU peacekeeping missions is that unlike the United Nations, which typically deploys following the signing of peace agreements, African Union peace operations have tended to be enforcement missions that are fielded to enforce ceasefire agreements and peace agreements. Second, AU peace keeping missions tend to deploy troops in situations of ongoing hostilities. This differs from UN missions, which for the most part (with few exceptions) operate under more stringent rules on the use of offensive force.

Since its first peace-keeping mission in Burundi with the African Mission in Burundi (AMIB),[75] in 2002 the practice has although with challenges become a staple of AU responses in situations of ongoing conflict. After the deployment in Burundi, the AU has fielded a number of missions including African Union Mission in Sudan (AMIS); AU Mission for Support to the Elections in the Comoros (AMISEC); African Union Mission in Somalia (AMISOM); AU Electoral and Security Assistance Mission to the Comoros (MAES); AU Military Observer Mission in the Comoros (MIOC); United Nations African Union Mission in Darfur (UNAMID Hybrid force); African-led International Support Mission to Mali (AFISMA) and; Africa-led International Support Mission to the Central African Republic (MISCA) which transformed into the UN Multidimensional Integrated Stabilization Mission[76] to the Central African Republic (MINUSCA).[77]

The PSC and the associated institutions that support its work, together with the Regional Economic Communities (RECs), jointly constitute what is commonly referred to as the African Union's Peace and Security Architecture (APSA).[78] They range from implementing various actions, mechanisms, and approaches entailed in the functioning of the PSC and by which relevant AU actors engage in the resolving of conflict, including violent conflicts.

Relatedly, the African Governance Architecture (AGA) is the AU's institutional framework established to coordinate action undertaken by AU organs, institutions and the regional economic communities (RECs) to support member states in strengthening democracy, governance and human rights. AGA was mandated by the AU Assembly in July 2010 at its 14th Ordinary session[79] and arose out of a series of deliberations within the AU (between the

[75] On the AU's earliest peace missions, see generally F. Aboagye, 'The African Union in Burundi: Lessons from the AU's first peacekeeping operation' and T. Murithi, 'The African Union's Evolving Role in Peace Operations: The African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia', *African Security Review* 17.1 Institute for Security Studies 70–82.

[76] On the AFISMA, MINUSCA and on UN-AU cooperation in peacekeeping in general, see generally P. Williams and S. Dersso, 'Saving Strangers and Saviours: Advancing UN-AU Cooperation on Peace Operations', *International Peace Institute* (2015).

[77] On features of AU peacekeeping missions, see Norwegian Institute of International Relations, 'Strategic Options for the Future of African Peace Operations 2015–2025' NUPI Seminar Report (2015) 11–13.

[78] On APSA, see generally K. Powell, 'The African Union's Emerging Peace and Security Regime', *ISS Monograph* 119 (May 2005);

[79] See AU, 'Decisions' 14th Ordinary session of the AU Assembly; see also 'Decision on the Theme, Date and Venue of the Sixteenth Ordinary Session of the Assembly of the African Union' adopted during its 15th Ordinary Session held between 25–7 July in Kampala, Uganda, Assembly/AU/Dec.304(XV).

DPA and AUC) driven by the desire to 'facilitate policy and programme convergence on Governance amongst AU Member States as a means to accelerate deeper integration.'[80]

The African Union's PSC is at the centrepiece of the effort to manage African violence and the AGA complements the African Peace and Security Architecture (APSA), which addresses the AU's peace and security agenda. The AGA and APSA were designed to bring together principles of democratic governance, peace, and security as interrelated and mutually reinforcing.[81]

In 2004, then Secretary-General Kofi Annan asserted in 2004 that '[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities.'[82] This statement has paved the way for the development of 'a range of judicial and non-judicial processes to meet the complex challenges facing many countries in varying types of transition.'[83] It is also reflected in the ATJF, which recognizes that

> [t]ransitional justice does not require or advocate a 'one-size-fits-all' formula but recognizes the need for mechanisms and processes to be defined in accordance with national assessments involving broad citizen participation and which are therefore responsible to their needs and aspirations and which are also compliant with international standards. Processes should incorporate the right to know, the right to justice, the right to reparations and the guarantee of non-recurrence.[84]

This approach was reinforced in the Report of the African Union High-Level Panel on Darfur (AUPD), which stated that, in the context of Sudan,

> [c]riminal justice will play an important role, but not an exclusive one, and must be underpinned by procedures that allow for meaningful participation of victims, as well as reparations and other acts of conciliation. Within the criminal justice system, the investigations, prosecutions, defence and judiciary must work in tandem, or in smooth sequence. Weaknesses in any one element of a criminal justice process would undermine the prospects of a

[80] On AGA the history and structure of AGA, see AU 'Framework of the African Governance Architecture' available online at www.iag-agi.org/IMG/pdf/aga-framewor9183.pdf

[81] G. Mukundi, 'Consolidating the African Governance Architecture', *SAIIA Policy Brief* 96, June 2014

[82] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary General*, UN Doc. S/2004/616, 23 August 2004, summary.

[83] Panel of the Wise, supra note 61, at 13.

[84] ATJF, supra note 51 at E.2.

> successful outcome. Thus, inadequate investigations will not result in effective prosecutions; an under-resourced judiciary on the other hand would be unable to cope with the work generated by effective investigations. In order to respond effectively to the violations in Darfur, the system will need to draw upon Sudan's rich legal heritage, including Sharia (Islamic) law and practice, to the extent that Sharia emphasizes the participation of victims in proceedings and the making of reparations. Traditional justice models with their focus on conciliation and wider participation of the community also provide viable mechanisms for dealing with the past. Truth-telling and an independent and informed analysis of the past, in order to draw out the lessons of Darfur for Sudan, should be given priority, as an investment in the stability of Sudan. All these components, as well as any additional justice and reconciliation mechanisms, need to work together to achieve effective response to the situation in Darfur.[85]

To guide the work of the AU organs and the PSC, the African Union's Transitional Justice Policy assists African societies emerging from violent conflicts or authoritarianism in pursuing peace, justice, and accountability.[86] At the heart of this policy is the understanding that in 'fragile post-conflict setting[s], a … balance … must be struck between peace and reconciliation on the one hand and responsibility and accountability on the other.'[87] In contrast to other approaches, the AU's transitional justice policy recognizes that societies emerging from conflict often have multiple needs, including ensuring peace, catalyzing democratic transformation, and pursuing reconciliation and accountability, and that it is ultimately the people of the affected society who must determine the appropriate combination of transitional justice mechanisms based on their unique circumstances.[88] By focusing on the larger range of measures open to societies in transition, the AU's Transitional Justice Policy allows affected societies and the AU to determine how and when to fit prosecutions into a larger, holistic transitional justice program. Such an approach does not negate the importance of accountability measures, but acknowledges that peace and reconciliation are equally important and desirable goals.[89]

[85] AU Peace and Security Council, Report of the African Union High-Level Panel on Darfur (AUPD) (29 October 2009) PSC/AHG/2(CVII) at § 205.
[86] African Union, Draft Transitional Justice Policy, §§ 1, 5 (on file with the author).
[87] Ibid. § 22.
[88] Ibid. §§3, 27–9.
[89] Ibid. §§ 23–4; *see also* Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 72; *see also* African Union, Report of the African Union High-Level Panel on Darfur iv, 3 (2009), online at www.refworld.org/docid/4ccfde402.html.

Indeed, for countries still in the midst of conflict, 'the most urgent desire of the affected population is to cease hostilities, restore peace and security.'[90] In the eyes of many of these affected communities, peace itself 'constitute[s] a first measure of justice in Africa.'[91] An exclusive focus on prosecutions, as is often the case in the West, detracts from this broader understanding of justice, reducing the idea of justice to the prosecution of a handful of individuals rather than addressing the root causes of mass atrocity crimes.[92] But ensuring that such atrocities are not repeated requires much more than prosecutions; it requires changes in the political, economic, and cultural structures of society that contributed to the atrocities in the first place.[93]

The AU's Transitional Justice Policy recognizes advancing peace, reconciliation, and accountability requires careful planning and strategic sequencing of transitional justice measures.[94] Particularly for countries still engaged in or just emerging out from conflict, this sequencing approach recognizes that it is not always possible to achieve peace and justice at the same time.[95] As Thabo Mbeki and Mahmood Mamdani have written, '[t]here is a time and a place for courts, as in Germany after Nazism, but it is not in the midst of conflict or a nonfunctioning political system.'[96] Where mass atrocities are ongoing, the initial focus must be to stop the fighting, implement a ceasefire, and negotiate a solution to the crisis.[97] This does not mean that all

[90] Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 80; *see also* ibid. at 80.

[91] Ibid. at 83. For example, when asked what factors would facilitate justice and reconciliation, affected community members in Darfur included 'peace, a secure environment free of weapons, demobilization and reintegration of combatants, [and] stability' in their list. Report of the African Union High-Level Panel on Darfur, at 48.

[92] S. Dersso, 'The ICC's Africa Problem' in K. Clarke, A. Knottnerus, and E. de Volder (eds), *Africa and the ICC: Perceptions of Justice* 61, 68–9 (2016).

[93] See ibid.; see also A. Sachs, *The Strange Alchemy of Life and Law* 84 (2009).

[94] AU Draft Transitional Justice Policy, at §§ 22–3; see also Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 13 (observing that '[j]ustice, peace, and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives' and that '[a]dvancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities').

[95] Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 11, 14.

[96] T. Mbeki and M. Mamdani, 'Courts Can't End Civil Wars', *New York Times*, 5 February 2014, available online at www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html.

[97] Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 11–2; AU Chairman Back's Sudan's Bashir Over Court, *Reuters*, 8 September 2008 (stating, in relation to Darfur: 'Justice has to be done. Justice must be seen to be done. What the AU is simply saying is that what is critical, what is the priority, is peace. That is priority number one now.'), available online at www.reuters.com/article/idUSL8101824.

accountability measures are suspended, but that they may be more limited until a political settlement has concluded.[98]

3. LEGAL INTERESTS IN PEACE: JUSTICE SEQUENCING

As established, since its transformation from the Organization of African Unity, the African Union, has demonstrated a renewed energy and growing capacity to resolve conflicts around the continent using particular peace–justice sequencing strategies. While on one hand, in March 2009, the AUC commissioned the Pan African Lawyers' Union (PALU) to prepare a draft protocol to expand the criminal jurisdiction of the African Court which resulted in the production of the Malabo Protocol for the African Court whose innovations are in the introduction of new international crimes, on the other hand, central to its justice emphasis was the incorporation of that structure in a larger transitional justice architecture.

The emergence of an African Court of Justice and Human Rights, therefore, is not to be mistaken as another example of a blind move toward criminal accountability in the twenty-first century in which court proceedings are deemed the only venue for addressing violence. Rather, the emergence of the African Court should be seen in relation to Africa's unfolding transitional justice domain underway. The assumption is that in mass atrocity violence situations, if peace and a functioning government cannot be achieved, the very effort to create a new state will suffer. In such situations (especially when compared to a specific crisis in a consolidated democracy), the political stakes are also higher, making the conflict between the peace-versus-justice dilemmas even more acute. This highlights the importance of understanding the way that the Malabo is part of a larger African transitional justice infrastructure that sees peace–justice sequencing as central to the relevance of political settlements in deeply unequal social fields.

Articles 29 and 34A of the revised Protocol provide a mechanism for assimilating the African Union's peace and justice sequencing strategy by providing the African Union's key peace and security organs an important role in the initiation and continuation of cases. In situations where criminal prosecutions may encourage peace by bringing all parties to the table, the Assembly, the Parliament, or the Peace and Security Council would have the authority to make an early referral of a case to the African Court under article

[98] AU Draft Transitional Justice Policy, at § 23. For example, even if prosecutions are temporarily suspended, it may be possible to conduct preliminary criminal investigations and identify and preserve evidence. Ibid.

29 to pressure the relevant parties to negotiate. By contrast, where prosecutions risk derailing peace processes by removing key actors critical to the negotiations or by encouraging parties to dig into the fighting in order to win at all costs, these institutions could delay referral of a case to the Court, thereby facilitating the search for a mediated political solution.[99]

A. *Article 29 and 34A: Sequencing*

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Once a case has been referred to the African Court under any of the referral mechanisms, articles 33, 34, and 34A would provide the AU's peace and security organs – via notification to the Chairperson of the African Union – with the information necessary to assess whether those bodies should intervene in the case. This is particularly crucial with respect to the expanded criminal jurisdiction since criminal prosecutions, as described above, have the potential to impact ongoing peace processes. By receiving notification of the initiation of a case under article 34A, the Assembly, Parliament, and Peace and Security Council, among other bodies, would be able to assess whether to submit a request for intervention under article 49. A right of intervention is not guaranteed, but rather is left to the discretion of the Court.[101]

[99] M. Sirleaf, 'Regionalism, Regime Complexes, and the Crisis in International Criminal Justice', 54 *Colum. J. Transnat'l L.* 699, 761 (2016) (noting that 'the emphasis in the AU on negotiating political solutions to deeply intractable conflicts may mean that a quick resort to judicial measures is de-emphasized').

[100] Ibid.

[101] Merger Protocol, art. 49.

B. *Articles 33, 34, 44A: Registrar's Notification of Chair of AU: Article 34A(1)*

Article 34A(1) obliges the registrar of the court to notify the Chairperson of the African Union of proceedings initiated before the criminal section and through which one of the triggers of jurisdiction could anchor considerations of sequencing of peace and justice by the African court and the AU. By obliging the registrar of the court to notify the Chairperson of the African Union of proceedings initiated before the criminal section, Provision 34A(1) also provides an opening to allow an AU agent to intervene in a prosecution or situation in the interests of peace.

It is possible that Art 34A(1), as basis for AU intervention in the work of the Court, could be seen as controversial in that it could be seen as having the potential to undermine the perceived independence of the prosecutor. Once a case has been referred to the African Court under any of the referral mechanisms, Articles 33, 34, and 34A would provide the AU's peace and security organs – via notification to the Chairperson of the African Union – with the information necessary to assess whether those bodies should intervene in the case. Thus, Article 34A(1) could be read as providing a conscious desire to distinguish between investigation and prosecution, both of which form part of the judicial process (interests of justice) and a political process (interests of peace) – as in the case of the OTP's interests of justice policy.[102] That is – distinguishing between the investigation and prosecution processes which form part of the judicial process (interests of justice) and a political process (interests of peace) – as we will see in the ICC's OTP Position Paper. This is particularly crucial with respect to the expanded criminal jurisdiction since criminal prosecutions, as described above, have the potential to impact ongoing peace processes. By receiving notification of the initiation of a case under article 34A, the Assembly, Parliament, and Peace and Security Council, among other bodies, would be able to assess whether to submit a request for intervention under article 49.

Unlike the ICC, however, there is no provision in the Malabo Protocol that permits the AU to automatically defer a criminal investigation or prosecution. Instead, the AU would have to submit a request for intervention under Article 49, and the decision as to whether to permit such intervention would rest with the African Court.

[102] OTP Policy paper, at 1 states that: 'that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the *mandate of institutions other than the Office of the Prosecutor* (emphasis mine).

Article 49 permits interventions only where the requesting party has an 'interest of a legal nature.' That phrase is identical to that in the intervention provision of the Statute of the International Court of Justice,[103] and it is therefore logical to examine how that court has interpreted that phrase in assessing how the African Court might interpret article 49. To date, the ICJ has never held that promoting peace constitutes an interest of a legal nature. Indeed, out of fifteen requests for intervention, the ICJ has permitted only two, both of which were related to territorial disputes.[104] The ICJ has routinely declined requests for intervention based on more humanitarian interests, such as the interest in combating apartheid.[105] It has also rejected the similar request to decline jurisdiction due to an ongoing peace process.[106] In light of this consistent jurisprudence, it is unlikely that the African Court would come to a different conclusion. A State that opposes such deferral could likewise seek to intervene under Article 49 with the reasons against deferral.

Affected States already have the ability to express their opinions on a potential deferral under the intervention provision in article 49. The key peace and security organs of the African Union may request a deferral through the intervention provision in article 49. Nonetheless, as a means of clarification, the Rules of the Court could be written so as to explicitly confirm that where the AU submits a request for intervention seeking a deferral, the Court will (1) seek the opinion of the affected State(s) and (2) consider those opinions before rendering a judgment on the request.

Ultimately, the right of intervention is not guaranteed, but rather is left to the discretion of the Court.[107] In exercising its discretion on whether to permit an AU organ to intervene in a criminal case, the African Court would have to determine whether a request to intervene in order to propose a deferral of the criminal case or some other subordination of the criminal proceedings to the

[103] Statute of the International Court of Justice, art. 62(1).

[104] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment of 4 May 2011, Dissenting Opinion of Judge Al-Khasawneh, § 6, available online at www.icj-cij.org/files/case-related/124/124-20110504-JUD-02-01-EN.pdf.

[105] South West Africa Cases, Judgment (Second Phase), at 34 (finding that 'humanitarian considerations' were insufficient to constitute a legal interest in the absence of an obligation provided by a relevant text, such as a treaty).

[106] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, at §§ 52–3 (noting that there were 'differing views' as to 'what influence the Court's opinion might have on these negotiations' and therefore deemed the facts not 'compelling' enough to decline the exercise of jurisdiction).

[107] Merger Protocol, art. 49.

peace process constitutes 'an interest of a legal nature which may be affected by the decision in the case.'[108] This issue is not straightforward and there is no definitive caselaw on this issue. Nonetheless, there is substantial support for such a position.

It is well established that legal interests are not limited to borders and contracts but also extend to matters of peace, security, and human rights. The International Court of Justice, for example, has held that 'all States can be held to have a legal interest' in ensuring observance of the prohibition on acts of aggression, genocide, and other 'obligations of a State towards the international community as a whole.'[109] Such obligations extend to the protection of human rights,[110] which include the right to 'national and international peace and security' under both regional African treaties and international declarations.[111]

Consistent with this understanding, judges of the International Court of Justice have explicitly recognized that a 'legal interest' exists in 'preserv[ing]

[108] Merger Protocol, art. 49. The language of the intervention provision is nearly identical to that contained in the Statute of the International Court of Justice. United Nations, Statute of the International Court of Justice, art. 62 (18 April 1946) (providing that a State may submit a request to the Court to be permitted to intervene where the State has 'an interest of a legal nature which may be affected by the decision in the case'), available online at www.icj-cij.org/en/statute.

[109] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, §§ 33–4, available online at www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-00-EN.pdf; see also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, § 68, available online at www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf. Although the ICJ referred to States, it is beyond dispute that an international organization may enforce a legal interest, even more so when specifically authorized to do so under a relevant treaty or protocol. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,, Advisory Opinion of 9 July 2004, §§ 15–17, available online at www.legal-tools.org/doc/e5231b/pdf/.

[110] International Law Institute, *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States* (13 September 1989) (declaring that 'every State has a legal interest in the protection of human rights'), available online at http://hrlibrary.umn.edu/instree/1989b.htm.

[111] Organization of African Unity, African Charter on Human and Peoples' Rights, art. 23(1) (June 1, 1981), available online at https://au.int/sites/default/files/treaties/7770-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf; General Assembly Res. 39/11, Declaration on the Right of Peoples to Peace (12 November 1984), available online at www.ohchr.org/EN/ProfessionalInterest/Pages/RightOfPeoplesToPeace.aspx; *Human Rights Council Declaration on the Right to Peace*, UN Doc. A/HRC/32/L.18, 24 June 2016, available online at http://unipd-centrodirittiumani.it/public/docs/Declaration_RightToPeace_24062016.pdf (adopted on 1 July 2016).

the internal stability of [a] country'[112] and 'humanitarian causes.'[113] A progressive African Court could, consistent with this jurisprudence, hold that issues of peace and security are 'interests of a legal nature' that would permit the Court to defer consideration of a case for a period of time. As noted, the final decision would be left to the Court's discretion.

There is no automatic ability of the AU or its organs to defer a criminal matter under the Malabo Protocol. Moreover, because any request for a deferral would have to be made through a request for intervention, the parties to the criminal matter, as well as the State where the crimes occurred, would have an opportunity to comment upon the request and present any supporting or countervailing considerations. By leaving the discretion for a deferral with the Court, the Malabo Protocol takes a different approach than the Rome Statute of the ICC which, under the United Nations Security Council, has the authority to require the ICC to defer an investigation or prosecution for up to a year.[114] The Malabo Protocol therefore ensures a less politicized process than that which has bedeviled the ICC.

Similarly, the AU's referral authority to the African Court under the Malabo Protocol is more constrained than that of the UN Security Council vis-à-vis the ICC. Unlike the UN Security Council, which may refer a case to the ICC related to any country, even if it is not a party to the Rome Statute,[115] the African Union may only refer cases related to matters in States that have

[112] *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo* v. *France)*, , Order of 17 June 2003, (dissenting opinion of Judge de Cara), available online at www.icj-cij.org/files/case-related/129/129-20030617-ORD-01-02-EN.pdf. The majority did not appear to contest that internal security may constitute a legal interest, which it described as a 'right,' and instead concluded that there was no risk of irreparable prejudice to that right. *See Case Concerning Certain Criminal Proceedings in France (Republic of the Congo* v. *France)*, Order of 17 June 2003, §§ 27–9, available online at www.icj-cij.org/files/case-related/129/129-20030617-ORD-01-00-EN.pdf.

[113] See, e.g., *South West Africa Cases (Ethiopia v. South Africa; Liberia* v. *South Africa)*, Judgment (Preliminary Objections) of 21 December 1962, 425 (separate opinion of Judge Jessup), available online at www.icj-cij.org/files/case-related/46/046-19621221-JUD-01-03-EN.pdf; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment (Second Phase) of 18 July 1966, 252–53 (dissenting opinion of Judge Tanaka), available online at www.legal-tools.org/doc/3ed45e/pdf/. In the 1966 decision, the majority did not dispute that a State may have a legal interest in such issues, but rather held that the legal interest must be clearly vested in the particular petitioner in order to permit a claim. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment (Second Phase) of 18 July 1966, § 44, available online at www.icj-cij.org/files/case-related/46/046-19660718-JUD-01-00-EN.pdf.

[114] Rome Statute of the International Criminal Court, art. 16 (17 July 1998), available online at www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

[115] Rome Statute of the ICC, art. 13(b); ibid. art. 12(2) (exempting UNSC referrals from the requirement that the relevant State be a party to the Statute).

ratified the Protocol.[116] There is thus no danger that the AU could request that the African Court overreach its authority by prosecuting a case related to a state that has not ratified the Protocol, as the ICC has done with Sudan – shown in the next section. Nevertheless, in order to explicitly confirm the possibility of deferrals for reasons of peace and security, the Rules of the Court could be written so as to explicitly confirm that a request for intervention in order to defer a case in favor of ongoing peace processes. For example, the rules could include a definition of 'interest of a legal nature' that specifies that matters of peace and security are included.

4. PRIORITIZING PEACE: SEQUENCING AS KEY TO JUSTICE RECONCEIVED IN THE AFRICAN REGION

Recognizing that international criminal law prohibits amnesties for war crimes and crimes against humanity, those who approach the international legal terrain through this lens often argue that in several situations where peace agreements initially included amnesties for warring parties, domestic, regional, and international courts have annulled those amnesties and permitted prosecutions to proceed. For example, they suggest that in October 1992, the Inter-American Commission on Human Rights found that Argentina's 'Full Stop Law' and other laws granting amnesty for human rights violations committed during Argentina's 'dirty war' deprived victims of their right to justice under the *American Convention on Human Rights*.[117]

In March 2001, The Inter-American Court of Human Rights invalidated Peru's Law No. 26479, which granted amnesty to perpetrators of human rights violations during its period of armed conflict from 1980 to 1995.[118] Here the argument made was that the Court held that 'all amnesty provisions … are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearances, all of them prohibited because they violate non-derogable rights

[116] Merger Protocol, art. 29(2) (providing that '[t]he Court shall also have no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol').

[117] Inter-American Commission on Human Rights, *Report No. 28.92: Argentina*, 2 October 1992, available online at: www.cidh.oas.org/annualrep/92eng/Argentina10.147.htm.

[118] Inter-American Court of Human Rights, *Case of Barrios Altos v. Peru*, Judgment of 14 March 2011, available online at: www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf [*Barrios Altos*]; see also Amnesty International, 'Peru: Amnesty laws consolidate impunity for human rights violations' online: www.amnesty.org/download/Documents/168000/amr460031996en.pdf.

recognized by international human rights law.'[119] These regional precedents led to the judicial invalidation of Argentinian amnesty laws in domestic courts, and eventual legislative annulment.[120]

Some also argue that the issuance of an international indictment sends a message of condemnation that delegitimizes the accused warring party, and triggers States' duties of arrest which isolate the individual and lead to retreat.[121] Human Rights Watch points to the situations of both the Former Yugoslavia and Liberia as successful examples of marginalization and isolation through issuance of arrest warrants:

> In Bosnia and Herzegonina the indictment of Radovan Karadzic by the ICTY marginalized him and prevented his participation in the peace talks leading to the success of the Dayton negotiations to end the Bosnian war. Similarly, the unsealing of the arrest warrant for Liberian President Charles Taylor at the opening of talks to end the Liberian civil war was ultimately viewed as helpful in moving negotiations forward. By delegitimizing Taylor both domestically and internationally, the indictment helped make clear that he would have to leave office, an issue that had been a potential sticking point in negotiations. He left Liberia's capital, Monrovia, a few months later.[122]

Similarly, some of those advocating this position in African contexts have suggested that although Article IX of the 1999 Lomé Peace Agreement between the government of Sierra Leone and the Revolutionary United Front granted 'absolute and free pardon and reprieve to all combatants and

[119] *Barrios Altos*, supra note 119 at § 41.

[120] See Lorena Balardini, 'Argentina: Regional Protagonist of Transitional Justice' in Elin Skaar Jemima Garcia-Godos and Cath Collins, eds., *Transitional Justice in Latin America: The Uneven Road from Impunity Towards Accountability* (Routledge: 2016) Chapter 3, 50 at 57–60 [Balardini].

[121] Bantekas, supra note 10 at 92; See also Human Rights Watch, *Settling Justice Short: Why Accountability Matters for Peace* (7 July 2009): 'Indictments of abusive leaders and the resulting stigmatization can lead to marginalizing a suspected war criminal and may ultimately facilitate peace and stability.' Available online at: www.hrw.org/report/2009/07/07/selling-justice-short/why-accountability-matters-peace [Human Rights Watch]

[122] Ibid.; The Former Yugoslavia was also cited by the Panel of the Wise at 11 as an example where indictments and prosecutions may help secure peace by removing spoilers from the peace process; On the other hand, Prorok, supra note at 220 argues that the 'threat of prosecution by the international tribunal in The Hague made it practically impossible for NATO to reach an early deal with Milosevic, thereby lengthening the war and suffering in the Balkans in the summer of 1999.' In terms of Liberia, others have argued that Charles Taylors' surrender and arrest was only possible because he had lost power and authority over his government to rebel forces, forcing him into exile (see below).

collaborators in respect of anything done by them in pursuit of their objectives,"[123] it came with an express reservation by the UN that it did not accept immunity for war crimes and crimes against humanity. As such, the Peace Agreement was not an impediment to the establishment of the Special Court for Sierra Leone and trying rebel leaders.[124]

While some view the annulment or invalidation of various amnesties as a positive approach to achieving peace, there is also a more regionally relevant approach to the management of violence on the African continent that is underway that points to a fresh and new set of possibilities that focuses on the preservation of human life first through the cessation of hostilities.

A. *Prioritizing Peace*

Seeking justice 'at all costs' while conflict situations are ongoing can significantly undermine peace processes.[125] Indicted leaders may be incentivized to continue or incentivize conflict to avoid capture, extradition, and trial.[126] By contrast, offering amnesties may persuade combatants to enter into negotiations and lay down their arms. As noted earlier, A prominent example is the situation in Uganda, where the ICC Prosecutor had issued arrest warrants against Joseph Kony, leader of the Lord's Resistance Army (LRA), as well as other high-ranking LRA commanders, as the government of Uganda was attempting to negotiate a peace agreement with the LRA. The threat of capture and arrest, and the ICC's refusals to drop the indictments, kept Kony and other LRA members from coming to the negotiation table and ultimately signing the peace agreement.[127]

[123] *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* (12 July 1999) UN Doc S/1999/777 available online at: https://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceAgreement.pdf.

[124] See Bantekas, supra note 10 at 105; See also Special Court for Sierra Leone, *Prosecutor* v. *Allieu Kondewa*, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (25 May 2004).

[125] See, e.g. Human Rights Watch, supra note 122: 'At the same time, some diplomats tasked with negotiating peace agreements have argued that the prospect of prosecution by the ICC has made achieving their objectives more difficult. Those negotiating peace have tended to view the possibility of prosecution as a dangerous and unfortunate obstacle to their work. Some fear that merely raising the specter of prosecution will bring an end to fragile peace talks. Facing understandable pressure to resolve an armed conflict, negotiators and others often feel pressured to push justice to the side.'; Prorok, supra note at 214.

[126] Ibid. at 214; L. Gissel, 'Justice Tides: How and When Levels of ICC Involvement Affect Peace Processes', 9 *International Journal of Transitional Justice* (2015) 428 at 429 [Gissel].

[127] Ibid. at 220.

Further, indicted heads of states are also incentivized to retain power as, '[s]overeignty norms ... provide some protection to sitting state leaders: while venturing outside sovereign borders puts state leaders at risk, remaining entrenched at home leaves them relatively secure against ICC prosecution. ... Further, domestic actors often lack the ability to remove a sitting leader who enjoys the protection of the state's security apparatus.'[128]

The most cited example is the Sudan's Omar Al-Bashir, who 'cancelled plans to step down from power in 2009, reversing course after the ICC issued an arrest warrant[.]'[129] The ICC arrest warrant has been criticized by experts on Sudan, who, arguing that justice should wait until perpetrators of atrocity are no longer in positions of authority and capable of retaliation, have stated, '[a]ttempts to deploy UNAMID [the AU/UN peacekeeping mission in Sudan] in Darfur are at a critical point. At this sensitive time, to lay charges against senior government officials, and to criminalise the entire government, will derail attempts to pull Sudan from the brink.'[130]

In this case, on 31 March 2005, the UNSC adopted Resolution 1593 in which it referred the conflict in Darfur to the ICC.[131] This marked the first time that the UNSC had invoked its power under Article 13(b) of the Rome Statute to refer a particular situation to the ICC prosecutor for investigation and possible prosecution.[132] The referral was predicated on the UNSC's determination that the situation in Sudan constituted a threat to international peace and security under Article 39 of the UN Charter, and that the prosecution of the perpetrators of the human rights violations in Darfur would help to restore peace and stability in the region.[133]

On 27 April 2007, the ICC issued arrest warrants against Janjaweed militia leader Ali Kushayb and Sudan's Minister of Humanitarian Affairs, Ahmed Harun.[134] On 14 July 2008, the ICC Prosecutor requested an arrest warrant against Sudanese President, Omar al-Bashir, which was issued on 4 March 2009.[135] The government of Sudan objected to the exercise of this jurisdiction in relation to Sudan, arguing that both the UNSC and ICC violated the

[128] Ibid. at 221.
[129] Ibid. at 85.
[130] As cited in Human Rights Watch, supra note 122.
[131] Akande, du Plessis and Jalloh, supra note 69, at 5.
[132] Ibid.
[133] Ibid.
[134] Decision on the Prosecution Application Under Article 58(7) of the Statute, *Harun* (ICC-02/05–01/07–1), Pre-Trial Chamber I, 27 April 2007.
[135] Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir* 9ICC-02/05–01/09–1), Pre-Trial Chamber I, 4 March 2009.

country's sovereignty.[136] As an immediate reaction to the arrest warrant against Bashir, the Sudanese government expelled more than a dozen humanitarian aid organizations, leaving more than one million people without access to food, water, and healthcare services.[137] In addition to the Sudanese government, the African Union (AU), the Arab League, and the Organisation for Islamic Conference also objected to the arrest warrant on the grounds that such an action by the ICC was destabilizing for peace talks which were to be revived in Doha, Qatar.[138] Several African and Arab members of the UNSC, supported by the permanent members, China and Russia, proposed a resolution to renew the United Nations–African Union Mission in Darfur (UNAMID), the joint AU-UN peacekeeping mission formally approved by United Nations Security Council Resolution 1769 on July 31, 2007, to bring stability to the war-torn Darfur region of Sudan while peace talks on a final settlement continued[139]

In response to the ICC's arrest warrant against Bashir, Sudan began aggressively mobilizing AU member states in support of its position, seeking to weaken the support for the ICC in Africa. The AU called upon the UNSC to invoke Article 16 of the Rome Statute to defer the processes initiated against Bashir on the grounds that a prosecution of the president could impede the prospects for peace in the region.[140] The UNSC showed minimal response to the AU request, considering it only briefly and failing to act on it.[141] In response, in its July 2009 summit in Sirte, Libya, the AU directed all of its member states to withhold their cooperation from the ICC in respect of the arrest and surrender of Bashir.[142] This message has been reiterated at

[136] Akande, du Plessis and Jalloh, supra note 69, at 5.
[137] Akhavan, supra note 14, at 648.
[138] S. Baldo, 'Sudan: Impact of the Rome Statute and the International Criminal Court', International Centre for Transitional Justice, May 2010, available online at: www.ictj.org/publication/sudan-impact-rome-statute-and-international-criminal-court.
[139] M. Phoebe, '10 Years of the International Criminal Court: The Court, Africa, the United Nations Security Council (UNSC) and Article 16 of the Rome Statute', (2012), available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169819.
[140] Akande, du Plessis and Jalloh, supra note 92, at 5. See also Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Addis Ababa, 1–3 July 2009, 8; Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc PSC/AHG/COMM.1(CCVII), 29 October 2009, 5.
[141] Akhavan, supra note 14, at 648.
Akande, du Plessis and Jalloh, supra note 92, at 6.
[142] Ibid.

subsequent summits and in the most recent event held in June 2015, South Africa declined/failed to turn over Bashir to the ICC.[143]

To contain the broad backlash against the ICC in Africa, the AU established a High-Level Panel for Darfur (AUPD) in March 2009, headed by Thabo Mbeki, with a mandate to recommend approaches for reconciling the demands of peace, justice, and reconciliation.[144] The report, released in October 2009, recommended balancing these demands by establishing a hybrid court composed of Sudanese and non-Sudanese judges and legal experts; the introduction of legislation to remove immunities for state actors suspected of crimes in Darfur; and a 'Trust, Justice and Reconciliation Commission'.[145] The report did not challenge the ICC's independent jurisdiction in the Darfur situation. Increasing tensions between the AU and the UNSC and ICC prompted the AU to present a proposal at the November 2009 session of the ICC Assembly of States Parties (ASP) that called for Article 16 to be amended to allow for the UN General Assembly to act should the UNSC fail to decide on a deferral request within six months.[146] The AU called upon the UNSC to invoke Article 16 of the Rome Statute to defer the processes initiated against him on the grounds that a prosecution of the president could impede the prospects for peace in the region.[147] The UNSC showed minimal response to the AU request, considering it only briefly and failing to act on it.[148] In response, in its July 2009 summit in Sirte, Libya, the AU directed all of its member states to withhold their cooperation from the ICC in respect of the arrest and surrender of Bashir.[149] This message has been

[143] See M. Taddele Maru, 'Why South Africa let Bashir Get Away', *Al Jazeera*, 15 June 2015, available online at: www.aljazeera.com/indepth/opinion/2015/06/south-africa-bashir-150615102211840.html

[144] S. Baldo, 'Sudan: Impact of the Rome Statute and the International Criminal Court', *International Centre for Transitional Justice*, May 2010, available online at: www.ictj.org/publication/sudan-impact-rome-statute-and-international-criminal-court.

[145] C. Ero, 'Understanding Africa's Position on the International Criminal Court' (Oxford Transitional Justice Research Working Paper Series), 10 March 2010, available online at: http://otjr.crim.ox.ac.uk/materials/papers/122/Justice_in_Africa.pdf.

[146] Akande, du Plessis and Jalloh, supra note 92, at 6.

[147] Akande, du Plessis and Jalloh, supra note 69, at 5.See also Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Addis Ababa, 1–3 July 2009, 8; Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc PSC/AHG/COMM.1(CCVII), 29 October 2009, 5.

[148] Akhavan, supra note 5, at 648.
Akande, du Plessis and Jalloh, supra note 69, at 6.

[149] Ibid.

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The attempt to apply Article 16 of the ICC in the case of Sudan has been highly controversial. Proponents of an Article 16 deferral cite a number of advantages. First, the deferral of investigation and prosecution may prevent an aggressive reaction from Sudan's ruling party, which could further jeopardize peace and security in Darfur. Second, it could allow more time to assess the merits and drawbacks of prosecuting Bashir. Third, it may place pressure on Sudan's ruling party to cooperate with the UN and its peacekeeping force to respect human rights and to protect civilians. Non-cooperation with such objectives could be sanctioned by a refusal to renew the Article 16 deferral. Finally, the use of Article 16 could be used by the international community as leverage in negotiations towards a peace agreement.[153]

On the other hand, opponents of issuing a deferral under Article 16 argue that deferring the investigation or prosecution of Bashir would deny justice to victims in Darfur and make the UN Security Council appear indecisive, as it was the organ that made the initial referral.[154] Some scholars have also been skeptical as to whether or not any peace negotiations are even taking place that would warrant such a deferral.[155] Various other scholars are more optimistic and insist that the ICC strategy to issue the arrest warrant against al-Bashir has been successful to a certain extent because the looming threat of ICC arrest warrants has created an incentive to at least feign a willingness to end the war.

[150] See M. Taddele Maru, 'Why South Africa let Bashir Get Away', *Al Jazeera*, 15 June 2015, available online at: www.aljazeera.com/indepth/opinion/2015/06/south-africa-bashir-150615102211840.html

[151] Akande, du Plessis and Jalloh, supra note 69, at 6.

[152] For a review of all ASP working group reports, see: www.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx.

[153] International Refugee Rights Initiative, supra note 68, at 32.

[154] Ibid.

[155] See R. Goldstone, 'Catching a War Criminal in the Act', *New York Times*, 15 July 2008, available online at: www.nytimes.com/2008/07/15/opinion/15goldstone.html?_r=0.

They note that in November 2008, Bashir announced a ceasefire with the Darfur rebels and that this was prompted by the pressure of the looming arrest warrant.[156]

A working group of the ASP has since been established to consider this and other proposed amendments to the Rome Statute. As per the most recent report, the proposed amendment is still under review.[157] In May 2011, the Doha Document for Peace in Darfur (DDPD) was finalized at the All Darfur Stakeholders Conference.[158] On 14 July, the Government of Sudan and the Liberation and Justice Movement signed a protocol agreement committing themselves to the Document, which is now the framework for the comprehensive peace process in Darfur. The DDPD was the culmination of two and half years of negotiations, dialogue and consultations with the major parties to the Darfur conflict, all relevant stakeholders and international partners. UNAMID lent technical expertise to the process and continues to support the dissemination of the Document as well as to urge non-signatory movements to sign up to the DDPD.[159] As recently as June 2015, the UNSC has expressed concern regarding the continuous serious delays in the overall implementation of the accord and the lack of permanent ceasefire.[160]

What the Sudan example shows us is that rushing to adjudication too quickly impedes democratic consolidation and that the move to trials may perpetuate more instability.[161] This argument holds that in addition to securing peace, other issues may be more crucial to a country's survival post-conflict, such as economic reconstruction, transition to a market economy, provision of healthcare, infrastructure, and employment – all leading to the strengthening of stable democracies.[162] Following a path of legal punishment can serve to maintain rather than reconcile differences between groups in society.'[163]

B. *Accountability is Not Possible Without Stability*

Argentina and Chile have been the most prominently-used examples of successful peace–justice sequencing. The Panel of the Wise has pointed to Argentina as an example revealing

[156] Akhavan, supra note 5, at 650.
[157] For a review of all ASP working group reports, see: www.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx.
[158] See http://unamid.unmissions.org/Default.aspx?tabid=11060.
[159] Ibid.
[160] See www.un.org/apps/news/story.asp?NewsID=51285#.VcKwCJNViko.
[161] Ibid.; See also Olsen et al., supra note 24.
[162] Olsen et al., supra note 24 at 987.
[163] Ibid at 986.

> that while political realities complicated the search for accountability, multiple truth-seeking initiatives continually exposed perpetrators, and a vigilant array of victims' groups and civil society organizations kept the demand for justice alive. In addition, Argentina's victims' groups used international and regional instruments at critical moments to pressure their government to act.[164]

In Argentina, the military dictatorship in place since 1976 collapsed in 1982 when Argentina's military defeat in the Falklands War with the United Kingdom led to the calling of elections.[165] The outgoing military regime implemented a blanket self-amnesty in September 1983, which was overturned by Argentina's Supreme Court three months later, allowing the trials of members of the armed forces for serious human rights violations committed during the dictatorship.[166] The overturning of the amnesty, however, provoked backlash among the military, 'leading the government to change course and design measures to contain, and eventually halt, trials.'[167] These included the 'Full Stop Law' of 1986, which established a 60-day deadline after which Argentine courts would no longer admit new criminal complaints against military perpetrators. According to Balardini, the Full Stop Law:

> produced results opposite to its intentions, sparking 'frenetic activity' in the courts ... As hundreds of claims were presented nationwide, the number of cases in court tripled during the allowed period. Tensions between the government and the military increased as a result. After military revolts that threatened democracy, [Argentinian President] Alfonsin submitted to Congress the Due Obedience Law ... Approved in 1987, it limited the criminal liability of subordinates based on the presumption that they were following orders. The immediate effect of these two laws was the withdrawal of charges against 431 existing defendants, bringing most ongoing investigations to a definitive halt.[168]

These measures held for approximately the next decade, where a series of 'unprecedented political and economic cris[es] ... shifted the focus of public and policy attention to social problems such as violent public order policing, poverty, and unemployment.'[169] However, slowly, with the help of human rights activists bringing challenges to the courts resulting in jurisprudence

[164] Panel of the Wise, supra note 18 at 12–13.
[165] Balardini, supra note 121 at 51.
[166] Ibid. at 57.
[167] Ibid.
[168] Ibid. at 58.
[169] Ibid. at 58.

from the Inter-American system, the international duty to prosecute was upheld and amnesties voided by the courts, and ultimately annulled by the Argentine legislature in 2003.[170] As a result, 'the combination of political and legal strategizing pursued by [human rights organizations], both nationally and internationally, plus clear political will in the various branches of state, led eventually to a full reopening of trials against perpetrators.'[171] Previous truth commission findings also served as evidence to bolster the later prosecutions.

Chile's transitional justice process has been described as 'painstaking' and lacking state commitment.[172] However, Collins and Hau describe that '[t]he excessive caution of its early transitional justice trajectory gradually gave way to what some now consider to be a success story of incrementalism.'[173] Transition from General Augusto Pinochet's 17 years of brutal military dictatorship ended following a democratic election in 1989. Like in Argentina, the military regime implemented a self-imposed, wide-ranging amnesty before ceding power. However, unlike Argentina, and fearful of potential backlash from the military, still commanded by Pinochet, Chile's new government opted to pursue a 'low-key transitional justice process focused on truth and reparations, which did not encroach unduly on entrenched military and right-wing interests.'[174]

As of mid-2015, the amnesty law was still in place. However, through advocacy and litigation, human rights organizations and victims have managed to limit its application through 'creative circumvention'[175] using judicial means, opening up domestic criminal justice procedures to victims of atrocities committed during the military dictatorship. According to Randeny and Lassee, 'Pinochet's arrest on a Spanish arrest warrant, the Inter-American Court's jurisprudence on amnesty laws, as well as public pressure on the basis of truth commissions' reports finally created the conditions necessary to initiate trials.'[176] In particular, as described above, jurisprudence from the Inter-American system invalidated amnesties for war crimes and crimes against humanity. In relation to Chile, the Inter-American Court of Human Rights re-

[170] Ibid. at 59–60.
[171] Ibid. at 60.
[172] C. Collins and B. Hau, 'Chile: Incremental Truth, Late Justice' in E, Skaar, J. Garcia-Godos and C. Collins, eds., *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability* (Routledge: 2016) Chapter 6 126 at 143 [Collins and Hau].
[173] Ibid. at 126.
[174] Ibid. at 143.
[175] Ibid. at 327.
[176] Randeny and Lassee, supra note 36 at 10.

affirmed in 2006 that 'States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty.'[177]

Uruguay provides another example of successful sequencing, although the path to justice has occurred far slower and in a context where judicial and political will has been lacking. Following a negotiated peace in 1985, victims and their relatives of the civil-military regime from 1973 to 1985 immediately presented claims to the courts regarding human rights violations. In response the Uruguayan government passed the 'Expiry Law' which terminated all judicial proceedings involving military forces and transferring investigations for human rights abuses to the executive branch of government. The Expiry Law was repeatedly challenged in Uruguayan Courts and held to be invalid in 2011 by the Inter-American Court of Human Rights. That same year, the government's legislature annulled the amnesty law, opening the door to new criminal action. However, Lessa and Skaar have pointed out that achieving justice has nevertheless been an 'uphill battle', with the Uruguayan Supreme Court reluctant to recognize the former regime's crimes as crimes against humanity.[178] Further, the executive has limited access to archives and other types of documentation, impeding truth-finding efforts. Despite these obstacles, Lessa and Skaar point out that 'the culture of fear that dominated Uruguayan society for so long is arguably no longer present. The fact that the military no longer constitutes a threat to democracy makes the political context very different from that of 1985, allowing more space in which to choose a pro-human rights stance.'[179] As such, the find that '[o]n balance … we can say that Uruguay's progress along the scale from impunity towards accountability has been significant, especially during the past decade, a period that has seen the most positive developments.'[180]

Mozambique is another example of successful peace–justice sequencing where, although 'there has been no justice for horrendous crimes committed during a lengthy civil war, … it has remained stable since the peace

[177] Inter-American Court of Human Rights, *Case of Almonacid-Arellano et al.* v. *Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs) at para 114 online: www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf.

[178] F. Lessa and E. Skaar, 'Uruguay: Halfway Towards Accountability' in E. Skaar, J. Garcia-Godos and C. Collins, eds., *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability* (Routledge: 2016) Chapter 4, 77 [Lessa and Skaar].

[179] Ibid. at 94.

[180] Ibid. at 96.

agreement was signed in 1992.'[181] The Panel of the Wise has observed that despite the amnesties, 'informal mechanisms to deal with issues of reconciliation have flourished in Mozambique. Civil society organizations have engaged in peacebuilding activities that have reintegrated former combatants and trained rural communities in dispute resolution and various methods of reconciliation and healing.'[182] However, conflict resumed in Mozambique between 2013 and 2014.[183] Igreja argues that the 'amnesty law in Mozambique fell short of creating a political environment conducive to a process of democratic participation that could consolidate a new political space where former war foes would repress … memories of political violence and work together, expressing mutual tolerance and respect and striving for reconciliation.'[184] In addition to providing vows of reconciliation, inclusion, and democracy as part of the 2014 peace accord, Igreja argues that 'a nationwide programme is needed to determine degrees of responsibility for serious human rights violations and crimes and, more specifically, regarding the composition and role of security and defence forces in the country.'[185]

Scholars have also pointed to Namibia as an example where 'amnesty has directly led to the consolidation of peace and healing of society in the wake of mass crimes.'[186] However, Höhn has pointed out that a decade after Namibia's transition, the Namibian National Society for Human Rights filed a submission in 2006 requesting an investigation by the International Criminal Court into grave human rights violations committed during Namibia's independence struggle from 1966 to 1990 by a number of alleged perpetrators, including former President Sam Nujoma.[187] This effort by civil society emphasizes that achievement of reconciliation also requires justice and accountability.

Others may question the placing of burden on rights by holding survivors accountable for pursuing justice. However these examples also raise the question of how long becomes too long to wait for justice. In some situations, when the door to prosecutions opens decades after a conflict, those victimized

[181] Human Rights Watch, supra note 122; See also Olsen et al., supra note 24 at 986.
[182] Panel of the Wise, supra note 18 at 32.
[183] A. Jarstad et al., 'Peace Agreements in the 1990s – What are the Outcomes 20 Years Later?' (2015) *Umea Working Papers in Peace and Conflict Studies*, No. 8 at 6–10 online: www.diva-portal.org/smash/get/diva2:887947/FULLTEXT02 [Jarstad et al.].
[184] V. Igreja, 'Amnesty Law, Political Struggles for Legitimacy and Violence in Mozambique', (2015) 9 *International Journal of Transitional Justice* 239 at 257 [Igreja].
[185] Ibid. at 258.
[186] Olsen et al., supra note 24 at 986; See also Jarstad et al., supra note 91 at 6–10.
[187] S. Höhn, 'International Justice and Reconciliation in Namibia: the ICC Submission and Public Memory', 109 *African Affairs* (2010) 471.

by violence may not live enough to see witness its results. Although there is no one approach fits all in sequencing histories, the common thread in all of these examples is the persistent efforts of human rights and victims' organizations, and civil society in pressing for justice using various judicial and advocacy means. For some the success of these actors may signify the consolidation of democratic institutions and the rule of law, and a successful demonstration of sequencing. These are key consideration for the future application of the African Court.

4

The African Union Transitional Justice Policy Framework and How it Fits into the African Governance Architecture (AGA)

Promise and Prospects for the African Court of Justice and Human Rights

GEORGE MUKUNDI WACHIRA

1. INTRODUCTION

The Africa rising narrative has gained traction within and beyond the continent.[1] Endowed with significant human and natural resources, Africa's promise and potential is unparalleled in modern history. The continent's growth and development has undoubtedly transformed over the last decade, buoyed by a youthful demographic. However, Africa's rise is measured in terms of economic growth.[2] In the midst of the celebrated macro-economic growth lie deep inequality, fragility, unemployment and exacerbating poverty of African peoples.[3] Despite marked socio-economic progress in Africa, significant challenges continue to stand in the way of reaping the full potential of the continent's abundance in resources. Democratic governance deficit is identified as one of the structural root causes of Africa's conflicts and under development.[4] The African Union (AU) acknowledges that 'the scourge of conflicts in Africa is a major impediment to the socio-economic development of the continent'.[5] To redress conflicts in Africa, the AU commits 'to promote peace and security, human rights and ending impunity.'[6]

In a remarkable departure from its predecessor – the Organization of African Unity – which relied on strict interpretation of the principle of state

[1] The Economist, 'Africa rising: A hopeful continent' (3 March 2013).
[2] Ibid.
[3] African Common Position on the Post 2015 development Agenda, (2015), at ¶ 17.
[4] Ibid. at ¶ 66.
[5] AU Constitutive Act, at Preamble.
[6] Ibid.

sovereignty (non-interference) – the AU's principle of non-indifference, marked a significant paradigm shift.[7] In an unprecedented affirmation of the right of the Union to intervene in a Member State where grave crimes have been committed, the AU further condemns and rejects impunity.[8] Indeed, conscious of the high cost of impunity to Africa's socio-economic development, the AU's Peace and Security Council in 2009 – through one of its pillars, the Panel of the Wise – recommended the adoption of an African Transitional Justice Policy Framework.[9]

While sufficient credit goes to the AU Panel of the Wise for the formal recommendation to the AU to consider developing and adopting a Transitional Justice Policy Framework, the original thought and idea about consolidating comparable transitional justice practices in Africa is traceable to the 2009 African Union High Level Panel Report on Darfur (Mbeki Panel Report).[10] The Mbeki Report made an unprecedented attempt to confront the 'challenge of finding an effective and comprehensive approach to the issues of accountability and impunity on the one hand, and to peace, healing, and reconciliation on the other.'[11] The Mbeki Panel Report recommendations were instrumental and likely guided the AU Panel of the Wise on the possible

[7] Constitutive Act, Art. 4(h) – Principles of the AU provides for the 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

[8] Ibid., at Art. (o) calls for: respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

[9] See African Union Panel of the Wise, 'Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity,' The African Union Series, New York: International Peace Institute, (February 2013), Annex, 72. See also *Protocol Relating to the Establishment of the Peace and Security Council* Articles, 6 and 14 relative to peacemaking and peace building in the restoration of the rule of law and post-conflict reconstruction of societies. At the time of writing this paper (July 2016) the draft framework was being reviewed by a 15 Member States Reference Group constituted by the AU Specialized Technical Committee on Justice and Legal Affairs in November 2015. The draft had been submitted to the STC on Justice and Legal Affairs in November 2016 for consideration and adoption – but was shelved and referred to the 15 Member States Reference Group for further refinement. The Draft is the culmination of efforts by the Department of Political Affairs and the Legal Counsel, African Union Commission with technical support from the Centre for the Study of Violence and Reconciliation, South Africa to consolidate and fine tune the original draft that was annexed to the Report of the Panel of the Wise.

[10] Report of the African Union High-Level Panel on Darfur (AUPD Report), *Peace and Security Council 207th Meeting at the Level of the Heads of State and Government*, 29 October 2009, Abuja, Nigeria,
PSC/AHG/2(CCVII).

[11] See African Union Panel of the Wise, 'Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity,' The African Union Series, New York: International Peace Institute, February 2013, at 5.

'contours' of an AU Transitional Justice Policy Framework'.[12] While the Mbeki Report was only focused on the situation in Darfur, its recommendations are applicable to other situations and include: 'the utility of comprehensive national processes and principles for the establishment of hybrid courts in parallel with truth seeking and reconciliation processes'.[13] This paper examines the draft AU Transitional Justice Policy Framework. The paper is structured into three broad sections. Section 1 begins by tracing the objectives of the AU TJ Policy Framework. Section 2 reviews the Policy Framework's focus and contents. Section 3 is a forecast of the promise and prospects of the Framework in addressing impunity and post conflict reconstruction and development in Africa.

2. OBJECTIVES OF THE AU TRANSITIONAL JUSTICE POLICY FRAMEWORK

South Africa's transition from apartheid to a democracy is hailed as nothing short of a miracle.[14] When Nelson Mandela took over from FW de Klerk as President of South Africa in 1994 – after spending 27 years in prison – the world sighed in amazement as once arch-foes formed a government of national unity. De Klerk was appointed as Mandela's deputy until 1996. Inspired and motivated by pragmatism or perhaps a symbolic gesture of reconciliation, it was a game changer in South Africa's pursuit for national unity among diametrically opposed sides. To deal with past injustices of apartheid, South Africa formed a Truth and Reconciliation Commission in 1995 with a mandate to examine human rights violations and atrocities from 1960 to 1994.[15] The mandate was set out in the Promotion of National Unity and Reconciliation Act, South Africa, 19 July 1995. While other African countries[16] had previously attempted reconciliation processes including through truth commissions, South Africa's iconic experiment is heralded as inspiring replication across the

[12] Ibid.

[13] AU Draft TJ Policy Framework, at 5.

[14] See J. Dugard. 2001. 'Retrospective Justice: International Law and the South African Model' in A James McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies*, (University of Notre Dame Press. Notre Dame, 2001); See also 'South Africa: beyond the miracle' accessed at www.sahistory.org.za/collection/27414.

[15] Promotion of National Unity and Reconciliation Act, South Africa, 19 July 1995.

[16] Uganda (1974), Zimbabwe (1985) and Nigeria (1999) See African Union Panel of the Wise, 'Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity,' The African Union Series', New York: International Peace Institute, February 2013, at 21, 27.

continent on dealing with past atrocities.[17] Rwanda, Sierra Leone, Liberia, Kenya, Ivory Coast, Mali, Zimbabwe, and South Sudan are some of the other African countries that have since attempted various transitional justice initiatives.

Although several AU Member States have since attempted different versions of transitional justice, there is lack of a coherent continental approach or guide towards effective and legitimate transitional justice processes and mechanisms. Indeed, the AU Panel of the Wise acknowledges that 'since the early 1990s, Africa has served as a vast testing ground for new policies to address impunity, seek truth and justice, and enable reconciliation in fractured societies'.[18] The impact of those experiments in meeting the objectives to which they were established is mixed. Several lessons can be teased out from comparable experiences of countries in Africa and beyond that have adopted and undertaken transitional justice. Besides examining effective practices – in light of differences in contextual realities of AU Member States – some of the lessons are on what not to replicate and copy, rather than what to do.

The AU TJ Policy Framework therefore seeks to consolidate lessons, practices and emerging norms on credible and legitimate transitional justice mechanisms and processes in Africa and raises questions about the new locus of justice being fomented through the African Court for Justice and Human Rights. The objectives of the Framework 'is to assist African Union (AU) Member States emerging from violent conflicts and repression in their pursuit of accountability, sustainable peace, justice and reconciliation. The AUTJF reflects contemporary issues in the area of transitional justice and aims to be a guide that can be adapted by countries in the design and implementation of transitional justice mechanisms.'[19]

The Framework makes it clear that it does not to seek to create any 'new obligations for AU Member States', but rather complements and provides clarity to AU instruments and policies that 'deepen the links between justice, governance, human rights, peace and security and development'.[20] Acknowledging the gap between what transpires in practice and in various AU normative instruments, the Framework seeks to 'improve the timeliness, effectiveness and coordination of efforts by States emerging from conflict and oppressive rule.'[21]

[17] See Editorial Note, 7 *International Journal of Transitional Justice* (March 2013), at 1, 2.
[18] Ibid. at 27.
[19] AU Draft TJ Policy Framework, at 2.
[20] Ibid.
[21] Ibid.

3. FOCUS AND CONTENT OF THE AU TJ POLICY FRAMEWORK

The scope and focus of the AU TJ Policy Framework is largely inspired by the AU Shared Values instruments and policies relative to democratic governance, human rights, peace and security and post conflict reconstruction and development.[22] The Framework places emphasis on an imperative for synergy, complementarity and coherence between the African Governance Architecture and the African Peace and Security Architecture.[23] Effective implementation of AU Share Values at national level is critical for addressing impunity and post conflict reconstruction and development. The Framework is conceptualized and designed as an imperative to 'end violent conflicts and repressive rule, and nurture sustainable development, social justice, human and peoples' rights, democratic rule, and good governance, consolidate peace, reconciliation and justice in Africa, and prevent impunity'.[24]

The Framework is structured along four broad areas. It begins by acknowledging the principles and values that underpin the Framework. It then highlights the guiding normative framework which includes the AU Shared Values on democratic governance, human rights, constitutionalism, rule of law, peace and security. While not purporting to be exhaustive, the Framework outlines some of the constitutive elements of transitional justice largely based on comparable lessons and experiences of AU Member States that have undertaken transitional justice in Africa. Finally, the Framework identifies the key actors and governance mechanisms for implementation. The next section examines the four broad areas in turn.

A. *Principles and Values*

The principles and values that guide the AU TJ Policy Framework emanate from AU Shared Values on 'peace, justice, accountability and reconciliation, which are interrelated, interdependent and mutually reinforcing'.[25] The

[22] AU Constitutive Act articles 3 and 4; African Charter on Democracy, Elections and Governance, articles 2, 3, 16, 28 and 39; African Charter on Human and Peoples Rights, articles 1–26; Protocol Relating to the Establishment of the Peace and Security Council articles 6 and 14; Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa; The African Charter on the Rights and Welfare of the Child; and AU Policy Framework on Post Conflict Reconstruction and Development, articles 31, 32 and 33.

[23] *See Decision of the AU Assembly on the Declaration of the Assembly of the African Union on the Theme of the January 2011 Summit:*
"Towards Greater Unity and Integration through Shared Values," (Assembly/AU/Decl.1 (XVI),) 4, 11 (as adopted during the Sixteenth Ordinary Session of the African Union, 30–31 January 2011).

[24] Ibid., at 3

[25] Ibid., at 7.

Framework is hinged on four main principles: entrenchment of African shared values; promotion of national and local ownership and inclusive participation in transitional justice processes; promotion of reconciliation with accountability and responsibility; and cooperation, coherence and coordination of transitional justice initiatives.[26]

1. Entrenchment of African Shared Values

The principle of entrenchment of African shared values in the AU TJ Policy Framework broadens the transitional justice discourse and application in Africa beyond conventional understanding thus far. According to the International Centre for Transitional Justice (ICTJ) – globally recognized as one of the pioneer transitional justice institutions – 'Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms'.[27] Emerging largely from the experiences in Nuremberg, Latin America and South Africa, transitional justice until the very late 1990s, was focused on addressing repression in the civil, political rights realm and related human rights atrocities by States.[28]

While repression and human rights atrocities continue to be the bedrock of pursuit for transitional justice in most African countries, there is emerging consensus that 'effective realization of socio-economic justice, gender justice, and right to development' are equally critical if not central to redressing past injustices.[29] Entrenchment of AU Shared Values in the Framework reflects and captures Africa's 'particular contexts, cultural nuances and priorities' that place emphasis on African solidarity, socio-economic rights, traditional justice, reconciliation, national cohesion, and transformative development.[30]

(a) PROMOTION OF NATIONAL AND LOCAL OWNERSHIP AND INCLUSIVE PARTICIPATION IN TRANSITIONAL JUSTICE PROCESSES Transitional Justice thus far has been driven and implemented by States with marginal if any

[26] Ibid., at 7, 8.
[27] See International Centre for Transitional Justice, 'What is Transitional Justice?' www.ictj.org/about/transitional-justice accessed 04 July 2016.
[28] See M. C. Okello et al. ed., '*Where Law Meets Reality: Forging African Transitional Justice*' (Pambazuka Press, 2012); See also Editorial Note, supra note 17, at 1–7.
[29] AU TJ Policy Framework, at 7. See also Editorial Note, supra note 17, at 1–7.
[30] Ibid.

inclusion and participation of the beneficiaries of those initiatives. However, limited ownership, lack of engagement and participation of beneficiaries of transitional justice entrenches disenfranchisement of victims and survivors of human rights atrocities. The AU TJ Policy Framework in recognition of that trend sought to cure that deficit by underlining the primacy and centrality of victims and citizens in conceptualization, design, implementation, monitoring and evaluation of transitional justice processes in Africa.[31]

The Framework promotes local and national ownership and inclusive participation of beneficiaries in transitional justice processes. While acknowledging that funding and technical support to transitional justice initiatives can be external, it seeks to promote local and national resourcing of transitional justice processes and mechanism to ensure sustainability of initiatives and comprehensively address structural root causes of conflict rather than its symptoms.

The Framework makes a case for respect for the principle of 'effective consultation, participation and informed consent in all engagements with affected groups in deciding on priority areas in transitional justice processes'.[32] Such consultations and engagements are based on human rights principles of 'equality, non-discrimination, justice, equity and fairness' which are the overarching basis for transitional justice in Africa.[33]

(b) promotion of reconciliation with accountability and responsibility The AU TJ Policy Framework embraces the AU Panel on Darfur's triple 'objectives of peace, reconciliation and justice as interconnected, mutually dependent and equally desirable'[34] as underlying pillars of transitional justice in Africa.[35] The Framework thus broadens the understanding of justice as going beyond pursuit for retribution. It links 'reconciliation, accountability and responsibility' as interrelated imperatives in the pursuit for sustainable peace in Africa.[36]

To prevent recurrence of conflict which is an overarching goal of credible and legitimate transitional justice, it is important to ensure real ownership of justice models through appropriate consultations and consensus building among all stakeholders including protagonists. The Framework acknowledges and recognizes that victims and perpetrators are part of the same

[31] Ibid.
[32] Ibid.
[33] Ibid., at 8.
[34] AUPD Report, at 5.
[35] AU TJ Policy Framework, at 8.
[36] Ibid.

society and are likely to continue living together post the conflict. The Framework calls for respect and protection of the dignity and rights of victims, witnesses and intermediaries as well as the fair trial rights of alleged perpetrators.[37]

Women, youth and children bear the brunt of most conflicts. The Framework therefore urges, for their inclusion in the design and implementation of transitional justice initiatives including protection of their vulnerabilities and special needs. In promoting reconciliation with accountability and responsibility, the Framework seeks to promote a comprehensive understanding of justice, which goes beyond criminal trials to one whose overarching goal is to pursue accountability while achieving reconciliation.[38]

i) Cooperation, Coherence and Coordination of Transitional Justice Initiatives

One of the major gaps in the promotion and consolidation of African shared values is limited cooperation and coordination of AU Organs, Institutions, Regional Economic Communities (RECs) and Member States in their implementation at national level.[39] The AU TJ Policy Framework seeks to cure this deficit by urging for clear definition, identification and assignment of roles and responsibilities of all actors and resources at continental and national level.[40] Actors are not limited to the state and include victims, civil society and international actors.

Early identification and roles assignment ensures coherence, effectiveness, efficiency, timeliness and sustainability of transitional justice initiatives in order to comprehensively address the structural root cause of conflicts. The Framework calls for transparency and exchange of information of local, national and international actors including share of comparable practices and experiences as a means of enhancing trust and learning.[41]

(c) NORMATIVE FRAMEWORK The AU Transitional Justice Policy Framework revolves around four key normative issues: link between transitional

[37] Ibid.

[38] See T. Murithi, 'Towards African Models of Transitional Justice' in M. Ch. Okello et al. (eds.), *Where Law Meets Reality: Forging African Transitional Justice* (Pambazuka Press, 2012) at 200.

[39] G. M. Wachira, 'Consolidating the African Governance Architecture' in Y. Turianskyi & S. Gruzd (eds.), *African Accountability: What Works and What Doesn't? (South African Institute for International Affairs, Johannesburg*, 2015).

[40] Ibid., at 9.

[41] Ibid.

justice and accountability; goals of transitional justice; balancing competing transitional justice goals; and sequencing.[42]

(i) *Link Between Transitional Justice and Accountability*

International human rights and international criminal law standards that include regional standards provide guidance and normative framework on transitional justice in Africa. Although the Framework does not expressly stipulate which standards apply, most AU Member States are party to several international and regional instruments against impunity and protection of human rights which is indicative of the scope of applicability of these norms in addressing accountability and transitional justice.

i. Goals of Transitional Justice

The overall goal of transitional justice is to address past atrocities and human rights abuses towards sustainable peace, justice and reconciliation. The key elements identified by the Framework as critical for achieving that imperative include: truth seeking; justice; reparations and guarantees of non-recurrence.[43] Various international, regional and national norms as well as institutions and tribunals including the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights have addressed some of these elements.[44] Their interpretations and jurisprudence constitute a body of norms and standards that could guide the implementation of the Framework in Africa.

The Rwanda experiment on the nexus between justice and reconciliation as exemplified by *gacaca*[45] courts affirms the importance of looking beyond conventional norms on criminal justice to include 'restorative and redistributive justice'.[46] Symbolic and practical reparations as part of transitional justice are equally highlighted by the Framework as critical and in consonance with international standards and norms.[47] To ensure non-repetition and

[42] Ibid., at 9–10

[43] Ibid., 10.

[44] See Generally various decisions of the African Commission on Human and Peoples Rights, Heyns and Killander (ed). 2013. Compendium of Key Human Rights Documents of the African Union, Pretoria University Press, 222–356. Provide further references of Case Law emerging from the ACtHPR.

[45] See, Hollie et al., 'Genocide, Justice and Rwanda's Gacaca Courts', 30 *Journal of Contemporary Criminal Justice*, at 333–52.

[46] AU TJ Policy Framework, at 10.

[47] *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, United Nations General Assembly resolution 60/147, 16 December 2005; Ibid., at 10

recurrence, the Framework identifies implementing structural reforms on democratic governance and accountability that include legal and institutional reforms, vetting and lustration and security sector reforms in order to restore trust by citizens to the broken institutions of state.[48]

ii. Balancing Competing Transitional Justice Goals

The Framework is clear that there is no one size fits all formula of what transitional justice policies and mechanism a country should adopt.[49] In fact in a continent as diverse as her people, countries have the discretion to undertake transitional justice processes that respond and are in alignment with the peoples' needs towards finding lasting peace. What is critically important is ensuring that the models adopted consider the triple objectives of peace, reconciliation and justice without compromising either.

Certainly not an easy task, the Framework recognizes that transitional justice is not a perfect alternative to justice during peace times and is therefore an outcome of negotiations and compromises. As such it may yield to some imperfect solutions. The norms that should guide such an undertaking should therefore be defined by broad citizen consultations and participation to ensure ownership by citizens and compliance with regional and international norms and standards.

iii. Sequencing

One of the unique but controversial propositions of the AU TJ Policy Framework is the imperative – if need be – of sequencing various transitional justice initiatives. Based on pragmatism and a desire to ensure that adopted transitional justice initiatives are not compromised by political considerations, the Framework acknowledges the need to sequence certain transitional justice initiatives.[50] The Framework emphasizes that the question is not a choice of whether to pursue justice or peace but rather of when to pursue either.[51] Peace and justice are therefore not necessarily conflictual but in fact if 'properly pursued, they promote and sustain one another'.[52]

B. *Constitutive Elements*

Traditionally, transitional justice identified five core elements: criminal prosecutions; reparations; legal and institutional reforms; truth commissions and

[48] AU TJ Policy Framework, at 10.
[49] Ibid.
[50] Ibid., at 10
[51] Ibid.
[52] Ibid.

memorialization.[53] Besides the five core elements, the AU TJ Policy Framework included three more elements: peacemaking processes; traditional justice; and gender and children justice.[54] The additional elements reflect the particular realities and context within which comprehensive transitional justice is understood in Africa.

C. *Peacemaking Process*

Most transitional justice initiatives in Africa have emerged because of compromise, negotiation, mediation and peace agreements. Peacemaking processes in Africa thus constitute the point of departure for negotiating inclusion of transitional justice processes and initiatives in peace agreements. The legal basis for the AU's engagement in peacemaking processes in Member States is the Constitutive Act[55] and the Protocol to the Peace and Security Council.[56]

The AU and its building blocks – the RECs –are therefore actively engaged in facilitating and at times act as guarantors of peace processes as was exemplified in Kenya, Zimbabwe, Ivory Coast, Mali, South Sudan, Burundi, Lesotho and Central Africa Republic. Some of these peacemaking processes have resulted in transitional justice initiatives notably in Kenya, South Sudan, Ivory Coast, Central Africa Republic and Mali.

The Framework provides guidance to Member States on the importance of ensuring that peace agreements take into account the following core issues among others:

a) The interconnectedness and interdependence of the imperatives of peace, justice, and reconciliation.
b) Political, economic, and social drivers of conflicts.
c) The regional and external dimensions of these conflicts.
d) Inclusion and participation of all stakeholders including women, youth, civil society and victims.
e) Conformity to international legal obligations.
f) Implementation and monitoring mechanisms.[57]

In order to give peace a chance, the Framework calls on Member States to ensure that parties 'enter into negotiations for a permanent cease fire,

[53] International Centre for Transitional Justice, 'The Elements of a Comprehensive Transitional Justice Policy' sourced at www.ictj.org/about/transitional-justice.
[54] AU TJ Policy Framework, at 11.
[55] Constitutive Act of the AU, Art. 3 (f), 4(e).
[56] Protocol to the Peace and Security Council, Art. 6, 13 and 14.
[57] AU TJ Policy Framework, at pg. 11.

including comprehensive security arrangements'.[58] Such arrangements should include disarmament, demobilization and reintegration of former combatants as well as repatriation, resettlement, reintegration and rehabilitation of refugees, internally displaced people and in particular women and children.[59]

D. *Traditional Justice and Reconciliation Mechanisms*

African traditional justice systems embrace accountability mechanisms that go beyond retribution.[60] The AU TJ Policy Framework adopts that approach in recognition that traditional justice in Africa has duo objectives of justice and reconciliation. The Framework calls on AU Member States 'to broaden their understanding of justice beyond retributive justice to encompass restorative, redistributive and transformative measures found in traditional African systems'.[61] However, it cautions that traditional justice should not be employed to trample upon fundamental human and peoples' rights as codified in regional human rights instruments.[62]

The Framework promotes 'support and respect for communal based accountability mechanisms that seek to foster integration and reconciliation'.[63] In acknowledgement of the role transitional justice plays towards reconciliation, the Framework seeks integration of 'generic African practices into international norms and standards that would enhance international commitment to end impunity and promote peace, justice and reconciliation'.

1. Truth Commissions and Archives

Truth Commissions have become synonymous with transitional justice. They are often the transitional justice processes of choice or default after periods of conflict to investigate past human rights atrocities. The Framework identifies truth commissions as pivotal for transitional justice in Africa and elaborates their scope, mandates and factors which impact upon successful truth commissions.

The Framework provides guidance on possible mandates of truth commissions depending on their contexts and circumstances that prompted their

[58] Ibid., at 13
[59] Ibid.
[60] See Murithi, supra note 38, at 200–17.
[61] AU TJ Policy Framework, at 14.
[62] Ibid.
[63] Ibid.

establishment. These range from fact finding, investigations, public consultations, hearings and recommending for accountability, legal and institutional reforms, lustration and reparations. One of the important contributions of truth commission is to establish the truth and provide an account of what happened which is useful for documentation and immortalizing history through archives and records.

The Framework provides indicators for successful truth commissions that include: independence of commissioners; sufficient but realistic mandate; publication and dissemination of reports; implementation of recommendations; and dealing with denial and acknowledgement.[64]

(a) JUSTICE AND ACCOUNTABILITY Besides national and international criminal prosecutions, the AU TJ Policy Framework acknowledges the purpose served by informal and indigenous justice systems – accountability and reconciliation. It notes that national and international prosecutions are an important component of addressing impunity. The Framework reaffirms that the purpose for justice in the African context has five principal objectives: accountability, deterrence, retribution, rehabilitation and reconciliation.[65]

The Framework underscores the importance of the complementarity principle in prosecuting international crimes. Victims' rights, protection of witnesses and fair trial rights are equally emphasized as is the importance of exploring regional criminal accountability mechanisms once they become operational.[66]

The AU TJ Policy Framework recognizes the role that amnesties can play to bring combatants and opposing camps to the negotiating table. However, it reaffirms that amnesties are not permissible if they:

1. Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights;
2. Interfere with victims' right to an effective remedy; or
3. Restrict victims' or societies' right to know the truth about violations of human rights and humanitarian law.[67]

[64] Ibid., at 18
[65] Ibid., at 18.
[66] Ibid., at 18–25; See also the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014.
[67] Ibid., at 21.

(b) reparation and memorialization The AU TJ Policy Framework endorses international norms and standards on reparations as the point of reference on reparations in transitional justice processes in Africa.[68] The guidelines reassert the 'state to individual responsibility for reparations.'[69] According to the UN Guidelines, reparations include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[70]

The Framework reaffirms the principle that 'reparations are both individual and collective, and are a public acknowledgement by a new or reconstructed society of the harms suffered; and provide recognition for a victim as well as redress'.[71] For reparations to be meaningful they must be accompanied by a public acknowledgement and must be 'adequate, effective and prompt.'[72] While reparations can be individual they can also be collective and could also include symbolic gestures such as memorialization.[73] The Framework outlines benchmarks and indicators for successful reparation programmes. Such indicators include: transparency; effective participation of victims; fair and just processes; gender sensitive; prompt and adequate and linked to development agenda for sustainability.[74]

Memorialization is identified as an important component of reparations and transitional justice given its symbolism as a tool for reconciliation, healing, justice and conflict prevention.[75] The AU's unprecedented establishment of a continental human rights memorial is commended and highlighted as an important contribution to ongoing peace and reconciliation efforts among Member States.[76] The Framework identifies benchmarks and indicators for successful memorialization programmes. These could include:

[68] *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, General Assembly Resolution 60/147, 16 December 2005; See also the Hague Convention on the Laws and Customs of International Humanitarian Law IHL and Customs of Land Warfare of 1907; International Covenant on Civil and Political Rights; African Charter on Human and Peoples Rights articles ; *Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence*, The African Commission on Human and Peoples' Rights (the African Commission or ACHPR), meeting at its 42nd Ordinary Session held in Brazzaville, Republic of Congo, 15–28 November 2007; Ibid., at 26.

[69] AU TJ Policy Framework, at 26.

[70] Ibid., at 26.

[71] Ibid.

[72] Ibid., at 27.

[73] Ibid.

[74] Ibid., at 28.

[75] Ibid., at 30.

[76] Ibid., at 30.

Effective participation and consultation of all stakeholders to ensure ownership; complementarity with other transitional justice processes; gender sensitive; incorporates official acknowledgement of atrocities and responsibility; comprehensive and respectful of diversity of victims.[77]

2. Institutional and Legal Reforms

To guarantee non-recurrence, societal transformation and legal and institutional reforms are necessary especially if the institutions and laws failed to prevent atrocities. One of the sustainable and transformative transitional justice guarantees for non-repetition is an overhaul and reforms of laws and institutions that failed to prevent human rights atrocities. The Framework identifies legal and institutional reforms as the bedrock of guaranteeing non-recurrence.[78] Strengthening democratic governance, protection and respect for human rights, constitutionalism and rule of law is regarded as crucial components of comprehensive transitional justice.

Accompanying legal reforms is the need for removal and lustration of public officials who may have been complicit, implicit and perpetrated human rights violations and atrocities. That entails vetting of public officials and if need be their removal from public office. Such a process should be undertaken in compliance with fair due processes and international human rights standards.

E. *Gender and Children*

Women and children often bear the brunt of conflict as victims and survivors. The Framework in recognition of the effect and impact of conflict on women and children provides guidance on the imperative to adopt and take special measures to address their vulnerability, needs and concerns in transitional justice processes. The Frameworks calls for 'inclusion of child specific or child friendly mechanisms to address the experiences of children in conflict'.[79] Such measures could include prioritizing anonymity, best interests of the child, and psychosocial support.[80] International and regional human rights standards on children should always apply especially relative to international and local criminal prosecutions of child soldiers.[81]

[77] Ibid.
[78] Ibid., at 31.
[79] Ibid., at 32.
[80] Ibid., at 33.
[81] Ibid.

Protecting the rights of women in Africa have gained significant momentum since the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[82] However, challenges remain in implementation of AU standards and norms on the rights of women especially during conflict. The Framework 'cognizant of the disproportionate effect of conflict on women and girls, requires that transitional justice measures should transform the lives of women and girls particularly those vulnerable to conflict-related human rights abuses, including systematic sexual violence that often continues unabated even after conflict ends'.[83]

The Framework calls for prosecution of sexual and gender-based violence and inclusion and participation of women in peacemaking and transitional justice processes. It also includes factoring gender considerations towards effective realization of socio-economic rights and full and equal participation in state rebuilding especially political leadership.[84]

F. *Actors and Governance Mechanisms*

Implementation of the AU TJ Policy Framework is hinged on effective coordination and identification of actors, resources and mechanisms to bring its propositions to action. State and non-state actors including partners are identified as crucial for implementation of not only the Framework but national transitional justice processes. The Framework calls on state actors to develop legal and institutional frameworks, strategies and appoint focal persons for coordinating implementation.[85]

The AU and RECs' role include guiding implementation, facilitating harmonization of policy instruments, providing technical support and monitoring implementation in Member States.[86] The AU's judicial and quasi-judicial organs are envisaged to provide investigative, prosecutorial and protection of human rights violations as well as monitoring compliance of AU human rights shared values. Given the importance attached to peacemaking processes by the Framework, the AU's Panel of the Wise is identified as an important actor for mediation and facilitating political negotiations.[87]

[82] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).
[83] AU TJ Policy Framework, at 34.
[84] Ibid.
[85] Ibid., at 38.
[86] Ibid.
[87] Ibid., at 39.

International actors and partners are acknowledged as crucial in providing comparable lessons as well as technical and additional financial resources.

4. PROMISE AND PROSPECTS

The development of an AU TJ Policy Framework marks a turning point for the AU in the fight against impunity. Beyond reaffirming its condemnation and rejection of impunity in its founding instrument – the Constitutive Act[88] – the AU through the Framework elaborates specific measures and practical steps to enhance accountability and realize human and peoples' rights in Africa. The Framework's significant promise is its offer to Member States crucial guidance on dealing with past atrocities. The Framework reasserts the idea that 'peace, justice, accountability and reconciliation, are interrelated, interdependent and mutually reinforcing'.[89]

Although it acknowledges that it might be necessary to sequence these processes based on appropriate timing and seizing the right moment, the Framework notes that the none of the four imperatives of peace, justice, accountability and reconciliation can be sacrificed for the other.

The Framework elaborates the mandates, provisions and relevant principles of AU Shared Values instruments in addressing impunity whose implementation would guarantee non-recurrence. One of the Framework's value propositions beyond affirming that its legal basis is the AU Shared Values instruments is the identification of comparable lessons and practices in Member States on dealing with impunity and addressing historical injustices. The Framework reasserts the fact that AU Shared Values are not in contradiction with international human rights and humanitarian standards.

Unlike any other transitional justice instruments globally, the AU TJ Policy Framework's point of departure is the imperative of peacemaking processes in shaping and informing transitional justice. Political negotiations and mediation in Africa offer perhaps the best platform for inclusion of transitional justice processes. The role of the AU Panel of the Wise and Regional Economic Communities as well as the African Governance Architecture and Peace and Security Architecture in undertaking, coordinating and guaranteeing peacemaking processes has significant potential and promise to yield sustainable peace in Africa.

[88] Constitutive Act, Art. (o) calls for: respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

[89] Ibid., at 7.

The Framework places emphasis on examining structural root causes of conflict in the design and conceptualization of transitional justice processes and mechanism among countries emerging from conflict, rather than only looking at the symptoms of conflict. Democratic governance, deficit, and in particular human rights violations and lack of respect for the rule of law and constitutionalism are identified as critical drivers and triggers of conflict. The Framework suggests not only reforming laws and institutions but also building state capacity to promote and uphold principles of democratic governance as essential in facilitating reconciliation and ensuring socio-economic and political justice.

The Framework's potential in changing the paradigm of state-society relations is marked by its according primacy to citizens and beneficiaries of transitional justice processes. Responding to heightened demands by citizens that 'nothing about us, without us' which has reverberated across the continent, the Framework calls on Member States to ensure that ownership of transitional justice processes resides with its beneficiaries. Through appropriate and genuine participation and consultations with citizens, victims and civil society the Framework goes beyond rhetoric to insist on inclusion of all actors from design, implementation and evaluation of transitional justice initiatives.

One of the unique contributions of the Framework in post conflict reconstruction and development in Africa is its broadening of the notion of justice beyond retributive justice to encompass restorative, redistributive and transformative justice. The Framework embraces traditional and alternative justice systems whose twin objectives of ensuring accountability and reconciliation is the hallmark of African understanding of justice.

The importance of socio-economic justice in transitional justice in Africa finds adequate emphasis in the Framework. Through promotion of effective reparations programmes that are designed to ensure that victims' losses are acknowledged publicly, symbolically through memorialization and where need be materially, the Framework finds significant resonance in Africa.

Another unique and important contribution of the AU TJ Policy Framework is its acknowledgement of the gender dimensions of transitional justice. Besides appropriately calling on Member States to address the special needs and vulnerabilities of women victims in conflict, it identifies women as peace makers, mediators and actors who have great promise and capacity to ensure transitional justice processes are effective, legitimate and credible. The Framework equally addresses the special vulnerabilities of children in conflict as victims and also as perpetrators – child soldiers – and how to deal with such children based on the overriding principle of the best interest of the child.

Conscious of the imperative for synergy, harmony, coherence and importantly the fact that its promise and potential hinges on the extent to which it is implemented at national level, the Framework identifies critical actors and mechanisms for that purpose. The AU, RECs, Member States, and non-state actors including civil society and development partners are crucial for the effective implementation of the AU TJ Policy Framework. As efforts continue to ensure that the Framework is adopted by the AU, one can only wait with bated breath for what promises to be a game changer in Africa's fight against impunity and the push for accountability and post conflict reconstruction and development.

5

The Advent of a Differentiated Accountability System

The African Court of Justice and Human Rights and the AU Transitional Justice Architecture

TIM MURITHI

1. INTRODUCTION

This chapter will assess how the move towards enabling the African Court of Justice and Human Rights (ACJHR) to prosecute the most serious crimes of international concern, could impact on the African Union's evolving transitional justice architecture. The chapter will argue the emergence of alternative sources and ways of framing international criminal law, as evidenced in the Malabo Protocol, will broaden the spectrum of options available to African Union (AU) member states in their attempts to implement transitional justice processes. The chapter will further argue that what I call a *differentiated accountability system* is at the core of the African Union's evolving transitional justice architecture. The chapter will assess how the African continent is emerging as a theatre of innovation in terms of advancing our understanding the nexus between international criminal law, transitional justice and peacebuilding. This development will enable the continent to extricate itself from the puerile and interminable false debate as to whether one is 'for' or 'against' impunity depending if one advocate for the interventions of the international criminal tribunals in Africa. The chapter concludes by arguing that it is always vital to learn what African transitional justice, and specifically judicial, strategies or responses might be appropriate in different country contexts, which should be the foundation for a differentiated accountability system. As we shall see, understanding the operationalisation of the Malabo Protocol as a judicial instrument requires considering its application in relation to political commitments to African transitional justice.

2. TRANSITIONAL JUSTICE IN CONTEXT

Though the formation of the African Court for Justice and Human Rights presupposes judicial solutions to violence and inequality to Africa, it is

important to understand how it is conceived as working in relation to larger structures of violence management, such as African transitional justice. What we see is that the processes that the field of transitional justice embodies have been implemented for as long as there have been conflicts and efforts to deal with the past. However, as a field of academic study and sphere of practical intervention, transitional justice began being systematically analysed during the transitions from authoritarian regimes in Latin America in the 1980s.[1] The genocide in Rwanda, in 1994, and in Srebenica, in 1995, further crystallised the quest and need to understand how societies that had endured mass atrocities could establish processes and mechanisms to deal with such a brutal past and enable a society to move forward. Concurrently, in 1994, South Africa's liberation from the yoke of a white supremacist apartheid regime to a system of democratic governance, also generated a broad range of insights and experiences that could be analysed and documented, on how to operationalise transitional justice. There are still perplexing challenges such as the issue of whether transitional justice processes can be implemented in the absence of a 'transition' or regime change. There is no definitive satisfactory response to this conundrum and often it is necessary to begin laying the foundations for transitional justice even in the absence of a transition or during a violent conflict.

3. A WORKING DEFINITION OF TRANSITIONAL JUSTICE

Alex Boraine notes that 'transitional justice seeks to address challenges that confront societies as they move from an authoritarian state to a form of democracy'.[2] More often than not such societies are emerging from a past of brutality, exploitation and victimisation. In this context, transitional justice does not seek to replace criminal justice; rather, it strives to promote 'a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and start a process of reconciliation and transformation towards a more just and humane society'.[3]

[1] P. Arthur, 'How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly* 31(2009), at 321–67.

[2] A. Boraine, 'Transitional justice', in Charles Villa-Vicencio and Erik Doxtader, eds., *Pieces of the Ppuzzle: Keywords on Reconciliation and Transitional Justice* (Cape Town: Institute for Justice and Reconciliation, 2004), at 67.

[3] Ibid.

The broadly accepted purpose of a process of transitional justice is to establish a quasi-judicial framework to undo the continuing effects of the past. It is also necessary not to lose sight of the fact that transitional justice is just that, a 'transitional process' and it should not be viewed as a permanent solution to addressing the atrocities of the past. It is a transient process that will have to give way to the rule of law and the restoration of a constitutional order that will manage and resolve the social, political and economic tensions within society. The institutional vehicles through which transitional justice is implemented, bodies such as truth and reconciliation commissions and special courts are temporary and time-bound institutions and should not be considered as a permanent solution.

Boraine argues that there are at least five components of a transitional justice process including:

- ensuring accountability in the fair administration of justice and restoring the rule of law;
- the use of non-judicial mechanisms to recover the truth, such as truth and reconciliation commissions;
- reconciliation in which a commonly agreed memory of the past atrocities is acknowledged by those who created and implemented the unjust system as a prerequisite to promoting forgiveness and healing;
- the reform of institutions including the executive, judiciary and legislative branches of government as well as the security sector to ensure that a degree of trust is restored and bridges between members of society can be re-built;
- the issuing of reparations to victims who had suffered human rights violations, as a way to remedy the harm suffered in the past.

Transitional justice is complicated by a number of dilemmas including how to balance the 'competing legitimate interests in redressing the harms of victims and ensuring the democratic stability of the state'.[4] It requires the balancing of two imperatives 'on the one hand, there is the need to return to the rule of law and the prosecution of offenders: on the other, there is a need for rebuilding societies and embarking on the process of reconciliation'.[5]

[4] Ibid., at 71.
[5] Ibid., at 72.

A. *The Relationship between Transitional Justice and Reconciliation*

Reconciliation is understood as the cumulative outcome of the broad-based application of transitional justice processes. Concretely, reconciliation processes require that the affected parties:

(i) recognise their *interdependence* as a prerequisite for consolidating peace;
(ii) engage in genuine *dialogue* about questions that have caused deep divisions in the past;
(iii) embrace a *democratic attitude* to creating spaces where they can disagree; and
(iv) work jointly to implement processes to address the legacies of *socio-economic exploitation and injustices*.[6]

At the heart of reconciliation is the achievement of the principles of justice and equity.[7] Consequently, transitional justice is viewed as an intermediary set of process within a differentiated accountability system that gradually and over-time lead towards the promotion of reconciliation.

B. *The Evolution of Transitional Justice*

Transitional justice ideas initially originated from the legal tradition, with a biased focus on the judicial processes to address civil and political violations, during transitions to and lay the foundations for the post-transition rule of law. Africa's experiences demonstrated that traditional notions of transitional justice needed to be re-thought and re-framed. Specifically, to effectively address the real concerns of victims of past violations, transitional justice norms had expanded beyond their narrow civil and political focus, to include socio-economic and psycho-social issues. Consequently, transitional justice is now understood as involving a broad spectrum of interventions that are embedded in peacebuilding and developmental processes. The differentiated accountability system is informed by the understanding that uniform approaches to addressing the violations of the past are misconceived, and that in practice a broad spectrum of processes, mechanisms and institutions can be deployed at different points in time to advance the interests of pursuing redress for historical injustice.

[6] T. Murithi and L. McClain Opiyo, 'Policy Brief No. 14: Regional Reconciliation in Africa: Policy Recommendations for Cross-border Transitional Justice', Institute for Justice and Reconciliation, Cape Town, (March 2014), www.ijr.org.za.

[7] T. Murithi, *The Ethics of Peacebuilding*, (Edinburgh: Edinburgh University Press, 2009), at 136–59.

4. INTERNATIONAL CRIMINAL LAW WITHIN THE TRANSITIONAL JUSTICE FRAMEWORK

International criminal justice falls within the rubric of retributive justice. Consequently, international criminal law (ICL) is only one element of a broad range of transitional justice processes. The dominant view among legal practitioners, scholars, jurists and lawyers is to view transitional justice as a 'spin-off' of ICL. This view also perpetuates a myth that transitional justice is a soft version of 'justice' that seeks out avenues to punish perpetrators and consequently it denies the 'duty to punish' and it undermines the 'morally superior' pursuit of the rule of law based on legal criteria. Regrettably, such views are the result of a myopic approach to the 'law' which begins in the law schools, where through a process of indoctrination legal scholars are erroneously taught that their sphere of activity is immune from the contamination of political, social and economic forces. This is a counter-intuitive position when one considers that all law is created through political negotiation, or more precisely through political manipulation. Consequently, the idea that 'law' somehow operates above politics is derisory and self-deluding which can lead to disastrous outcomes, particularly in post-conflict contexts which evade easy categorisations, and which due to their extremely volatile nature can lead to the loss of life by the actions of over-zealous prosecutorial fundamentalists.

5. THE EUROCENTRIC ORIGINS OF INTERNATIONAL LAW

International law emerged from the domestic political, cultural and legal norms of European societies. Subsequently, international law and ICL has been projected onto the world stage as a universally applicable system of norms and rules, which should frame and guide the way societies should live. If Eurocentric domestic norms can inform international law, the question arises as to whether other non-European societies can also extract, distil and proffer certain norms which can inform the reconstruction and redefinition of international law (IL) and ICL? The response is self-evidently in the affirmative the modern regime of international law is to a large extent a work-in-progress as a normative framework. The current corpus of IL and ICL does not foreclose the possibility that other sources of influence can be drawn upon to reorient this IL and ICL normative framework. The way forward will not be to continue to pretend that its origins were culturally inclusive and to embrace the possibility of new ways of conceptualising and framing international law and international criminal law, by drawing from other cultures around the world.

6. THE AFRICAN UNION'S EVOLVING TRANSITIONAL JUSTICE ARCHITECTURE

The Constitutive Act of the African Union, of 2000, empowers the body 'to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity . . . upon the recommendation of the Peace and Security Council'.[8] In contradiction of some of the dominant narratives about the continental body, the African Union was two-years ahead of the operationalisation of the Rome Statute in formally adopting a legal position on the importance of confronting mass atrocities through rejecting impunity for international crimes. Consequently, from the outset the AU's policy documents sought to internalise the organisation's commitment to confront impunity. Along these lines the AU Constitutive Act identified the need to create an AU Court of Justice and recognised the continued functioning of the African Court on Human and Peoples' Rights.

The cyclical nature of conflict in Africa, points to the critical need to move beyond temporary stalemates and ceasefires, peacekeeping deployments and military operations, that are so common in this era, towards a regional policy informed by intentionally confronting the underlying grievances that have fuelled decades of animosity and violence on the continent. This means that the continent's peace and security institutions need to interface more effectively with the African Union's evolving post-conflict reconstruction and transitional justice mechanisms.

A. *Truth Seeking*

The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights are the key institutions which are primarily engaged in an establishment of the 'truth' in the context of the specific cases that they engage with.

B. *Retributive Justice*

In addition, the African Court on Human and Peoples' Rights has historically been the primary instrument through which victims could pursue redress for past violations. On 30 May 2016, the African Union-mandated Extraordinary

[8] African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, (Addis Ababa: African Union, 2014), at Preamble.

Chambers in Senegal, issued a conviction against the former dictator of Chad, former President Hissène Habré for his individual culpability in the commission of mass atrocities including killings, rape and torture of more than 40,000 victims. Consequently, through these Extraordinary Chambers, the African Union ushered in an alternative model for pursuing retributive justice, which can be replicated in the future if there are sufficient grounds and the political incentive to do so.

Once it is operational the ACJHR will address the retributive justice component of the AU's transitional justice architecture.

C. *Restorative Justice*

The African Union does not have a dedicated framework for operationalising restorative justice, though it does engage with national restorative justice processes and institutions such as the truth and reconciliation commissions that have been convened in Liberia, Sierra Leone, Ghana, South Africa, Kenya, Mauritius, Tunisia, Côte d'Ivoire and Burundi. It continues to engage ongoing processes in South Sudan and Central African Republic.

D. *Reparation*

The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights are currently the two institutions which can provide redress for past violations, within which reparation could be included as part of a restitution ruling. This aspect of the AU's transitional justice architecture needs to be further developed.

E. *Institutional Reform*

The Principles of the Protocol establishing the Peace and Security Council (PSC) of the AU, of 2002, stipulate a commitment towards promoting the 'peaceful settlement of disputes and conflicts' as well as ensuring the 'respect for the rule of law, fundamental human rights and freedoms'. Subsequently, the AU PSC was established in 2004, through the *Protocol Relating to the Peace and Security Council of the African Union*, of 2002 (African Union, 2002). The PSC Protocol provides a normative framing of activities that fall under the rubric of the core business of transitional justice interventions. Specifically, the Council's role is to coordinate the peacemaking, peacekeeping, peacebuilding and by extension transitional justice efforts on the continent. There is a natural overlap between peacebuilding and transitional justice processes on the ground.

F. *African Governance Architecture*

The African Union Commission *Strategic Plan 2009–2012*, which was approved by the Heads of State and Government, provided the AU Commission with a mandate 'to achieve good governance, democracy, [and] human rights'.[9] In February 2010, at the 14th Ordinary Session of the AU Assembly of Heads of State and Government committed the Union towards establishing a Pan-African Architecture on Governance. The intention was not to create a new institution but to enhance coordination among AU organs and institutions with the formal mandate for governance, democracy and human rights. However, the emphasis in creating this architecture was that Member States would continue to 'have the primary responsibility of building and consolidating governance' based on the recognition that 'a strong and effective AGA requires solid, functioning and accountable national structures'.[10]

The African Governance Architecture and Platform's *Implementation Strategy and Action Plan: 2013–2017* stipulates that the main institutions that comprise the AGA include the:

- AU Commission;
- African Court on Human and Peoples' Rights;
- African Commission on Human and People's Rights;
- Pan-African Parliament;
- African Peer Review Mechanism;
- The Economic, Social and Cultural Council;
- The AU Advisory Board on Corruption;
- NEPAD Planning and Coordinating Agency;
- Regional Economic Communities.[11]

In June 2012, the African Governance Architecture Platform was launched in Lusaka, Zambia. The Platform 'is the coordinating arm of the African Governance Architecture'.[12] The AGA Platform was envisaged 'as an interactive and non-decision-making mechanism'.[13] The Secretariat of the AGA Platform is situated within the AU Department of Political Affairs and its

[9] African Union, *The African Governance Platform – Draft Implementation Strategy and Action Plan: 2013–2017*, (Addis Ababa: African Union, 2013), at 2.

[10] African Union, AGA *Draft Implementation Strategy and Action Plan: 2013–2017*, at 7.

[11] Ibid., at 5.

[12] African Union, Department of Political Affairs, *Retreat to Fine Tune the 2013–2017 Strategy and Action Plan of the African Governance Architecture and Platform*, Kuriftu Resort, Debre Zeit, Ethiopia, (26–28 March 2013), at 1.

[13] Ibid.

function is 'to facilitate information flow, exchanges, dialogue, synergies and joint action between the various African governance actors'.[14]

G. *Constitutionalism and Governance Reform*

In effect, the AGA Platform 'is the central coordinating mechanism for monitoring compliance and implementation of agreed governance standards as embodied in the African Charter on Democracy, Elections and Governance'.[15] This is also the Platform through which the issue of constitutionalism will be monitored and engaged with across the continent. As indicated above this will also implicate the ongoing work of the Regional Economic Communities (RECs), some of which have developed their own governance standards and infrastructure.

H. *Judicial Reform*

The AU's Office of Legal Counsel has oversight for legal issues and in collaboration with the Department for Political Affairs, the different courts within the AU system and national judicial institutions and ministers of justice, it engages with issues of judicial reform across the continent. However, the focus on judicial reform can also be developed further.

I. *Security sector reform*

The AU Peace and Security Department working closely with national ministries of defence and Chiefs of Defence Staff have elaborated a Security Sector Reform Policy Framework, which can guide the national processes, particularly in the aftermath of conflict or authoritarian rule.

J. *Reconciliation*

The AU *Post-Conflict Reconstruction and Development Policy Framework (PCRD)*, of 2006, outlined the pillars of a post-conflict reconstruction and reconciliation system. Specifically, the AU PCRD Policy Framework comprises six constitutive elements, namely:

(i) Security;
(ii) political governance and transition;

[14] Ibid.
[15] *Draft Implementation Strategy and Action Plan*, *supra* note 11, at 5.

(iii) *human rights, justice and reconciliation*;
(iv) humanitarian assistance;
(v) reconstruction and socio-economic development;
(vi) gender.[16]

Through the enumeration of these six constitutive elements the AU was one of the first inter-governmental organisations to recognise the importance of a multi-dimensional response to complex emergencies, to social and political transition following conflict and to long-term development. Through its AU PCRD Policy Framework, the AU articulated the nexus between transitional justice norms and the normative promotion of security, governance and development.

Between 2011 and 2016, the African Union became the first regional organisation to actively work on developing a specific policy relating to transitional justice. In 2016, the prospective African Union Transitional Justice Framework (AUTJF), which is still in draft form, was further elaborated set up with the objective of encouraging 'member states to broaden their understanding of justice beyond retributive justice to encompass restorative and transformative measures found in traditional African systems'.[17] The prospective AUTJF further recommends that 'states enacting transitional justice measures incorporate economic and social rights'[18]and encourages 'states to design reparations programmes that would address the structural nature of economic and social rights violations' and that 'non-state actors and beneficiaries should be encouraged to participate in such programmes'.[19] The prospective AUTJF recommends the promotion of 'reconciliation as a profound process which entails finding a way to live that permits a vision of the future, the rebuilding of relationships, coming to terms with the past acts and enemies, and involves societies in a long-term process of deep change'.[20]

The efforts by the African Union to push the boundaries of the way in which transitional justice has been conceived to include social and economic rights, rectifies an oversight which was internalised by the dominant ICL legal framework which defined the field. The economic and social dimension of transitional justice processes is now emerging as a key driver of

[16] African Union, *Post-Conflict Reconstruction and Development Policy Framework*, (Addis Ababa: African Union, 2006).
[17] African Union, *Draft African Union Transitional Justice Framework*, (Addis Ababa: African Union, 2015), at 19.
[18] Ibid., at 20.
[19] Ibid., at 21.
[20] Ibid., at 40.

sustainable transformation for societies that have experienced violations. This innovation by the AU is further laying the foundation for a differentiated accountability system.

7. THE IMPLICATIONS OF THE MALABO PROTOCOL ON THE AU TRANSITIONAL JUSTICE ARCHITECTURE

The emergence of alternative sources and ways of framing international criminal law, as evidenced in the Malabo Protocol, will broaden the spectrum of options available to AU member states in their attempts to implement transitional justice processes. This will enhance the differentiated accountability system which is at the core of the African Union's evolving transitional justice architecture.

On 1 July 2008, member states of the AU adopted the *Protocol on the Statute of the African Court of Justice and Human Rights*, which in effect 'merged the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into a single Court'.[21] Subsequently, the AU adopted the *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (hereafter Malabo Protocol). The Malabo Protocol will enter into force upon the ratification of the Protocol by 15 member states of the African Union, with instruments of ratification being deposited with the Chairperson of the AU Commission. The AU also intends to register the entry into force of the Court with the secretariat of the United Nations.

The organs of the African Court include the: (i) Presidency; (ii) Office of the Prosecutor; (iii) Registry; (iv) Defence Office. This is indicative of the intentions to create an institution to adjudicate international crimes. Article 3(1) of the Protocol stipulates that 'the Court is vested with an original and appellate jurisdiction, including *international criminal jurisdiction*'.[22]

The African Court has the 'jurisdiction to hear matters or appeals as may be referred to it in any other agreements that the member states or the regional economic communities or other international organisation *recognized* by the African Union'.[23] The word 'recognition' is significant in this instance since it gives the AU the means not to engage with international organisations that it is not prepared to recognise.

[21] African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 23rd Ordinary Session of the Assembly, Malabo, Equatorial Guinea, (27 June 2014), at Preamble.
[22] Ibid., at Art. 3(1).
[23] Ibid., at Art. 3(2).

8. AFRICA AS A THEATRE OF INNOVATION IN INTERNATIONAL CRIMINAL LAW

The AU has subsequently embarked on the elaboration of its own international criminal law through the prospective operationalisation of the Malabo Protocol.

A. *The Statute of the African Court of Justice and Human Rights*

According to the merged Statute of the ACJHR the structures of the institution will include three sections, namely: (i) a General Affairs Section; (ii) a Human and Peoples' Rights Section; and (iii) an ICL Section.[24] Furthermore, the ICL Section will have three Chambers, including: a Pre-Trial Chamber; a Trial Chamber and an Appellate Chamber, highlighting again the parallel structures when contrasted to the Rome Statute. According to Article 7, the ICL Section is 'competent to hear all cases relating to the crimes specified in the Statute'. These include the international crimes stipulated in the Constitutive Act of the AU. They are further elaborated in Article 28A, which states that 'the International Criminal Law Section of the Court shall have the power to try persons for the crimes' of: genocide; crimes against humanity; war crimes; the crime of unconstitutional change of government; piracy; terrorism; mercenarism; corruption; money laundering; trafficking of persons; trafficking of drugs; trafficking of hazardous wastes; illicit exploitation of natural resources; and the crime of aggression.[25] These crimes will not be subject to any statute of limitations.

This panoply of crimes introduces some interesting departures from the crimes framed in the Rome Statute, and are reflective of the current challenges that the African continent is confronting. Interestingly, some crimes will apply directly to external non-African actors who engage in these crimes either as planners or willing executioners, notably of the crimes relating to mercenarism, money laundering, trafficking of persons, drugs and hazardous wastes, as well as illicit extraction and aggression. These commission of these crimes by non-African actors intervening across the continent, could theoretically lead to a situation in which western operatives end up on the docket of the African Court in Arusha, in what would be a reciprocal outcome when contrasted to the ICC's current prosecutorial case load which includes only Africans. This is particularly relevant when it relates to the crime of aggression, given the proclivity of western powers notably the US and France to intervene

[24] African Union, *Statute of the African Court of Justice and Human and Peoples Rights*, (Addis Ababa: African Union, 2014).

[25] Ibid., at Art. 28A.

military across Africa, as though the colonial era was still a going concern. Article 28A of Statute stipulates that the 'crime of aggression means the planning preparation, initiation or execution, by a person . . . state or organisation [sic] . . . of a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union'.[26] More specifically, Article 28M notes that 'regardless of a declaration of war by a state, group of states, organisations of states or non-state actors or by a foreign entity', the crime of aggression shall include, 'the use of armed forces against the sovereignty, territorial integrity and political independence of any state'. These will include invasions, bombardment, blockades, air, land or sea attacks, harbouring armed militia. The AU Assembly of Heads of State and Government can also incorporate additional crimes to keep up with the developments of IL.

Through the prospective operationalisation of the Malabo Protocol, African countries have politically 'birthed' their own version of a regional court to adjudicate international crimes. Consequently, the African continent is now a theatre of innovation in terms of advancing a differentiated accountability system and providing vital insights into the nexus between international criminal law, transitional justice and peacebuilding.

9. BEYOND THE PUERILE FALSE DEBATE ON IMPUNITY AND THE SUPPORT FOR THE ICC IN AFRICA

The articulation and operationalisation of a differentiated accountability system will enable the continent to extricate itself from the puerile, facile and interminable false debate as to whether you are 'for' or 'against' impunity depending if you advocate for the interventions of the International Criminal Court (ICC) in Africa. Rather than viewing the emergence of alternative sources and framings of international criminal law as a threat to the ICC or as an attempt by regional actors to evade justice, they should be viewed for their potential to create differentiated jurisdictions to address the violations in situations of conflict. It is necessary to make judicial processes more responsive to the victims, by drawing them into the processes of pursuing redress for the violations that they have endured. Consequently, ICC interventions will not necessary be the most appropriate framework to deploy in every situation in which there has been mass atrocities. The fact remains the Rome Statute stipulates a relationship between the ICC and nation-states, but it does not elaborate on the prospects for a relationship between the ICC and regional or

[26] Ibid., at Art. 28M.

continental courts. This is a lacuna in ICL which needs to be urgently addressed given the prospective operationalisation of the African Court of Justice and Human Rights. Ultimately, the existence of a differentiated accountability system provides the African continent a broad range of options, through which to address impunity, and complements the AU's objection to the abuse of the principle of universal jurisdiction, particular in instances in which African statesmen and women are disproportionately subject to IL, when compared to other regions of the world.

10. CONCLUSION

Given the historical and imperial origins of European international law, non-African governments and societies as well as international organisations will need to reflect on how they can collaborate more closely with traditional justice and reconciliation processes to promote genuine ownership of the processes of post-conflict justice and peacebuilding. External actors must be willing to learn and not blindly or patronizingly transpose or impose systems that are not immediately translatable or understandable to their host populations. We should question attempts to impose a universal conception of justice or assume that so-called 'international law' is devoid of any imperial pretentions as far as disciplining and controlling target countries is concerned. Instead, we should draw lessons from African thinking relating to ICL, evidenced in the Malabo Protocol, which is a riposte to the tendency to privilege euro-centric notions of justice, particular its over-emphasis on individual culpability. It is always vital to learn what African transitional justice, and specifically judicial, strategies or responses might be appropriate in different country contexts, which should be the foundation for a differentiated accountability system. Africa in this sense has challenged the artificial normative strictures of the global discourse of ICL and is advancing its own home-grown norms to dealing with the violations of the past. On this basis, Africa has become an innovator in the development of ICL and transitional justice norms. The fact that a number of countries on the continent will be emerging from conflict in the next decade and beyond, Africa will continue to be a thought-leader, norm-setter and norm entrepreneur in terms of ICL and transitional justice processes and institutions and the perplexing challenge of addressing the violations of the past. The question that faces us today in the context of our globalised world is whether we are prepared to draw from the lessons of African models of justice and reconciliation.

6

Concurrent Jurisdiction of the International Criminal Court and the African Criminal Chamber in the Case of Concurrent Referrals

ERIKA DE WET

1. INTRODUCTION

In accordance with article 24(2) of the Charter of the United Nations (Charter), the United Nations Security Council (UNSC) has the primary responsibility for the maintenance of international peace and security.[1] Chapter VII of the Charter further provides the UNSC with extensive powers to take binding decisions for member states to maintain or restore international peace and security. Articles 25 and 103 of the Charter respectively oblige member states to give effect to binding decisions under the Charter and to give precedence to these decisions in cases of conflict with other obligations under international law.[2] In this context, it is important to keep in mind that while the African Union (AU) is not a party to the Charter, all its member states are. This implies that in case of a conflict between a binding UNSC decision and a decision of the AU, member states will have to give precedence to those obligations following from the UNSC decision.[3]

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[1] The text of the UN Charter is available online at www.un.org/en/sections/un-charter/un-charter-full-text/ (last accessed 10 March 2018). Art. 24(1) determines: 'In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.'

[2] The Charter supra note 1, at Art. 103 of the Charter (n 1) states: 'In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[3] Even though the wording of Art. 103 only refers to treaty obligations, states over time have accepted in practice that the UNSC can also oblige states to deviate from customary international law. A concrete example includes the UNSC resolutions addressing piracy before

The question arises as to whether conflicting AU and UNSC decisions are likely, in light of the fact that the African Union Peace and Security Council for its part is charged with the primary responsibility for the prevention, management and resolution of conflicts in Africa. Article 16 of the African Union Protocol Relating to the Establishment of the Peace and Security Council of the AU of 9 July 2002 (AUPSP) determines that, insofar as the AU's relationship with sub-regional organizations is concerned, the AU has the primary role in relation to the maintenance of peace and security on the continent.[4] One can read this statement as running counter to the primacy conferred upon the UNSC, unless it was intended as an implicit reminder that article 53(1) of the Charter calls on the UNSC to utilize regional arrangements or agencies for enforcement action under Chapter VII of the Charter. This point will be taken up again below, when discussing article 17 of the AUPSP.[5] However, despite the possibility of interpreting article 16 of the AUPSP harmoniously with the Charter, the question arises as to how these two security councils will interact on issues of peace and security.

This contribution focuses in particular on the legal implications where both the UNSC and the AU Peace and Security Council refer the same situation in which international crimes have potentially been committed respectively to the International Criminal Court (ICC) and the yet to be established Criminal Chamber of the African Court of Justice and Human Rights (African Criminal Chamber – ACC), for the purpose of investigation and possible individual prosecution of the perpetrators. The ICC Statute provides for referrals of such

the coast of Somalia and which were adopted under Chapter VII of the Charter. These resolutions inter alia permit states to pursue suspected pirates in the territorial waters of Somalia. This is a clear deviation from both treaty and customary norms pertaining to the law of the sea. See e.g. SC Res. 1846, 2 December 2008, at § 10 which has since been regularly extended. See also A. Paulus & J. Leiss, 'Article 103', in B. Simma, D.E. Khan, G. Nolte and A. Paulus (eds), *The Charter of the United Nations. A Commentary*, Vol I (Oxford University Press, 3rd edn, 2012), 2133. *Contra* A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press, 2011), who argues that the UNSC cannot permit states to deviate from customary international law.

4 The Text of the AUPSP is available at www.peaceau.org/uploads/psc-protocol-en.pdf (last accessed 10 March 2018). The first sentence of Art. 16(1) reads: 'The Regional Mechanisms are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa.'

5 It is also possible to interpret Art. 16 of the AUPSP, supra note 4, as merely implying that AU decisions take primacy over those of sub-regional organizations such as the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC). See E. de Wet, 'Regional Organizations and Arrangements: Authorization, Ratification or Independent Action', in M. Weller (ed), *The Oxford Handbook on the Use of Force* (Oxford University Press, 2015), 320.

situations in article 13(b) of its Statute.[6] The purpose of this article was to enable the ICC to undertake investigations and prosecutions in states not party to the ICC Statute.[7] In this context, one has to keep in mind that the UNSC has the competence under Chapter VII of the Charter to create international criminal tribunals, such as the International Criminal Tribunals for the Former Yugoslavia[8] and Rwanda as sub-organs of the UNSC,[9] as well as to request a treaty-based international criminal court such as the ICC to investigate whether international crimes have been committed in a particular territory.[10] However, the ICC, for its part, is not obliged to accept such a referral as it is – unlike all its member states – not a party to the Charter and therefore not bound by it. However, through article 13(b) the ICC is vested with the power to receive referrals from the UNSC.[11] Thus far, the UNSC has referred two situations to the ICC, namely, that of Darfur (Sudan)[12] and Libya.[13]

[6] The Rome Statute of the International Criminal Court of 17 July 1998 (ICCSt.) is available at www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (last accessed 10 March 2018). Art. 13(b) determines that the ICC may exercise jurisdiction if 'a situation in which one or more of [the crimes in Art 5.] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

[7] D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bahir's Immunities', *JICJ* 7 (2009), 340; D. Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Co-operate with the ICC', *JICJ* 10 (2012) 299, 304. This is because the main purpose of allowing UNSC referrals is to extend the jurisdiction of the ICC to situations in which it would otherwise not have jurisdiction, due to the fact that those situations occur in non-states parties.

[8] SC Res. 817, 25 May 1991 (International Criminal Tribunal for the Former Yugoslavia).

[9] SC Res. 955, 8 November 1994 (International Criminal Tribunal for Rwanda/ ICTR).

[10] The ICC is currently the only inter-state treaty-based body that facilitates referrals from the UNSC. The unanimous referral by the UNSC of the situation in Libya to the ICC in SC Res. 1970, 26 February 2011, in accordance with Chapter VII of the Charter suggests that there is acceptance or at least acquiescence by states that the UNSC has the power to make referrals to the ICC under Chapter VI of the Charter.

[11] The cooperation between the UNSC and ICC in matters of referrals is further regulated by the Negotiated Relationship Agreement between the International Criminal Court and the United Nations of 4 October 2004, Art. 17, available at https://treaties.un.org/doc/Publication/UNTS/Volume%202283/II-1272.pdf (last accessed 10 March 2018). See also Akande (Effects of Security Council Resolutions), supra note 7, 308.

[12] In SC Res. 1593, 31 March 2005, the UNSC determined: '*Acting* under Chapter VII of the Charter of the United Nations, 1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court; 2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organizations to co-operate fully . . .'

[13] In SC Res. 1970, 26 February 2011, the UNSC determined: '*Acting* under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41 . . . 4. *Decides* to refer

According to the amended article 29(1)(b) of the Protocol on the Statute of the African Court of Justice and Human Rights of 1 July 2008 (Statute of the African Court),[14] the AU Peace and Security Council will for its part also have the competence to refer cases to the African Criminal Chamber. Article 46F (2) further confirms that the ACC will have jurisdiction in instances where the AU Peace and Security Council refers a situation to it, where it appears that crimes have been committed over which the ACC has jurisdiction.[15] The use of 'case' in article 29(1)(b) and 'situation' in article 46F(2) of the Statute mirrors the terminology used in the ICC Statute, where the term 'case' has been interpreted more narrowly than 'situation', since it only includes specific individual investigations or prosecutions. If the identical terms used in the Statute of the African Court were given a meaning identical to these terms in the ICC Statute, it would seem that the AU Peace and Security Council would not be able to refer conflict situations in which potential international crimes have been committed. However, since article 46F(2) authorizes the ACC to refer situations referred by the AU Peace and Security Council, one could argue that article 29(1)(b) implicitly also covers 'situations' and not merely individual cases.

Furthermore, it is not clear whether the AU Peace and Security Council can refer a situation to the ACC only where it concerns an AU member state that is also a party to the Statute of the African Court, or whether it can in addition refer situations in AU member states that have not yet ratified the Statute of the African Court. The organizational practice has not yet confirmed whether the AU Peace and Security Council's primary role in matters

the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court; 5. *Decides* that the Libyan authorities shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organisations to co-operate fully with the Court and the Prosecutor . . .'

[14] The Protocol on the Statute of the African Court of Justice and Human Rights of 1 July 2008 (before amendment) is available at https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights (last accessed 10 March 2018). It was amended by the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights of 27 June 2014 (Amendment Protocol), available at www.au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (last accessed 10 March 2018).

[15] Amendment Protocol, supra note 14, at Art. 46F, determines: 'The Court may exercise its jurisdiction with respect to a crime referred to in article 28A in accordance with the provisions of this Statute if . . . 2. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Assembly of Heads of State and Government of the African Union or the Peace and Security Council of the African Union.'

of peace and security on the continent implies that it has powers analogous to that of the UNSC under Chapter VII (albeit on a regional level). Either way, the inclusion of these articles in the Statute of the African Court gives rise to the possibility of a conflict between the ICC and the ACC. It is possible that a situation or a case resulting from a referral of a situation from the UNSC to the ICC has also been referred to the ACC by the AU Peace and Security Council. While these are not the only situations in which jurisdictional conflicts between the ICC and ACC can arise,[16] the central role of the UNSC in the maintenance of international peace and security, as personified by article 103 of the Charter, merits an analysis of how conflicts resulting from simultaneous referrals can be resolved and preferably be prevented from happening in the first place.

This contribution will examine these questions. In doing so, it departs from the premise that – despite tensions between the AU and the ICC - Africa remains committed to supporting the prosecution of international crimes committed on the continent, while continuing a cooperative relationship with the ICC.[17] Such a premise may come across as surprising in light of the increasing discontent of African governments with the ICC, which is perceived as biased towards Africa.[18] In fact, a series of events in recent years suggest that the AU and its member states are in practice are increasingly rejecting the ICC (and for that matter the UNSC). For example, at the time of writing one of the former 34 African state parties to the ICC has definitely withdrawn from the ICC in accordance with article 127(1) of the ICC Statute.[19] Other acts of

[16] For example, it is possible for the ICC Prosecutor to initiate investigations *proprio motu* in accordance with Art. 15(1) of the ICC Statute (supra note 6), while an investigation is already underway at the ACC.

[17] It is worth noting that African states have supported the creation of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, while the AU is supporting the Extraordinary African Chambers within the courts of Senegal for the trying of international crimes during the Habré regime in Chad. The Rwandan courts have also engaged in domestic prosecutions of international crimes subsequent to the genocide in 1994, while several African states that are party to the ICC have undertaken self-referrals to the ICC (i.e. Central African Republic, the Democratic Republic of the Congo and Uganda).

[18] See *inter alia* H.G. van der Wilt, 'Universal Jurisdiction under Attack. An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States', *JICJ* 9 (2011), 1043, 1043 ff; H.G. van der Wilt, 'Complementarity Jurisdiction (Article 46H)', in G. Werle & M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (TMC Asser Press, 2017), 187 ff. 2; L. Oette, 'Peace and Justice, or Neither? The Repercussions of the Al-Bashir Case for International Criminal Justice in Africa and Beyond', *JICJ* 8 (2010) 345, 345 ff.

[19] ICCSt. supra note 6, Art 127(1) determines: 'A state party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification

rebellion included the refusal by Chad, Malawi, the Democratic Republic of the Congo and South Africa to surrender President Bashir of Sudan to the ICC when he visited these countries,[20] as well as the decision by the AU that its member states do not cooperate with the ICC in relation to the surrender of sitting heads of state.[21] Similarly, the creation of the ACC at first sight comes across as an act of rebellion, since the Statute of the African Court remains silent on the relationship between the ACC and the ICC, despite the fact that 33 African AU member states are parties to the ICC Statute.[22]

However, the author is of the opinion that, while many AU member states may indeed, at the time of writing, have little political enthusiasm for cooperation with the ICC, the creation of the ACC does not legally prevent them from doing so, neither does it release them from their obligations under the Charter or the ICC statute, as long as they remain parties to these treaties. The potential for cooperation between the AU Peace and Security Council and the UNSC is acknowledged by the Charter as well as the AUPSP. Part VIII of the Charter, notably article 53(1), allows the UNSC to delegate enforcement

specifies a later date.' On 27 October 2017 Burundi's withdrawal from the ICC Statute took effect. See AFP, 'Burundi becomes first nation to leave international criminal court', The Guardian (28 October 2017), available at www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court (last accessed 15 January 2018).

[20] In two decisions of 12 and 13 December 2011, Pre-Trial Chamber I rebuked Malawi and Chad for failing to comply with the cooperation requests issued by the ICC to arrest and surrender Omar Al-Bashir during his visits to their territories (ICC-02/05–01/09–139; and ICC-02/05–01/09–1). Pre-Trial Chamber II also issued a second decision on non-compliance in relation to Chad on 26 March 2013 (ICC-02/05–01/09). See also Decision on the Co-operation of the Democratic Republic of the Congo regarding Omar Al-Bashir's Arrest and Surrender to the Court, *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05–01/09–195), Pre-Trial Chamber II, 9 April 2014, § 29 (*Al Bashir (DRC)* decision); Decision following the Prosecutor's Request for an Order further clarifying that the Republic of South Africa is under the Obligation to Immediately Arrest and Surrender Omar Al Bashir, *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/0501/09), Pre-Trial Chamber II, 13 June 2015 (*Al Bashir (South Africa)* decision), and Request by the Court for the Arrest and Surrender of Omar Al-Bashir, *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (ICC-02/05–01/09), Pre-Trial Chamber II, 6 July 2017 (*Al Bashir (South Africa II)* decision).

[21] Assembly of the African Union, Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec/1, 12 October 2013, § .2.3, available at www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf (last accessed 10 March 2018). In January 2018 the Assembly also expressed its support for requesting the UNGA to request and advisory opinion from the ICJ 'on the question of immunities of a Head of State and Government and other Senior Officials as it relates to the relationship between Articles 27 and 98 and the obligations of States Parties under International Law'. See Assembly of the African Union, Decision on the International Criminal Court, Assembly/AU/Dec.672(XXX), 28–29 January 2017, paras 5(ii), available at https://au.int/en/decisions/decisions-declarations-and-resolution-assembly-union-thirtieth-ordinary-session (last accessed 10 March 2018).

[22] Van der Wilt (Complementarity), supra note 18, at 190.

measures to regional organizations such as the AU.[23] Article 17 of the AUPSP for its part acknowledges the primacy of the UNSC in the maintenance of international peace and security and pledges close cooperation with the UNSC in promoting and maintaining peace, security and stability in Africa and in keeping with Chapter VIII of the UN Charter. This commitment to cooperation with the United Nations is further affirmed in article 3(e) of the Constitutive Act of the AU, which 'takes due account' of the Charter and the Universal Declaration of Human Rights.[24] These references in the Charter, the AU Constitutive Act and the AUPSP support the development of a symbiotic, cooperative relationship between the AU (including its Peace and Security Council) and the UN (including the UNSC) in matters of peace and security. This would include cooperation in relation to the prosecution of international crimes as a mechanism for restoring international peace and security in situations where an international (including regional) threat to peace exists.

2. CONFLICTING OBLIGATIONS PERTAINING TO STATE COOPERATION WITH THE ICC AND THE ACC

Before elaborating on the conflicts that may result from concurrent jurisdiction of the ICC and the ACC,[25] it is necessary to briefly outline the extent to which there can be overlaps in substantive, personal and temporal jurisdiction between the two courts. It is only when there is a simultaneous overlap in relation to all three areas of jurisdiction that a jurisdictional conflict can arise. While the ACC has much broader substantive jurisdiction than the ICC, both have jurisdiction in relation to genocide, crimes against humanity, war crimes and the crime of aggression.[26] The personal jurisdiction over natural persons

[23] According to the first sentence of Art. 53(1) of the Charter, supra note 1: 'The Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority.'

[24] The Constitutive Act of the African Union of 11 July 2000 is available at https://au.int/en/treaties/constitutive-act-african-union (last accessed 10 March 2018). According to Art. 3(e), one of the objectives of the AU is to 'encourage international co-operation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights . . .' Similarly, AUPSP, supra note 4, at Art. 7(1)(k) promotes the development of a 'a strong "partnership for peace and security" between the Union and the United Nations and its agencies . . .'

[25] Concurrent jurisdiction exists when more than one court has the legal competence to entertain the same case. See *Legal Dictionary*, available at http://legaldictionary.net/concurrent-jurisdiction/ (last accessed 10 March 2018).

[26] ICCSt., supra note 6, at Art. 5; Statute of the African Court (as amended), supra note 14 at Art. 28A(1).

of the ICC and ACC is limited to individuals who were over the age of 18 at the time the crime was committed.[27] Both courts can exercise jurisdiction over crimes that occurred on the territory of state parties and crimes that are committed by nationals of a state party, while the ACC also provides for jurisdiction where the victim of the crime is a national of a member state, as well as in relation to extraterritorial acts by non-nationals that threaten a vital interest of a member state.[28]

The statutes of both the ICC and the ACC limit the overall temporal jurisdiction in respect of crimes committed after the entry into force of the respective treaties.[29] In the case of the ICC this was 1 July 2002, while in the case of the ACC it will be 30 days after the Amendment Protocol had entered into force.[30] In addition, both the ICC and the ACC have only temporal jurisdiction over crimes committed in the member state in question after its ratification of the respective Statute.[31] As the Amendment Protocol has not yet entered into force,[32] any jurisdictional conflict between the ICC and ACC for the time being remains hypothetical. Even so, future conflicts cannot be excluded once the Amendment Protocol enters into force.

In the context of this contribution, it is the potential overlap in substantive, personal and temporal jurisdiction resulting from simultaneous referrals by the UNSC and the ACC that is of interest. In cases of such overlap, member states of these respective courts may find themselves confronted with conflicting obligations to cooperate in relation to investigations and prosecutions. As mentioned above, a UNSC referral combined with article 13(b) of the ICC Statute enables the ICC to undertake investigations and prosecutions in states

[27] ICCSt., supra note 6, at Art. 26; Statute of the African Court (as amended), supra note 14, at Art. 46D. While Art. 25(1) ICCSt. limits the personal jurisdiction of the ICC to natural persons, the ACC has jurisdiction over natural persons and legal persons (with the exception of states), in accordance with Art. 46B(1) and Art. 46C (1)of the Statute of the African Court (as amended).

[28] ICCSt., supra note 6, at Arts. 12(2)(a) & (b); Statute of the African Court (as amended), supra note 14, at Art. 46E(2).

[29] ICCSt., supra note 6, at Art. 11(1); Statute of the African Court (as amended), supra note 14, at Art. 46E(1).

[30] Statute of the African Court (as amended), supra note 14, at Art. 11.

[31] ICCSt., supra note 6, at Art. 11(2) ICC; Statute of the African Court (as amended), supra note 14, Art. 46E(2). States that have acceded to the ICCSt, after its entry into force can extend the ICC's jurisdiction retroactively until 1 July 2002. This is possible when a state party makes a declaration to that effect under Art. 11(2) of ICCSt. in conjunction with Art. 12(3).

[32] While the Statute of the African Court (supra note 14) has only been ratified by six states, the Amendment Protocol, supra note 14, has not been yet been ratified by any state. Both treaties requir(ed) 15 ratifications for entry into force. Ratification information is available at www.au.int/en/treaties (last accessed 10 March 2018).

not party to the ICC Statute. Once a situation in a non-state party is brought within the jurisdiction of the ICC by means of a UNSC referral, the ICC statutory framework determines the way in which investigations, prosecutions and cooperation by member states are to take place.[33] For example, in accordance with article 86 of the ICC Statute, state parties will have to fully cooperate with the ICC in its investigation and prosecution of crimes within the ICC's jurisdiction.[34] In addition, they will have to comply with requests for arrest and surrender in accordance with the ICC Statute.[35]

As far as ICC non-member states are concerned, it is worth recalling that they are all members of the UN and, therefore, bound by UNSC decisions, including the precedence clause in article 103 of the Charter. These states, therefore, are bound to give effect to obligations in the referring UNSC resolutions that are directed at them. Thus far the UNSC, when referring situations to the ICC, has obliged the respective state to fully cooperate with the ICC.[36] This reference to 'full cooperation' in UNSC Resolution 1593 (2005) concerning Darfur, and UNSC Resolution 1970 (2011) concerning Libya established a textual link with the ICC Statute that triggers all articles in the ICC Statute concerning cooperation.[37] Therefore, the states in question (Sudan and Libya) had to take all measures required by international and national law necessary to facilitate investigations and eventual prosecutions by the ICC in relation to those individuals against whom the ICC issued arrest warrants. It further meant that indicted state officials could not invoke immunities to prevent their arrest and surrender.[38]

[33] ICCSt., supra note 6, at Art. 1, determines that the 'jurisdiction and functioning of the Court shall be governed by the provisions of the Statute'. See also Akande, supra note 7, at 340; P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' *JICJ* 7 (2009) 315, 324; G. Sluiter, 'Obtaining Co-operation from Sudan – Where is the Law?' *JICJ* 6 (2008) 871, 381.

[34] ICCSt., supra note 6, at Art. 86(1), determines: 'States Parties shall, in accordance with the provisions of this Statute, co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'

[35] ICCSt., supra note 6, Art. 89(1), stipulates: 'The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any state on the territory of which that person may be found and shall request the co-operation of that state in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.' See also D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bahir's Immunities', *JICJ* 7 (2009), 334.

[36] See supra notes 12, 13.

[37] See also *Al Bashir (DRC)* decision, supra note 20, at § 29; *Al Bashir (South Africa)* decision, supra note 20, at § 9; *Al Bashir (South Africa II)* decision, supra note 20, at § 87.

[38] *Al Bashir (DRC)* decision, supra note 20, at § 29; *Al Bashir (South Africa)* decision, supra note 20, at §§ 6, 7; *Al Bashir (South Africa II)* decision, supra note 20, at § 89.

Moreover, ICC member states can assume or presume that in response to UNSC Resolutions 1593 (2005) and 1970 (2011), Sudan and Libya respectively have removed any international or domestic legal obligations that prevented their cooperation within the ICC statutory framework – despite the fact that these resolutions did not explicitly state as much. This conclusion is supported by the 1970 *Namibia* advisory opinion of the International Court of Justice (ICJ).[39] The decision concerned the UNSC resolution that declared the South African presence in Namibia illegal,[40] without, however, imposing any explicit obligations on third states. The ICJ gave a purposive interpretation to the resolution and determined that the UNSC resolution required all states to recognize the illegality of South Africa's presence and to refrain from any acts that would imply the recognition of the legality of South Africa's presence.[41] All states thus had to accept the legal situation resulting from the UNSC binding decision and act in accordance with such acceptance, as anything less would undermine the efficacy of the principal organ entrusted with the primary responsibility for international peace and security.[42]

As far as the ACC is concerned, article 46L of the Statute of the African Court provides for a comprehensive cooperation framework with the ACC for state parties to the Statute of the African Court. If the AU Peace and Security Council were to refer situations occurring in parties to the Statute of the African Court to the ACC, clearly the latter's statutory framework would be applicable to investigations and prosecutions. Moreover, if one assumes for the sake of argument that the AU Peace and Security Council can also refer situations in states that are not party to the Statute of the African Court to the ACC, then it is likely that the effect of such a referral would be comparable to that of a UNSC referral to the ICC. The statutory framework of the ACC would become applicable and determine the obligations of member states in relation to the investigations and prosecutions by the ACC in the territory of a non-state party.

In cases of a simultaneous referral by the UNSC to the ICC and the AU Peace and Security Council to the ACC, states will have to give preference to the obligations stemming from the UNSC referral in cases of conflict. In light

[39] Advisory Opinion, *Legal Consequences for States of the Continental Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports, 16; Akande, supra note 7, at 347.

[40] SC Res. 276, 30 January 1970, § 2.

[41] *Namibia* Advisory Opinion, supra note 37, at §§ 114–6; Akande, supra note 7, at 347.

[42] Akande, supra note 7, at 347; N. Boschiero, 'The ICC Judicial Finding on Non-Co-Operation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593', *JICJ* 13 (2015), 646–7.

of article 103 of the Charter, all UN member states (which include all AU member states) will have to give precedence to obligations to cooperate with investigations and prosecutions resulting from a UNSC referral. The overriding effect attached to Chapter VII obligations extends to investigations and prosecutions resulting from a UNSC referral in accordance with Chapter VII of the Charter. In line with the reasoning if the *Namibia* advisory opinion, such an interpretation is necessary to ensure the efficacy of binding UNSC decisions in the interests of international peace and security.

3. A SYMBIOTIC EXISTENCE THROUGH COMPLEMENTARITY?

An existing avenue for resolving or even preventing conflicts that can result from simultaneous referrals to the ICC and ACC respectively is the complementarity principle provided for in article 17 ICC Statute, as well as article 46H of the Statute of the African Court, as amended. Similarly, the *ne bis in idem* principle in article 20(3) of the ICC Statute and article 46I of the Statute of the African Court can provide a form of complementarity. The principle of complementarity implies that prosecutions should first and foremost be undertaken by the national courts of state parties who have jurisdiction over the crime.[43] As far as article 17 of the ICC Statute is concerned, articles 17(1)(a) and 17(1)(b) respectively determine that a case is inadmissible if it is being investigated or prosecuted by a state which has jurisdiction over it, or where such a state has decided not to prosecute the person concerned, unless the state is genuinely unwilling or unable to carry out the investigation or prosecution.[44] In order for a case to be inadmissible before the ICC in terms of article 17 of the ICC Statute, the same person must be investigated or prosecuted for what is substantially the same conduct by the respective national court.[45] Article 46H of the Statute of the African Court contains a

[43] Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008).

[44] ICCSt., supra note 6, at Art. 17(1), determines: 'Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute; (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3 . . .'

[45] This has been confirmed by the ICC Appeals Chamber when confronted with challenges to admissibility in accordance with Art. 19 of the ICCSt., supra note 6. See Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May

similar clause with one noticeable difference, namely, that it also provides for complementarity in relation to the courts of the African regional economic communities, where those are specifically provided for. This suggests that the Statute of the African Court provides for prosecutions by regional courts as an alternative to its own jurisdiction where member states are unwilling or unable to carry out prosecutions.[46]

The question thus arises whether and to what extent the investigation or prosecution undertaken by an international court created by treaty such as the ACC could qualify as a national investigation or prosecution in terms of articles 17(1)(a) and 17(1)(b) of the ICC Statute, namely, one undertaken by a 'state'. Similarly, the question arises as to whether an investigation or prosecution undertaken by the ICC can qualify as a regional investigation or prosecution in terms of article 46H(1) of the Statute of the African Court. If ACC investigations or prosecutions were to qualify as national investigations or prosecutions, that is, those undertaken by a 'state', they would be covered by the principle of complementarity embodied in articles 17(1)(a) and 17(1)(b) of

2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09–02/11 OA), Appeals Chamber, 30 August 2011, §§ 36, 39–40 (*Kenya admissibility* judgment). According to the Appeals Chamber the phrase 'is being investigated' in this context signifies the taking of concrete steps to determine whether a particular suspect is responsible for particular conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. See also Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Gaddafi and Al-Senussi* (CC-01/11–01/11), Appeals Chamber, 21 May 2014 (*Gaddafi* Appeal Judgment), § 72. According to the Appeals Chamber, investigations for 'substantially the same conduct' hinges on the extent of the overlap between the incidents investigated by the state and the ICC respectively. In an earlier judgment the Appeals Chamber concluded that charges for ordinary domestic crimes were not based on 'substantially the same conduct' as charges for crimes against humanity. See Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', *Simone Gbagbo* (ICC-02/11–01/12 OA) Appeals Chamber, 27 May 2015 (*Gbagbo Appeal* Judgment), §§ 2, 14. See generally K.J. Heller, 'Radical Complementarity', *JICJ* 14 (2016), 637 ff.

[46] Statute of the African Court (as amended), supra note 14, at Art. 46 H reads: '1. The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities'.

2. The Court shall determine that a case is inadmissible where (a) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable to carry out the investigation or prosecution; (b) the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state to prosecute; (c) the person concerned has already been tried for conduct which is the subject of the complaint . . .'

the ICC Statute – to the extent that they indeed concern the same individuals being investigated for what amounts to substantially the same conduct. Similarly, if ICC investigations or prosecutions (relating to the same person for the same conduct) were to qualify as one undertaken by a regional court, they would be covered by article 46H of the Statute of the African Court.[47]

In such instances, the overriding quality of the obligation on states to cooperate with ICC investigations and prosecutions that resulted from a UNSC referral under Chapter VII would only be triggered if the respective investigations and/or prosecutions by the ACC were tainted by unwillingness and inability as defined in article 17 of the ICC Statute. However, if the ACC were engaging in a genuine investigation or prosecution,[48] there would be no need for the ICC to insist on exercising its jurisdiction in the same case. After all, as already indicated, while a UNSC referral of a situation to the ICC does oblige ICC member states to cooperate with subsequent investigations and prosecutions initiated by the ICC, such cooperation has to take place in accordance with the ICC Statute.[49] This, in turn, implies that it remains up to the ICC to decide which specific investigations and prosecutions to pursue, inter alia taking account of article 17 of the ICC Statute.

In accordance with the above reasoning, the ACC for its part would also have a legal basis to refrain from continuing with an investigation or prosecution which is also being undertaken by the ICC, or from initiating such an investigation or prosecution in the first place. The reason for this is that if the ICC were to qualify as a regional court in terms of the Statute of the African Court, article 46H(1) could be read as relating to a prosecution by the ICC as an alternative to the ACC's own jurisdiction where a state is unwilling or

[47] Kenya has proposed to the Working Group on Amendments of the International Criminal Court Assembly of State Parties that the Preamble to the ICC Statute be amended. The words 'and regional' should be added in the sentence pertaining to complementarity to read: 'Emphasising that the International Criminal Court established under this Statute shall be complementary to national *and regional* criminal jurisdictions' (emphasis added). See Report of the Working Group on Amendments, ICC-ASP/13/31 (7 October 2014), at 17; E. de Wet, 'The Relationship Between the International Criminal Court and *Ad Hoc* Criminal Tribunals: Competition or Symbiosis?' *Journal of International Peace and Organisation* 83 (2008), 46–7.

[48] For an analysis of the term 'genuinely' in ICCSt., supra note 6, at Art. 17, and its relationship with 'willing' and 'unable', see Van der Wilt (Complementarity), supra note 18, at 192 ff. See also the *Kenya admissibility* judgment, supra note 45, at § 40. The Appeals Chamber underscored that the determination of the existence of an investigation must be distinguished from assessing whether the state is 'unwilling or unable genuinely to carry out the investigation or prosecution'. This is a separate, additional consideration when determining the admissibility of a case. Interestingly, the Statute of the African Court, supra note 14 ,at Art. 46H (as amended), does not contain the term 'genuinely'.

[49] See text leading up to note 33.

unable to investigate or prosecute a particular case. Such a formal legal basis is important, since the ACC (or rather the African Court as a whole) is not party to the Charter and, therefore, not legally bound to UNSC decisions under Chapter VII of the Charter. Therefore, even while member states to the ACC will have to give precedence to obligations to cooperate with the ICC where prosecutions result from a UNSC referral under Chapter VII of the Charter, the ACC itself would still need a formal legal basis for coordinating investigations and prosecutions with the ICC. A reading of article 46H of the Statute of the African Court providing for the complementarity principle to apply to investigations and prosecutions by the ICC does give the ACC a formal legal basis for such co-ordination.

As indicated at the outset of this section, the above legal interpretation turns on whether investigations and prosecutions by the ACC can qualify as those undertaken by 'a state' under article 17 of the ICC Statute, as well as whether those undertaken by the ICC can be regarded as the equivalent of investigations and prosecutions undertaken by courts of the regional economic communities in terms of article 46H(1) of the Statute of the African Court. The answer to this question would depend on whether one takes a textual or purposive approach to interpreting these two articles. As to whether the ACC can qualify as a 'state' court for the purpose of articles 17(1)(a) and 17(1)(b) of the ICC Statute, their text clearly refers to national (domestic) jurisdictions. Both mention an investigation and prosecution 'by a state' which has jurisdiction over a case. Similarly, article 17(2)(a) refers to a 'national decision' and article 17(3) to a 'national judicial system'.[50]

This seems to imply that the court in question has to be controlled by a particular state in relation to its creation, status, staff appointments (including judges and prosecutors), applicable law and also financing.[51] For example, the court in question needs to be imbedded in the national judiciary of a state, staffed by a majority of national judges and funded by its own government. Also, the applicable law (including the extent to which the court applies international law) is determined first and foremost by the domestic legal order.[52] However, the fact remains that the statutes of both the African Court and the ICC were created through international treaties. They do not constitute part of the legal system of any state; the appointment of their staff members (notably those who play the most prominent roles in the criminal prosecution, such as the judges and prosecutors) is determined by processes provided for in their respective statutes; their applicable law is also regulated

[50] De Wet, supra note 47, at 47.
[51] Ibid.
[52] Ibid.

by their statutes; while their funding stems from international sources such as the assessed or voluntary contributions by state parties.[53]

A textual interpretation of article 17 of the ICC Statute, therefore, would not support an interpretation according to which the ACC would qualify as the court of a 'state'. Similarly, a textual interpretation of article 46H(1) does not support an interpretation in accordance with which the ICC qualifies as a court of one of the regional economic communities. These concern courts within African sub-regional communities to which the ICC clearly does not belong.[54] Even so, these difficulties in classification resulting from a textual interpretation can perhaps be avoided if one resorts to a teleological (purposive) interpretation of article 17 of the ICC Statute and article 46H(1) of the Statute of the African Court. In accordance with a teleological interpretation, the purpose of both these articles is to ensure that the ICC and the ACC act as residual institutions. They should only intervene where other competent courts have proven to be ineffective in prosecuting international crimes.

If the ACC indeed proves itself to be willing and able to engage in genuine investigations and prosecutions, it is reasonable to conclude that investigations and prosecutions by the ACC would in principle qualify as those undertaken 'by a state' for the purpose of article 17 of the ICC Statute.[55] These investigations and prosecutions, therefore, would be covered by the complementarity principle enshrined in article 17 of the ICC Statute. As a result, the ICC would only have to insist on exercising jurisdiction over cases resulting from UNSC referrals where, in a particular case concerning the same person for substantially the same conduct, the ACC investigation or prosecution did not live up to the standards outlined in article 17.[56] Similarly, a purposive interpretation of article 46H of the Statute of the African Court would provide the ACC with a legal basis to defer certain cases to the ICC. It would allow the ACC to refrain from initiating investigations or prosecutions (of the same person for what amounts to the same conduct), where the ICC has already done so in response to a UNSC referral under Chapter VII. Alternatively, the ACC can defer the case to the ICC where the latter insists on proceeding with a particular investigation or prosecution resulting from a UNSC referral.

[53] De Wet, supra note 47, at 35.

[54] See for example the Treaty for the Establishment of the East African Community of 30 November 1999, which established the East African Court of Justice in Art. 9. The text is available at http://eacj.org/wp-content/uploads/2012/08/EACJ-Treaty.pdf (last accessed 10 March 2018).

[55] De Wet, supra note 47, at 49.

[56] Ibid.

As indicated above, the *ne bis in idem* principle may also provide for a form of complementarity. This principle is guaranteed in article 20(3) of the ICC Statute[57] and article 46I of the Statute of the African Court.[58] In both statutes, the principle is articulated in a way which aims at preventing a person from being tried for the same conduct by different courts, unless the trial by the other court was aimed at shielding the accused or was not conducted in accordance with the principles of independence or impartiality under international law. Interestingly, both articles 20(3) of the ICC Statute and 46I of the Statute of the African Court refer to a trial by 'another court' as opposed to one by 'a state'. These articles, therefore, do not specify that the other prosecution has to take place in a domestic court. This in turn implies that article 20(3) of the ICC Statute would allow for the application of the *ne bis in idem* principle to also cover cases where a person has been tried by the ACC for the same conduct, without contradicting the wording of the article (as is the case with article 17 of the ICC Statute). The almost identical provision in article 46I of the Statute of the African Court would further provide the ACC with the legal basis to refrain from prosecution where a person has been tried for the same conduct by the ICC. Stated differently, if either the ICC or the ACC were simply to wait until the other court has tried a case, articles 20(3) of the ICC Statute and 46I of the Statute of the African Court would provide a clear legal basis (or even an obligation) *not* to try the same case. The only exception would be where the proceedings in the other court (whether the ACC or ICC) were fundamentally flawed, so as to satisfy the criteria stipulated in articles 20(3)(a) and (b) of the ICC Statute or articles 46I(a) and (b) of the Statute of the African Court.

[57] ICCSt., supra note 6, at Art. 20(3), determines: 'No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

[58] Statute of the African Court, supra note 14, at Art. 46I(2,) determines: 'Except in exceptional circumstances, no person who has been tried by another court for conduct proscribed under Article 28A of this Statute shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

4. CONCLUSION

African states do not as yet face the risk of conflicting obligations to cooperate with the ACC and ICC, due to simultaneous or overlapping referrals by the AU Peace and Security Council and the UNSC respectively. However, such conflicts may come into existence in the future if the ACC comes off the ground and there is overlapping substantive, personal and temporal jurisdiction between the ICC and the ACC. The fulfilment of these conditions for jurisdictional overlap will, amongst other things, depend on whether the Amendment Protocol will receive the required 15 ratifications and whether the current 33 African states that are party to the ICC Statute do not withdraw from it. If (more) African states indeed were to withdraw from the ICC, as many in recent times have threatened to do, they will no longer be bound by the duty to cooperate with the ICC under inter alia articles 86 and 89 of the ICC Statute. The UNSC of course can still refer situations arising in any state (including those that have withdrawn from the ICC) to the ICC in accordance with its Chapter VII powers, as well as oblige that state (and any other state) to cooperate with the ICC. However, such referrals will remain few and far between, especially while the prospects for cooperation between the AU and the UNSC in matters of ICC referrals remain bleak.

There is also the issue of the financing of the ACC, which is bound to be very expensive and may in practice prevent African states from ratifying the Amendment Protocol. As a result, it is possible, if not likely, that the ACC does not get off the ground for years to come. Therefore, the real concern from the perspective of those who want to prevent impunity for international crimes is not so much jurisdictional conflicts between the ACC and the ICC, as the lack of any (residual) international jurisdiction for the prosecution of international core crimes on the continent. This would be the logical result if there were a mass withdrawal of African states from the ICC, without the ACC being in place.

However, if the current African members of the ICC remained parties to the ICC Statute and the ACC indeed came off the ground, it is possible for the ACC and ICC to develop a cooperative relationship in cases of jurisdictional overlap. The above analysis has attempted to explain how a purposive interpretation of the complementarity principle in articles 17 and 20(3) of the ICC Statute and articles 46H(1) and 46I of the Statute of the African Court could provide a legal basis for such cooperation. Both the ACC and the ICC would have much to gain from such cooperation. The ICC for its part has limited capacity and can only engage in a limited number of investigations

and prosecutions.[59] An effective ACC would relieve the case load of the ICC and result in the availability of more resources for ICC investigations and prosecutions in other regions. Stronger involvement in other regions would strengthen the legitimacy of the ICC, which is currently perceived by many on the African continent as biased towards Africa.

The ACC and the AU Peace and Security Council for its part would also have an interest in preventing a jurisdictional conflict with the ICC, in particular where the conflict concerns investigations and prosecutions resulting from a UNSC referral under Chapter VII of the Charter. Most peace-keeping and peace-enforcement operations in Africa, whether under the auspices of the AU or the UN, are dependent on the financial and logistical support of Western states. This included Western members of the ICC and the permanent Western members of the UNSC. If a jurisdictional conflict between the ACC and ICC were perceived as an attempt to undermine binding treaty obligations *vis-à-vis* the UN and the ICC, this may have a negative impact on the willingness of Western states to support African peace-keeping and peace-enforcement initiatives. A cooperative relationship between the ICC and ACC in matters of jurisdictional overlap could prevent this from happening, while simultaneously carving out a strong role for the ACC in preventing impunity for international crimes on the continent.

[59] Van der Wilt, supra note 18, at 198.

7

The African Criminal Court

Towards an Emancipatory Politics

ADAM BRANCH

The relation between law and politics is a difficult question for every international criminal tribunal; for the proposed African Criminal Court (ACC), it is already subject to heated debate. But it is also a crucial question, for whether the proposed new African court will be legitimate and effective will in large part depend upon whether a viable relationship between law and politics can be negotiated in its establishment and future operation. In this chapter, I will argue that the dominant positions in the debate over the politics of the proposed ACC, while presenting a broad set of possibilities for the court, tend to sidestep what may be the most important aspect of the question: not *whether* politics will shape the proposed court, but, because politics will inevitably shape its operation, *what* political agenda and orientation should determine the court's functioning. Only if the proposed ACC is moulded by progressive, democratic political agency – a possibility enabled by the court's location within the African Union (AU) as well as certain provisions of the Malabo Protocol – will it be able to contribute to an emancipatory politics. To realize this possibility will require effectively addressing the dilemmas revealed by interventions of the other major international criminal tribunal involved in Africa – the International Criminal Court (ICC) – which have tended to entrench the violence of powerful states, both African and Western, and to undermine possibilities for peace and justice. In charting this course for the proposed ACC, the dominant understanding of the relation between politics and law needs to be re-thought and the foundation of the political vision guiding the ACC needs to be critically examined. Otherwise, the proposed African court may be subject to counterproductive instrumentalization by states and may end up replicating the problems seen with the ICC.

This chapter will locate the emancipatory potential of the ACC in specific elements of the Malabo Protocol, in particular in its expanded slate of international crimes and the expanded set of persons and organizations over

whom it claims jurisdiction. It will also locate this potential in the fact that the proposed court is embedded within a regional peace and security architecture, a fact with institutional political importance in terms of allowing broader continental policies and commitments to shape the court, but also with symbolic importance in terms of the kinds of political claims that can be made upon it. Together, these may allow the ACC to respond to and be accountable to African peoples, movements and organizations, representing a significant advance for international criminal tribunals. However, I emphasize that this kind of responsiveness and accountability, and ultimately the court's emancipatory political possibilities, are just that – possibilities – and there is no guarantee that the ACC will realize these progressive dimensions. Indeed, whether or not it can do so depends not so much on the technical legal and institutional developments leading to the future operation of the court – although these are certainly important – but, centrally, on whether democratic movements and struggles can effectively engage with and steer the court's development and operation now and into the future, so that international criminal law becomes a tool of progressive continental politics.

1. LEGALISM AND THE ACC

The idea that politics should guide international criminal tribunals is anathema to the dominant legalist approach, which declares that politics can have no place in determining the operation of international criminal tribunals, which are legitimate and effective only when they are insulated from politics.[1] Legalist arguments have been made on both sides of the debate over the ACC, pitting those who see the proposed court as an important piece in an apolitical global legal architecture against those who see it as a significant threat to that architecture because of its inescapable politicization. Exploring this debate can help illuminate the possibilities faced by the ACC.

For legalist proponents of the ACC, the court can effectively fill in gaps within the existing international criminal law architecture, a structure that reaches from national courts, up through regional mechanisms, to the ICC at its pinnacle. Based on an expansive notion of complementarity, international criminal law is envisioned as most effective when there is a multiplicity of mechanisms with specific geographical or subject-matter competences, providing a comprehensive web of courts to ensure that no case escapes prosecution under international criminal law. Most strongly voiced by the

[1] For the classic treatment of this theme with reference to international tribunals, see J. Shklar, *Legalism* (Cambridge, MA: Harvard University Press, 1964).

AU itself, this position presents the ACC as a good-faith effort by Africa to carry forward the fight against impunity. The proposed ACC brings certain advantages to the existing legal architecture, it is argued, in particular the expansion of the crimes within its jurisdiction to include those particularly relevant to Africa, and the commitment to hold corporations, as well as individuals, legally accountable, both of which will be discussed further later. In this view, there is no politics to the ACC beyond closing the 'impunity gap' more effectively and providing justice to victims – fundamentally moral-legal objectives. In Don Deya's words, the ACC will be in a 'complementary and harmonious relationship with the ICJ, the ICC and other courts,' 'the aim,' he explains, being 'to reduce the possibility of "politics" or "political considerations" playing a part in what should essentially be a judicial task'.[2] This legalist argument identifies significant practical hurdles in the way of an effective, legitimate ACC – ranging from funding gaps, to an overly expansive jurisdiction, to the need for legal development of newly included crimes, to a lack of clarity concerning relations with the ICC and with national courts.[3] However, with proper legal design and state support, it is maintained, the ACC will be able to overcome these hurdles and contribute towards the global rule of law.

For the ACC's legalist critics, however, the court will necessarily be subject to intense and counterproductive politicization by African states, and so its insulation from politics will be impossible. The ACC will be inescapably politicized by African political elites and an AU that represents their interests, critics argue, and so the ACC will undermine the global rule of law, not contribute to it. The most commonly cited evidence for this is the Malabo protocol's controversial immunity provision, as well as the fact that the most immediate impetus for the development of the court seems to have been the ICC's prosecution of presidents Omar al-Bashir and Uhuru Kenyatta. The argument against the ACC is thus often paired with a defence of the ICC, as those supporting the former are accused of doing so in order to undermine the latter and, in so doing, the fight against impunity. Critics have, implicitly or explicitly, denounced the proposed ACC as a ploy by African leaders to

[2] D. Deya, 'Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes', *Openspace* 2 (February 2012) 22–6, at 25. See in particular the presentation of this position in V. Nmehielle, '"Saddling" the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?', 7 *African Journal of Legal Studies* (2014) 7–42, at 8.

[3] For a sober assessment of these practical obstacles, see A. Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects', 60 *Netherlands International Law Review* (2013) 27–50.

guarantee themselves immunity from prosecution through an ineffective, compromised institution that will be under their control in a cynical instrumentalization of international criminal law. This understanding often appears based upon a fundamental distrust of any politics in Africa and an assumption that African sovereignty is little more than a shield for abusive leaders against international human rights. As Murungu argues, the AU may not have 'any genuine purpose in establishing a Criminal Chamber' other than 'trying to protect some of its leaders who are well known for a culture of impunity and the commission of serious international crimes against their own citizens.'[4] According to Kurt Mills, the proposal for the ACC is 'designed as [an] attempt to put the brakes on globally based prosecutions of Africans—or at least African heads of state,'[5] and Max Du Plessis has asked if the ACC is a case of 'negative complementarity,' possibly setting the stage for show trials and entrenching impunity.[6] The ACC is a threat to the ICC and there can be no principled opposition by African states, organizations or intellectuals to the ICC and its actions, according to this position: Richard Dicker of Human Rights Watch asserts that the AU's challenge to ICC prosecutions of African heads of state reveals that 'the AU leadership's objective was to. . .roll back the fight against the most serious crimes under international law'; African states' opposition to the ICC is thus 'a rejection of the fight against impunity'.[7]

[4] C. B. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal Justice* (2011) 1067–88, at 1087. See also the 'Joint Letter to the Justice Ministers and Attorneys General of the African States Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights', 3 May 2012, available online at www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties (visited 15 September 2016).

[5] K. Mills, '"Bashir is Dividing Us": Africa and the International Criminal Court', 34 *Human Rights Quarterly* (2012) 404–7, at 423–4. Matasi and Bröhmer conclude that it appears from the provisions discussed above that these are technical maneuvers to oust the jurisdiction of the ICC; see M. Matasi and J. Bröhmer, 'The Proposed International Criminal Chamber Section of the African Court of Justice and Human Rights: A Legal Analysis', *SSRN Electronic Journal* (2013), available online at http://ssrn.com/abstract=2236040 (visited 15 September 2016), at 16.

[6] M. Du Plessis, 'A Case of Negative Regional Complementarity?', *EJIL*: Talk! Blog of the European Journal of International Law, 27 August 2012, available at www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/ (last visited 15 September 2016). See the discussion in K. Ambos, 'Expanding the Focus of the "African Criminal Court"', in W. Schabas, Y. McDermott and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (New York: Routledge, 2016) 499–529, at 521–4.

[7] R. Dicker, 'The International Criminal Court (ICC) and Double Standards of International Justice', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015) 3–12, at 10.

Against these critics of the ACC, AU Legal Counsel and Director of Legal Affairs Vincent Nmehielle points out that categorical condemnation of the ACC takes the AU's effort as being necessarily in bad faith and the proposed court as being entirely subjugated to the will of putatively criminal, corrupt African leaders.[8] Instead, he argues, the diversity of positions on international criminal accountability among African leaders, and even within the AU on the prosecution of African heads of state, must be recognized. Thus, the practice of the ACC is by no means politically predetermined. Du Plessis similarly agrees that, while there are some countries who seek to use the ACC as a way of undermining the ICC, 'it is too simplistic to claim that the proposal for such a mechanism is simply or purely motivated by a desire to undermine the ICC,' in particular since moves towards an ACC predated the ICC's indictment of al-Bashir.[9] Thus, the ACC's possibility of being a key piece in a global legal architecture cannot be dismissed out of hand.[10]

The legalist critics of the ACC prejudge the counterproductive politicization of the proposed court; the legalist supporters of the ACC tend to assume that politics can be eliminated from the functioning of the court, thus guaranteeing its legitimacy and efficacy. Both, however, ignore the lessons about the relation between politics and law offered by the immediate history of the ICC, which tends to be held up by the critics of the ACC as a model international court. A brief look at the relation between law and politics in the ICC's operation in Africa suggests that politics are an inescapable dimension of international criminal tribunals in Africa and, thus, that instead of the legalist pretence that politics can be eliminated from the workings of international criminal law, the centrality of politics to law should be accepted. Admitting this inevitable politicization would then allow for open debate over what those politics are and should be and how courts can be held accountable by those in whose name they act.

The discussion of the ICC will set the stage for my argument, namely, that although the ACC shares the fundamental limitations revealed by the ICC's work in Africa, the African court is within a sufficiently different context that it

[8] Nmehielle, supra note 2, at 33–4.

[9] M. du Plessis, T. Maluwa and A. O'Reilly, *Africa and the International Criminal Court*, Chatham House International Law, July 2013, available online at www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf (visited 15 September 2016), at 10.

[10] This was the position articulated by the representatives of Human Rights Watch and Amnesty International at the African Court Research Initiative International Symposium (Arusha, Tanzania, 28–29 July 2016), although both expressed serious reservations about the practical hurdles in the way of the ACC's being able to help address the impunity gap.

has the possibility of contributing towards an emancipatory politics. However, as suggested already, this possibility requires a re-thinking of the relation between the ACC and the political beyond the legalists' false dichotomy of international law either being part of a non-political 'fight against impunity' or being corrupted by politicization.

2. LESSONS FROM THE ICC IN AFRICA

The irony of the legalist critique of the ACC is that many of the arguments being made against the proposed court – that it will be politically instrumentalized by powerful states to the detriment of legality and justice, that it will uphold authoritarian rule instead of challenging it – are precisely the accusations that have been made against the ICC, often by African critics.

Today, fifteen years after the Rome Statute entered into force, there remain few observers who would deny that the ICC's practice in Africa has been guided by pragmatic decisions on the part of the prosecution, shaped by global politics. The ICC's exclusive focus on Africa is fundamentally a product of the global War on Terror: The US was actively opposed to the ICC when it was founded, and so the ICC, under threat before it had even started its first case, decided it would have to conform to US interests if it was to have a chance to survive. As David Bosco has described in detail, the ICC responded to US opposition by making clear that it would target putatively politically meaningless African violence, not the violence of the US or its allies. And so the first, defining case for the ICC, launched at the very moment when US invasions were raging, was the DRC.[11] The ICC's turn to Africa represented a strategic response to the changed political landscape after 9/11, but it also drew on a long history of Africa being represented as a terrain of humanity, of incorrigible savages committing atrocities against helpless victims in need of a Western saviour.[12] The ICC's exclusive intervention in Africa was thus a product of international power relations that made Africa the only region weak enough so that international intervention could take place there without accountability and unimportant enough so that the West would allow the ICC to intervene there, and also the historical legacy of the Western civilizing mission in the continent. The result was that there has been a substantive politics behind the ICC's supposedly apolitical legal engagement with Africa: the ICC has

[11] D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press, 2014), at 89–90.

[12] M. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 42 *Harvard International Law Journal* (2001) 201–45.

reinforced the relation of subordination between Africa and the West by declaring African sovereignty to be subject to disqualification by a 'global' court that appears structurally unable to intervene anywhere but in Africa.

But avoiding US censure was not enough; the court also had to seek enforcement power – the fundamental dilemma faced by any international criminal tribunal built upon a domestic model of criminal law enforcement. The history of the ICC in Africa has thus been a history of the ICC's constant effort to align itself with Western, in particular US, support in a desperate quest for enforcement capacity.[13] Constructive relations have emerged between the ICC and Western violence: the crowning moment was in Libya, when the ICC was a partner in regime destruction, but such alignments have also been seen in Uganda, Mali and Ivory Coast. The recent capture of LRA commander Dominic Ongwen, for instance, was enabled by the presence of the US military in Central African Republic as part of the expansion of AFRICOM.

The ICC's decisions as to where to intervene within Africa, its tendency to target certain situations to the exclusion of others and pursue certain parties within those conflicts while ignoring others, have been shaped also by its need for powerful allies *within* the continent as well. Frequently, the ICC allies itself with African states who will facilitate prosecutions and, in exchange, provides those states with effective immunity. The ICC takes sides with the victors or the stronger party to a conflict, even though violence by all sides could fall under the ICC's jurisdiction. In practice, the ICC's capacity appears limited to prosecuting minor warlords who have fallen out with state sponsors and former African leaders who have been overthrown by Western military intervention. The result is that, in every case in which the ICC has become involved, the court has either aligned itself with the interests of the powerful or, when it has tried to prosecute those with power, faced disaster – most notably with the collapse of the cases against Uhuru Kenyatta and William Ruto and the constant disregard of the arrest warrant against Omar Al-Bashir, which have thrown the court into crisis. Thus, the ICC has made it clear that the best way to avoid prosecution is not to abide by the law but to win on the battlefield, to sign up to the War on Terror or to offer up suspects to the ICC.

African states have realized the ICC's dire straits and taken advantage of the situation themselves.[14] The ICC has been instrumentalized by states or,

[13] A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (New York: Oxford University Press, 2011), at 200–203.

[14] For more on this logic, see P. Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda', in N. Waddell and P. Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008) at 37–45.

sometimes, non-state actors who seek to appropriate for themselves the mantle of 'saviour' so as to legitimize their violence, often through the strategic use of self-referrals. African states can, through ICC intervention, obtain justification for their use of force against those whom the ICC has declared international criminals. This ability to assume the role of human rights enforcer is typically the prerogative of African states with the requisite international patronage, and so global law enforcement can provide a link between the West and its allies, justifying militarized state-building in the name of building the capacity to enforce international justice. Thus, the ICC's practice has conformed most closely not to the liberal rule of law but to international lines of force, ushering in not a post-Westphalian order but a new geography of de facto impunity. Again, the substantive politics behind the court's putative apolitical legality are revealed: to entrench the power of authoritarian African rulers and violent state actors.

The final political dimension to the ICC's operations in Africa stems from its exclusive jurisdiction over atrocity crimes. Because the crimes the ICC has jurisdiction over – war crimes, crimes against humanity and genocide – are so extreme and morally charged, the ICC's practice cannot help but be endowed with a polarizing logic of friend-enemy.[15] That is, perpetrators of atrocity crimes are more than criminals – they are the inhuman enemy, the *hostis humani generis*. At the same time, the crimes are considered so atrocious, so morally evil, that the 'friend' is anyone who will effectively deploy violence in the name of enforcing international law, who will bring such inhuman perpetrators to justice. The result is that, as the ICC gets involved in contexts of widespread, extreme violence, it provides a tempting instrument for those who would seek to criminalize and dehumanize their enemies through international law and would seek to sanctify their own violence as enforcing human rights. This has meant that the ICC intervenes into situations of significant political violence, which it can end up polarizing and intensifying, raising the stakes in dangerous ways. When this tendency is combined with the ICC's political selectivity in terms of where it intervenes, as just discussed, the danger is obvious: in the very pursuit of international legal justice, international courts can become accessories to the violence of the powerful and entrench violence in conformity with existing lines of power.

These negative repercussions of ICC intervention have produced significant resistance to the ICC from within Africa from a broad set of social and

[15] S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21 *European Journal of International Law* (2010) at 941–65.

political actors who have accused the ICC of ruining peace processes and amnesties. ICC involvement, particularly in Northern Uganda, has led to intense controversies over the supposedly universal applicability of the ICC's model of justice, as activists there have mobilized for 'traditional' forms of local justice declared to be more relevant to the victims.[16] In Kenya, activists were divided on whether the ICC had the capacity to deliver justice or whether it would prove ineffective and derail domestic efforts at building peace and reconciliation. And there have been accusations that the ICC ignores local voices and is ignorant of the contexts into which it intervenes.

At heart, these problems stem from the ICC's lack of accountability towards those in whose name it acts. The ICC's practice makes clear the fundamental problem facing any tribunal that attempts to enforce international criminal law on the global level in the absence of a global sovereign or global political community, that is, any court that tries to scale up a domestic criminal legal system to the global level with the assumption that the benefits of a domestic legal system – justice for victims, the enforcement of peaceful social order, deterrence – will be replicated globally. Most obviously, the attempt to enforce international criminal law without a sovereign global state leads to the selective application of the law due to the lack of central enforcement capacity. Equally important are the problems that stem from the lack of a political community at the global level that can be the source of the law and to whom the law is accountable. Without a global political community, any court that purports to enforce international law will suffer from a lack of political accountability and democratic legitimacy. It will be subject to politicization by the powerful, often by the very international actors who most need their impunity to be challenged by a global court. And so, although there is much talk of victims' participation at international tribunals, that participation is restricted to being in the limited spaces allowed by the tribunals; the legal process is in no way accountable to those victims in whose name it acts. Similarly, while the involvement of NGOs and civil society organizations is often proclaimed, those organizations with a voice are exclusively those that are focused on the anti-impunity agenda and the demand for expanding criminal accountability for certain atrocity crimes. As the consequences of the ICC's lack of accountability have become increasingly obvious, so has the ICC's legitimacy faced increasing challenge.

[16] T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006).

Denunciations of ICC intervention, primarily from Africa, have become too loud for the court and its publicists to ignore.[17] Many of the court's legalist supporters admit that the ICC has been politicized; however, they also insist that politicization can be dealt with within the Rome Statute regime of international criminal law. According to Keppler, for instance, 'Efforts should include pressing for the investigation of relevant crimes wherever they are committed, and broader ratification of the Rome Statute.'[18] Thus, the legalist solution to politicization is typically found in insulating the ICC from external political forces, in particular the Security Council, by giving the ICC more autonomy, fostering state cooperation and providing more resources.[19]

This supposed solution, however, ignores the fundamental character of the ICC's politicization and treats the court as if it had the possibility to escape political pressure and become a genuinely non-political tool of global law. As I have argued, the politicization of the ICC, its focus on Africa and its subservience to the United Nations Security Council and to Western interests are not simply minor hurdles for the ICC, to be overcome through adjustments in its practice. Instead, given its lack of enforcement capacity, lack of downward accountability and exclusive jurisdiction over atrocity crimes, politicization is the condition of possibility for the ICC to function at all. In the words of William Schabas, international prosecution 'is both selective and political by nature.'[20] The proposed ACC will face this same dilemma as an inevitable consequence of its work – but with two key differences that may enable it to have a different relation with the political, as I argue in the next section.

To realize this possibility, however, the very idea of international criminal law as operating effectively and legitimately only when it is insulated from politics, when it is non-political, must be abandoned. We have seen that this idea cannot survive the scaling-up of international criminal law from the domestic to the global level, where the proclamation of apolitical legality only

[17] See, for instance, *Is the International Criminal Court Targeting Africa Inapporpriately?*, ICC Forum, Human Rights Project at UCLA School of Law with the support of the Office of the Prosecutor of the ICC, March 2013 – January 2014, available online at http://iccforum.com/africa (visited 15 September 2016).

[18] E. Keppler, 'Managing Setbacks for the International Criminal Court in Africa', 56 *Journal of African Law* (2012) 1–14, at 7.

[19] O. Bekou and A. Zidar, 'The International Criminal Court at Ten: Contemporary Challenges', in O. Bekou and A. Zidar (eds), *Contemporary Challenges for the International Criminal Court* (London: British Institute of International and Comparative Law, 2014) 1–10.

[20] W. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), at 97.

hides the actual political determination of law enforcement.[21] Better to admit the inevitable politicization of international criminal law so that it can be held accountable and an emancipatory politics can be put at its centre.

3. THE POLITICS OF THE AFRICAN CRIMINAL COURT: OLD DILEMMAS, NEW POSSIBILITIES

A. *The ACC and the African Peace and Security Architecture*

Can the ACC avoid the destructive repercussions evident in the ICC's problematic relation to politics? The ACC seems to replicate the conditions that led the ICC into difficulties: it is an international court on a domestic model that lacks an enforcement mechanism; it has jurisdiction over atrocity crimes; it has no formalized mechanisms for accountability to the people to whom it is supposed to bring justice. I will argue that, while there is a significant danger that the proposed African court could very well be afflicted by the problems revealed by the ICC's interventions in Africa, the new court has at least the *possibility* of serving more emancipatory ends. This possibility stems from a different relation between the ACC and the political and thus the opportunity for a different politics to inform its work.

Legalism provides one paradigm through which the origins and the future operation of the proposed ACC can be envisaged. In this paradigm, the African court is to bring justice in accordance with international criminal law and function within a coherent global legal architecture; this global legal structure is primary and the ACC's legitimacy and efficacy are grounded in its insulation from politics. But there is a second paradigm that has helped inform and motivate the development of the African court and that provides a vision for its future functioning: a peace and security paradigm, in which the ultimate value underlying African continental institutions, including the ACC, is to ensure lasting peace and overcome Africa's legacy of political violence. Justice has a place in this peace and security framework, but it is not the narrow criminal justice for mass atrocity of the ICC and other international criminal tribunals. Rather, a broader transitional justice is valued, in which trials may play a role determined by concerns of securing a lasting peace instead of by a declared uncompromising commitment to 'ending impunity.' Thus, the proposed court, while remaining a fundamentally legal body, is informed by a continental political agenda and integrated into continental structures for achieving peace.

[21] See Ibid. at 80–97 for a discussion of this dilemma.

The integration of the proposed court into broader continental structures of peace has been made possible by the rapid development of the African Peace and Security Architecture over the last decade, by the foregrounding of transitional justice in the AU, as well as by a broad commitment to a more interventionist peace agenda, which has become a prominent aspect of the AU's operations and rhetoric, most notably, perhaps, in Article 4(h) of the AU Constitutive Act.[22] Most immediately, the ACC's conformity to broader goals of continental peace is enabled by specific provisions in the Malabo Protocol: Article 46F on the Exercise of Jurisdiction gives the power to refer situations to the ACC to the AU Assembly of Heads of State and Government and to the AU Peace and Security Council. The Protocol also, in Article 46H, explicitly declares the ACC to be complementary not only to national courts but also to courts of the regional economic communities, further entrenching the ACC in the multi-layered continental peace and security architecture. Also notable is the absence of explicit reference in the Malabo Protocol to the ICC or to the UN Security Council; although what the relation between these bodies and the ACC will be in practice remains to be worked out, the lack of reference to them further emphasizes the new court's primarily continental commitment. Furthermore, the fact that the ACC, with its international criminal law mandate, will be one of the three sections of the proposed African Court of Justice and Human Rights – the others being a General Affairs Section and a Human and People's Rights Section – means that the daily operations of the court as well as the epistemic and professional communities of its staff may be infused with a broader legal and political vision in which criminal trials play only a part. The prosecutor and deputy prosecutors, although comprising an independent office of the prosecutor, will be appointed by the Assembly according to Article 22A (2), again presumably ensuring that they will be committed to the Assembly's broader objectives. Together, these could enable the ACC to be integrated into what Kamari Clarke has called African 'ecologies of justice.'

The other important way in which the ACC will be able to contribute to a continental peace agenda is through its expanded subject-matter and personal

[22] T. Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship?', Institute for Justice and Reconciliation Policy Brief, March 2013, available online at http://ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%20Miruthi.pdf (visited 15 September 2016). Murithi further developed this idea in his comments at the African Court Research Initiative International Symposium (Arusha, Tanzania, 28–29 July 2016).

jurisdictions. First, the ACC claims jurisdiction over an expanded set of crimes,[23] opening possibilities not available under the Rome Statute. Of particular note is the criminalization in Articles 28E through 28L *bis* of the illicit exploitation of natural resources, but also the criminalization of mercenarism, corruption and trafficking in hazardous wastes, all of which have been subject to intense political deliberation and, in some cases, legalization through treaties by the AU and the OAU. One result is that crimes of particular importance to Africa have been enshrined within the mandate of an international court, giving the ACC's subject-matter jurisdiction a particularly African visage.[24] Also, as Charles Jalloh has argued, addressing these non-atrocity crimes can play a preventive function for atrocity crimes, dealing with the often overlooked factors that go into producing mass violence.[25] Furthermore, expanding the court's remit beyond atrocity crimes will lessen the tendency towards the moralization and political polarization of situations into which the ACC intervenes. Thus, intervention by the ACC may help defuse tense political situations instead of escalating them.

Second, the ACC claims jurisdiction not only over natural persons but also over corporations and not only over Africans but, under certain circumstances, over people and corporations globally. Article 46(C) establishes jurisdiction over corporations, while Article 46E *bis* explains that the court may exercise its jurisdiction '(c) When the victim of the crime is a national of that State;' or when faced with the commission of '(d) Extraterritorial acts by non-nationals which threaten a vital interest of that State'. In so doing, the ACC extends its personal jurisdiction beyond the borders of Africa.[26] Those who can be designated as criminals comprise a broader set of actors, enabling a better and more comprehensive reckoning for peace.

Put together, the net effect of the expansion of jurisdiction beyond atrocity crimes and the expansion of the personal jurisdiction beyond Africa is to open a new range of political possibilities through the law. The ACC claims jurisdiction over not just atrocity crimes committed by Africans against Africans, as the ICC effectively did, but over atrocity crimes as well as the broader range of crimes that accompany violence and conflict in Africa. It claims jurisdiction over the global networks of individuals, states and corporations

[23] This is what Charles Jalloh calls the Rome Statute Plus crimes; C. Jalloh, 'Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa', 7 *African Journal of Legal Studies* (2014) 43–59, at 56.

[24] Nmehielle, supra note 2, at 29–31.

[25] C. Jalloh, comments at African Court Research Initiative International Symposium (Arusha, Tanzania, 28–29 July 2016).

[26] See Chapter 27, this volume.

that are complicit in that violence. These crimes, from environmental destruction, to corruption, to illegal trafficking, are hidden when the focus is only on those Africans who are deemed 'most responsible' (or, in practice, most available) for the most spectacular atrocities. As opposed to the ICC, which takes violence in Africa and then singles out a handful of Africans upon whom it places full responsibility, the ACC can delineate more complex and accurate global narratives of those responsible for violence, potentially contributing more effectively to peace and to justice.

The proposed ACC thus entails a possible radical change in international criminal law's role in mediating Africa's relation with the rest of the world. The ICC, as argued above, often served as a tool for legitimating Western intervention and interference in African affairs, as well as for upholding the violent power of unaccountable African states. International criminal law as embodied in the ACC could instead become part of what Rowland J.V. Cole has called an 'African agenda' in international law, which he argues can be 'traced back to the struggle for independence and the articulation of pan-African doctrine' with a focus on dignity, self-determination and establishing sovereign equality for African states within the international community.[27] This is the substantive politics that could be advanced by the ACC's more immediate political focus on peace and security. The ACC thus has the potential to serve a counter-hegemonic political vision founded on self-determination and sovereign equality, a vision that, Cole and others argue, has informed Africa's aspirations for international law since decolonization.[28]

However, any celebration of the ACC as an agent of progressive politics needs to be tempered by the legalist critique of the ACC and the recognition that this vision of an African court contributing to peace remains a largely state-centred agenda. As such, is open to steering or manipulation by state elites in their own interest. This is posed starkly in the contentious issue of head of state immunity, provided for by Article 46A *bis*. In an international context defined by major imbalances of power and resources, and in which the West arrogates to itself the authority to effect 'regime change' in the Global South, preventing African heads of state from being subject to politically motivated international criminal prosecution is crucial if self-determination is to have substantive meaning. This is one spirit in which to understand the AU's declaration that

[27] R. Cole, 'Africa's Approach to International Law: Aspects of the Political and Economic Denominators', *African Yearbook of International Law* (2013) 287–310, at 292. See also J. T. Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography', 3 *Trade, Law and Development* (2011) 26–64.

[28] See, more generally, S. Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

it and its member states 'reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent' with regards to the ICC.[29] However, providing immunity to heads of state, and even more so to an amorphous group of 'senior state officials,' as the Malabo Protocol does, also sets the stage for the ACC to replicate the worst of the ICC's problems, becoming simply a tool to be wielded by regimes against political opposition. I will explore the ways that the Malabo Protocol's state-centrism opens the door to these forms of counterproductive politicization next.

B. *The ACC and Political Instrumentalization*

The first obstacle in the way of a progressive African court is that, like the ICC before it, the proposed ACC lacks centralized enforcement powers and is dependent primarily upon member states for enforcement, as established in Malabo Protocol Article 46L (1) and (2). Thus, the ACC will face the same pressure to pursue politically viable cases that the ICC has faced and may end up conforming its prosecutorial practice to pragmatic considerations. Equally troubling is the fact that Article 46L (3) declares that 'The Court shall be entitled to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union.' This provision raises the spectre of the ACC serving as a subcontractor for Western security interests in the continent, a trend that has been seen with some AU peacekeeping missions in recent years. The fact that the protocol allows for state referrals in 46F (1) also opens the ACC to the kind of politically motivated self-referrals that have plagued the ICC and proven deeply controversial for that court. In the case of the ACC, the problem of self-referrals is even more exaggerated because head of state immunity guarantees that states can make referrals without even the possibility that the ACC might prosecute the referring state's own crimes. This makes self-referral to the ACC a very attractive strategy for any state involved in violent political conflict since there is almost nothing for the state to lose and a great deal to gain.

Second, the Malabo Protocol's expansion of crimes also has the potential to serve the interests of authoritarian states. The ACC proposes to establish jurisdiction over crimes that, according to commentators, are 'not yet fixed

[29] *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), adopted* 3 July 2009, A.U. Assemb., 13th Ord. Sess., ¶ 5, A.U. Doc. Assembly/AU/13(XIII). Jalloh emphasizes the need to take the grievances of African heads of state seriously on this issue, see Jalloh, supra note 23, at 48.

in the international criminal law firmament.'[30] One such crime included in the protocol which has been subject to intense critique is terrorism; the fear is that states can use the new provisions to criminalize dissent, secure power and legitimate violence.[31] Another is the criminalization of unconstitutional changes of government, including a ban on constitutional amendments that are considered 'an infringement on the principles of democratic change of government' or a 'substantial modification' of the electoral laws within six months of elections 'without the consent of the majority of the political actors.'[32] These stipulations are so opaque – what comprises an 'infringement,' what is 'substantial,' who are the 'political actors,' when is a 'majority' present? – as to make the inclusion of this crime open to significant political manipulation. This is in addition to the question of whether changes of government through popular uprisings would be included under the law and the dangerous consequences of such criminalization for state repression of popular protest.

In short, the expansion of international crimes within the protocol, while representing a potentially beneficial expansion of the crimes and actors to be held accountable under international law by the African court, also represents a potentially dangerous intensification of the tendency to moralize and polarize politics seen with the ICC's international criminal law enforcement. Indeed, the recent history of 'democracy promotion' and the way that a 'right to democracy' has been used to justify devastating military interventions, should give pause to those who seek to promote more liberal political orders through the international criminalization of unappealing domestic political developments. There is thus the danger that the inclusion of such expansive new crimes within the jurisdiction of the ACC may help reinforce African security states and serve Western security regimes.

Indeed, if the ACC actually gets off the ground, it will unavoidably face intense pressure to become incorporated into existing networks and alignments of power and violence within Africa, alignments that are integrated into the interventions and interests of global powers. The ACC may be buffeted by political manipulation while it searches for enforcement powers and may systematically ignore the abuses of the powerful while pursuing the weak. The existence of the ACC could even render the international criminal law

[30] Matasi and Bröhmer, supra note 5, at 11.

[31] Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (2016), available online at www.amnesty.org/en/documents/afr01/3063/2016/en/ (visited 16 September 2016), at 16–7.

[32] Malabo Protocol Article 28E (1).

regime more arbitrary and international order more opaque as there arises an increasingly inconsistent and incoherent set of regional and global legal institutions, producing more ambiguities that can be manipulated by those with the power to do so. Overlapping jurisdictions between the ACC and the ICC may allow forum-shopping by the powerful, or the pursuit of enforcement by the ACC could lead to ad hoc deployments of force, which could undermine the peace and security infrastructure of the AU instead of strengthening it. Finally, there is the threat that the ACC, in pursuit of enforcement and Western support, might itself sign up to the global War on Terror and become part of the developing transnational networks of unaccountable military and police violence across the continent.

C. *Towards a Democratic Politics for the ACC*

The Malabo Protocol thus has two major aspects; the question becomes how to ensure that the progressive possibilities are realized and the regressive are avoided. Key is the political agenda that will steer the court. This chapter has argued that the fundamental problem with international criminal courts, as witnessed with the ICC in Africa, is their lack of accountability to those in whose name they act. If the African court also comes to be characterized by a lack of downward accountability, the consequences of its politicization by states may be equally dangerous as those witnessed with the ICC. The proposed African court, however, entails novel possibilities for downward political accountability, not so much to those named as victims, but to a broader set of social movements, popular struggles and civil society organizations whose concerns go beyond the anti-impunity agenda. These possibilities may allow the progressive dimensions of the Malabo Protocol to be realized and prevent its more dangerous potentials from arising.

The most important aspect of the ACC that can enable its downward accountability is also the most obvious: its location within Africa. Being within Africa provides the context for a tenuous political community on the regional level – or, really, for multiple political actors speaking in the name of an African political community – to demand accountability from the court. This is made possible by the fact that Africa as a region has shared histories, ideas and legacies of struggle, emancipation and self-determination. It is a continent with a common experience of being subject to a violent international order and to long processes of destructive foreign interference. It has a history of efforts at continental political unity in Pan-Africanism, which bears within it emancipatory, progressive possibilities that are constantly being drawn upon to challenge more authoritarian interpretations of continental unity or national identity.

This is radically distinct from what exists on the global level, and the new possibilities of the ACC can be illuminated through a comparison to the ICC. The ICC functions within a global context that is not characterized by shared histories or common legacies, but rather by a long history of inequality and domination. There is no concrete content to concepts such as global civil society, the international community or 'humanity', no substantive history that can make them the basis for concrete political visions or programmes. As a result, under the cover of a common global community and identity, the ICC's practice reflects actually existing global political order – namely, an order of inequality and violence, which it cannot admit since its legitimacy stems from its proclamation of universality and equality.

Therefore, while the proclaimed universality of the ICC on a global scale, based in an ideological 'humanity', serves to obscure the international inequality and violence that actually define world order and shape ICC practice, the idea of African unity that legitimates the proposed ACC is fundamentally different. It draws upon ideas of continental unity based upon internal legacies of common histories, political struggles and solidarity within Africa, as well as a legacy of unity defined against an external international political and economic system that exploits and oppresses the continent. The idea of Africa thus represents a terrain on which emancipatory political claims can be made, on which certain forms of politics are possible, based on the imagination of an African political community founded through internal organization and against external oppression.

Whereas a domestic criminal legal system has a political structure – the state – to give it efficacy, and a political community – the nation – to provide it legitimacy and hold it accountable, a global court has neither. Thus, when the ICC claims to act in the name of 'humanity', it politically deploys a category that can be manipulated without accountability or without reference to any specific, concrete historical community or institution. However, when the ACC invokes 'Africa', it will have to contend with a host of other visions of the continent embodied in existing communities, historical legacies of Pan-Africanism, internationalism and regional institutions. Legacies of popular and democratic Pan-Africanism, the AU's progressive dimensions, the struggle for self-determination and sovereignty – all these can be drawn upon by those who seek to make the ACC accountable by calling upon it to take action or contesting its anti-democratic or abusive manipulation. Of course, African states and institutions also have a history of internal repression, the cynical manipulation of Pan-Africanism to silence democratic demands, and subservience to and collaboration with foreign political and economic interests and intervention. But with the ACC, at least the possibility exists for plural,

democratic and popular claims to be made on the court. The possibility opens for the ACC to be held accountable in a way that is simply impossible with the ICC, which can dismiss anyone who disagrees with it by claiming for itself the exclusive right to speak for humanity, victims or global justice.

The ACC will not be able to reject criticism made of it as representing corrupt African political interests seeking to undermine supposedly apolitical global justice. Because the ACC is dealing with specific African victims of crimes and not universal, abstract victims, it will find it more difficult to manipulate the victims' discourse to dodge criticism.[33] And, given that African states, organizations and peoples will have to live with the consequences of the ACC's actions – as opposed to the ICC, which can wash its hands of any particular situation without repercussions – perhaps the ACC will have to be more accountable for the outcomes of its interventions. For their part, African states will not be able to reject ACC decisions as a Western conspiracy.

While the proposed ACC certainly does not resolve the dilemmas of scaling a domestic model of international criminal law up to a level where the sovereign state is absent, the pathologies that plague the ICC due to the lack of any global community are ameliorated with the ACC given the more concrete reality of Africa as a political community. Again, this provides no guarantee that the proposed ACC will be any less arbitrary or any less subservient to the interests of powerful states. However, with the ACC, there is at least the possibility that it could be held accountable, in however attenuated a fashion, by those Africans in whose name it acts.

The expanded jurisdiction of the ACC helps enable this kind of democratic politics. As discussed, the Malabo Protocol includes a broad set of crimes, far beyond atrocities, that are of particular importance to Africa; indeed, it even leaves open the possibility of incorporating new crimes. The protocol also expands those agents who can be prosecuted far beyond the borders of the continent. This represents a radically new opportunity in terms of the kinds of claims that can be made on the court by social and political movements, struggles and organizations that speak in the name of Africa's peoples. Whereas the anti-atrocity agenda narrowed the scope of global justice through the agency of the ICC and other tribunals, now the potential scope of the law is expanded vastly and a broad array of social, political, economic and environmental forms of violence and oppression can be brought within the remit of global justice and remedy.

[33] S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2014) 235–62.

It is uncertain to what degree this will prove practicable. But, even if the ACC never actually carries out prosecutions in response to demands made by popular struggles, its mere existence could have a dramatic impact. For the ACC creates a site around which these demands can be made and granted legitimacy – no longer can they be dismissed out of hand as they have been by the ICC. The ACC tells African social movements and struggles that they can decide for themselves what comprises an international crime, whom should be held accountable and what global justice means today.

4. RE-ENVISIONING THE POLITICS OF THE AFRICAN CRIMINAL COURT

The ACC thus has the possibility to help articulate and advance a substantive, emancipatory politics, based on a vision of Africa as a continent with a history of violence committed against it with impunity, but also with a history of struggle to secure self-determination and justice in the face of that violence. The ACC could give legal embodiment to the demand for justice for that legacy of violence, grounded in the legacy of struggle and solidarity. In these ways, the ACC offers the possibility to be in service of a counter-hegemonic, emancipatory political project for the continent. The ACC could thus help realize a vision in which, in Antony Anghie's words, 'international law can be transformed into a means by which the marginalized may be empowered. In short, that law can play its ideal role in limiting and resisting power.'[34]

However, the ACC will be able to achieve this democratic politics only if it is open to the demands and claims made by popular movements, social struggles and civil societies in the name of Africa's legacies of struggle for self-determination, sovereignty and democracy. This will only occur if those movements and struggles demand that the court be accountable to them – because the state elites currently deciding the shape of the ACC have no interest themselves in making the court democratically accountable. Interestingly, contemporary political developments may be laying a foundation for just such demands for accountability, found in particular in the broad uprising of new forms of protest and social struggle throughout the continent.[35] These developments can ground alternative understandings of international law: indeed, there is no need for international criminal justice to be the exclusive

[34] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2007), at 318.

[35] A. Branch and Z. Mampilly, *Africa Uprising: Popular Protest and Political Change* (London: Zed Books, 2015).

preserve of states. State-centric models of international law have long been challenged by legal scholars and activists, primarily from the Global South, who argue that social movements and struggles can also be sources for international law.[36]

African lawyers, academics and activists involved in the court can thus look to social movements and popular struggles as proposing new ways of doing international criminal justice and as imagining ways to make international criminal justice responsive and accountable to those it claims to serve.[37] Upon that basis, African discourses and institutional experiments around the ACC may be able to help reform dominant understandings of international criminal justice more generally, opening new possibilities that have been foreclosed by the restrictive state-centred international law.[38] The ACC may help catalyze a process by which international law comes increasingly to be understood as a fragmented, multi-centric terrain in which multiple histories weave together within a broad ethical-political framework; in Upendra Baxi's words, these Third World understandings of international law build upon 'histories of mentalities of self-determination and self-governance, based on the insistence of the recognition of radical cultural and civilisational plurality and diversity … They suggest constantly the need for the reinvention of our common insurgent humanness.'[39]

An approach to international law that looks to popular movements and democratic demands for guidance for the ACC would also ensure that the international courts do not monopolize the discourse of global justice.[40] International criminal law, embodied in the ACC, will be only one part of broader political struggles, one tool among many used by progressive political forces in the service of emancipation, instead of being a new constitution to which all must conform.

Thus, the decisions and punishments meted out by the ACC may be of less importance than the symbolic value of the legal strategies it legitimates.

[36] B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

[37] L. Eslava and S. Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law', 3 *Trade, Law and Development* (2011) 103–30.

[38] Deya emphasizes the innovative dimension of African international law; Deya, supra note 2, at 26.

[39] U. Baxi, 'What May the "Third World" Expect from International Law?', 27 *Third World Quarterly* (2006) 713–25, at 714.

[40] K. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (New York: Cambridge University Press, 2009); S. Nouwen and W. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', 13 *Journal of International Criminal Justice* (2015) 157–76.

The ACC leads to transformations in imaginations, in ideas about what is accepted as normal and what is refused, what is justiciable and what is outside of justice. The ACC shows that there are legitimate alternatives to the vision of global justice embodied in any court and opens the debates over justice to broad plural determination. This reinforces the central lesson of the ICC in Africa: that international criminal tribunals are simply unable to function in accordance with their legitimating ideology of a single, unitary court on the international level. Rather, they are always part of a political context and will always be politically determined. And as that political context, if it is democratic, will be plural and contested, so will international law be articulated differently by different political forces. Legal analysis and activism, at the ACC and more broadly, should begin from a recognition of the plurality of African popular struggles and respond to those struggles through deliberation, debate and contestation instead of rejecting the accountability of international courts through a spurious denial of international criminal law's inescapably political nature.

PART II

The Criminal Law Jurisdiction of the African Court

A

The Crimes

8

A Classification of the Crimes in the Malabo Protocol

CHARLES C. JALLOH

1. INTRODUCTION

Today, when it comes to penal matters, legal scholars and practitioners of international law tend to draw a distinction between 'international crimes' and 'transnational crimes'. But it would be misleading to suggest that there is consensus on the precise meaning of these terms. Authors have assigned them a wide variety of definitions in the literature. For our purposes, the phrase 'international crimes' should be taken to mean 'breaches of international rules entailing the personal criminal liability of the individuals concerned'.[1] This conception is similar to, but broader than, that preferred by a group of scholars who have described 'international crimes' as 'those offences over which international courts or tribunals have been given jurisdiction under general international law'.[2]

In contrast, the notion of 'transnational crimes', apparently conceived by a United Nations body, is said to describe 'certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country'.[3] Or, put more succinctly, 'transnational crimes' is a reference to 'crimes with actual or potential trans-border effects'.[4] That is to say, those offenses 'which are the subject of international suppression conventions but for which there is as yet no international criminal jurisdiction'.[5]

[1] A. Cassese, *International Criminal Law* (2nd edn., Oxford University Press, 2008), at 11.
[2] R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn., Cambridge University Press, 2014), at 3.
[3] G. Mueller, 'Transnational Crime: Definitions and Concepts', in P. Williams and D. Vlassis (eds.), *Combating Transnational Crime* (Frank Cass, 2001) 13–21, at 13. See also N. Boister, 'Transnational Criminal Law?', 14 *European Journal of International Law* (2003) 955, 953–76.
[4] Cryer, supra note 2, at 5.
[5] Ibid.

The simplicity of this two-part categorization of crimes understates the surprising uncertainty, and masks serious philosophical and other disagreements among scholars, as to what features make some crimes 'international' and others 'transnational' in nature.[6] It also elides the confusion about the legal consequences, if any, that may flow from the commission of the crimes that fall into these apparently separate categories for individuals as well as for States. The bare distinction further implies that there is greater clarity than actually exists regarding what specific offenses fall into these seemingly impermeable categories, their origins or sources, and the criteria for their inclusion in one basket or the other, and in some cases, not at all.

As Bassiouni has argued, part of the reason for the current uncertainty stems from the lack of a widely accepted definition of what an international crime is and the absence of universally accepted criteria regarding what qualifies certain penal prohibitions as crimes under international law.[7] The result is that entire legal regimes ('International Criminal Law' or 'ICL' and 'Transnational Criminal Law' or 'TCL') centred around what Cryer calls 'fuzzy sets'[8] have developed in a rather 'haphazard'[9] manner, with the distinction between the various groups of offenses and the categories of which they form a part varying – sometimes dramatically – based on the nature of the social, State or community interest that is being protected as well as the harm that is being sought to prevent through criminalization.

This chapter is an early exploration into the regional (African) approach to international and transnational crimes. In the absence of a unified theory of what makes each of the above crimes groupings what they are, under international or transnational law, Section 2 will start with an examination of the five-part criteria that a prominent international law scholar has offered as a possible way to distinguish between various offenses. Though perhaps imperfect, as they were deduced based on empirical observations of what States seem to do rather than rooted in a grand penal theory, Section 3 will then use that suggested classification to assess the material jurisdiction of the African

[6] For further discussion of at least four distinctive meanings of 'international criminal law', see C. Kress, 'International Criminal Law' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2009), available online at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1423?rskey=bSnTKk&result=1&prd=EPIL (last visited 26 February 2017).

[7] M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn., Martinus Nijhoff Brill, 2013) at 142.

[8] R. Cryer, 'The Doctrinal Foundations of the International Criminalization Process', in M. Cherif Bassiouni (ed.), *International Criminal Law* (3rd edn., Martinus Nijhoff, 2008) at 108.

[9] Bassiouni, supra note 7, at 142.

Court of Justice and Human and Peoples' Rights ('African Criminal Court'[10] – the first regional criminal court to be established anywhere in the world). The legal framework for the latter tribunal has already attracted serious criticism. Part of the reason for the controversy stems from its inclusion of an explicit immunity clause for incumbent senior government officials and its perceived status as a result of African government backlash against the fledgling permanent International Criminal Court.

A less strident criticism, which is nevertheless theoretically interesting and therefore worthy of consideration, arises from the Malabo Protocol's fusion of 'international' and 'transnational' crimes in a single treaty. I argue in this chapter that, rather than focus on which particular offenses are placed into one or the other of this presently largely binary scheme, the emerging practice of African States suggests that it is probably more helpful for legal scholars to start examining the source of the relevant prohibitions and the reasons for their criminalization as well as the legal consequences and implications of their commission. This would better enable us to appreciate the similarities, and differences, between these crimes. It also permits us to explore synergies and best practices that may exist to strengthen each of their underlying legal frameworks.

The last part of the chapter, Section 4, draws some preliminary conclusions. It thereby sets the stage for the analysis that follows in the rest of this part of the book.

2. THE CHARACTERISTICS OF INTERNATIONAL AND TRANSNATIONAL CRIMES

This chapter stars from the premise that, in the ordinary course, states in Africa – or for that matter any other region of the world – are free to criminalize any conduct that they deem will cause harm to individuals or communities within their jurisdiction or within their effective control, subject

[10] Though the official name of the court is African Court of Justice and Human and Peoples' Rights, for convenience if perhaps at the expense of precision, I will use the short-hand 'African Criminal Court'. This should not detract from the fact that as this volume shows, in addition to criminal law issues, the wider court has a general jurisdiction over inter-state disputes within the Africa region as well as the competence to hear human rights complaints brought by individuals as well as states – all of which would be heard by three different sections of the court. The reference to the African Criminal Court allows us to focus us only on the criminal jurisdiction of the tribunal. See, in this regard, Article 8 (nomenclature) of African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (adopted at the Twenty-Third Ordinary Session of the Assembly of Heads of State and Government Held in Malabo, Equatorial Guinea, 27 June 2014) ('Malabo Protocol').

only to constitutional or other limits imposed by international law. In prescribing crimes, they are at liberty to act alone under national law. Where the systems contemplated at the national level are not doing the job for one reason or the other, say because of a lack of willingness or lack of capacity to do so, they are free to come together to do collectively what each of them are able to do on their own. In that sense, and reflective of their sovereign nature and the traditional bases of jurisdiction recognized under international law, they can freely assert their jurisdiction to prescribe offences as well as delegate their jurisdiction to adjudicate, and jurisdiction to enforce to a domestic or a regional court – such as that proposed by the AU for the African region – or even an international penal tribunal established for such purpose. It follows that the blending of various types and categories of crimes into a regional treaty does not necessarily require additional doctrinal justification for them to prohibit such offenses and to seek to punish those who perpetrate them.

A. *The Nature of International and Transnational Crimes*

The doctrinal match for the criminological phrases *international crimes* and *transnational crimes* reflect a plethora of definitions, many of which are not always consistent. For starters, the former as classically understood, was usually taken as a reference to what some scholars today more frequently label *transnational criminal law*. That is, the body of domestic law referring to those parts of municipal law addressing crimes that has cross border or extraterritorial origins and or effects.[11] This was the case at least until the United Nations Security Council established the first modern ad hoc international criminal tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively. But the terminological confusion, which tended to lead to the loose equation of transnational criminal law with 'traditional international criminal law' and the law concerning the crimes within the jurisdiction of the UN ad hoc tribunals as 'new international criminal law,' does not end there.[12]

In fact, it appears to also go the other way. So that, in the literature, it is not unusual to find authors alluding to *transnational criminal law* when they proceed to actually discuss 'crimes of international concern.'[13] The latter would cover a wide range of conduct with little commonality other than the

[11] N. Boister, 'The concept and nature of transnational criminal law', in N. Boister and R. Currie (eds.), *Routledge Handbook of Transnational Criminal Law* (Routledge, 2015) at 11.

[12] C. Warbrick, 'International criminal cooperation and the new international criminal law', in K. Koufa (ed.), *The New International Criminal Law. Thesaurus Acroasium, vol. XXXII* (Sakkoulas Publications, 2003), 209–80.

[13] Boister, supra note 11, at 11.

decision, or acceptance, by States that some form of inter-State cooperation regime or some coordinated international action must be taken by them within the domestic sphere to suppress such behaviour.[14] It is also interesting that, in a way, the resurrection of State interest in the so-called serious crimes of international concern forming part of what many of us would consider *international criminal law*, at least as administered by the International Criminal Court ('ICC'), originated in part from Trinidad and Tobago's proposal to criminalize drug trafficking – itself a classic transnational crime – which ironically did not make it into the statute of the permanent international penal tribunal.[15] Yet, in a further irony, the most recent work on a draft crimes against humanity convention, at the International Law Commission ('ILC'), has drawn considerable inspiration from the statute of the ICC for its definition of the offence at the same time as it placed great reliance on various global transnational crimes conventions for its mutual legal assistance, extradition and other clauses. Both fields, it seems, are beginning to converge substantively as well as procedurally.

In any event, despite the lack of definitional clarity, the traditional distinction between international and transnational crimes on the one hand, and between international and transnational criminal law on the other, now provides at least a generally agreed basis for scholars to distinguish between so-called *international* crimes *stricto sensu* (that is the post-Nuremberg law governing the so-called 'core crimes' – genocide, crimes against humanity, war crimes and the crime of aggression) and *transnational* crimes (covering a diverse set of crimes such as slavery, drug trafficking, or money laundering). The former are seen as capturing those acts that implicate the fundamental values of the international community as a whole. As the Rome Statute of the International Criminal Court (ICC Statute) would later put it in its preamble, those offenses are among those that particularly 'threaten the peace, security, and well-being of the world'.[16] On the other hand, transnational criminal law provides for the exercise of national jurisdiction by states in respect of conduct which has transnational implications. These, by their nature, involve or affect the interests of more than one State.

But, in an attempt to draw clear boundaries to help minimize the conflation, scholars have suggested that the crucial distinction between these crime

[14] Cryer, supra note 8, at 146.

[15] Letter dated 21 Aug 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General, UN Doc. A/44/195, (1989); UN General Assembly, UN Doc. A/44/49 (1989).

[16] See *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), at Preamble § 3.

categories is that in addition to the distinctive normative goal of protecting core Grotian or Kantian community values, as Boister and Kress have suggested, international criminal law actually creates a system of direct penal responsibility for individuals under international law.[17] Here, in this category of crimes, international law basically bypasses municipal law and criminalizes behaviour directly. In other words, these are universal crimes condemned by international law. They must thus be punished irrespective where in the world they are committed and by whom.[18]

On the other hand, when it comes to so-called *transnational criminal law*, there is an *indirect system* of liability. That system imposes obligations on States Parties to criminalize certain conduct under their domestic laws as much as some core international crimes conventions do. The obligation here is placed on the State, not on individuals. States undertake to prohibit and punish those among the latter category who commit the crime. The obligation is usually imposed in political contexts that indicate the national authorities want to jealously guard their jurisdiction to prescribe, their jurisdiction to adjudicate and their jurisdiction to enforce the relevant prohibitions rather than delegate them to a distant international penal tribunal over which they have may not have meaningful control.

The regime of ICL now largely addresses itself directly to the individual. It anticipates enforcement of the prohibitions under both national and international law at the *national*, and in some cases, the *international* level. The TCL regime, for its part, addresses itself primarily to the State and uses national courts primarily as a means for enforcement. In other words, the latter reflects a web of mutual interstate obligations generating national duties to prohibit the conduct. This is usually supplemented with a specific treaty-based duty to legislate and for a duty to either investigate and prosecute or to extradite the perpetrator, and typically limits the availability of the traditional political offence exception. The degree of enforcement of transnational crimes, as well as coordination between States, will depend on the nature of the specific offence under consideration. It will also reflect the extent to which they (i.e. States) desire to address the threat stemming from the prohibited conduct. The prohibition of such crimes in transnational criminal law regime reflects the concern with the self-interest of sovereignty conscious States.

[17] Boister, Supra, note 11 at 11. Credit for the description of international criminal law as entailing direct and indirect systems of enforcement goes to Bassiouni. See, in this regard, his treatise on International Criminal Law cited above, supra note 7.

[18] K. J. Heller, 'What is an International Crime: A Revisionist History', 58 *Harvard International Law Journal* 2 (2017).

The ICL regime, while secondarily accounting for the stability and other interests of states, seems mainly aimed at protecting human beings and the preservation and even promotion of certain fundamental values within the '*jus puniendi*'[19] of the international community as a whole.[20] Values that include the protection of human rights and freedoms, including the right to life and at least a soft right of victims of atrocity crimes to some form of remedy and reparation.

Still, the distinction between ICL and TCL should not be overemphasized. There are certainly some remarkable overlaps between the two regimes. For instance, while ICL did insist from its founding – in what was then a rather radical idea – 'that individuals have international duties which transcend the national obligations of obedience imposed by the individual state',[21] some of the main treaties that prohibited conduct that is now widely considered to fall within the realm of international offenses initially permitted or imposed upon states the duty to prosecute or punish such criminal conduct within their municipal law. The addition of international criminal courts as enforcement mechanisms, initially only ad hoc and eventually also permanent, came much later. At present, there is no Transnational Criminal Court, in the same way that there is an ICC. Nonetheless, for both TCL and ICL offenses, states still bear the primary legal obligation – at least at the domestic level – to investigate and prosecute the suspects who may have committed such crimes. A failure to do so may, in some cases, give rise to a duty to extradite that person upon request of another State willing and able to prosecute.[22] This is the case for crimes like torture, which is both an international crime found under war crimes and crimes against humanity, but also

[19] See Kress, supra, note 6 (the Latin refers to the state's right to punish criminal offenses pursuant to its laws within the jurisdictional limits of international law).

[20] As the ICTY put it in Tadić, 'a state sovereignty approach has been gradually supplanted by a human being oriented approach … International law, while of course duly safeguarding the legitimate interests of States must gradually turn to the protection of human beings'. See Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, *Prosecutor v. Tadic*, (IT-94–1), Appeals Chamber, 2 October 1995 § 97. See, further on this, R. Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' 16 *European Journal of International Law* (2006) at 979.

[21] 'International Military Tribunal at Nuremberg, Judgment and Sentences' 41 *American Journal of International Law* (1947) 172, at 221.

[22] The ILC studied the obligation to prosecute or extradite and produced several careful reports. Upon conclusion of the work, perhaps due to controversy on the outcome of the project, it only recommended the General Assembly take note of its 2013 and 2014 report which it expected would offer useful guidance to States. See, in this regard, *Report of the International Law Commission, Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014)*, UN Doc. A/69/10, 2014 at paras. 63–64.

a separate subject of a suppression treaty (i.e. the Convention Against Torture[23]). Of course, in the case of what we might label purely international crimes in relation to one of the current 123 States Party to the ICC, complementarity might require the unwilling and/or incapable State to surrender the suspect to The Hague. The complementarity principle, as a jurisdiction-sorting rule that initially gives priority to concrete actions of national over international authorities, further supports the argument that the distinction should not be overemphasized.

Unlike in most domestic systems, as compared to the international level, there is not at present a comprehensive penal code of crimes at the international level. The ILC, which was tasked in 1947 by the United Nations General Assembly with producing a draft code of crimes for states to consider for adoption, appear to have had no choice but to focus – as per the terms of its actual mandate concerning the topic – on the relatively narrow list of 'offenses against the peace and security of mankind'.[24] Despite its many useful contributions, including to the development of the corpus of modern international criminal law through, inter alia, the formulation of the Nuremberg Principles and the draft statute for the permanent international penal court, in addition to the draft code of crimes against the peace and security of mankind. The ILC did not explicitly adopt a comprehensive theoretical framework setting out preconditions for an international crime or the policy that should guide international criminalization when the project was finally completed in 1996.[25]

B. A *Workable Analytical Framework*

Bassiouni, who probably undertook one of the earliest and most complete efforts to clarify the concept of international crimes, has rightly observed that the international criminal law literature is replete with terms all of which are aimed

[23] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, (adopted 10 December 1984, entered into force 26 June 1987).

[24] G.A. Res. 174/ (II), 21 November 1947. The ILC considered that its mandate was limited to offences which contain a political element and which endanger the maintenance of international peace and security. This implied that it necessarily excluded, from the start, offenses such as piracy, drug trafficking, human trafficking, counterfeiting, etc. See, in this regard, the *Report of the International Law Commission on its Second Session, 5 June to 29 July 1950*, UN Doc. A/1316, 1950, § 149.

[25] See *Report of the International Law Commission on the work of its forty eighth session, 6 May–26 July 1996, Official Records of the General Assembly*, Fifty-first session, Supplement No. 10, UN Doc. A/51/10, 1996; Bassiouni, supra note 7, at 141.

at identifying the various crimes categories at the international level.[26] This includes the use of the descriptors such as crimes under international law, international crimes, international crimes *largo sensu*, international crimes *stricto sensu*, transnational crimes, international delicts, *jus cogens* crimes, *jus cogens* international crimes, and even a further subdivision of international crimes referred to as core crimes.[27] He proposed to bring some type of order by seeking to address two things. First, the criteria that should guide the policy of international criminalisation. Second, after having done so, to identify the particular characteristics the presence of any of which would, if found, be sufficient to delimit what constitutes an international crime.

With respect to the policy criteria, Bassiouni suggested five main guidelines, as follows:

(a) the prohibited conduct affects a significant international interest, in particular, if it constitutes a threat to international peace and security;
(b) the prohibited conduct constitutes egregious conduct deemed offensive to the commonly shared values of the world community, including what has historically been referred to as conduct shocking to the conscience of humanity;
(c) the prohibited conduct has transnational implications in that it involves or effects [*sic*] more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries;
(d) the conduct is harmful to an internationally protected person or interests; and
(e) the conduct violates an internationally protected interest but it does not rise to the level required by (a) or (b), however, because of its nature, it can best be prevented and suppressed by international criminalization.[28]

[26] This, of course, is not the only way to think of international crimes. There are various others discussed in the literature. The choice to focus on Bassiouni's approach is a pragmatic one, since his work is highly influential in this regard and constitutes a major attempt to advance discussions of this topic in the field. For a review of other approaches, in probably the most complete study of the concept of international crimes since Bassiouni's attempt, Einarsen carries out a detailed review which situates Bassioni's work in the literature, something that is possible in a monograph, but not in the context of this short chapter. Readers should see, in this regard his thoughtful treatment, T. Einarsen, 'The Concept of Universal Crimes in International Law', *Torkel Opsahl Academic EPublisher* (2012).

[27] Bassiouni, supra note 7, at 142.

[28] Bassiouni, supra note 7, at 142–3. For a thoughtful critique of this criteria, see Cryer, supra note 8, at 125.

Having set out the above criteria, he next considered the ten features that make something an international crime in international treaty law. These were:

(1) explicit or implicit recognition of proscribed conduct as constituting an international crime, or a crime under international law, or a crime;
(2) implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish;
(3) criminalisation of the prohibited conduct;
(4) duty or right to prosecute;
(5) duty or right to punish the proscribed conduct;
(6) duty or right to extradite;
(7) duty or right to cooperate in prosecution, punishment (including judicial assistance);
(8) establishment of a criminal jurisdictional basis;
(9) reference to the establishment of an international criminal court or international tribunal with penal characteristics; and
(10) no defence of superior orders.[29]

The assessment of whether a particular crime fulfils one or more of the foregoing characteristics could probably best be done empirically. The presence of any of those characteristics, in any convention, was thus apparently sufficient in the practice of states for him to label the prohibited conduct an 'international crime'.[30]

Several observations can be made about the above policy criteria and the characteristics of international penalization. First, Bassiouni's interesting scheme appears to have found some general support among scholars as a useful starting (not ending) point for discussion.[31] It offers a workable framework for discussion on the classification of such crimes, though their full practical consequences cannot be explored here given our limited focus. Nonetheless, as some academics such as Cryer have noted, the foregoing criteria are not necessarily 'self-applying, and the judgments that they are fulfilled are, for the purpose of positive international criminal law, subjective'.[32] Second, and as Einarsen has also observed, Bassiouni does not explain the sources of the five policy criteria.[33] Rather than being grounded on a

[29] Bassiouni, supra note 7, at 145.
[30] Ibid. at 143.
[31] Indeed, I would have liked to further interrogate this theoretical framework. But reasons of space do not permit me to do so in this case.
[32] Cryer, supra note 8, at 125.
[33] Einarsen, supra note 26, at 155.

theoretical framework, they appear to be descriptive of a wide variety of penal treaties thereby raising questions about their potential prescriptive value. Third, the history of international criminalization does not always show that States have systematically or consciously adopted and applied these criteria objectively when determining what offenses to prohibit or not. This would be consistent with the free hand that they have under principles of international law to regulate matters within their domestic spheres.

Nonetheless, by providing an empirical study based starting point for debate, it seems sufficiently clear that we can probably judge whether some of the crimes that have been proposed for the African Criminal Court offer a basis to regulate conduct as criminal in nature. This, of course, goes above and beyond what is required because international law does not demand a justification from States in their assertion of jurisdiction – as the Permanent Court of International Justice clarified in the classic *Lotus* Case, a position that has been admittedly somewhat softened since then. We can still nonetheless query, by careful analogy, whether the mixed basket of crimes contained in the Malabo Protocol carry with them some or all of the similarities and logic of the established crimes to explain, if not necessarily justify, their repression at the regional (i.e. African) level. To the extent that we are here contemplating a system that has been identified as far from coherent, in any event, this useful analytic scheme demonstrates that the variety of offences contained in the regional African instrument may not be outside the norm as may at first blush appear.

Based on the above guidelines, Bassiouni's study, which obviously reflects a broad instead of narrow conception of what gives rise to international crimes such that it is inclusive of what some might ordinarily consider 'transnational' crimes, identified the presence of one or more of the penal features in 281 conventions. He argued that, while it would be ideal for all or most of these ten characteristics to appear in every penal treaty, this was simply not the reality.[34] He went on to identify about 27 crimes in existing international conventions, which he further subdivided into four general groupings: 'truly international' crimes; 'transnational' crimes; 'partly international or transnational' crimes; and 'international crimes.' The practicality of these groupings being the way to enhance their prevention and suppression.[35] These four broad classes seem to mirror each other and differ only in the quality of being pure or mixed as the language of 'truly' or 'partly' indicate.

[34] Bassiouni, supra note 7, at 145.
[35] Ibid. at 147.

Unlike treaties such as the ICC Statute, instruments addressing the phenomenon of transnational crimes do not establish direct penal liability by defining specific crimes in the same manner that, for example, genocide or crimes against humanity are delineated. Instead, by accepting to sign on to such a treaty as noted earlier, the State undertakes to criminalise in its domestic law the prohibited conduct as well as to provide penalties for the violations. Though the matter may not yet be entirely settled, the United Nations Convention against Transnational Organized Crime has provided some useful guidance on what criteria a crime must fulfil to fall within the so-called 'transnational' crimes category. Under this approach advanced by the UN, much like Bassiouni's ten penal characteristics for what makes something an 'international crime', the presence of one or more of the following four factors is said to be determinative of 'transnational crime' status:

(1) it is committed in more than one state;
(2) it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state;
(3) it is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; and
(4) it is committed in one state but has substantial effects in another state.[36]

Under this methodology, we may conclude that the transnational nature of a crime apparently relies on the existence of cross-border geographical dimensions. This is supported by the main literature on transnational criminal law which seeks to add definitional certainty on TCL as a category. It also implies the fact of several States coming together to engage in some type of cooperation to stem the perpetration of the crime as part of protecting their individual and collective interests.

3. WITHER THE CATEGORIES? THE CLASSIFICATION OF CRIMES IN THE MATERIAL JURISDICTION OF THE AFRICAN CRIMINAL COURT

A. *The Context*

The African Court of Justice and Human and People's Rights, whose creation is contemplated by the Malabo Protocol which, as of writing, has only been

[36] See *United Nations Convention against Transnational Organized Crime*, 2225 U.N.T.S. 209, 2000 (which entered into force on 29 September 2003), Art. 3(2). The convention has received wide endorsement, including from Africa, with 187 parties as of this writing.

signed by eleven African States, will exercise jurisdiction over general, criminal, and human rights matters through three different chambers:

(1) a General Affairs Section;
(2) a Human and Peoples' Rights Section; and
(3) an International Criminal Law Section.[37]

For the limited purposes of this chapter, I do not engage on the first two types of jurisdiction which are carefully evaluated by other colleagues in this volume. Rather, I ponder the subject matter competence of the last of the three foregoing sections in a way that should inform the subsequent chapters that follow on the specific crimes. More specifically, I will examine what the Malabo Protocol defined as 'international' crimes as listed in its Article 28A. There is, of course, much that could be said about the subject matter jurisdiction of the African Criminal Court, triable in the International Criminal Law Section.[38] However, the discussion here is limited only to the description ('international crimes') that the drafters gave to the 14 crimes contained in the court's subject matter jurisdiction. This issue is of interest, not only because of the seeming confusion that exists in the literature on what makes a crime an international as opposed to a transnational one, which traditional distinction we could use the Malabo Protocol to test, but also because it is evident that the invocation of that label in the circumstances of this one instrument will be controversial. Controversial because, at the least, the classification of the crimes as 'international' threatens to undo the conventional paradigm among scholars and policymakers that, until recently, attempted to draw a somewhat neat division separating international from transnational crimes.

Partly because of this, and the way the Malabo Protocol relies on an eclectic mix of treaty sources for the crimes contained within the African Criminal Court's jurisdiction, it is important to discuss these offences. This exercise becomes that much more necessary because it offers a sufficient basis to compare the African regional instrument with the international penal tribunals that have preceded it, again, even if this is not necessarily required to justify the form of the regional prohibitions under international law. The clarification may also be helpful for both theoretical and practical reasons. Indeed, in relation to the latter aspect, some scholars, such as Van der Wilt, have already relied on the conventional international versus transnational crime distinction to propose that this categorization could enable a division of labour that could help avert future jurisdictional conflicts between the

[37] See Malabo Protocol, supra note 10, at Art. 9.
[38] See, in this regard, part II of this volume.

African Criminal Court and the ICC.[39] This is an interesting proposal, though given the arguments of this paper, I remain doubtful whether the international-transnational crimes divide could by itself be a sufficient basis to properly resolve any jurisdictional conflicts that might arise.

B. *The Baskets of Crimes in the Malabo Protocol*

The ACC contains a more extensive list of fourteen crimes within its subject matter jurisdiction. It differs, in that respect, from the international and other tribunals that preceded it. Indeed, since the seminal Nuremberg trials in 1945, international criminal courts have tended to include only three main offenses within their jurisdictional ambits. Part of the reason for that stems from the practical reality that only the gravest crimes that have been widely condemned under international law can be realistically prosecuted at the international, as opposed to, the national levels. The more extensive list of crimes in the African Criminal Court are, as listed in the constitutive instrument, (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. The form of the list does not appear to imply any hierarchy. The first three, and the last one, are typically considered to be among the worst crimes known to international criminal law.

Applying Bassiouni's ten penal characteristics to each of these offenses in the Malabo Protocol, if we assume all ten are present in each crime, they could reflect up to one hundred and forty. However, even on a cursory review, it becomes apparent that not all of the identified characteristics can be found in each crime. This is to be expected since some of the crimes may contain ideological or political components (for example, the crime of unconstitutional change of government), which implies that they may be expected to have a lower number of actual penal characteristics. Conversely, the offenses lacking political or ideological features might contain a larger percentage of penal characteristics. Whatever the case, for convenience, we can at the broadest level of generality sub-divide the fourteen crimes included in the Malabo Protocol into Bassiouni's four main categories. These, it will be recalled, are (1) international crimes, (2) transnational crimes, (3) partly

[39] H. van der Wilt, 'Complementary Jurisdiction' in G. Werle, and M. Vormbaum (eds.), *The African Criminal Court: A Commentary* (T.M.C. Asser Press/Springer, 2016), 187, at 202.

international crimes and (4) partly transnational crimes, which can thus be depicted graphically as follows[40]:

TABLE 8.1

1.International crimes	2.Transnational crimes	3.Partly international	4.Partly transnational
Aggression	Piracy	Terrorism	Corruption
Genocide	Mercenarism	Unconstitutional change of government	
Crimes against humanity	Money laundering		
War Crimes	Trafficking in persons		
	Trafficking in drugs		
	Trafficking in hazardous wastes		
	Illicit exploitation of natural resources		

The discussion, which follows next, considers some of the main features and sources of the crimes contained in each of these four groupings.

1. The International Crimes in the Malabo Protocol

As a branch of public international law, international criminal law relies on the sources of international law. The formal sources are those listed in Article 38(1) of the Statute of the International Court of Justice.[41] That is: treaties, custom, general principles of law, and as subsidiary means of determining the law, judicial decisions and the writings of highly qualified publicists. It follows that, to the extent that African States have included international crimes in the statute of their regional court, we might expect that they derive from the explicit recognition of the proscribed conduct as constituting a crime under international law, whether found in treaties or pursuant to customary international law composed of state practice and *opinio juris*.

[40] Another possibility, which would have diverged somewhat from Bassiouni's approach, would have been to divide the crimes into only international or transnational crimes. It would also be possible to distinguish public order crimes from the economic and environmental crimes.

[41] Charter of the United Nations and Statute of the International Court of Justice, 59 Stat. 1031, [the Charter], 1055 [ICJ Statute], T.S. No. 993 [ICJ Statute at 25], 3 Bevans 1153 [ICJ Statute at 1179], 26 June 1945.

The four crimes in the Malabo Protocol that are classified as international in nature are sometimes referred to as 'core'[42] international crimes, to wit: aggression, crimes against humanity, genocide and war crimes. It is obvious that these widely recognized crimes are rooted in international law. Two of the four (that is, genocide and war crimes) are expressed in universal multilateral treaties that are widely endorsed by African States as well as in widely known international instruments such as those produced by the ILC.[43] The other two (that is, crimes against humanity and the crime of aggression) have not yet been codified in stand-alone treaties. Still, there have been several international instruments which have defined them. Those definitions have generally shaped the more specific ones included in the statutes of various international criminal tribunals. In the case of crimes against humanity, following on persistent academic proposals, there is at present an ongoing effort to develop a draft global convention on the topic within the ILC which has completed the first reading in the summer of 2017 and is expected to accomplish second and final reading in the summer of 2019.[44] The crime of aggression has been defined in various international instruments, but excepting the carefully and slowly crafted definition contained in the ICC Statute, these have not been treaties.

The inclusion of these four serious international crimes in the Malabo Protocol suggests that African States take seriously their legal duty, presumably

[42] It can be noted that, in the views of some writers and often for unexplained reasons, the 'core crimes' are three in total. These are typically genocide, crimes against humanity, and war crimes. It is unclear what drives this classification. For instance, it could be speculated that these are considered 'core' offenses because they are some of the world's worst crimes (i.e. based on gravity criterion). Another possibility might be to say that these are the types of crimes, which go beyond individual conduct to encompass state policy or action. Or it maybe that this is a pragmatic choice because, since Nuremberg, we have only had these three crimes as prosecutable offenses in the statutes of the various ad hoc international penal courts. Yet, even such rationales would be unsatisfactory. It is clear that on all these ways of thinking of the features that make genocide, crimes against humanity and war crimes special enough to be placed in the heinous category, aggression is no less significant because it seems equally grave. In fact, perhaps more than any other crime, it can also be linked to state action/policy or conduct. It therefore makes sense, in my view, to include aggression in my classification of what amount to 'core crimes' under international law.

[43] The reference here is to the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S., Dec. 9, 1948; First Geneva Convention, 75 U.N.T.S. 31, 12 August 1949; Second Geneva Convention, 75 U.N.T.S. 85, 12 August 1949; Third Geneva Convention, 75 U.N.T.S. 135, 12 August 1949; Fourth Geneva Convention, 75 U.N.T.S. 287, 12 August 1949. First Additional Protocol to the 1949 Geneva Convention, 1125 U.N.T.S. 3, 8 June 1977.

[44] The instruments, which have reflected varied definitions of crimes against humanity, are principally the Statutes of ad hoc international criminal tribunals set up by or with the support of the UN. Nonetheless, the ILC is presently working on the preparation of a crimes against humanity convention. Aggression (as crimes against peace) was defined at Nuremberg, but due to political and practical limitations, only again surfaced in the Rome Statute.

based on conventional and customary international law, to prosecute the most serious international crimes whenever they occur on the continent. The stated intention of the African Union in relation to their inclusion was apparently to create, within the African continent, a court that will have the competence to address these crimes to the highest international standards.[45] In other words, the African system sought to address them as they would have been dealt with by, for instance, the ICC or any other State responsibly exercising universal jurisdiction.[46]

Keeping these goals in mind, in terms of sequence, the decision of the Assembly of Heads of State and Government directing the establishment of the new tribunal specifically requested that the AU Commission ('AUC'), in proposing a treaty for their consideration, 'examine the implications of the Court being empowered to try international crimes *such as genocide, crimes against humanity and war crimes*'.[47] Thus, war crimes, crimes against humanity and genocide, were specifically identified as worthy of inclusion in the future regional court's instrument. This may have come partly because of the context of the creation of the African Criminal Court as a sort of more local alternative to the ICC. As to the fourth international crime (i.e. the crime of aggression), which was later included in the draft statute, the drafters argued that the language of 'such as'[48] in the Assembly decision implied that the list of the three core crimes was an illustrative instead of a closed list. It followed that a crime of similar gravity and significance, like the crime of aggression, could be properly included in the statute of the future court.[49]

The above meant that, by fiat of the political directive in the decision of the African Union's highest organ (the Assembly of Heads of State and Government) and the drafters' reading of it, the regional court would enjoy jurisdiction over four serious international crimes. Thus, it was not surprising that

[45] African Union Commission, *Report of The Study on the Implications of Expanding the Mandate of the African Court of Justice and Human Rights to Try Serious Crimes of International Concern*, October 2010, Legal/ACJHR-PAP/5 (II), at § 53 ('AUC Report').

[46] Ibid.

[47] My emphasis. See *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, AU/Dec.213(XII), 1–3 February 2009, § 3, adopted at Addis Ababa, Ethiopia; *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, AU/Dec.245 (XIII) Rev.1, 1–3 July 2009 § 3, adopted by the Assembly of Heads of State and Government, 13th Ordinary Session, Sirte, Libya.

[48] AUC Report, supra note 45, at 37.

[49] There is a debate concerning whether aggression can be prosecuted domestically or even regionally, See D. Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', *Oxford Institute for Ethics, Law and Armed Conflict*, (May 2010), www.elac.ox.ac.uk/downloads/dapo%20akande%20working%20paper%20may%202010.pdf (last visited 26 July 2018); See also Judgment, *Jones and Others v. UK*, (34356/06; 40528/06), § 213–5.

Articles 28B, 28C and 28D detailed the subject matter jurisdiction of the African Criminal Court concerning the core international crimes – genocide, crimes against humanity, war crimes respectively – those being the ones deemed to be the most serious crimes of international concern. They reproduced, in terms of which definitions of those offenses to use, those set out in the Rome Statute. The *Report of the Study on the Implications of expanding the mandate of the African Court of Justice and Human Rights to try serious crimes of international concern* ('AUC Report on the Amended African Court Protocol')[50] summed up the preferred approach of the drafters as follows: '... with regard to these three serious crimes [genocide, crimes against humanity and war crimes] where jurisdiction will inevitably be shared with the ICC, the definitions adopted should essentially be similar to (if not better than) those of the ICC.'[51]

The justification provided for this posture was two-fold.[52] First, though this may only be half true, the report claimed that 'in terms of the continuous development of law, the Rome Statute definitions represent the most current advances in definitions of these crimes. ... Anything less may be retrogression.' The second justification was framed by considerations of complementarity. The drafters took the view that it was necessary to reflect, in terms of the definition and content of crimes, the latest developments in international law as any variation between the Rome Statute and the African regional instrument portends challenges for complementarity practice.[53] As they put it: 'The ICC could be moved to indict a person who is already indicted before the African Court, for aspects of crimes which are covered in the Rome Statute definition and which are absent in the Amended African Court Protocol definition.'[54]

In the result, the Malabo Protocol definitions of the core international crimes reflected this approach. For example, regarding the crime of genocide, the regional instrument includes a new paragraph – among the established statutory or treaty list of genocidal acts – 'acts of rape and any other form of sexual violence'. The laudable goal here was to reflect more recent advances in the law of genocide – as developed by the International Criminal Tribunal

[50] See AUC Report, supra note 45, at § 53.
[51] See Ibid.
[52] See Ibid.
[53] Note that this is not complementarity à la Rome Statute (see Art. 17) but rather proposes a scenario of competing jurisdiction in respect of a particular situation or case. While the African Court can be said to be complementary to the ICC, the relationship is best described as one involving horizontal 'burden sharing' between two international tribunals.
[54] See AUC Report, supra note 45 at § 53.

for Rwanda ('ICTR') in the *Akayesu* case. Under that jurisprudence, rape acts were seminally determined to amount to genocide if they occur in the right context.[55]

It can be argued, as Ambos does, that the specification of the crime in this way was superfluous, given both *Akayesu* and the line of tribunal jurisprudence on sexual violence that has since followed it.[56] However, although a bigger leap in influencing the law of genocide might have been to expand the long contested list of so-called protected groups to cover political and perhaps even cultural groups, the explicit naming and shaming of this phenomenon present in many modern African and other conflicts is, on balance, a highly welcome development. By adding rape acts to the crime of genocide, in the Malabo Protocol, it gives greater clarity and legitimacy to the more modern prohibitions. It thus helps to address a traditional (gender) blind spot for international criminal law, especially given the more gender-neutral framing of the rape acts and the hopefully not-overbroad nature of the second part of the sentence ('any other form of sexual violence').[57]

On crimes against humanity, the Malabo Protocol reproduced essentially the same definition as that found in Article 7 of the Rome Statute. This includes the chapeau requirements, including the problematic State or organizational policy element, as well as the same list of prohibited acts as can be found in Article 7 of the Rome Statute.[58] However, there were also some differences in the text. For instance, the Malabo Protocol definitions includes in its list of forbidden acts an act amounting to crimes against humanity: the crime of torture. The definition contemplates, as 'torture', a crime against humanity delineated as the infliction of 'cruel, inhuman and degrading treatment or punishment' which in the ICC, as expressed in the Rome Statute and Element of Crimes, is limited to the perpetrator's 'intentional infliction of severe pain or suffering' of a person, 'whether mental or physical,' in his or her custody and infliction of '*severe* physical or mental pain or suffering upon one

[55] See Judgment, *Prosecutor v. Akayesu*, (ICTR-96–4-T), 2 September 1998. On Akayesu and its contribution to international law, see K. D. Askin, 'Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles', *Berkeley Journal of International Law* (2003) 288–349.

[56] K. Ambos, 'Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M),' in G. Werle and M. Vormbaum (eds.), *The African Criminal Court: A Commentary* (T.M.C. Asser Press/Springer, 2015) 39–40.

[57] Indeed, well beyond the Akayesu legacy, the broad formulation used here was intended to enhance the protections of victims of sexual violence given the myriad ways that these acts can be committed.

[58] See Charles C. Jalloh, What Makes a Crime Against Humanity a Crime Against Humanity, 28 *American University International Law Review* 2 (2013) 381–441.

or more persons'.[59] For the future African Criminal Court, a key issue will be how to distinguish the line between ordinary cruel treatment, on the one hand, and torture on the other (which entails a greater degree of cruelty), as that is defined under international human rights (not criminal) law. Indeed, because the difference between cruel treatment and torture is likely one of degree,[60] the African Criminal Court's definition captures within its prohibitive scope both severe and less severe forms of ill treatment. In a way, if we leave aside the concern about lesser degrees of inhumane treatment that should be prosecuted at the national level falling within the jurisdictional scope of the regional court, this expansion of the protective umbrella to victims of torture could be a positive expansion of the crime against humanity of torture.

Regarding war crimes, the definition of which was drawn from the Rome Statute, the Malabo Protocol retained, albeit in an attenuated form to the point of a near merger, the traditional distinction between international armed conflict ('IAC') and non-international armed conflict ('NIAC'). But it also attempted to reflect the latest developments in international criminal law, not always successfully or most logically, by adding 14 new war crimes to supplement Article 8C of the Rome Statute.[61] As to IACs, the African instrument included several new prohibitions amounting to war crimes as well. These included previously controversial issues, at least in the context of the ICJ and the negotiation of the Rome Statute, such as the addition of a penal prohibition banning the 'use of nuclear weapons or other weapons of mass destruction'. With no African State being a known nuclear weapons jurisdiction, and the high possibility that such weapons would only be deployed by non-African States, it can be argued that this grave crime has as its object those officials in more developed countries that may be tempted to deploy 'nuclear weapons'

[59] See 'Elements of the Crimes', *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session*, ICC-ASP/1/3 and Corr.1, 3–10 September 2002, at part II.B.

[60] There is some interesting case law from the European Court of Human Rights which have had to grapple with the difference between torture and ordinary cruel treatment, which will be instructive for the future African court. See, for instance, Judgment, *Ireland* v. *United Kingdom*, (5310/71), Court (Plenary), 18 January 1978; Judgment, *Tyer* v. *The United Kingdom*, (5856/72) Court (Chamber), 25 April 1978; Judgment, *Soering* v. *United Kingdom*, (14038/88), Court (Plenary), 7 July 1989.

[61] These inclusions, which were suggested by the ICRC office in Addis Ababa, Ethiopia included inter alia employing poison or poisoned weapons; employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices and employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

but also other 'weapons of mass destruction' during a war involving states from their region. In a region of the world that has seen its share of foreign interventions from former colonial powers, and sometimes other (more private) interests, this gap filling offense could be part of the process of Africanizing international criminal law which the mainstream ICL regime has so far largely resisted.

Finally, in defining the crime of aggression, the Malabo Protocol also used as a starting point the definition in Article 8bis of the Rome Statute. That definition, like all the international crimes discussed above, was taken as a floor – rather than a ceiling – allowing a tweaking of the definition in an attempt to address specificities of the African context.[62] The specificities of the African context include the extension of the manifest violations to not only cover those prohibited by the Charter of the United Nations, but also to those violations of the Constitutive Act of the African Union, as well as interference with 'territorial integrity' and 'human security' of the population of a State Party. It additionally envisages, as encompassing within the crime of aggression, a wider category of targeted actors that go beyond the traditional category of aggressor States. These would include a 'group of states' (presumably including military alliances such as the North Atlantic Treaty Organization), but importantly also 'non-state actors' and 'any foreign entity'. The expansion of the crime to include the latter elements arguably takes more seriously the role of non-state actors such as rebel, terrorists, and militia groups in the commission of heinous atrocities in Africa.

In sum, while it may be that some of the changes made in the Malabo Protocol to the established definitions of international crimes will not in practice add much to the effectiveness of the crime, or potentially even create interpretational difficulties, the takeaway for our more limited purposes of determining whether they are appropriately categorized as international crimes is clear. They are indeed international crimes, and because of their serious nature, they are in fact rightly considered to be among the 'core' offenses. In this regard, evaluating them against Bassiouni's five-part policy criteria, genocide, crimes against humanity, and war crimes, easily constitute prohibited conduct affecting a significant international interest because their commission constitutes a threat to international peace and security in respect of which African States are rightly concerned. They also entail prohibited conduct that is grave enough to shock the conscience of Africans. They are so

[62] A read of the AUC Report, supra note 45, which is the closest thing we have to a legislative history of the Malabo Protocol, indicates that the drafters made a distinction between crimes of serious international concern and those of particular concern to African states.

serious that they can rightly be deemed offensive to the commonly shared values of the world community, of which the African continent is but one part. The commission of these crimes hold international implications and typically involve or affect more than one state in their planning, preparation, or commission, whether through the nationality of their perpetrators or victims, or both, and the fact that the means employed to accomplish them frequently transcend national borders. Finally, the conduct that they attempt to regulate is harmful to internationally protected interests. It flows from this that these crimes, as easily the most widely recognizable ones under modern international criminal law, also fulfil most if not all the ten penal characteristics that Bassiouni's empirical study sought to identify and classify.

An important question arises whether, in light of the differences in the definitions of crimes introduced by the Malabo Protocol vis-à-vis other definitions of the same offenses in various international instruments, we might begin to see a form of fragmentation of international criminal law. The ILC Study on the issue of fragmentation highlights that rules of international law, including those in specialized regimes like that under study here, could have relationships of both interpretation and conflict. The ILC's draft conclusions and commentary suggests ways such conflicts could be avoided. Using interpretation as a tool, in the future, may prove useful or even be necessary in future discussions of this issue of regional/particular versus general international criminal law. Still, it would be hard to claim that the ad hoc nature of how ICL has developed to date reflect a coherent unitary model or even understanding of the concept of international crimes let alone a system of international criminal law.[63]

2. The Transnational Crimes in the Malabo Protocol

Besides the above international crimes, the drafters of the Malabo Protocol felt that they did not need to limit the jurisdiction of the African Criminal Court to the core crimes mentioned in the decision of the AU Assembly of Heads of State and Government. They reasoned that, since various African instruments had expressed concerns about several other issues, this had opened 'the door for the consideration of **other** crimes, which are of serious concern to'[64] the

[63] *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, A/61/10, (2006) § 251.

[64] See AUC Report, supra note 45, at § 58. (n 45) [emphasis in original].

African Union.[65] Having made this determination, the question arose as to how to determine those other 'serious crimes of concern to African states'. To delimit those, the drafters felt that they should examine treaties that had already contemplated serious matters that the Africa region and other regional economic communities on the continent had addressed over the years. The seven crimes placed in the 'Transnational Crimes' category in the above table (i.e. piracy, mercenarism, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources), along with the other remaining crime (i.e. corruption), were drawn from regional conventions as well as other international instruments that some African States had acceded to.[66] They were therefore essentially justified for inclusion in the Malabo Protocol on the basis of their nature and gravity. They were possessing intrinsic seriousness to the violations, the need to protect the peace, good order and stability of African countries, and in some cases, their serious impact on the countries and indeed the continent as a whole. In this regard, the African Union Commission, in preparing the draft Statute, sought to draw a gravity of the crime based distinction between the 'serious crimes of international concern' and those 'of serious concern to African states'.[67] They thus particularized the scope of the crimes using this approach.

For reasons of space, and considering that they are discussed at length by other authors in separate chapters in this book, I will not examine each of the individual crimes that I have placed in the transnational crimes category of the Malabo Protocol. Instead, as these are already analyzed in subsequent chapters in this book, I will take two examples (i.e. mercenarism and piracy), one reflecting how the drafters drew from a regional (i.e. African) treaty and the other from an international instrument that has been widely endorsed by African States.[68] These examples are arguably representative of the wider category of seven crimes in terms of their legal basis. So also is their transformation into regional (mercnearism) and international (piracy) nature such

[65] Ibid.

[66] Though it does not have any official status, a helpful starting point to understand the sources of the crimes contained in the Malabo Protocol can be found in the annex to Werle's and Vormbaum's edited collection.

[67] This distinction was drawn throughout the report. See AUC Report, supra note 45, at the same place.

[68] It may be asked whether the two examples selected here are sufficiently representative of the wider category of seven to justify treating only them. A related question could be whether the seven are similar in nature, their effect and their underpinning. I think, on the first issue, the answer is yes. On the second issue, their underpinning and effects are similar, though somewhat varied. This does not, in my view, take away from the limited conclusions drawn here.

as to account for their particularity for African states. First, recognising that mercenarism has long been an issue of concern to African states as an offense which has the potential to undermine regional peace and security, Article 28H of the Malabo Protocol draws on the 1977 Convention for the Elimination of Mercenarism in Africa.[69] Concluded under the auspices of the Organization of African Unity, the predecessor to the AU, the convention sought to prohibit the recruitment, training, using, and financing of mercenaries and mercenary activity as well as the active participation of a mercenary in an armed conflict or 'in a concerted act of violence' aimed at 'overthrowing a legitimate government or otherwise undermining the constitutional order of a state'; 'assisting a government to maintain power' or 'a group of persons to obtain power'; or 'undermining the territorial integrity of a state'. This crime, which is a form of extension of the crime of aggression,[70] is significant. Historically, the presence of all kinds of mercenaries in African wars has been significant from before during the period of colonization and since then. It was a kind of activity that was used to undermine the human rights and self-determination claims by African peoples against their colonial masters.

Second, I will refer to piracy, which many scholars would consider the oldest international crime. Be that as it may, since we do not need to resolve that debate here, Article 28F of the Malabo Protocol adopts the definition of the crime of piracy as can be found in Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982. The offence was added to the Malabo Protocol to address the problem of piracy, which has become a major topic of concern for African states and indeed the international community as represented by the United Nations. As was argued by the drafters, '[t]his old crime has acquired a renewed importance in Africa, especially because piracy off the East and West African Coasts has lately become a serious concern in terms of law and order, peace, security and stability, and commerce and economic development.'[71]

In this regard, again using Bassiouni's five part criteria, it can readily be shown that some of these crimes address prohibited conduct affecting a significant international or regional interest because those offences are presumed to generate a threat to regional or international peace and security. This, for instance, was the case with respect to piracy and mercenarism. The commission of these offences undermine peace and security in the Africa

[69] Organization of African Unity, *OAU Convention For The Elimination Of Mercenarism In Africa*, Doc. CM/817 (XXIX) Annex II Rev.1, (entered into force in 1985).

[70] Bassiouni, supra note 8, at 207.

[71] See AUC Report, supra note 45, at § 60.

region. Some of the other crimes entail prohibited conduct which is so egregious as to shock the conscience of Africans. They may be deemed offensive to the commonly shared values of the African community. This can also be said to be the case, in an admittedly more dubious argument, with respect to money laundering as an economic crime, but perhaps less so trafficking in persons, drugs and the illegal dumping of harmful hazardous wastes, as well as crimes like illicit exploitation of the natural resources of entire societies. Of course, all the prohibited conduct captured by these crimes may have transnational implications in terms of involving or affecting more than one African (or even non-African) State in their planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or the fact that the means employed towards their accomplishment transcend national borders. In some of these crimes, the criminalized conduct is harmful to either or both internationally and regionally protected interests.

Most if not all of these crimes also reflect one or more of Bassiouni's ten penal characteristics. They implicitly or explicitly recognize the proscribed conduct as crimes under international conventional or customary law (e.g. piracy) and implicitly recognize the penal nature of the acts by establishing a legal duty in regional conventions to take steps to recognize the need for criminalisation of the prohibited conduct (e.g. corruption). In a handful of the cases, they establish that African States bear duties, or at least enjoy rights, to investigate and or prosecute those suspects who commit them (unconstitutional change of government). They also provide a framework for the establishment of a regional criminal jurisdiction to address them (i.e. illicit exploitation of natural resources).

3. The Partly International Crimes in the Malabo Protocol

Following Bassiouni's classification, two crimes (terrorism and the crime of unconstitutional change of government) have been included in a third category in the earlier table. However, like piracy, some might credibly argue that the former offence belongs to the international crimes basket. The character of terrorism, which may include transborder dimensions in both preparation and commission, also means that it is a crime that could easily be added to the partly or fully transnational offence basket. This goes to show that the categories are not necessarily watertight. It further demonstrates that they may in fact be permeable. On a broader level, this permeability may raise doubts about the formal categories more generally. Nonetheless, the goal here is not to resolve doctrinal issues that might arise in respect of them as much as

it is to offer a preliminary basis through which to think about the classification of the diversity of crimes contained in the African regional treaty.

As a technical matter, the Malabo Protocol adopts the definition of terrorism provided for in Article 3 of the Organization of African Unity Convention on Prevention and Combatting of Terrorism, with minor modifications.[72] Article 28G of the Protocol criminalises the promotion, sponsoring, contribution to, commanding, aiding, incitement, encouragement, attempting, threatening, conspiring, organizing, or procurement of any person, with the intent to commit an act of terrorism. An act of terrorism is defined as:

> [a]ny act which is a violation of the criminal laws of a State Party, *the laws of the African Union or a regional economic community recognized by the African Union, or by international law*, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage (emphasis added).

To constitute a crime, the prohibited conduct or acts must be calculated or intended to intimidate, put in fear, force, coerce, or induce any government, body, institution, the general public, or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles. With respect to the acts of terrorism, it is unclear why the Malabo Protocol does not include the acts criminalised, perhaps as a starting point, by several UN Conventions and to which the obligation to prosecute or extradite (*aut dedere aut judicare*) applies. Despite the lack of a universally acceptable definition of terrorism, there appears to be consensus that the conduct criminalized by the 12 UN Conventions constitutes *international crimes*.[73]

The crime of unconstitutional change of government is one of the new crimes created by the Malabo Protocol. Article 28E, criminalises commission or ordering, 'with the aim of illegally accessing or maintaining power', several acts including carrying out a coup against a democratically elected government. Of all the crimes included in the instrument, the crime of unconstitutional change of government is perhaps one of the most important public

[72] See Organization of African Unity, *Convention on the Prevention and Combating of Terrorism*, 2219 U.N.T.S. 179, 1999 (adopted 14 July 1999, entered into force 6 December 2002).

[73] See Chapter 15 in this volume. *See also* B. Saul, 'Attempts to Define "Terrorism" in International Law', 52 *Netherlands International Law Review* 1, (2005) 57–83; B. Saul, 'Defending Terrorism: Justifications and Excuses for Terrorism in International Criminal Law', 25 *Australian Yearbook of International Law*, (2006) 177–226.

order crimes for Africa given the history of coup d'états on the continent. It is also a key public order crime, the prohibition of which has been perhaps the most controversial. It also elicited heated debates on a wide range of issues in relevant AU organs during the drafting process.[74] The drafters of the Malabo Protocol argued that:

> This elaborate definition continues the trend of the AU, over the last dozen years, of appreciating that unconstitutional change of government could be sudden, forceful or violent (as in coup d'état or mercenary attacks) or could be more silent, insidious and long-drawn out (as, for example, a democratically elected government which, once in office, systematically dismantles democratic laws, principles and institutions in order to prolong its hold to power).

It is the recognition of the problematic nature of a leader illegally hanging on to power that led to a regional prohibition. Essentially, Article 25 of the African Charter on Elections, Democracy and Good Governance provided, in addition to various sanctions against the offending state, that 'perpetrators of unconstitutional change of government may also be tried before the competent court of the Union'.[75] Thus, without previously having criminalized this offense at the regional court level, the Malabo Protocol gives African states the possibility of taking enforcement action in a regional penal tribunal against a person who violates regional norms where he refuses to peacefully transfer power to a winning candidate following free and fair elections.

Recent developments help illustrate the significance of the prohibition. For example, following contested election results in The Gambia in 2016, the AU reminded President Yahya Jammeh that he would have violated regional law if he failed to relinquish power.[76] The AU stated that the refusal to peacefully

[74] On regional instruments relevant to unconstitutional change of government, see AUC Report, supra note 45, at §§ 45–50. During the adoption of the Malabo Protocol, the definition of the crime of unconstitutional change of government was controversial. Part of the reason stemmed from a desire on the part of some African delegations, especially after the Arab Spring, to provide an escape hatch for those who engage in a popular uprising as a way of unseating their government. The argument was that, under international law, there is an inherent right of a people to self-determination, and that the Malabo Protocol should not criminalize circumstances in which such a right is being exercised. See deliberations relating to the Malabo Protocol, African Union Peace and Security Council, 'Press Statement on Unconstitutional Change of Government' 29 April 2014, following its 432nd Meeting held an open session, 'Unconstitutional changes of Governments and popular uprisings in Africa – challenges and lessons learnt', 29 April 2014.

[75] Adopted on 30 January 2007, entered into force 15 February 2012, at Art. 25(5).

[76] See Peace and Security Council of the African Union, *Communiqué*, PSC/PR/COMM. (DCXLVII), adopted at the 647th Meeting in Addis Ababa, 13 January 2017, www.peaceau.org/uploads/647.psc.comm.gambia.13.01.2017-1.pdf (last visited 26 February 2017).

transfer power thwarted the will of the people. The regional organisation feared that this would lead to instability in not just the country where the president refused to step down, but that it would also undermine the peace and security of the entire Africa region. In the end, though there were some legal questions about the implications of such regional actions for regime change and African State practice on the *jus ad bellum* since Gambia was not even a party to the African Charter on Democracy and Governance, only a signatory (though it has accepted the principle of democratic governance under the Constitutive Act of the African Union), the Jammeh Government did proceed to peacefully relinquish power. Part of the reason was no doubt because of pressure from outside, but also the willingness of African States to put boots on the ground to enforce their collective decision. Although this outcome might have been made possible because of the threat of the use of force, from Senegal acting with the imprimatur of Addis Ababa and New York, the winner of the election, Adama Barrow, was subsequently successfully sworn in.

To sum up, using both Bassiouni's five part criteria and his ten penal characteristics, it can readily be demonstrated that the crimes of terrorism and unconstitutional changes of government can also be explained as regional level offenses because of the harms that they cause and the regional interests that they seek to protect.

4. The Partly Transnational Crimes in the Malabo Protocol

The crime of corruption has here been placed in the partly transnational crimes category. Obviously, this crime can be committed wholly in violation of domestic law and without any transnational or trans-border effects. Nonetheless, given the history of kleptocracy on the part of some African leaders, it was recognized that perpetrators can do more damage to a society by draining it of its resources essential for basic needs of the community. This frequently has a transnational dimension. In some cases, it intersects with other crimes such as money laundering. It is for that reason it was included in the Malabo Protocol to address a matter that has been of both international and regional concern, as the conclusion of several conventions in that regard demonstrates. Again, the categories are not impermeable and others may well legitimately place this crime (i.e. corruption) in the fully transnational crimes or even international crimes category given the existence of a global convention on the same subject.

Corruption as a transnational crime appears to be somewhat ill-defined and could elicit legality challenges (though there is a widely accepted UN convention on the topic). At the regional level, Article 28I of the Malabo Protocol

basically replicates, with some modifications, the African Convention on Preventing and Combating Corruption.[77] The chapeau suggests that the African Criminal Court will be limited to prosecuting only those acts 'of a serious nature affecting the stability of a state, region or the [African] Union'.[78] This qualifier, which we do not see replicated for the other crimes in the instrument under discussion, offers a formal gravity threshold by removing from the ambit of the regional tribunal 'petty corruption' for the sake of addressing what is often referred to as 'grand corruption'. The latter is usually committed by leaders and high-level persons holding high public office, such as presidents, vice presidents, or sitting government ministers, all of whom are in a different part of the Malabo Protocol guaranteed some type of temporary immunity from prosecution during their time in office.[79] On this view, it would seem that low level corrupt activity that occurs within a State will not attract the interest of the regional court, presumably because such offences could be more readily prosecuted within the national courts, and in countries that have them, they may even be pursued by national anti-corruption commissions.

Perhaps of greater concern is the lack of clarity as to the meaning of 'stability' – whether it is economic, political or social. If 'stability' is economic, and corruption is considered an economic crime, it is arguable that while embezzlement of say one million dollars could threaten the (economic) stability of one state, it might not be the case for a richer state, not least a region. In the same vein, the threshold 'of a serious nature affecting the stability of a state, region or the Union'[80] appears to be too high. Should a monetary value be attached to such a threshold? If that is the case, is it appropriate in view of differentials in the GDPs of African countries, if that is the measure adopted? How is impact of a corrupt activity to be measured?

It is arguable that, with the extensive list of fourteen crimes within its material jurisdiction, the risk is that the future African Criminal Court will be overburdened. This argument carries weight, if the experience of the

[77] Adopted 1 July 2003, entered into force 5 August 2003.

[78] Malabo Protocol, supra note 10, at Art. 281.

[79] See the controversial temporary immunity clause, Malabo Protocol, supra note 10, Art. 46A *bis*, which provides in fairly overbroad language that is likely broader than customary international law that 'no charges shall be commenced or continued before the African Criminal Court against 'any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'. For a critique, see the chapters in this volume by ICC President Judge Eboe-Osuji (Chapter 28) and Professor Tladi (Chapter 29).

[80] Malabo Protocol, supra note 10, at Art. 281.

international criminal tribunals that have preceded it are anything to go by. It is also not entirely clear what parameters, if any, were contemplated to regulate the relationship between the national courts in states parties to the Malabo Protocol and the African Court which will likely sit in Arusha, Tanzania. Indeed, it can be argued that given the work of the international criminal tribunals and the high costs associated with investigating and prosecuting such crimes, away from the *locus criminis*, the regional court would likely have benefited from a clarification that its mandate is to focus on the particularly serious international or transnational crimes within its jurisdiction. The Protocol suggested inclusion of only serious crimes of international or regional concern within the jurisdiction of the court. But, in terms of the particular definitions, the same instrument did not delineate formal limits in a systematic way. It did so only in respect of corruption, which was classified as serious and less serious, leaving the rest of the 13 crimes to the wide discretion of the prosecutor.

In the Rome Statute, the jurisdiction of the Court was narrowly crafted in such a way to limit to the 'most serious crimes'[81] of concern to the international community as a whole. The use of the terminology of 'grave crimes' in the preamble suggests some criteria to delimit the scope of the Court's jurisdiction. This is not to say that they were not serious crimes, such as terrorism, which could have also been included. Though it is said that there is no formal hierarchy of crimes in the Rome Statute, we all know that some of the crimes are considered as more egregious than others. In this regard, some scholars see the four core crimes in the treaty as establishing some type of 'quasi-constitutional threshold'[82] for the addition of new crimes. In addition, it was clear from the experience of the ad hoc tribunals that preceded it during the 1998 negotiations and the policies of the Office of the Prosecutor since then, that the ICC would have to focus on those bearing 'greatest responsibility,'[83] which can be understood as an additional limitation to those holding leadership or authority positions. That also limits the possible reach of the court and helps to ensure that it is not overwhelmed with cases, especially given its wide potential jurisdiction in over 123 States Parties.

[81] Rome Statute, supra note 16 at *Preamble*.

[82] W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2015), at 118.

[83] C. Jalloh, 'Prosecuting Those bearing "Greatest Responsibility": The Contributions of the Special Court for Sierra Leone' in C. Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2013), at 589.

4. CONCLUDING REMARKS

This chapter has tried to show that traditional international criminal law and transnational criminal law literature remains confused as to the proper basis to distinguish between 'international crimes' and 'transnational crimes', and for that matter, international criminal law and transnational criminal law. Indeed, as there has historically been limited guidance as to what criteria – if any – states use to determine which crimes to include in international instruments as they negotiate relevant treaty crimes, there is only a limited academic literature attempting to systematically clarify the boundaries between these concepts. One helpful distinction that appears settled is that between crimes under international criminal law, which establish direct penal liability for persons, on the one hand, and those under suppression conventions that instead obligate states to take measures to prohibit as criminal various types of conduct under their domestic law, on the other.

In the absence of clarity in international processes as to what policies should guide criminalization of offences suitable for collective action by States, as opposed to those suitable for each of them acting separately, this contribution has drawn on the spare literature focusing in particular on Bassiouni's proposed criteria to explore the implications of this state of affairs in what might initially appear like the hodgepodge of crimes contained in the African region's Malabo Protocol. I have shown that, using the policy criteria and penal characteristics identified by that prominent African author as a starting point, it is not entirely surprising that African States reflect some of the same confusion in their determinations as to what prohibitions should be criminal conduct at the regional level for the future African Criminal Court. Much like how various theories can be used to explain the international prohibition of certain offenses at the international level, and the ad hoc nature in which criminalisation occurred historically, the African court instrument also reflects various regional interests being prioritized for regional over national or international enforcement action. This implies the need for greater clarity, in the future, to be set forth by national authorities as to what doctrinal frameworks drive the adoption of certain crimes for addition to the statutes of future international and regional penal tribunals. Only in this way might we start to develop a more coherent international or regional legal regime that accounts for all the harms and community interests for which prohibition is being sought.

If nothing else, though not yet in force and unlikely to be for a few more years, the arrival of the Malabo Protocol on the international legal scene has posed a serious challenge for international lawyers to explain the objective

phenomenon that we might have previously taken for granted in regards to the categories of transnational and international crimes. Considering that it was a proposal by Trinidad and Tobago regarding drug trafficking that reopened the global discussion and led concretely to the final establishment of the long-awaited permanent ICC, and the fact that some states continue to advocate for addition of new 'transnational' crimes like terrorism to the Rome Statute, it could be that the African State practice will in the future help show the way forward towards a richer and more nuanced conception of what we consider modern 'international criminal law'. An international criminal law that would hopefully be more responsive to the needs of developing states in terms of addressing not only individual crimes, but also the web of economic crimes and other related public order offenses that together give rise to instability and give succour to what has aptly been described as 'system criminality'[84] in international law. A criminality that, to date, has only been tackled in piecemeal fashion, in two separate silos, ~~that~~ is probably better considered together.

[84] A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge University Press, 2009).

9

Perspectives on the International Criminal Jurisdiction of the African Court of Justice and Human Rights Pursuant to the Malabo Protocol (2014)

DANIEL D. NTANDA NSEREKO AND MANUEL J. VENTURA

1. INTRODUCTION

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014) (as it is formally known) ('Malabo Protocol (2014)') could be said to represent many things, depending on one's perspective. For some, it is a genuine attempt by African States to address international and transnational crimes that bedevil the African continent.[1] For others, it is a cynical response to decisions of the International Criminal Court (ICC) that African leaders do not like, and the so-called 'abuse' of universal jurisdiction by Western states for crimes committed on the African continent.[2] The aim of this chapter, however,

The views expressed herein are those of the authors and do not necessarily reflect the views of the Special Tribunal for Lebanon.

[1] *See for example* M. Sirleaf, 'The African Justice Cascade and the Malabo Protocol' 11(1) *International Journal of Transitional Justice* (2017) 71–91; A. Abass, 'Historical and Political Background of the Malabo Protocol', in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (T.M.C. Asser/Springer, The Hague/Berlin, 2017), pp. 15–16.

[2] *See for example* H. van der Wilt, 'Complementary Jurisdiction (Article 46H)', in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (T.M.C. Asser/Springer, The Hague/Berlin, 2017), pp. 189–90; C. Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' 9(5) *Journal of International Criminal Justice* (2011) 1067–88, at 1077–9, 1088. *See also African Union*, *Decision* No. Ext/Assembly/AU/Dec.1 (October 2013), *Decision on Africa's Relationship with the International Criminal Court (ICC)*, 12 October 2013, paras 4, 10(ii), 10(iv); *African Union*, *Decision* No. Assembly/AU/Dec.547(XXIV), *Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC)*, Doc. Assembly/AU/18(XXIV), 30–31 January 2015, paras 3, 4(a)–(b), 9, 17(b), 17(d)–(e).

is to simply offer objective perspectives on the provisions of the Malabo Protocol (2014) that add international criminal jurisdiction to the African Court of Justice and Human Rights (ACJHR), particularly those relating to genocide (Article 28B), war crimes (Article 28D), crimes against humanity (Article 28C) and aggression (Article 28M).

At the outset, one often forgotten matter should be recalled. The Malabo Protocol (2014) as a whole was the result of debates and negotiations between African States which manifested themselves in specific language, omissions and compromises. As with all treaties, one cannot expect a perfect outcome – it is hard, if not impossible, to please all interested parties. As a result, some of the ideas reflected in the Malabo Protocol (2014) are very innovative, salutary and make a positive contribution to the development of international criminal law. Other ideas may be unrealistic. Others are outright retrogressive and undesirable. But as it relates to core international crimes alone, the Malabo Protocol (2014), as detailed below, brings much good to the international criminal law table.

2. A MOST CONVOLUTED ARCHITECTURE: THE INTERACTION OF AT LEAST FOUR DIFFERENT TREATY REGIMES

Before delving into the substantive crimes under the Malabo Protocol (2014), one issue cannot escape attention. That is the convoluted and complex legal architecture of the ACJHR as envisaged by the Malabo Protocol (2014). As the inclusion of the word 'protocol' in its name suggests, the Malabo Protocol (2014) is not a treaty that stands on its own. Rather, it is the last of at least 4 different treaty regimes that endeavour to work and interact together to create – among other things – Africa's regional court for international crimes.

The first of these is the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) (African Human Rights Court Protocol). This established the African Court on Human and Peoples' Rights – the African equivalent of the European Court of Human Rights and the Inter-American Court of Human Rights. Its mandate is to guard against violations of the African Charter on Human and Peoples' Rights (1981) – Africa's regional human rights treaty. It hears and adjudicates on complaints from the African Commission on Human and Peoples' Rights, States parties, African intergovernmental organizations, non-governmental organizations and individuals; it may also render advisory opinions at the

request of African Union (AU) member states.[3] The African Human Rights Court Protocol entered into force (and the court was established) on 25 January 2004, 30 days after the 15th AU state (Comoros) deposited its instrument of ratification.[4] As of 15 June 2017, 52 of the AU's 55 member states have signed the African Human Rights Court Protocol (1998), while 30 member states have ratified or acceded to it.[5] The first set of judges were sworn in 2006 and the court is currently up and running and actively fulfilling its mandate.

The second relevant treaty is the Protocol of the Court of Justice of the African Union (2003) (African Court of Justice Protocol). This established an entirely different court, the African Court of Justice – the African equivalent of the International Court of Justice and the European Court of Justice. The court was originally envisaged by the Constitutive Act of the African Union (2000) (AU Constitutive Act), but its statute, composition and functions were left to be finalized in a separate protocol at a later time.[6] The African Court of Justice's jurisdiction extends to the interpretation and application of the AU Constitutive Act (2000), AU treaties and subsidiary legal instruments (including regulations and directives), as well as any question of international law and all matters where states parties specifically agree to confer jurisdiction upon it.[7] As of 15 June 2017, 44 of the AU's 55 member states have signed the African Court of Justice Protocol (2003), while 18 member states have ratified or acceded to it.[8] It entered into force on 11 February 2009, 30 days after the 15th AU state (Algeria) deposited its instrument of ratification.[9] However, unlike the African Court on Human and Peoples' Rights, the African Court of Justice exits only on paper. The Assembly of Heads of State and

[3] *See generally* Arts. 2, 3(1), 4(1), 5(1)–(2), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

[4] *See* Art. 34(3), Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

[5] *See* African Union, List of Countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998), available at: https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 25 November 2018).

[6] *See* Arts. 5(1)(d), 18(1)–(2), 26, Constitutive Act of the African Union (2000).

[7] *See* Art. 19(1)–(2), Protocol of the Court of Justice of the African Union (2003).

[8] *See* African Union, List of Countries which have signed, ratified/acceded to the Protocol of the Court of Justice of the African Union (2003), available at: https://au.int/sites/default/files/treaties/7784-sl-protocol_of_the_court_of_justice_of_the_african_union_1.pdf (accessed 25 November 2018).

[9] *See* Article 60, Protocol of the Court of Justice of the African Union (2003).

Government of the AU determined in 2004 that the African Court of Justice should be merged with the African Court on Human and Peoples' Rights, but without prejudice to the operationalization and continued existence of the latter.[10]

This merger brings us to the third relevant treaty: the Protocol on the Statute of the African Court of Justice and Human Rights (2008) (African Court of Justice and Human Rights Protocol). This treaty envisages a new court – the ACJHR – which, as aforementioned, would combine the functions and mandates of the African Court on Human and Peoples' Rights and the African Court of Justice. As of 8 February 2018, 31 of the AU's 55 member states have signed the African Court of Justice and Human Rights Protocol (2008), while only 6 member states have ratified or acceded to it.[11] 15 AU member states are needed to ratify (or accede to) the African Court of Justice and Human Rights Protocol (2008) before it enters into force,[12] and thus the protocol – and the ACJHR – remains only on paper for the time being.

To the ACJHR, the AU has added a fourth treaty layer: the Malabo Protocol (2014). This protocol, which is the focus of this chapter, adds international and transnational crimes to the jurisdiction of the proposed ACJHR, as well as procedural and other provisions to facilitate their investigation and prosecution. 15 AU member states must ratify (or accede to) the Malabo Protocol (2014) before it can enter into force.[13] As of 8 February 2018, only 11 of the AU's 55 member states have signed the Malabo Protocol (2014), and no member state has ratified or acceded to it.[14]

[10] *See* African Union, *Decision on the Seats of the African Union*, Assembly/AU/Dec.45 (III) Rev.1, Assembly of the African Union, Third Ordinary Session, 6–8 July 2004, para. 4; African Union, *Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union*, EX.CL/Dec.165 (VI), Executive Council, Sixth Ordinary Session, 24–28 January 2005, para. 2.

[11] *See* African Union, List of Countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights (2008), available at: https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_3.pdf (accessed 25 November 2018).

[12] *See* Article 9(1), Protocol on the Statute of the African Court of Justice and Human Rights (2008).

[13] *See* Art. 9(1), Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014).

[14] *See* African Union, List of Countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014), available at: https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf (accessed 25 November 2018).

Aside from the substantive content of the ACJHR as envisaged by the Malabo Protocol (2014), this practice of stacking treaties on top of existing treaties – particularly when they are intimately linked together in the fashion outlined above – is inelegant and prone to cause confusion. For example, it is not entirely clear whether one treaty is a prerequisite for the next treaty. Must an AU member state first ratify/accede to the African Human Rights Court Protocol (1998) (or the African Charter on Human and Peoples' Rights (1981)) and/or the African Court of Justice Protocol (2003) before it can ratify/accede to the African Court of Justice and Human Rights Protocol (2008) and only then can it do so with respect the Malabo Protocol (2014)? The text of these treaties does not provide clear answers. If it was indeed necessary for (yet) another protocol to have been adopted, then it would have made more sense, at the very least, to have explicitly stated that only states parties to the African Court of Justice and Human Rights Protocol (2008) could become states parties to the Malabo Protocol (2014).

Nevertheless, just as one would, at some point, question the wisdom of constantly upgrading a computer instead of purchasing a new one, there is something to be said about the wisdom of the number of amendments and changes (i.e. 'upgrades') that have been put into place by the complicated and convoluted treaty regime that is present here. One wonders whether it would have been more advisable to simply create a new court from scratch.

3. CORE INTERNATIONAL CRIMES AT THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS UNDER THE MALABO PROTOCOL (2014)

The crimes that would fall within the jurisdiction of the ACJHR under the Malabo Protocol (2014) include the 'traditional' or 'core' international crimes: genocide, crimes against humanity, war crimes and the crime of aggression. With respect to these crimes, the ACJHR Statute under the Malabo Protocol (2014) largely replicates the definitions found in the Rome Statute of the ICC (1998) (Rome Statute). However, in several instances it introduces innovative ideas that are salutary. In other places things could have been better, while in others, substantive omissions are apparent.

A. *Genocide*

The Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Genocide Convention) contains closed and narrow categories

with respect to its 'protected groups', since they are expressly limited by that treaty to only four: national, ethnical, racial or religious groups.[15] This is replicated in the Rome Statute (1998).[16] Thus, if similar actions were carried out on any other group – regardless of whether the group is viewed objectively or subjectively – they would fall outside of the scope of the crime of genocide (although they would likely be considered, at a minimum, as persecution as a crime against humanity). This situation has attracted criticism directed at the definition of genocide over the years. The same criticism might also be repeated with respect to Article 28B of the ACJHR Statute under the Malabo Protocol (2014), since it lists the same four protected groups.

Some early jurisprudence from the International Criminal Tribunal for Rwanda (ICTR) viewed genocide's protected groups differently. Consider the following pronouncement in *Akayesu*:

> Moreover, the Chamber considered whether the groups protected by the Genocide Convention [(1948)], echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention [(1948)], if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention [(1948)]. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention [(1948)], which according to the *travaux préparatoires*, was patently to ensure the protection of *any stable and permanent group*.[17]

This holding, that the Genocide Convention (1948) protects any stable and permanent group – as opposed to only national, ethnical, racial or religious

[15] *See* Art. II, Genocide Convention (1948).

[16] *See* Art. 6, Rome St. (1998). It should be noted that during the negotiations leading to the Rome Statute (1998), some States tried to expand genocide's protected groups, but this was met with reluctance by the majority of States. The attempts were ultimately unsuccessful. *See* H. von Hebel and D. Robinson, 'Crimes Within the Jurisdiction of the Court', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague/London/Boston, Kluwer Law International, 1999), p. 89; W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2010), p. 129; W. A. Schabas, 'Article 6: Genocide', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition (Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2016), margin No. 16, p. 135.

[17] Trial Judgment, *Prosecutor v. Akayesu*, (ICTR-96–4-T), ICTR, 2 September 1998, para. 516 (emphasis added).

groups – has not been wholeheartedly embraced by subsequent jurisprudence. Only the same ICTR Trial Chamber both in *Rutaganda* and *Musema* adopted it, albeit with slight modifications,[18] and one can also catch a glimpse of it in the International Criminal Tribunal for the former Yugoslavia (ICTY)'s *Krstić* case.[19]

Some AU countries also appear to have moved away from the closed protected groups found in the Genocide Convention (1948) by the manner in which genocide has been incorporated into their domestic law. Thus, while some have included only the four protected groups found in the Genocide Convention (1948),[20] others have gone beyond this and added political groups,[21] political and 'colour' groups,[22] social groups,[23] any other

[18] Trial Judgment, *Prosecutor* v. *Musema*, (ICTR-96–13-T), ICTR, 27 January 2000, para. 162:

> It appears, from a reading of the *travaux préparatoires* of the Genocide Convention [(1948)], that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "non stable" or "mobile groups" which one joins through individual, voluntary commitment. That would seem to suggest *a contrario* that the [Genocide] Convention [(1948)] was presumably intended to cover relatively stable and permanent groups. Therefore, the Chamber holds that in assessing whether a particular group may be considered protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the political, social and cultural context in which the acts allegedly took place.

See also Trial Judgment, *Prosecutor* v. *Rutaganda*, (ICTR-96–3-T), ICTR, 6 December 1999, paras 57–58.

[19] Trial Judgment, *Prosecutor* v. *Krstić*, (IT-98–33-T), ICTR, 2 August 2001, para. 556:

> The preparatory work of the [Genocide] Convention [(1948)] shows that setting out such a list [of protected groups] was designed more to describe a single phenomenon, roughly corresponding to what was recognized, before the Second World War, as "national minorities", rather than to refer to several distinct prototypes of human groups.

[20] As in Angola (Art. 367, Penal Code of Angola); Burundi (Art. 195, Penal Code of Burundi); Djibouti (Art. 481, Penal Code of Djibouti); Eritrea (Art. 107, Penal Code of Eritrea); Ghana (Section 49A, Criminal Code (1960)); Guinea-Bissau (Art. 101, Penal Code of Guinea-Bissau); Kenya (Section 5, International Crimes Act (2008)); Mali (Art. 30, Penal Code of Mali); Mozambique (Art. 160(2)(j), Penal Code of Mozambique); Mauritius (Sections 2, 4(1)(b), Schedule, Part II, International Criminal Court Act (2011)); Rwanda (Article 2, Loi No. 33 bis/2003, 6 September 2003); South Africa (Sections 1, 4(1), Schedule 1, Part 1, Implementation of the Rome Statute of the International Criminal Court Act (2002)); Sudan (Art. 187, Criminal (Amendment) Law (2009)); Uganda (Sections 7(1)(a), 7(2), Schedule 1, International Criminal Court Act (2010)); Zimbabwe (Section 4, Genocide Act (2000)).

[21] As in Côte D'Ivoire (Art. 137, Penal Code of Côte D'Ivoire).

[22] As in Ethiopia (Art. 269, Criminal Code of Ethiopia).

[23] As in São Tomé and Príncipe (Art.210, Penal Code of São Tomé and Príncipe).

groups based on 'any arbitrary criterion',[24] or any other identifiable group.[25] Given this African reality, and the aforementioned (but limited and controversial[26]) jurisprudence arising from *Akayesu*, a question might be asked: was an opportunity lost to incrementally modernize genocide so that any stable and permanent group could be protected, somewhere halfway perhaps between those AU member states that have incorporated the four protected groups of the Genocide Convention (1948) into domestic law and those that have gone beyond?

Such a change would have moved genocide away from customary international law (assuming that genocide's definition is the same under custom and it is in the Genocide Convention (1948)). Yet, it is also true that the treaty's original drafters could only express their vision for the protected groups through the prism and frame of reference of 1948, that is, the prevailing permanent and stable groups at that time: national, ethnical, religious and racial groups. Today, for example, it is not at all uncommon for a person to move from one religion to another. Nonetheless, a conscious decision was made to remain faithful to Article II of the Genocide Convention (1948) by the drafters of the Malabo Protocol (2014). In the absence of cases in modern times where stable and permanent groups have been targeted for genocidal acts, but were found not to fit within either national, ethnical, racial or religious groups, it appears unjustified to modify the protected groups at this time. It remains to be seen whether this continues to hold true in the future.

[24] As in Burkina Faso (Art.313, Penal Code of Burkina Faso); Cape Verde (Art. 268, Penal Code of Cape Verde)); the Central African Republic (Art. 152, Penal Code of the Central African Republic); Comoros (Art. 17, Loi No. 11–022, 13 December 2011); the Congo (Art. 1, Loi No. 8–98, 31 October 1998); the Democratic Republic of the Congo (Art. 1, Law No. 8–98, 31 October 1998); Niger (Art. 208(1), Penal Code of Niger); Senegal (Art. 431(1), Penal Code of Senegal).

[25] As in Lesotho (Section 93, Penal Code Act (2010)).

[26] For criticism of *Akayesu*'s above pronouncement on genocide's protected groups, *see* G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford, Oxford University Press, 2006), p. 230; W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, (2nd Edition Cambridge, Cambridge University Press, 2009), pp. 151–3. As one commentator has noted, it 'looks increasingly idiosyncratic as time goes by': W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2010), p. 129; W. A. Schabas, 'Article 6: Genocide', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (3rd Edition Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2016), margin No. 17, p. 135; C. J. Tams, L. Berster and B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2014), margin No. 60, p. 115.

The ACJHR Statute as per the Malabo Protocol (2014) also adds to the enumerated list of acts and conduct that can constitute genocide. In addition to those found in Article 6(a)–(e) of the Rome Statute (1998) (which replicates Article II(a)–(e) of the Genocide Convention (1948)), Article 28B(f) adds 'rape or any other form of sexual violence' as acts of genocide *per se*. Of course, this should not be interpreted as saying that such acts could not have constituted genocide before this innovation. Indeed, the notion that rape and similar conduct, under the right conditions, could form the *actus reus* of genocide was first held by the ICTR's *Akayesu* judgement[27] and consistently recognized by international criminal case law ever since.[28] But it is the first time that this jurisprudence has been formally codified as such into a definition of genocide under international law.[29] Until now, rape and other forms of sexual violence has been prosecuted as genocide before international criminal tribunals as acts that cause serious bodily or mental harm,[30] not as rape and sexual violence *per se*. It is important that such actions – particularly those directed against women – be expressly recognized as capable of constituting genocide rather than being subsumed within a broader range of criminal acts. Therefore, the addition of such acts within the enumerated list of the *actus reus* component of the definition of genocide is a welcome development.

[27] Trial Judgment, *Prosecutor v. Akayesu*, (ICTR-96–4-T), ICTR, 2 September 1998, paras 731–4.

[28] *See for example*, Trial Judgment, *Prosecutor v. Kayishema and Ruzindana*, (ICTR-95–1-T), ICTR, 21 May 1999, para. 108; Trial Judgment, *Prosecutor v. Rutaganda*, (ICTR-96–3-T), ICTY, 6 December 1999, para. 51; Trial Judgment, *Prosecutor v. Musema*, (ICTR-96–13-T), 27 January 2000, para. 156; Trial Judgment, *Prosecutor v. Bagilishema*, (ICTR-95–1A-T), 7 June 2001, para. 59; Trial Judgment, *Prosecutor v. Krstić*, (IT-98–33-T), ICTY, 2 August 2001, para. 513; Trial Judgment, *Prosecutor v. Semanza*, (ICTR-97–20-T), 15 May 2003, para. 320; Trial Judgment, *Prosecutor v. Stakić*, (IT-97–24-T), ICTY, 31 July 2003, para. 516; Trial Judgment, *Prosecutor v. Kajelijeli*, (ICTR-98–44A-T), 1 December 2003, para. 815; Trial Judgment, *Prosecutor v. Brđanin*, (IT-99–36-T), ICTY, 1 September 2004, para. 690; Trial Judgment, *Prosecutor v. Blagojević and Jokić*, (IT-02–60-T), ICTY, 17 January 2005, para. 646; Trial Judgment, *Prosecutor v. Muvunyi*, (ICTR-2000–55A-T), 12 September 2006, para. 487; Appeal Judgment, *Prosecutor v. Seromba*, (ICTR-2001–66-A), 12 March 2008, para. 46; Trial Judgment, *Prosecutor v. Popović et al.*, (IT-05–88-T), ICTY, 10 June 2010, para. 812; Trial Judgment, *Prosecutor v. Tolimir*, (IT-05–88/2-T), ICTY, 12 December 2012, para. 737; Trial Judgment, *Prosecutor v. Karadžić*, (IT-95–5/18-T), ICTY, 24 March 2016, para. 545.

[29] It should be noted that some States have already explicitly included rape and sexual violence as the *actus reus* of genocide for the purposes of their domestic law. *See* section 268.4(2), *Criminal Code* (1995) (Australia); Art. 2, Organic Law No. 08/96 (1996) on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes Against Humanity since 1 October 1990 (Rwanda); Article 607(1)(2), *Código Penal* (Spain).

[30] *See* Art. 4(2)(b), ICTY St.; Article 2(2)(b), ICTR St.; Article 4, ECCC Law; Art. 6(b), ICC St. (1998).

On the other hand, one substantive omission from genocide under the ACJHR Statute as per the Malabo Protocol (2014) is the inchoate offence of direct and public incitement to commit genocide, which is found in Article III(c) of the Genocide Convention (1948). In the Rome Statute (1998), this offence is not found in its provision on genocide (Article 6), but is instead included in Article 25 which governs modes of liability at the ICC (specifically, Article 25(3)(e)) (a matter that invoked some disagreements among the drafters)).[31] However, direct and public incitement to commit genocide is found neither in Article 28B (genocide) or 28N (modes liability) of the ACJHR Statute as per the Malabo Protocol (2014). To be fair, incitement is expressly listed in Article 28N(i) and it applies to all crimes equally.[32] That is, however, not the same thing as *direct* and *public* incitement to commit genocide. Indeed, the jurisprudence[33] has made it quite clear that these are substantive elements of the offence, with the 'public' requirement in particular having engendered some controversy in the case law.[34] Thus, under the Malabo Protocol (2014), mere incitement is punishable vis-à-vis genocide – a distinct shift away from the Rome Statute (1998). This unfortunately also departs from the original intent of the drafters of the Genocide Convention (1948), who, by

[31] *See* K. Ambos, 'Article 25: Individual Criminal Responsibility', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (3rd Edition Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2016), margin No. 35, p. 1016.

[32] Art. 28N(i) reads (emphasis added):

> An offence in committed by any person who, in relation to any of the crimes or offences provided for in this Statute:
>
> (i) *Incites*, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute[.]

[33] It is worth noting that this jurisprudence only arises from cases originating at the ICTR. No accused was ever charged with direct and public incitement to commit genocide at the ICTY, and hence no ICTY jurisprudence exists. At the Extraordinary Chambers in the Courts of Cambodia (ECCC), this crime was not specifically included in its governing statute, while the Special Court for Sierra Leone (SCSL) did not have jurisdiction over genocide at all.

[34] *Compare* Appeal Judgment, *Kalimanzira v. The Prosecutor*, (ICTR-05–88-A), 20 October 2010, para. 157 and Appeal Judgment, *Ngirabatware v. The Prosecutor*, (MICT-12–29-A), 18 December 2014, paras 52–4 (both pointing to widely circulated speeches and articles rather than speeches to small and closed groups) *with* Appeal Judgment, *Nzabonimana v. The Prosecutor*, (ICTR-98–44D-A), 29 September 2014, para. 128; Appeal Judgment – Partially Dissenting and Separate Opinion of Judge Pocar,*Prosecutor v. Kalimanzira*, (ICTR-05–88-A), 20 October 2010, para. 45 (both pointing out that the size of the audience when a speech was given was not an element of the offence).

specifying the 'direct' and 'public' requirements, wished to allay concerns regarding freedom of speech and expression.[35]

B. *War Crimes*

The ACJHR Statute under the Malabo Protocol (2014) also introduces innovations regarding the definition of war crimes in Article 28D. While it largely replicates the lists of war crimes in the context of international and non-international armed conflicts that is found in the Rome Statute (1998) (including, notably, the 2010 ICC Kampala Amendments on war crimes in non-international armed conflicts),[36] it also adds a significant number of new ones. To the list of war crimes committed during international armed conflicts the following are added:

- Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated (Article 28D(b)(v));
- Unjustifiably delaying the repatriation of prisoners of war or civilians (Article 28D(b)(xxviii));
- Willfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination (Article 28D(b)(xxix));
- Making non-defended localities and demilitarized zones the object of attack (Article 28D(b)(xxx));
- Slavery and deportation to slave labour (Article 28D(b)(xxxi));
- Collective punishments (Article 28D(b)(xxxii); and
- Despoliation of the wounded, sick, shipwrecked or dead (Article 28D(b)(xxxiii)).

[35] *See* W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, (2nd Edition Cambridge, Cambridge University Press, 2009), pp. 319–24; C. J. Tams, L. Berster and B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2014), margin numbers 6–8, pp. 160–61.

[36] *See* Art. 8(2)(a)(i)–(viii), Rome St. (1998) (grave breaches of the Geneva Conventions (1949); Art. 8(2)(b)(i)–(xxvi), Rome St. (1998) (other serious violations of the law and customs of international armed conflicts); Art. 8(2)(c)(i)–((iv), Rome St. (1998) (serious violations of Common Art. 3 of the Geneva Conventions (1949)); Art. 8(2)(e)(i)–(xv), Rome St. (1998) (other serious violations of the law and customs of non-international armed conflicts).

In addition, in a particularly refreshing move away from the Rome Statute (1998), the following war crime is included in Article 28D(b)(xxi): 'Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law or armed conflict'.

This is to be contrasted to the equivalent provision in Article 8(2)(b)(xx) of the Rome Statute (1998) (emphasis added):

> Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law or armed conflict, *provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123*[.]

As is well known, this provision was the compromise solution that resulted from the controversy, difficulties and eventual deadlock that ensued during the negotiations on the inclusion of prohibited weapons in the Rome Statute (1998). It pitted those states that opposed the inclusion of nuclear weapons as a prohibited weapon in the Rome Statute (1998) against those states that, as a result of this position on nuclear weapons, opposed the inclusion of biological and chemical weapons (i.e. the poor man's nuclear weapon) as a prohibited weapon in the Rome Statute (1998).[37] However, in the words of the late Professor Cassese, 'given the extreme unlikelihood that such amendment will ever be agreed upon, the use of those weapons, projectiles, etc. may eventually not amount to a war crime within the jurisdiction of the [ICC] [under Article 8(2)(b)(xx)]'.[38] These prophetic words have proved to be right, at least so far. The ICC is now some 16 years old and we are no closer to the amendment required under this article, despite the efforts of some states (particularly

[37] For a more complete history of the negotiations leading to this compromise solution, *see* H. von Hebel and D. Robinson, 'Crimes Within the Jurisdiction of the Court', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague/London/Boston, Kluwer Law International, 1999), pp. 113–16; R. S. Clark, 'Building on Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare' 12(3) *New Criminal Law Review* (2009) 366–89, at 369–77; M. Cottier and D. Křivánek, 'Article 8(2)(b)(xvii)–(xx): Prohibited Weapons', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (3rd Edition Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2016), margin numbers 565–73, pp. 454–7.

[38] A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' 10(1) *European Journal of International Law* (1999) 144–71, at 152.

Belgium and Mexico) in the lead up to the 2010 ICC Review Conference held in Kampala, Uganda. It remains a dead letter. However, the ACJHR Statute under the Malabo Protocol (2014) has boldly included Article 28D(b)(xxi) as a general provision without any strings attached. This means that a determination of whether a particular weapon causes 'superfluous injury or unnecessary suffering or [is] inherently indiscriminate' has been left to judges and, potentially, future judicial evolution – something that the drafters of Article 8 (2)(b)(xx) of the Rome Statute (1998) were particularly weary of.

Similarly, to the list of war crimes committed during non-international armed conflicts, the ACJHR Statute under the Malabo Protocol (2014) adds the following:

- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies (Article 28D(e)(xvi));
- Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations (Article 28D(e)(xvii));
- Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage (Article 28D(e)(xviii));
- Making non-defended localities and demilitarized zones the object of attack (Article 28D(e)(xix));
- Slavery (Article 28D(e)(xx));
- Collective punishment (Article 28D(e)(xxi)); and
- Despoliation of the wounded, sick, shipwrecked or dead (Article 28D(e)(xxii)).

While these provisions are mostly carbon copies of the same crime committed in international armed conflicts (i.e. the corresponding crime found under Article 28D(b)), the substantive differences found in Article 28D(e)(xviii) and Article 28D(e)(xx) are worth noting.

With respect to Article 28D(e)(xviii), that provision should be contrasted to its international armed conflict twin, Article 28D(b)(iv) (emphasis added): 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians *or damage to civilian objects or widespread, long-term and severe damage to the natural environment* which would be *clearly* excessive in relation to the concrete and direct overall military advantage anticipated'.

While the language of Article 28D(e)(xviii) is not exactly the same as that contained in Article 28D(b)(iv), the underlying idea largely aligns and is

readily identifiable in both provisions. There are however, some important substantive differences. For one, Article 28D(e)(xviii) does not explicitly include damage to civilian objects, although this could perhaps be read into the concept of 'civilian damage'. But more importantly, is that the standard under Article 28D(e)(xviii) appears to be *lower* than that under Article 28D(b)(iv); the former only requires the incidental damage/injury/loss to be excessive but the latter requires the incidental damage/injury/loss to be *clearly* excessive. In other words, the standard appears to have been set higher in the context of an international armed conflict ('clearly excessive' – Article 28D(b)(iv)) than under a non-international armed conflict ('excessive' – Article 28D(e)(xviii)). One struggles to understand why this should be so. The same could be said with respect to the omission of crimes against the environment in Article 28D(e)(xviii), particularly in light of the International Commission of the Red Cross' customary international humanitarian law study which determined that customary rules had 'arguably' developed with respect to the protection of the environment in non-international armed conflicts.[39]

Concerning Article 28D(e)(xx), its international armed conflict counterpart, Article 28D(b)(xxxi)), includes additional substantive language (emphasis added): '[s]lavery *and deportation to slave labour*'. Clearly, the drafters of the provision had in mind the events of World War II, when Nazi Germany deported millions of foreign civilians and prisoners of war to provide slave labour to the German war industry; numerous individuals were charged and tried for slave labour as a war crime and/or crime against humanity in the war's aftermath.[40] However, considering that deportation generally occurs when

[39] *See* J-M. Henckaerts and L. Doswald-Beck (eds), *International Committee of the Red Cross Customary International Humanitarian Law – Volume I: Rules* (Cambridge, Cambridge University Press, 2009), p. 151, Rule 45: 'The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.' *See also* pp. 143–51, Rules 43–4.

[40] *See* Judgment, *United States of America et al.* v. *Göring et al.*, in *Trial of the Major War Criminals before the International Military Tribunal – Volume 1: Official Documents* (Nuremberg, International Military Tribunal, 1947); Judgment, *United States of America* v. *Milch*, Case No. 2, Military Tribunal II, 16 April 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 – Volume II* (Washington, Nuernberg Military Tribunals, 1949); Judgment, *United States of America* v. *Flick et al.*, Case No. 5, Military Tribunal IV, 22 December 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 – Volume VI* (Washington, Nuernberg Military Tribunals, 1952); Judgment, *United States of America* v. *Krauch et al.*, Case No. 6, Military Tribunal VI, 29 July 1948, in *Trials of the War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 – Volume VIII* (Washington, Nuernberg Military Tribunals, 1952); Judgment, *United States of America* v. *Krupp von Bohlen und Halbach et al.*, Case No. 10, Military Tribunal III, 31 July 1948, in *Trials of the War Criminals*

there is an expulsion of persons across a *de jure* border from one country to another (or in some cases a *de facto* border)[41] and that individuals have been convicted of this crime during a non-international armed conflict,[42] there would appear to be little room to doubt that deportation to slave labour could take place on the African continent during a non-international armed conflict. This would be particularly so where the relevant armed group operates across state boundaries. The Lord's Resistance Army, which allegedly operates in Uganda, South Sudan and the Democratic Republic of the Congo, comes to mind. Whether such an offence would be in violation of customary international law applicable in non-international armed conflicts would remain to be seen, but is not, on the face of it, far-fetched.

These criticisms aside, a positive development relating to war crimes can be seen in the crime of conscripting or enlisting children into national armed forces in an international armed conflict (Article 28D(b)(xxvii)) or armed forces during a non-international armed conflict (Article 28D(e)(vii)). While these provisions largely copy the same provisions found in the Rome Statute (1998) (in international and non-international armed conflicts),[43] the provisions of the ACJHR Statute under the Malabo Protocol (2014) differ in one important way: no child *under the age of eighteen years* can be conscripted or enlisted. This is consonant with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000)[44] and with the

before the Nuernberg Military Tribunals under Control Council Law No. 10 – Volume IX (Washington, Nuernberg Military Tribunals, 1950); Judgment, *United States of America v. von Weizsäcker et al.*, Case No. 11, Military Tribunal IV, 11 April 1949, in *Trials of the War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 – Volume XIV* (Washington, Nuernberg Military Tribunals, 1949).

[41] *See* Appeal Judgment, *Prosecutor v. Stakić*, (IT-97–24-A), ICTY, 22 March 2006, paras 278, 300 (in the context of a crime against humanity); *see also* Appeal Judgment, *Prosecutor v. Naletilić and Martinović*, (IT-98–34-A), ICTY, 3 May 2006, para. 152. This holding was subsequently applied to cases involving deportation as a war crime: Trial Judgment, *Prosecutor v. Prlić*, (IT-04–74-T), ICTY, 29 May 2013, Vol. 1, para. 132; Vol. 3, paras 810–39; *see also* Trial Judgment, *Prosecutor v. Krnojelac*, (IT-97–25-T), ICTY, 15 March 2002, para. 473.

[42] *See for example* Trial Judgment, *Prosecutor v. Milutinović et al.*, (IT-05–87-T), ICTY, 26 February 2009, Vol. 3, paras 475, 630, 788, 930, 1138 and Trial Judgment, *Prosecutor v. Đorđević*, (IT-05–87/1-T), ICTY, 23 February 2011, para. 2230 (where the accused were convicted of, *inter alia*, deportation as a crime against humanity during 1999 Kosovo War between Serbia/Yugoslavia and Kosovo Albanians (a separate international armed conflict ensued between the member States of the North Atlantic Treaty Organization and Serbia/Yugoslavia)).

[43] *See* Art. 8(2)(b)(xxvi), Rome St. (1998) (international armed conflicts); Art. 8(2)(e)(vii), Rome St. (1998) (non-international armed conflicts).

[44] *See* Art. 1–4, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000) (however, while the conscription of children under the age of eighteen years is prohibited (Article 2), Article 3(1) still nonetheless

African Charter on the Rights and Welfare of the Child (1990).[45] It is, however, different from the Rome Statute (1998),[46] Additional Protocols I and II to the Geneva Conventions (1977)[47] and the Statute of the Special Court for Sierra Leone (SCSL Statute),[48] which only forbid the enlistment and recruitment of children under *fifteen years of age*. In other words, the ACJHR Statute under the Malabo Protocol (2014) affords greater protection for children than the ICC, the Geneva Conventions and the Special Court for Sierra Leone (SCSL).

But perhaps the most interesting of all the 'new' war crimes is the crime of 'using nuclear weapons or other weapons of mass destruction' (Article 28D (g)). As aforementioned, attempts during the negotiations that led to the Rome Statute (1998) to criminalize the use of nuclear weapons proved controversial and divisive in light of stout opposition by some P5 states.[49] Therefore, its inclusion in the ACJHR Statute under the Malabo Protocol (2014), which is in line with the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba) (1996),[50] is a most welcome innovation. Given the horrendous short- and long-term effects of the use of such weapons, their use should not be permitted, notwithstanding the 1996 advisory opinion of the International Court of Justice (ICJ) on the subject.[51]

permits the recruitment of children over the age of fifteen eighteen years into the national army of States, provided that it is voluntary, with parental consent, fully informed and with reliable proof of age (in contrast, under Article 4(1), armed groups are prohibited from recruiting children under the age of eighteen years at an time)).

[45] *See* Arts. 2, 22(2), African Charter on the Rights and Welfare of the Child (1990). As of 15 June 2017, 44 of the AU's 55 member States have signed this treaty, while 48 member States have ratified or acceded to it. *See* African Union, List of Countries which have signed, ratified/acceded to the African Charter on the Rights and Welfare of the Child (1990), available at: https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf (accessed 25 November 2018).

[46] *See* supra fn. 43.

[47] *See* Art. 77(2), Additional Protocol I to the Geneva Conventions (1977); Art. 4(3)(c), Additional Protocol II to the Geneva Conventions (1977).

[48] *See* Art. 4(c), SCSL Statute. *See also* Art. 4(c), Residual SCSL St.

[49] *See* supra fn. 37.

[50] *See* Art. 2–6, African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba) (1996). As of 15 June 2017, 52 of the AU's 55 member states have signed this treaty, while 41 member States have ratified or acceded to it. *See* African Union, List of Countries which have signed, ratified/acceded to the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba) (1996), available at: https://au.int/sites/default/files/treaties/7777-sl-the_african_nuclear-weapon-free_zone_treaty_the_treaty_of_pelindaba_3.pdf (accessed 25 November 2018).

[51] *See Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226 (where the ICJ did not, under any branch of international law at that time, find that nuclear weapons were illegal *per se*). *See generally* G. Nystuen, S. Casey-Maslen and A. G. Bersagel (eds), *Nuclear Weapons Under International Law* (Cambridge, Cambridge University Press, 2014).

Furthermore, the manner of this provision's inclusion also helps to expose the futility of dividing war crimes between international and non-international armed conflicts, since Article 28D(g) is not included in any of the four lists of war crimes that can be committed in those two types of conflicts,[52] but stands on its own. This would suggest that this crime can be committed in the course of either an international or non-international armed conflict. In other words, the prosecution of this crime would not need to establish the classification of the armed conflict as an element of the offence but merely the existence of an armed conflict regardless of its character – in the spirit of Article 3 of the ICTY Statute.

Indeed, classification can be a difficult task, particularly where non-state armed groups are involved. For example, in the ICC's *Lubanga* case, the Pre-Trial Chamber's decision confirming the charges determined that the relevant conflict was international in nature due to Uganda's occupation of the Ituri region and only became non-international upon Uganda's withdrawal.[53] In contrast, the Trial Chamber subsequently determined that the conflict was in fact of a non-international character for the entire period and accordingly re-characterized the charges under Regulation 55.[54] This was, after all, a case/conflict that involved no less than six armed groups and three states in and around the Ituri area in the Democratic Republic of the Congo.[55] There is no doubt that similarly complex African classification situations will eventually be adjudicated pursuant to the ACJHR Statute under the Malabo Protocol (2014). Yet, the difficulties involved in classification could have been avoided by *not* dividing up war crimes into lists of those committed in international and non-international armed conflicts, at least as much as possible, particularly when we consider that many of the underlying war crimes are found in both lists

[52] *I.e.* Art. 28D(2)(a)(i)–(viii) (grave breaches of the Geneva Conventions (1949); Art. 28D(2)(b)(i)–(xxxiii) (grave breaches of Additional Protocol I to the Geneva Conventions (1977) and other serious violations of the law and customs of international armed conflicts); Art. 28D(2)(c)(i)–(iv) (serious violations of Common Art. 3 of the Geneva Conventions (1949)); Art. 28D(2)(e)(i)–(xxii) (other serious violations of the law and customs of non-international armed conflicts).

[53] *See* Decision on the Confirmation of Charges, *Prosecutor* v. *Lubanga*, (ICC-01/04–01/06–803-tENG), 29 January 2007, paras 220, 235–7.

[54] *See*, Judgment Pursuant to Article 74 of the Statute, *Prosecutor* v. *Lubanga*, (ICC-01/04–01/06–2842), 14 March 2012, paras 563–7.

[55] Namely, the Union des Patriotes Congolais (UPC) (and its military wing, the Force Patriotique pour la Libération du Congo (FPLC)), Rassemblement Congolais pour la Démocratie – Kisangani/Mouvement de Libération (RCD-ML) (and its military wing, the Armée Populaire Congolaise (APC)), Front des Nationalistes Intégrationnistes (FNI), Force de Résistance Patriotique en Ituri (FRPI), Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo (PUSIC) and the Forces Armées du Peuple Congolais (FAPC), together with Uganda, Rwanda and the Democratic Republic of Congo (DRC). *See*, Judgment Pursuant to Article 74 of the Statute, *Prosecutor* v. *Lubanga*, (ICC-01/04–01/06–2842), 14 March 2012, paras 503–67.

anyway (especially violations of the laws and customs of war). Rather, a more attractive option would have been something similar to, or an adaption of, that found in Article 3 of the ICTY Statute, which simply states that the ICTY has the power to prosecute those who violate the law and customs of war and then provides a non-exhaustive list of such violations.[56] This architecture, and ICTY jurisprudence,[57] led the ICTY, in Article 3 cases, to skip conflict classification altogether and the tricky problems that they can entail.

One last war crime is worth mentioning. However, this is not because of its inclusion in the ACJHR Statute under the Malabo Protocol (2014), but rather because of its absence. This is the crime of terror (as it was known at the ICTY) or terrorism (as it was known at the SCSL/ICTR) as a war crime. It is simply not found in any of the war crimes provisions. Neither of course, is it found in the Rome Statute (1998) or explicitly in the ICTY Statute (despite convictions under Article 3 of the ICTY Statute for this crime), but it was found in the SCSL and ICTR Statutes.[58] It must be remembered that this particularly odious offence is one of the very few crimes (when one excludes genocide convictions) that have attracted life sentences at any of the international criminal tribunals.[59] Given this fact, and the various cases concerning this offence that were prosecuted at the ICTY and the SCSL,[60] it is somewhat perplexing that this war crime was not included in the ACJHR Statute under the Malabo Protocol (2014).

[56] Article 3, ICTY Statute, states, in full, that:

> The International Tribunal [ICTY] shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
> (e) plunder of public or private property.

[57] *See* Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić*, (IT-94–1-AR72), ICTY, 2 October 1995, paras 87–93.

[58] *See* Art. 4(d), ICTR St.; Art. 3(d), SCSL St.; *see also* Art. 3(d), Residual SCSL St.

[59] *See* Appeal Judgment, *Prosecutor v. Galić*, (IT-98–29-A), ICTY, 30 November 2006, Disposition (for the campaign of shelling and sniping undertaken by Bosnian Serbs forces during the notorious 3-year, 10 month siege of Sarajevo in Bosnia and Herzegovina).

[60] *See* Trial Judgment, *Prosecutor* v. *D. Milošević*, (IT-98–29/1-T), ICTY, 12 December 2007; Appeal Judgment, *Prosecutor* v. *D. Milošević*, (IT-98–29/1-A), ICTY, 12 November 2009; Trial Judgment, *Prosecutor v. Brima et al.*, (SCSL-04–16-T), SCSL, 20 June 2007; Appeal Judgment,

C. *Crimes Against Humanity*

Crimes against humanity in the ACJHR Statute under the Malabo Protocol (2014) – Article 28C – is mostly a carbon copy of the provision on crimes against humanity found in the Rome Statute (1998).[61] However, a few salient matters are worth pointing out. The *chapeau* to Article 28C could be read as expanding the reach of crimes against humanity's contextual element. This is so because it refers to 'a widespread or systematic attack *or enterprise* directed against any civilian population, with knowledge of the attack *or enterprise*'. This is an interesting development, because there exists jurisprudence and academic commentary to the effect that the word 'attack' denotes violent and, in certain circumstances, non-violent acts.[62] If that is so, one wonders what sort of additional acts the terms 'or enterprise' are supposed to cover. Is the term 'enterprise' subsumed under the term 'attack'? An alternative view, however, is simply that the words 'or enterprise' serve to add further clarity to the notion that non-violent acts are encompassed by the contextual *chapeau* element, especially when we consider that the term 'attack' has also been interpreted by some jurisprudence to denote the existence of violence, a view supported by some commentators.[63]

Prosecutor v. *Brima et al.*, (SCSL-2004–16-A) , 22 February 2008; Trial Judgment, *Prosecutor* v. *Fofana and Kondewa*, (SCSL-04–14-T), 2 August 2007; Appeal Judgment, *Prosecutor* v. *Fofana and Kondewa*, (SCSL-04–14-A), 28 May 2008; Trial Judgment, *Prosecutor* v. *Sesay et al.*, (SCSL-04–15-T), 2 March 2009; Appeal Judgment, *Prosecutor v. Sesay et al.*, (SCSL-04–15-A), 26 October 2009; Trial Judgment, *Prosecutor* v. *Taylor*, (SCSL-03–01-T), 18 May 2012; Appeal Judgment, *Prosecutor* v. *Taylor*, (SCSL-03–01-A), 26 September 2013.

[61] *See* Art. 7, Rome St. (1998).

[62] Trial Judgment, *Prosecutor* v. *Akayesu*, (ICTR-96–4-T), 2 September 1998, para. 581: '[a]n attack may also be non violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner'; Trial Judgment, *Prosecutor* v. *Musema*, (ICTR-96–13-T), 27 January 2000, para. 205: '[a]n attack may also be non-violent in nature'; K. Ambos, *Treatise on International Criminal Law – Volume II: The Crimes and Sentencing* (Oxford, Oxford University Press, 2014), p. 58: 'the attack need not necessarily be "violent in nature" (e.g., the system of apartheid)'; W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2010), p. 153: '[a]lthough many of the specific acts of crimes against humanity involve physical violence, such offences as persecution and apartheid, for example, may be perpetrated as a result of legislation and government policy.'

[63] *See* Appeal Judgment, *Nahimana v. The Prosecutor*, (ICTR-99–52-A), 28 November 2007, para. 918: 'an attack . . . means the perpetration . . . of a series of acts of violence, or of the kind of mistreatment referred to in sub-paragraphs (a) to (i) of the Article [Article 3, ICTR Statute]'; Case 002/01 Trial Judgment, *Co-Prosecutors v. Nuon and Khieu*, (002/19–09–2007/ECCC/TC/E313), 7 August 2014, para. 178: '[a]n attack is a course of conduct involving the commission of a series of acts of violence'; G. Mettraux, International Crimes and the *Ad Hoc* Tribunals (Oxford, Oxford University Press, 2006), p. 156 (after citing *Akayesu* (see supra fn. 62)): '[t]he

Largely incorporating the crimes against humanity definition of the Rome Statute (1998) also means that the ACJHR Statute under the Malabo Protocol (2014) has included the requirement of 'a State or organizational policy' in Article 28C(2)(a).[64] In so doing, this requirement has been added to crimes against humanity's contextual element, thus departing from consistent ICTY and ICTR jurisprudence holding that it is not required under customary international law.[65] As to what constitutes an 'organization' for the purposes of an 'organizational policy', this is an issue that has been the subject ongoing controversy at the ICC. Two views have arisen on the matter. The first view sees this term as not being defined or limited by 'the formal nature of the group and the level of its organization' (although this is relevant), but rather 'on whether a group has the capability to perform acts which infringe on basic human values.'[66] In other words, its 'capacities for action, mutual agreement and coordination[] . . . are essential features to defining an organization that, by very reason of the means and resources it possesses and its membership, allow an attack to be executed.'[67] The late Judge Kaul succinctly expressed

author does not agree with the view that the establishment and maintenance of such a system of apartheid can be regarded as "non-violent" or that, for that matter, any "attack" within the meaning of crimes against humanity could be non-violent in the broad sense of the word'; G. Boas, J. L. Bischoff and N. L. Reid, *International Criminal Law Practitioner Library – Volume II: Elements of Crimes under International Law* (Cambridge, Cambridge University Press, 2008), p. 41: '[a]n "attack" for the purposes of crimes against humanity[] [. . .] has been simply and consistently described by *ad hoc* chambers as "a course of conduct involving the commission of acts of violence"'.

64 *See* Art. 7(2)(a), Rome St. (1998).

65 *See* Appeal Judgment, *Prosecutor* v. *Kunarac et al.*, (IT-96–23 & IT- 96–23/1-A), ICTY, 12 June 2002, paras 98–101; Appeal Judgment, *Prosecutor v. Blaškić*, (IT-95–14-A), ICTY, 29 July 2004, para. 120; Appeal Judgment, *Semanza* v. *The Prosecutor*, (ICTR-97–20-A), 20 May 2005, para. 269; Appeal Judgment, *Gacumbitsi* v. *The Prosecutor*, (ICTR-2001–64-A), 7 July 2006, para. 84. However, some commentators have been critical of the ICTY Appeals Chamber's original analysis in *Kunarac* that underlies this holding: *see* M. C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), pp. 25–8.

66 Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, (ICC-01/09–19-Corr), 31 March 2010, para. 90. *See also* Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, (ICC-02/11–14-Corr), 15 November 2011, para. 46; Decision on the Confirmation of Charges Pursuant to Article 67(1)(a) and (b) of the Rome Statute, *Prosecutor* v. *Ruto et al.*, (ICC-01/09–01/11–373), 23 January 2012, para. 33; Decision on the Confirmation of Charges Pursuant to Article 67(1)(a) and (b) of the Rome Statute, *Prosecutor* v. *Muthaura et al.*, (ICC-01/09–02/11–382-Red), 23 January 2012, para. 114.

67 Judgment Pursuant to Article 74 of the Statute, *Prosecutor v. Katanga*, (ICC-01/04–01/07–3436-tENG), 7 March 2014, paras 1119–1120. *See also* Judgment Pursuant to Article 74 of the Statute, *Prosecutor* v. *Bemba*, (ICC-01/05–01/08–3343), 21 March 2016, para. 158.

the second view. According to him, the relevant organization must 'partake of some characteristics of a State[] [which] eventually turns the private "organization" into an entity which may act like a State or has quasi-State abilities.'[68] Without this requirement, he avers that perhaps the mafia or other similar criminal organizations would be able to commit crimes against humanity.[69] The ICC Appeals Chamber has not yet pronounced itself on this matter. Consequently, uncertainty remains, although Ambos has rightly pointed out that the criteria or characteristics outlined by both sides of the debate 'as possible distinguishing features for the determination of an "organization" shows[] ... that those criteria are in large part identical ... and only differ substantially insofar as [Judge] Kaul regards them as indications of state-likeness[.]'[70]

With respect to the underlying crimes, it is noticeable that not only is torture criminalized – as is the case at all modern international criminal tribunals and courts[71] – but also, for the first time, Article 28C(f) explicitly adds 'cruel, inhuman and degrading treatment or punishment' as well. Of course, this language originates from the Torture Convention (1984) and was designed to capture conduct that, while odious and deplorable, might not

[68] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya – Dissenting Opinion of Judge Hans-Peter Kaul, *Situation in the Republic of Kenya*, (ICC-01/09–19-Corr), 31 March 2010, para. 51. *See also*, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', *Prosecutor v. Ruto et al.*, (ICC-01/09–01/11–2), 15 March 2011; Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', *Prosecutor* v. *Muthaura et al.*, (ICC-01/09–02/11–3), 15 March 2011; Decision on the Confirmation of Charges Pursuant to Article 67(1)(a) and (b) of the Rome Statute – Dissenting Opinion of Judge Hans-Peter Kaul, *Prosecutor* v. *Ruto et al.*, (ICC-01/09–01/11–373), 23 January 2012; Decision on the Confirmation of Charges Pursuant to Article 67(1)(a) and (b) of the Rome Statute – Dissenting Opinion of Judge Hans-Peter Kaul, *Prosecutor* v. *Muthaura et al.*, (ICC-01/09–02/11–382-Red), 23 January 2012.

[69] *See generally* Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya – Dissenting Opinion of Judge Hans-Peter Kaul, *Situation in the Republic of Kenya*, (ICC-01/09–19-Corr), 31 March 2010, paras 33–70.

[70] K. Ambos, *Treatise on International Criminal Law – Volume II: The Crimes and Sentencing* (Oxford, Oxford University Press, 2014), pp. 74–75. *See also* C. K. Hall and K. Ambos, 'Article 7 [(2)(a)]: Crimes Against Humanity', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (3rd Edition Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2016), margin No. 110, p. 249.

[71] *See* Art. 7(1)(f), Rome St. (1998); Art. 5(f), ICTY St.; Art. 3(f), ICTR St.; Art. 2(f), SCSL St.; Art. 2(f) Residual SCSL St.; Art. 5, ECCC Law.

necessarily amount to torture as defined in Article 1(1) of that treaty.[72] However, its inclusion in the ACJHR Statute under the Malabo Protocol (2014) raises a question: where does this leave 'other inhumane acts' in Article 28C(1)(k)? Surely there is overlap, since many of the acts that could amount to cruel, inhuman or degrading treatment or punishment could have already been prosecuted as 'other inhumane acts' under Article 28C(1)(k).[73] The danger here is that by including both of these provisions, the drafters could have – perhaps inadvertently – rendered one of them superfluous, unless the two can be somehow distinguished. It remains to be seen how this matter will be resolved by the judges of the ACJHR.

Finally, one interesting omission can be seen in Article 28C when compared to the Rome Statute (1998). Included (somewhat awkwardly) in the crimes against humanity provision at the ICC, is Article 7(3) of the Rome Statute (1998) which provides for a definition of 'gender' for the treaty as a whole, and states that the term 'refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.' This provision has been described by one commentator as 'the most puzzling and bizarre language ever included in an international treaty',[74] but was added in order to address concerns that the term 'gender' might be read to include sexual orientation.[75] The result was the compromise contained in Article 7(3). However, with its omission from the ACJHR Statute under the Malabo Protocol (2014), the judges of the ACJHR will be free from any constraining definition. Since 'gender' is expressly listed as one of the groups

[72] *See* Art. 16(1)–(2), Torture Convention (1984).

[73] *See* Trial Judgment, *Prosecutor v. Kupreškić et al.*, (IT-96–16-T), ICTY, 14 January 2000, para. 566 (inhumane and degrading treatment as an 'other inhumane act'); Trial Judgment, *Prosecutor v. Tadić*, (IT-94–1-T), ICTY, 7 May 1997, para. 730 (beatings as an 'other inhumane act'); ICTY, *Prosecutor v. Kvočka et al.*, Trial Judgment, Case No. IT-98/30/1-T, 2 November 2001, para. 209 (beatings and humiliation as 'other inhumane acts'); Trial Judgment, *Prosecutor v. Akayesu*, (ICTR-96–4-T), 2 September 1998, para. 697 (forced undressing and public nakedness as 'other inhumane acts'); Trial Judgment, *Co-Prosecutors v. Kaing*, (001/18–07–2007/ECCC/TC/E188), 26 July 2010, para. 372 (imposition of deplorable conditions of detention as an 'other inhumane act').

[74] T. van Boven, quoted in D. M. Koenig and K. D. Askin, 'International Criminal Law and the International Criminal Court Statute: Crimes Against Women', in K. D. Askin and D. M. Koenig (eds), *Women and International Human Rights Law*, Vol. 2, p. 20, fn. 73.

[75] *See* W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2010), p. 186; C. Steains, 'Gender Issues', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague/London/Boston, Kluwer Law International, 1999), pp. 371–5; V. Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* (2005) 55–84, at 58–66.

upon whom persecution as a crime against humanity can be carried out (as per Article 28C(1)(h)), it will be interesting to see if and how the concept of gender will develop.

D. *Aggression*

The ACJHR Statute under the Malabo Protocol (2014) also shows innovation in respect of the crime of aggression (Article 28M). In spite of some ambiguities, it is, on the whole, a marked improvement from the 2010 ICC Kampala Amendments on aggression (i.e. Articles 8 *bis*, 15 *bis*, 15 *ter*, Rome Statute (1998)). With respect to the substantive crime, while broadly mirroring Article 8 *bis* of the Rome Statute (1998), the most notable aspect of Article 28M is that, unlike Article 8 *bis*, it encompasses not only acts of aggression carried out by states but also those carried out by *non-state* actors.[76] Thus, it covers both the illegal initiation of international and *non-international* armed conflicts. This is important because non-international armed conflicts significantly outnumber international armed conflicts. Indeed, a recent study found that in 2012 at least 37 armed conflicts took place and of these only one was an 'active international armed conflict …, narrowly defined' while 'belligerent occupations continued [in] parts of nine states and territories.'[77] In 2013, the same study found that the total number of armed conflicts had risen to 39, with two active international armed conflicts and the number of belligerent occupations remaining unchanged.[78] In 2014, armed conflicts rose again to 42, with only three active international armed conflicts and situations of belligerent occupation rising to 10.[79]

Nevertheless, this raises some questions, since in the Rome Statute (1998), an act of aggression is intimately linked to a manifest violation of Article 2(4) of the UN Charter (1945) – the prohibition on the use of force. That provision is of no relevance to a non-international armed conflict since this prohibition is

[76] This is not to say that the actions of non-State actors could *never* fall within the definition of aggression under Art. 8 *bis*. Indeed, Art. 8 *bis*(2)(g) specifically refers to the actions of 'armed bands, groups, irregulars or mercenaries' against a State provided that they are of sufficient gravity and that were 'sen[t] by or on behalf of a State' or a State was 'substantially involve[d] therein.' In other words, unless the actions of a non-State actor can be attributed to a State or a State can be proved to be substantially involved in them, they would stand to be excluded from Art. 8 *bis*.

[77] 'Armed Conflicts in 2012 and their Impacts', in S. Casey-Maslen (ed.), *The War Report: 2012* (Oxford, Oxford University Press, 2013), pp. 3–4.

[78] 'Armed Conflicts in 2013 and their Impacts', in S. Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013* (Oxford, Oxford University Press, 2014), pp. 27–9.

[79] 'Summary', in A. Bellal (ed.), *The War Report: Armed Conflict in 2014* (Oxford, Oxford University Press, 2015), p. 7.

addressed to states and does not apply to non-state actors (at international law).[80] Article 28M(A) of the ACJHR Statute under the Malabo Protocol (2014) attempts to overcome this by, in addition to the UN Charter (1945), referring to, in the alternative, a manifest violation of the Constitutive Act of the African Union (2000) 'and with regard to the territorial integrity and human security of the population of a State Party.' Yet, the Constitutive Act of the African Union (2000), like the UN Charter (1945), appears to address AU member states only[81] and contains no express provision regarding the use of force by non-state actors, but instead merely 'condemn[s] and reject[s] … unconstitutional changes of governments.'[82]

In addition, the ICC's aggression leadership element found in Article 8 *bis* (1) is also adopted into Article 28M, albeit in a slightly modified fashion – to account for the fact that aggression under the ACJHR Statute pursuant to the Malabo Protocol (2014) applies to non-international armed conflicts and non-state actors. Thus, according to Article 28M(A), the person accused of the crime of aggression must be 'in a position effectively to exercise *control over or to direct* the political or military action of a state or *organization*.' Two issues arise. The first issue, is that the 'control or direct' standard, which was copied from Article 8 *bis*(1), actually *narrows* the class of persons who could be criminally responsible for aggression when compared to the crimes against peace (as aggression was then known) jurisprudence of World War II. In fact, a number of defendants were convicted after World War II not on the basis that they controlled or directed the political or military action of their respective states, but instead because they were in a position to *shape or influence* such action – a less restrictive standard.[83] In other words, the scope for

[80] M. Shaw, *International Law*, (6th Edition Cambridge, Cambridge University Press, 2008), p. 1148–9: 'Article 2(4) of the UN Charter [(1945)] prohibits the threat or use of force in international relations, not in domestic situations. There is no rule against rebellion in international law. It is within the domestic jurisdiction of states and is left to be dealt with by internal law.' *But see* E. Lieblich, 'Internal *Jus Ad Bellum*' 67(3) *Hasting Law Journal* (2016) 687–748 (where the author proposes a novel theory of *jus ad bellum* which would apply *within* a State – both to governments as well as non-State armed groups).

[81] *See* Arts. 4(a), (e)–(g), (i), Constitutive Act of the African Union (2000).

[82] Art. 4(p), Constitutive Act of the African Union (2000).

[83] For a detailed account of the relevant jurisprudence, see K. J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' 18(3) *European Journal of International Law* (2007) 477–97. *See also* C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge, Cambridge University Press, 2013), p. 182: 'A comparison between the definition of a potential perpetrator under Article 8 *bis* (1) and the range of persons prosecuted by the post-war Tribunals show that Heller was right to conclude that the decision to adopt the control or direct standard "represents a significant *retreat* from the Nuremberg principles – not their codification"'.

criminal responsibility for aggression under customary international law[84] is wider than that found in Article 8 *bis*(1) and now Article 28M(A).

The second issue, is that Article 28M(A) introduces the same interpretational difficulties that one finds in crimes against humanity, since the question that will inevitably arise is what an 'organization' means in this context and whether it is the same as, or different from, that found in Article 7(2)(a) of the Rome Statute (1998) (see discussion above) and Article 28C(2)(a) of the ACJHR Statute under the Malabo Protocol (2014). Here, Judge Kaul's view that the organization must be 'state-like' (in the context of crimes against humanity)[85] finds more favour, since the idea that the African equivalent of the mafia could be responsible for acts of aggression really begins to stretch international criminal law to a place that, frankly, gives such criminal thugs more credit than they deserve.

But the most refreshing aspect of aggression as per Article 28M – and of all the core international crimes in the ACJHR Statute pursuant to the Malabo Protocol (2014) – is that it comes, on paper, with absolutely no strings attached. No special articles, unique requirements or jurisdictional provisions that only apply to aggression are included. In stark contrast, Article 15 *bis* and Article 15 *ter* of the Rome Statute (1998) purposefully put into place barriers and jurisdictional hoops that have to be jumped through and overcome, thereby ensuring that the ICC will unlikely adjudicate upon an aggression case anytime soon. Thus, Article 15 *bis*(2) and Article 15 *ter*(2) require one year to elapse after the requisite number of ICC States Parties (30) have ratified the 2010 ICC Kampala Amendments[86] before the ICC can exercise jurisdiction over aggression; Article 15 *bis*(3) and Article 15 *ter*(3) require a decision to be made after 1 January 2017 to activate the ICC's jurisdiction over aggression (this is in addition to the one year period stipulated in Article 15 *bis*(2) and

[84] As various international criminal tribunals have held on numerous occasions, World War II-era jurisprudence is 'indicative of customary international law': Appeal Judgment, *Prosecutor* v. *Taylor*, (SCSL-03–01-A), 26 September 2013, para. 417 (and the case law cited therein). *See also* Appeal Judgment, *Prosecutor* v. *Šainović et al.*, (IT-05–87-A), ICTY, 23 January 2014, paras 1627–42.

[85] *See* supra fns 68–69.

[86] As of 25 November 2018, 37 ICC States Parties have ratified the 2010 ICC Kampala Amendments on the crime of aggression: Andorra, Argentina, Austria, Belgium, Botswana, Chile, Costa Rica, Croatia, Cyprus, the Czech Republic, El Salvador, Estonia, Finland, Georgia, Germany, Guyana, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, The Netherlands, Palestine, Panama, Poland, Portugal, Samoa, San Marino, Slovakia, Slovenia, Spain, Switzerland, Trinidad and Tobago and Uruguay.

Article 15 *ter*(2));[87] Article 15 *bis*(4) permits states to 'opt out' of aggression at the ICC where the ICC Prosecutor acts *proprio motu* or where there is a state referral[88]; Article 15 *bis*(5) provides that the ICC only has jurisdiction over aggression where the state of nationality of the accused *and* the state on which the crime takes have *both* ratified the 2010 ICC Kampala Amendments on aggression (unless the UN Security Council, acting under Chapter VII of the UN Charter, refers the matter). The ACJHR Statute under the Malabo Protocol (2014) does not contain any such provisions with respect to aggression. Rather, aggression is treated just like any other international crime; as it should be. Africa deserves credit for this straightforward approach.

4. CONCLUSION

Taking into account all the matters discussed in this chapter, Africa must be commended for many of the bold approaches it appears to have taken with respect to core international crimes. There are certainly a number of interesting, innovative and admirable provisions in this regard contained in the Malabo Protocol (2014) that international criminal law as a discipline should reflect upon. But the Malabo Protocol (2014) is about more than just those provisions that have been detailed and considered in this chapter.

Other positive steps can be seen with the addition of a whole host of crimes that have previously been generally considered as better dealt with through inter-state cooperation and national prosecution rather than by an international or regional criminal court (with the exception of terrorism at the Special Tribunal for Lebanon) – these include the crime of piracy (Article 28F), terrorism (Article 28G), mercenarism (Article 28H), corruption (Article 28I), money laundering (Article 28I *bis*), trafficking in persons (Article 28J), trafficking in drugs (Article 28K), trafficking in hazardous wastes (Article 28L) and the illicit

[87] Accordingly, the ICC's jurisdiction over the crime of aggression was only activated as of 17 July 2018 by the ICC Assembly of States Parties in December 2017: see ICC, Resolution ICC-ASP/16/Res.5, Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017.

[88] As of 25 November 2018, only Kenya and Guatemala have lodged an Art. 15 *bis*(4) declarations opting out of the 2010 ICC Kampala Amendments on the crime of aggression. The existence of Art. 15 *bis*(4) is difficult to reconcile with Art. 120 of the Rome Statute (1998) which provides that '[n]o reservations may be made to this Statute'. Particularly as it applies to new ICC States Parties, it would appear to be the very definition of a reservation as contained in Article 2(d) of the Vienna Convention on the Law of Treaties (1969): '"reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.

exploitation of natural resources (Article 28L *bis*). Further positive steps can be seen with the inclusion of passive personality and extraterritorial protective jurisdiction (Article 46E *bis*(2)(c)–(d)), corporate criminal liability (Article 48C), the creation of a Defence Office as an independent organ (Articles 2 (4), 22C) and the exclusion of the death penalty (Article 43A(1)–(2)).

On the other hand, eyebrows are raised by the inclusion, for example, of the crime of unconstitutional change of government (Article 28E), particularly when one considers the habitual vote-rigging, violence and other irregularities that have accompanied many of Africa's elections in recent times. Difficulty arises in establishing that a given government is truly a 'democratically elected government'. We must also not forget that elections, in and of themselves, are no guarantee or insurance policy against future tyranny.[89] Other concerns emanate from the reality that significant additional resources will have to be invested into the ACJHR, given the wide-ranging and diverse mandate envisaged by the Malabo Protocol (2014).[90] Despite an AU commitment to ensure that the ACJHR is adequately funded,[91] where all the additional money will actually come from is presently unknown.

But the most controversial provision of all is Article 46A *bis*, which provides complete immunity for incumbent Heads of State or Government and 'other

[89] This might explain, perhaps, why numerous States, including a number in Africa, have included a 'right to rebel' within their domestic law. *See* Benin (Art. 66, Constitution of the Republic of Benin); Burkina Faso (Art. 167, Constitution of Burkina Faso); Chad (Preamble, Constitution of Republic of Chad); Cuba (Art. 3, Constitution of the Republic of Cuba); the Czech Republic (Art. 23, Czech Charter of Fundamental Rights and Freedoms); the Democratic Republic of the Congo (Art. 64, Constitution of the Democratic Republic of the Congo); Ecuador (Art. 98, Constitution of the Republic of Ecuador); El Salvador (Arts. 87–88, Constitution of the Republic of El Salvador); Estonia (Art. 54, Constitution of the Republic of Estonia); Germany (Art. 20(4), Basic Law for the Federal Republic of Germany); Greece (Art. 120(4), Constitution of Greece); Honduras (Art. 3, Constitution of Honduras); Liberia (Art. 1, Constitution of the Republic of Liberia); Peru (Art. 46, Constitution of Peru); Portugal (Arts. 7(3), 21, Constitution of the Portuguese Republic); Slovakia (Art. 32, Constitution of the Slovak Republic); Togo (Art. 45, Constitution of the Republic of Togo); and Venezuela (Art. 350, Constitution of the Bolivarian Republic of Venezuela).

[90] To put things into some perspective, consider that the ICC's approved budget for 2016 was €139.59 million (approximately $US151.55 million at 14 November 2016) (*see* ICC, *Resolution on the Programme budget for 2016, the Working Capital Fund and the Contingency Fund for 2016, scale of assessments for the apportionment of expenses of the International Criminal Court and financing appropriations for 2016*, Resolution ICC-ASP/14/Res.1, 26 November 2015); while the entire AU's budget for the same year was $US416.86 million (*see* African Union, *Decision on the Budget of the African Union for the 2016 Financial Year*, Decision No. Assembly/AU/Dec. 577(XXV), 14–15 June 2015).

[91] *See* African Union, *Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) Doc. Assembly/AU/18(XXIV)*, Decision No. Assembly/AU/Dec.547(XXIV), 30–31 January 2015, paras 15–16, 17(b).

senior state officials'. This is an issue that has, for good reason, taken over much of the debate and discussion concerning the Malabo Protocol (2014). Article 46A *bis* is plainly a regressive choice by Africa, since it hardwires a double standard whereby one set of laws applies to the politically weak and another to the politically strong. It is also the direct result of sentiment common among African leaders that the ICC has unfairly and in a racist manner targeted Africa in its investigations and prosecutions. Yet, one must keep in mind that this anti-ICC rhetoric only began when politically powerful Africans were sought by the ICC (such as President Al-Bashir of the Sudan or President Kenyatta and Deputy President Ruto of Kenya). It was conspicuously absent when the ICC sought politically weak Africans (such as the likes of Lubanga, Katanga, Mbarushimana, Ngudjolo and Laurent Gbagbo), and remained absent when, well after the criticisms had begun, the ICC sought other politically weak Africans (like Ongwen and Al Mahdi).[92] It would thus appear, as Desmond Tutu has observed, that African leaders 'conveniently accuse the ICC of racism.'[93]

And so, can it be said that the Malabo Protocol (2014) simultaneously represents a step forward and backwards in the fight against impunity? Indeed, it is not often that one hears both of these seemingly contradictory notions contained in the one judicial entity. Or are the negatives offset by the many innovations contained in the ACJHR Statute pursuant to the Malabo Protocol (2014), so that, on the whole, international criminal justice is well served? That is ultimately a matter for you the reader to decide, being guided by the various authors of this book. Suffice to say that, for now at least, the jury appears to be still out on these questions.

[92] *See* M. J. Ventura and A. J. Bleeker, 'Universal Jurisdiction, African Perceptions of the International Criminal Court and the New AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights', in E. A. Ankumah (ed.), *The International Criminal Court and Africa: One Decade On* (Cambridge/Antwerp/Portland, Intersentia, 2016), pp. 442–4; S. Batohi, 'Africa and the International Criminal Court: A Prosecutor's Perspective', in G. Werle, L. Fernandez, M. Vormbaum (eds), *Africa and the International Criminal Court* (The Hague/Berlin, T.M.C. Asser Press/Springer, 2014), p. 50; T. Murithi, 'Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court', in G. Werle, L. Fernandez, M. Vormbaum (eds), *Africa and the International Criminal Court* (The Hague/Berlin, T.M.C. Asser Press/Springer, 2014), pp. 182–f4.

[93] D. Tutu, 'In Africa, Seeking a License to Kill', *The New York Times*, 10 October 2013.

10

Genocide and Other International Crimes by Unincorporated Groups

Will There Be Loopholes for Them in the African Court?

HANNIBAL TRAVIS

Corporate criminal liability may fill a gap in the traditional framework for punishing individual actors to deter mass atrocities. Corporate policies, according to many scholars, reward and coordinate the activities of natural persons who might have acted differently as individuals. The argument of this chapter is that the same may be true of organizations other than corporations, and that closing the many gaps left in the net cast around crimes against humanity and war crimes will require holding noncorporate organizations accountable in court.

At the Nuremberg Trial, US prosecutor Robert Jackson famously compared aggression to assault with bare fists, which was a crime under all "civilized" laws, and he argued that multiplying the offense by a million and adding machine guns and explosives to the mix was no defense.[1] Similarly, the hiring of "hit men" or the inflaming of social tensions to the point of assault or riot is also an offense under civilized laws. The question arises, does crossing national borders and multiplying the scale of the offense by thousands or millions – while adding missiles, mortars, and tanks to the mix – immunize from penal remedies what would otherwise be an offense?

The African Court of Justice and Human and Peoples Rights is poised to exercise the power to punish a plethora of pan-African population-level crimes. This chapter focuses on the modes of liability clause of the amended statute of the court, which extends African court criminal liability to legal persons. A complicating factor is the wording of the relevant article, Article 46C, which refers to "corporation[s]," "corporate personnel," "corporate intention," and a "body corporate" without referring in parallel provisions to

[1] R. Houghwout Jackson, Opening Address for the United States of America by Hon. Robert H. Jackson, International Military Tribunal (1946), p. 43, https://books.google.com/books?id=42bzAAAAMAAJ.

organizations other than corporations.[2] Such organizations – which include partnerships, political parties, and unincorporated associations in the form of terror groups – are suspected of committing or facilitating a variety of crimes that will be within the jurisdiction of the future African court, and such organizations have been sued in U.S. federal courts for genocide, rape, torture, summary executions, terrorism, and other extrajudicial killings.[3]

Political groups such as parties, armies, and fronts have been guilty of some of the worst atrocities in recent memory – the devastation of Sierra Leone, eastern Angola, eastern Congo (Kinshasa), and northern Uganda, for example. Religious organizations, charities, and foundations probably lie behind some of the most horrific episodes of terrorism and civilian enslavement and massacre by terrorist groups. For example one only needs to recall the African embassy bombings of 1998, the Somali university and other bombings, the Kenyan Westgate shopping mall massacre, the Boko Haram attacks on Christians and pro-government Muslims in northern Nigeria and neighboring states, and the Islamic State massacres of Copts and other Christians in Libya and Tunisia.[4] Religious and gender-related persecution by nonstate actors such as churches and armies has also been a problem, including the sexual abuse of children by Catholic priests rotated from parish to parish, female genital mutilation in northern and eastern Africa, the involvement of Christian churches in exorcisms and violence against albinos and other social groups, the destruction of Tawerga by the Libyan rebel *thuwar*, and violence between Christians and Muslims in the Central African Republic, Egypt, Ethiopia, and Eritrea. In Rwanda, in 1994, the church was a sanctuary for fleeing Tutsis but also a site of many massacres, sometimes with the direct complicity of the church. This led to the war crimes trial of Benedictine nuns, implicated in helping commit genocide.[5] Ethnic, local-territorial, and clan organizations such as tribes are also suspected of playing a major part in widespread atrocities in northern Nigeria, western Sudan (Darfur) Liberia, and elsewhere.

[2] Draft Protocol on Amendments to the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, OAU Doc. No. Exp/Min/IV/Rev. 7 (2012), https://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf [hereinafter "Draft Protocol"].

[3] E.g., *Ellul* v. *Congregation of Christian Bros.*, 774 F. 3d 791 (2d Cir. 2014); *Sikhs for Justice* v. *Indian National Congress*, 17 F. Supp. 2d 334 (S.D.N.Y. 2014); *Adhikari* v. *Daoud & Partners*, 95 F. Supp. 2d 1013 (S.D. Tex. 2015); *Safra* v. *Palestinian Authority*, 82 F. Supp. 3d 37 (D.D.C. 2015).

[4] E.g., E. Knox, "Note: The slippery slope of material support prosecutions: Social media support to terrorists", 66 *Hastings Law Journal* (2014) 295–330, at 305.

[5] L. Reydams, "Belgium's first application of universal jurisdiction: The Butare Four case", 1 *Journal of International Criminal Justice* (2002–2003) 428–36, at 431.

Other scholars have explored the criminal accountability of noncorporate associations under international law, especially in the context of the "Butare Four" case. Luc Reydams observes that one innovation in the Belgian disposition of that case was to convict an accused for preparing reports that fomented violence against ethnic Tutsis, in an environment that led to the massacres of thousands of them in the region, but which reports were not distributed as a public incitement, and which did not result in a conspiracy finding under Belgian law either; the charge was accessory or accomplice to murder and assassination.[6] Christopher Harding argues that organizational accountability apart from the accountability of members may be justified when there are organizational dynamics or cultures, independence of organizations from dominant individual personalities, organizational capacity for bilateral or multilateral dealings, and concrete objectives or interests of the organization.[7] Dov Jacobs has proposed that the phrase "or organizations" be added to Article 25(1) of the Rome Statute, governing the persons over whom the ICC has jurisdiction, currently "natural persons."[8]

Attribution of individual criminal accountability is seen as a key gap in the ICC Elements of Crimes, as is effective enforcement against clandestine groups such as paramilitaries and against groups created or used to sell arms or buy mineral or oil resources to knowingly finance armed attacks, war crimes, and dissolution of nation-states' integrity. Aiding and abetting is a theory that is thought to fill some of the gaps left by superior responsibility, direct commission, and other theories that focus on the top or bottom of pyramidal or network-like organized criminality requiring cooperative acts.[9]

[6] Ibid., at 429–35. The case is arguably the sole successful use of the Belgian universal jurisdiction law of 2001, which was repealed in 2003, although remnants of it survived in the penal code of Belgium; R. Baker, "Universal jurisdiction and the case of Belgium: A critical assessment," 16, no. 1 *ILSA Journal of International and Comparative Law* (2009) 141–67, at 154, 157–8.

[7] *Individuals, Organizations and Criminal Responsibility* (Cullompton, UK: Willan Publishing, 2007) 63–4, 226–7.

[8] "The Sheep in the Box: The Definition of the Crime of Aggression at the International Criminal Court," in C. Burchard, O. Triffterer & J. Vogel (Eds.), *The Review Conference and the Future of the International Criminal Court* (The Hague, the Netherlands: Kluwer Law International, 2010), 131–151, at 147–9.

[9] J. Bischoff, "Reception of Common Law in Substantive International Criminal Law," in Larissa van den Herik & Carsten Stahn (Eds.), *The Diversification and Fragmentation of International Criminal Law* (Dordrecht, the Netherlands: Matinus Nijhoff, 2012), p. 537; Cecilia Cristina Naddeo, "Praising the region: What might a complementary criminal justice system learn from the Inter-American Court of Human Rights?" in ibid. 189–90, 208; Aaron Fichtelberg, "Resource Wars, Environmental Crime, and the Laws of War: Updating War Crimes in a Resource Scarce World," in Avi Brisman & Nigel South (Eds.), *Environmental Crime and Social Conflict: Contemporary and Emerging Issues* (Abingdon & New York:

However, the theory of joint criminal enterprise leaves a gap for large-scale ethnic cleansing or territorial destruction, and for members of a group who form a common design or plan to commit international crimes where such crimes occur as a natural and foreseeable result of the group enterprise but were outside its original design or plan.[10]

This chapter has three sections. In Section 1, it makes the case that partnerships, trusts, and other unincorporated business associations are not currently covered by Article 46C, and that they should be. In Section 2, it surveys evidence that political and tribal groups, including parties, authorities, statelets, and clan groups are committing crimes within the jurisdiction of the African court and that Article 46C could beneficially apply to them. In Section 3, it concludes with a survey of how religious foundations, trusts, and associations could lead or become complicit in serious crimes, and describes situations in which Article 46C might need to extend to them. The collective crimes that this Section focuses on include genocide, torture, enslavement, recruitment of child soldiers, destruction of sacred sites, corruption, and terrorism, among others less commonly committed or aided by organizations besides corporations.

1. BUSINESS ORGANIZATIONS OTHER THAN CORPORATIONS COULD EXPLOIT LOOPHOLES IN ARTICLE 46C

Article 46C of the Draft Protocol is entitled "Corporate Criminal Liability." That provision has also been analyzed by Joanna Kyriakakis, in her separate chapter for this volume. However, it refers in its first paragraph or section to the court having "jurisdiction over legal persons, with the exception of States."[11] This raises the question of whether noncorporate legal persons are included in this category.

It appears from the rest of Article 46C, with the exception of section 6, that only corporations may be criminally liable under the statute, as the title of Article 46C also implies. Section 2, for example, states that "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."[12] There

Routledge, 2016), 184–8, 190. See also, Antonio Cassese, Guido Acquaviva, Mary Fan, & Alex Whiting, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011), p. 381

[10] A.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Antwerpen/Oxford: Intersentia, 2005), 68–69, 728.

[11] Draft Protocol, art. 46C.

[12] Ibid.

is no provision made here for assessing the intentions of organizations other than corporations. Sections 3 through 5 and 7 of Article 46C, moreover, refer to attribution of policies and knowledge to a "corporation" or its "conduct" or "culture."[13] Section 6, by contrast, states that: "The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes."[14] The phrase legal persons sweeps more broadly than "corporation," but as with the preamble, its effect is unclear or arguably nonexistent with it comes to noncorporations, due to the title and sections 2–5, and 7 of Article 46C.

A survey of the other crimes defined in the Draft Protocol provides ample reason to be concerned that organizations other than corporations could exploit loopholes in Article 46C. For example, two or more persons might create a partnership whereby they murder or enslave other persons, but no one individual committed a murder or trafficked in persons with knowledge that multiple such acts had been or were being committed, thereby escaping a crime against humanity charge.[15] Likewise, such partners could plan to unlawfully and wantonly appropriate private property, while no one partner appropriates "extensive" properties; in such a case, only the partnership, but not the individuals, may be culpable under Article 28D(a)(iv).[16] Or they could establish a partnership by which one of them commits an unlawful act dangerous to public or private property or the cultural heritage of a state, and the other foments a general insurrection in a state without necessarily committing a particular unlawful act, in which case the individuals might escape prosecution for terrorism under Article 28B even though the partnership's activities as a whole satisfy the elements of a crime.[17]

Moreover, if some members of an unincorporated association intend to endanger the lives of persons in order to bring about a general insurrection by engaging in armed conflict, while other members take no part in armed conflict but do intend to endanger lives during the insurrection, all the members might avoid terrorism charges.[18] Finally, if two or more persons associate in a mafia or other corrupt organization to give gifts to government officials in exchange for acts or omissions, but one person gives the gifts, while the other(s) solicit or receive the official acts in exchange for them, none of

[13] Ibid.
[14] Ibid.
[15] Ibid., art. 28C.
[16] Ibid., art. 28D.
[17] Ibid., art. 28C.
[18] Ibid.

them might be prosecutable under Article 28I, whereas if they were joined in a corporation and their knowledge and conduct was charged to it, then the corporation would have been subject to such a prosecution.[19] Some of the individuals in these hypotheticals might be chargeable as inciters, accomplices, conspirators, or joint criminal enterprise participants, but these forms of liability also leave significant gaps and impose often difficult hurdles in prosecuting enterprises.

Business organizations other than corporations also develop policies, practices, and cultures that transcend individual intentions. For comparative purposes, American courses on the subject often begin with an exploration of fiduciary duties to a venture, which Justice Cardozo described as an onerous burden of good faith and fair dealing, whether the venture was a joint enterprise, a partnership, or a trust.[20] A participant in such a joint project owes the enterprise "undivided loyalty" that is "relentless and supreme," according to Cardozo's opinion for the court.[21] Similarly, in civil-law systems it may be said that a partnership is an agreement among several persons to share in the proceeds from some venture – a winery, for example – and that these persons owe duties of care to one another in carrying out "the partnership business."[22] Partners share the profits of ventures; the default rule is that they share equally, while they can contract for different shares.[23] A trust, at civil law, was a legal relationship in which one person requested another to convey a thing or perform some act – freeing a slave was one prominent example.[24] In modern societies, another kind of trust emerged to handle complex businesses such as railroads, oil companies, and banks. Some trusts combined so many competing companies into one venture that they stood accused of monopolizing a line of trade, and gave rise to anti-trust law.[25] Indeed, the Sherman Anti-Trust Act is said to have been the inspiration for charging the *Schutzstaffel* (the S.S.), the Nazi party, and other substate organizations as criminal actors at Nuremberg.[26] Today, legal persons include corporations, general partnerships, limited partnerships, trusts, joint

[19] Ibid., art. 28I.
[20] *Meinhard* v. *Salmon*, 249 N.Y. 458 (1928).
[21] Ibid.
[22] J. Baron Moyle ed., *The Institutes of Justinian* (Oxford: Clarendon Press, 4th ed. 1906), 148–50.
[23] Ibid., 148–9.
[24] Ibid., 98–100.
[25] D. Dewey, *Monopoly in Economics and Law* (Chicago: Rand McNally & Co., 3rd ed. 1966), 140–7.
[26] S. Darcy, *Collective Responsibility and Accountability under International Law* (Leiden: Brill, 2007) 198–202.

stock companies, unincorporated membership associations, syndicates, unions, and other groups.[27]

Like corporations, other forms of companies or entities can obtain knowledge of their representatives' conduct, and develop policies or imputed activities as a consequence.[28] There is no reason why the corporate form would be uniquely capable of committing the crimes often acknowledged as involving organizations – bribery, environmental crimes, and genocide.[29] Indeed, under Canadian law, war crimes and crimes against humanity by "legal persons" – not restricted necessarily to corporations – are subject to actions for international crimes.[30] Pursuant to the doctrine of universal jurisdiction, a state is entitled to define the persons subject to prosecution for international crimes according to its own law and standards.[31]

Moreover, various "legal persons" other than corporations act as complainants-plaintiffs or as defendants-respondents in civil as well as criminal cases.[32] By attempting to shape the legal rights and responsibilities of states and other nonstate actors, they arguably open the door to confronting a similar level of criminal accountability as corporations. In order to maintain parity of treatment among corporations, unincorporated associations, and other legal persons, it makes sense to extend the scope of Article 46C to partnerships, associations, foundations, trusts, armies, fronts, political parties, tribes, and other organizations that are not corporations.

[27] *Carden* v. *Arkoma Associates*, 494 U.S. 185 (1990); *United Steelworkers of America, AFL-CIO* v. *R.H. Bouligny, Inc.*, 382 U.S. 145, 149–51 (1965); *Chapman* v. *Barney*, 129 U.S. 677 (1889); *Underwriters at Lloyd's, London* v. *Osting-Schwinn*, 613 F. 3d 1079, 1086–92 (11th Cir. 2010); Certain Interested Underwriters at Lloyd's, London, England v. Layne, 26 F.3d 39, 43–44 (6th Cir. 1994); *Penrod Drilling Co.* v. *Johnson*, 414 F.2d 1217, 1222 (5th Cir. 1969); C. Alan Wright et al., *Federal Practice and Procedure*, vol. 13F (St. Paul, MN: West Group, 3rd ed. 2009), § 3630.

[28] Cf. *New York Central & Hudson River Railroad Co.* v. *United States*, 212 U.S. 481 (1909), addressing whether a corporation can commit the crime of bribery.

[29] M. Kelly, "Prosecuting Corporations for Genocide", 6 *Harvard Law & Policy Review* (2012) 340–367, at 353–4, 366.

[30] L. Cameron & V. Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013), 343. See also, C. Wanless, "Corporate Liability for International Crimes under Canada's Crimes Against Humanity and War Crimes Act", 7 *Journal of International Criminal Justice* (2009) 207.

[31] *Demjanjuk* v. *Petrovsky*, 776 F.2d 571 (6th Cir. 1985). Cf. also, *Kadic* v. *Karadzic*, 70 F. 3d 232, 238–42 (2d Cir. 1995).

[32] E.g., *Vietnamese Association for Victims of Agent Orange* v. *Dow Chemical Co.*, 517 F.3d 104, 112–13 (2d Cir. 2008); *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Association of Holocaust Victims for Restitution of Artwork and Masterpieces* v. *Bank Austria Creditanstalt AG, et al.*, 04 Civ. 3600 (S.D.N.Y. August 19, 2005).

2. POLITICAL AND CLANDESTINE MILITARY GROUPS, AND THEIR CRIMES AGAINST CIVILIANS

A. *Social Groups Other Than Corporations Can Commit Organizational Crimes*

It may not be the norm that corporations commit grave crimes of international concern. More commonly, the wealthy and powerful – and sometimes the poor and ambitious – form political movements and their armed wings, variously known as parties, fronts, bases, armies, and states.

Many of the worst atrocities of the twentieth century began in this way. Before World War I, a political movement called the Committee of Union and Progress emerged in the Ottoman Empire, dedicated to the aim of seizing the businesses and properties of the empire's Christian populations, events later known as the Armenian Genocide but actually broader than that. American and British diplomats wrote of the party's scheme to kill, drive away, and plunder the Christian peoples of the empire.[33] The National Socialist Worker's Party of Germany, and elite Death's Head Units of the *Schutzstaffel* (S.S.), began as World War I veterans who had sported the silver "death's head" associated with the aristocratic German cavalry officer prior to the war in order to indicate their trench warfare specialty.[34] In the 1920s, the Nazis evolved out of a veteran-dominated group called the *Freikorps*, some of whom – distinguished by their loyalty to Adolf Hitler – wore the silver Death's Head of the elite trench soldiers.[35] Nationalism and anti-Semitism often motivated these paramilitary thugs, which grew into a militia of 200,000, including sympathizers.[36] Joining the *Sturmabteilung*, the Freikorps units

[33] G. Horton, *The Blight of Asia: An Account of the Systematic Extermination of Christian Populations by Mohammedans and of the Culpability of Certain Great Powers; with the True Story of the Burning of Smyrna*, Indianapolis: The Bobbs-Merrill Co., 1926, ch. 3, www.hri.org/docs/Horton/hb-3.html; V. Dadrian, *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucuses* (New York: Berghahn Books, 2003), 180, 184. Said Halim, a leader of this movement who later rose to high office in the Ottoman Empire, believed in the purification of minorities from Turkey. Dadrian, *History*, p. 404; Ahmet Seyhun, Said Halim Pasha: An Ottoman Statesman and Islamist Legal Thinker (1865–1921), Ph.D. dissertation (McGill University, 2002), 10, 17, 27, 98, 120–21, 138, 142, 155.

[34] T. D. Grant, *Stormtroopers and Crisis in the Nazi Movement: Activism, Ideology and Dissolution* (New York: Psychology Press, 2004) 39–40.

[35] R. M. Spector, *World without Civilization: Mass Murder and the Holocaust, History and Analysis*, vol. 1 (Lanham, MD: University Press of America, 2005), 221.

[36] F. Bajohr, "The 'Folk Community' and the Persecution of the Jews: German Society under National Socialist Dictatorship, 1933–1945", 20 *Holocaust and Genocide Studies* (2006) 184–8.

murdered dozens of the Nazis' political rivals per year, and developed a branch called the S.S. which would take a leading part in the Holocaust.[37] Hitler's right hand, Heinrich Himmler transformed the *Freikorps* into an "organization called the *Totenkopfverbände* (Death's Head Units) to run concentration camps and for other special duties."[38] In 1939, Hitler told his troops that he was sending the Death's Head Units to the east to kill without mercy those of Polish race and language. The Units grew to 40,000 persons by 1945.[39] If the *Freikorps* and *Sturmabteilung* had been banned by some international proceeding or institution in the 1920s, countless lives may have been saved.

Scholars use a variety of terms for such politico-military organizations that may seize part of the state's authority, be deployed by the state, or seek to intimidate or displace the state: death squads, militias, irregular armed groups, vigilantes, civil defense forces, national guards, and paramilitary forces.[40] Famous examples include the Interahamwe of Rwanda, the Janjaweed of Sudan, the ZANU-PF of Zimbabwe, the Basij of Iran, the "Sons of Iraq," the *shabiha* in Syria, and the village guards in Turkey. Moreover, Kenyan women's organizations blamed militias for the post-election killings, tortures, and mutilations of members of ethnic groups during the month of January 2008.[41] The International Commission of Inquiry on Libya blamed the Misrata rebel militia or *thuwar* for ethnically cleansing and killing the Tawergas, referred to as slaves (*abid*) or blacks by the Misratans in language evoking the Darfur genocide.[42] Some of the crimes that motivated the creation of the Special Court for Sierra Leone began when Foday Sankoh's Revolutionary United Front seized diamond fields in the Kono region of the country, advancing from there into other areas where child soldiers were conscripted,

[37] P. Johnson, *Modern Times: The World from the Twenties to the Nineties* (New York: HarperCollins, paperback ed. 2001), at 124–5, 278–89; W. Shirer, *The Rise and Fall of the Third Reich* (New York: Fawcett Crest, paperback ed. 1992), at 70, 297, 581–72.

[38] Johnson, *Modern Times*, p. 287.

[39] "SS-Totenkopfverbände," *in* Samuel Totten & Paul Bartrop (Eds.), *Dictionary of Genocide* vol. 1 (Santa Monica, CA: ABC-CLIO, 2008), p. 407.

[40] S. Carey & N. Mitchell, "Pro-Government Militias", *Annual Review of Political Science* 20 (2017): 127–147 Carey and Mitchell, draft at 3, 8–9, 43, www.sowi.uni-mannheim.de/lspol4/wp-content/uploads/2015/11/Carey-and-Mitchell-ARPS-online.pdf. See also, H. Travis, *Genocide, Ethnonationalism, and the United Nations: Exploring the Causes of Mass Killing Since 1945* (Abingdon & New York: Routledge, 2013), pp. 36–55, 120–131, 153, 157–160; H. Travis, "The United Nations and Genocide Prevention: The Problem of Racial and Religious Bias," *Genocide, Studies International* 8 (2014): 122–153, 129–136.

[41] Kenya: Women's Memorandum to the Mediation Team, All Africa.com (January 31, 2008).

[42] International Commission on Libya Report (March 2, 2012), para. 59.

sex slaves taken, and killings and amputations were committed.[43] Even worse crimes (in terms of overall magnitude) took place in Angola, where Jonas Savimbi's National Union for the Total Independence of Angola won control of the country's major diamond-producing regions as early as 1992, and traded them around the world unhindered until 1999, when Security Council resolutions impacted the rebels' $500 million per year in sales.[44] In the Democratic Republic of the Congo (DRC), the Rally for Congolese Democracy (RCD-Goma), the National Congress for Defense of the People, and other proxy forces of Rwanda and Uganda have turned the east into a zone of terrible violence and mass rape, alongside the plunder of diamond and mineral resources.[45]

In the 1990s, there were various reports that multinational corporations had acted in concert with local security forces or thugs to commit genocide, torture, and human-rights violations.[46] For example, the Amungme tribal council in Irian Jaya, the Republic of Indonesia, alleged that mining company

[43] M. Kaplan, "Note: Carats and Sticks: Pursuing War and Peace Through the Diamond Trade", 35 *New York University Journal of International Law and Politics* (2003) 559–617, at 567–71. See also, G. Joses Yoroms, "Militia as a Social Phenomenon: Toward a Theoretical Construction", in D. Francis (Ed.), *Civil Militia: Africa's Intractable Security Menace?* (Aldershot: Ashgate, 2005); J. Alie, "The Kamajor Militia in Sierra Leone: Liberators or Nihilists?", in Francis, (Ed.), *Civil Militia*.

[44] Kaplan, "Carats and Sticks," 573–7.

[45] M.E. Baaz, "Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo," *International Studies Quarterly* 53 (2009): 495–518; Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. No. S/2002/1146, ¶ 215 (2002), www.un.org/News/dh/latest/drcongo.htm. As a U.S. report explained in 2004:

> War broke out in 1998 between the Government and rebel forces backed by the Governments of Rwanda and Uganda. . .
>
> In the case of the May 2002 Kisangani massacre committed by the RCD/G, six of the nine defendants were acquitted of involvement; two escaped and only one defendant was still in prison at year's end. The military judicial authorities who handled the inquiry overlooked reprisals that their soldiers took against the civilian population. On August 19, President Kabila promoted the two RCD/G officers charged with leading the massacres, Laurent Nkunda and Gabriel Amisi (also known as Tango Fort), to Brigadier-General. . .
>
> Gang rapes by members of armed groups, which were common in the east, continued to be violent, sometimes involving props such as tree branches, and resulted in vaginal fistula, a rupture of vaginal tissue that leaves women unable to control bodily functions and vulnerable to enduring ostracism.

U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Congo, Democratic Republic of the: Country Reports on Human Rights Practices 2003 (February 25, 2004), www.state.gov.

[46] D. Cassel, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts", 6 *Northwestern J. of International Human Rights* (2008) 1, at 8–9; J. Paust, "Human Rights Responsibilities of Private Corporations", 35 *Vanderbilt Journal of Transnational Law* (2002) 801.

Freeport-McMoran Copper & Gold, Inc. acted with local officials to deport his people from their habitat, to destroy this habitat, to commit genocide, and to commit torture and human-rights violations by death threats, surveillance, and other international torts.[47] Similarly, the residents of Bougainville, Papua New Guinea (PNG), alleged that an Australian mining company violated international law by colluding with PNG forces to blockade their community and ensure that war crimes and racial discrimination were perpetrated against them.[48] In a case arising out of Burma, a federal court initially ruled that an oil company could be held liable for international crimes involving a joint venture to use forced labor and violence to build a pipeline.[49] More recently, similar cases have emerged out of Africa.[50] In one of them, the U.S. Court of Appeals for the Second Circuit concluded that multinational corporations could be sued for having aided and abetted a violation of the law of nations, although the case is now likely to be dismissed for insufficient links to the U.S. mainland under the "touch and concern" test.[51]

The continuing struggle for resources, as well as the rise of political and religious extremism, led to widespread atrocities over the past decade or two. By the second term of President Obama, crimes against children, civilians, cultural heritage, established governments, sectarian and tribal groups, and economic infrastructure were seemingly very common. Schools and shelters for children frequently come under attack, notably in Nigeria but also elsewhere.[52] Child soldiers continued to be conscripted in large numbers.[53]

[47] *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

[48] *Sarei* v. *Rio Tinto PLC.*, 221 F. Supp. 2d 1116, 1116–1119, 1148–1162 (C.D. Cal. 2002), rev'd in part, 456 F.3d 1069 (9th Cir. 2006), withdrawn and new opinion at 487 F. 3d 1193 (9th Cir. 2007), further proceedings at 671 F. 3d 736 (9th Cir. 2011) (en banc), vacated, — US —, 133 S.Ct. 1995 (2013).

[49] *Doe* I v. *Unocal Corp.* ("Unocal I"), 963 F.Supp. 880, 890–91 (C.D. Cal.1997), aff'd and portions of opinion adopted by 248 F.3d 915 (9th Cir. 2001).

[50] *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Presbyterian Church of Sudan* v. *Talisman Energy*, 582 F. 3d 244 (2d Cir. 2009); In re South African Apartheid Litigation, 15 F. Supp. 3d 454 (S.D.N.Y. 2014).

[51] *Khulumani* v. *Barclays Nat'l Bank Ltd.*, 504 F.3d 254, 270 (2d Cir. 2007) (citation omitted), *subsequent proceedings at* 15 F. Supp. 3d 454.

[52] CNA/EWTN News, "Nigerian Bishop: Life Here Has Become 'Cheaper Than Salt,'" North Carolina Register, October 29, 2014, www.ncregister.com/daily-news/nigerian-bishop-life-here-has-become-cheaper-than-salt; Zenit Staff, "Worst-hit Nigerian Diocese Reeling From Boko Haram Attacks," Zenit (October 28, 2014), https://zenit.org/articles/worst-hit-nigerian-diocese-reeling-from-boko-haram-attacks/.

[53] Cf. UN Human Rights Council, Human Rights Council Hears Special Representative of the Secretary-General on Children and Armed Conflict (September 10, 2013), http://reliefweb.int/report/world/human-rights-council-hears-special-representative-secretary-general-children-and-armed.

Stories of exploitation and enslavement appeared in an alarming number of press and nongovernmental organization (NGO) reports.[54] For example: "In Nigeria, the abduction of more than 250 school girls, and the killing of boys and girls in attacks on schools by Boko Haram, are tragic examples of how radicalized extremist armed groups are targeting children."[55] Conflicts involving atrocities against civilians spread like wildfire from one nation to another, with Libyans traveling to Afghanistan and Iraq to perpetrate terrorist acts, returning to Libya to wage civil war there, driving other Libyans and Libyan arms into the Sahel, sparking conflagrations in those countries among others, and eventually contributing to the creation of the Islamic State.[56] Enslavement remains distressingly common, for example in Mauritania, Niger, Haiti, India, Pakistan, and the United States.[57]

Churches and mosques were burned to the ground and the traditions of pagan and neo-pagan religions continued to be ground into dust.[58] Many Buddhist, Taoist, Hindu, and Jewish temples and historic sites would also be destroyed if China, India, and Israel were less powerful militarily. Plunder and the wanton destruction of villages, economic assets, and essential

[54] E.g., ibid.; "Boko Haram, ISIS Christians Killings," Newsmax (April 20, 2015), www.newsmax.com/world/GlobalTalk/boko-haram-isis-christians-killings/2015/04/20/id/639599/; Patrick Goodenough, "Christians and Yazidis in Iraq Subjected to Savage Rapes, Sexual Slavery," CNS News.com (2015), http://cnsnews.com/news/article/patrick-goodenough/christians-and-yazidis-iraq-subjected-savage-rapes-sexual-slavery; Loveday Morris, "Islamic State Says It Is Buying and Selling Yazidi Women, Using them as Concubines," *Washington Post*, Oct. 12, 2014; see also, *Prosecutor* v. *Al Bashir*, ICC-02/05–01/09 (March 4, 2009), at 6, www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050109/Court+Records/Chambers/PTCI/1.htm; James Tracy, "Human Costs of War and Violence," in Mickey Huff & Andy Lee Roth (Eds.), *Censored 2013: Dispatches from the Media Revolution* (Seven Stories Press, 2014) 107–11; U.N. Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Iraq, Mar 5 2015, http://documents.un.org; U.N. Security Council, Assessment of the work of the Security Council during the presidency of China, Annex to the letter dated 19 March 2015 from the Permanent Representative of China to the United Nations addressed to the President of the Security Council (February 2015), http://documents.un.org.

[55] Special Representative of the Secretary General for Children and Armed Conflict, Report to the U.N. General Assembly, UN Doc. No. A/69/212 (July 31, 2014), para. 8, documents.un.org.

[56] Tracy, "Human Costs"; H. Travis, "Genocide, Counterinsurgency, and the Self-Defense of UN Member States Before the International Criminal Court," *U.C. Davis Journal of International Law & Policy* 22 (2016): 139–202, 180–194, 200–201.

[57] H. Duffy, "Human Rights Cases in Sub-regional African Courts: Towards Justice for Victims or Just More Fragmentation," in *The Diversification and Fragmentation of International Criminal Law* 163–166; M. Fisher, "This Map Shows Where the World's 30 Million Slaves Live. There Are 60,000 in the U.S.", The Washington Post WorldViews Blog (October 17, 2013), www.washingtonpost.com/news/worldviews/wp/2013/10/17/this-map-shows-where-the-worlds-30-million-slaves-live-there-are-60000-in-the-u-s/.

[58] Travis, "Why Was Benghazi"; Travis, "Wargaming," 121–3.

infrastructure continued unabated.[59] Large populations in diverse contexts lost secure access to food, safe water, sanitation, housing, warm clothing, employment, health, and personal security. Corruption's role in diluting and diverting the wealth of developing nations into private stashes and foreign accounts persisted. Climate change threatened to kill millions of people.

Nonstate armed groups as well as some states perpetrated mass atrocities affecting children and other civilians.[60] The UN special rapporteur on torture and cruel, inhuman, or other degrading treatment or punishment highlighted "the exercise of de facto control or influence over nonstate actors operating in foreign territories," as well as military occupation and more traditional military and law-enforcement operations, as presenting a danger of torture or violations of international humanitarian law, international criminal law or customary international law.[61]

For example, Leila Zerrougui, the Special Representative of the Secretary-General on children and armed conflict, has reported that assaults on schools and hospitals happened in many warzones, and were potentially war crimes. Child soldiers continued to be used, and the impact of war on children was worsening.[62] Ms. Zerrougi commented that children were being revictimized as child soldiers in the Central African Republic even after they had escaped this life once before.[63] During the same discussion, Nigeria pointed to the DRC and Mali as nations that it called upon to abide by their pledges to end the use of children in conflict.[64]

The Russian Federation remarked that in Syria, "rebels, including Al Qaeda groupings, had forced minors into active participation in the conflict."[65] The International Association for Democracy in Africa has observed that despite interventions against it, "Al Qaeda had been victorious since its depredations had fragmented heterogeneous democratic societies on the basis

[59] E.g., E. Watkins, "Sanctions, Saboteurs Take Toll on Syria's Oil Industry", *Oil & Gas Journal*, November 14, 2011, 25.

[60] Special Representative of the Secretary General for Children and Armed Conflict, Report, paras. 8, 53 . "Out of the 59 parties cited for grave violations in the annexes to the report of the Secretary-General on children and armed conflict (A/68/878-S/2014/339), 51 are non-State armed groups." Ibid., para. 18.

[61] Ibid.

[62] U.N. Human Rights Council, Human Rights Council hears Special Representative of the Secretary-General on Children and Armed Conflict (September 10, 2013), http://reliefweb.int/report/world/human-rights-council-hears-special-representative-secretary-general-children-and-armed.

[63] Ibid.

[64] Ibid.

[65] Ibid.

of religion and color, and set communities against each other."[66] A US delegate to the General Assembly commented that macabre episodes around the world, "from Syria to the Central African Republic, South Sudan to the Democratic People's Republic of Korea, were a reminder that the challenge of ending mass atrocities was greater than ever."[67]

These trends are visible in UN displacement data. The number of internally displaced persons according to estimates went from 1.2 million in 1982 to 24 million in 1992 to 40 million in 2015.[68] In 2011, there were many countries in Africa with large populations of displaced and stateless people according to the Office of the UN High Commissioner for Refugees. Angola, Burundi, CAR, Chad, Cote d'Ivoire, the DRC, Ethiopia, Eritrea, Kenya, Libya, Rwanda, Somalia, Sudan, Uganda, Western Sahara, and Zimbabwe had 100,000 or more persons of concern to UNHCR.[69] By 2013, Mali and South Sudan were suffering insurgencies and had been added to the list of countries with 100,000 or more persons displaced or "of concern" to UNHCR, while the displacement crises in Kenya and Libya had abated somewhat. The number of those displaced from the CAR was nearly six times as large as in 2011.[70] By 2014, Nigeria and perhaps some others such as Kenya and Libya had rejoined the list of countries suffering mass displacement, with 1.2 million internally displaced persons in Nigeria and hundreds of thousands in Kenya and Libya.[71] More recently, Nigeria's figure has surpassed two million, driven by Boko Haram's actions such as attacking schools and enslaving boys and girls.[72]

International and domestic criminal tribunals have belatedly begun to turn their attention to political organizations. In 1999, the International Criminal Tribunal for the former Yugoslavia concluded that an individual could be

[66] Ibid.

[67] U.N. General Assembly, International Criminal Tribunals Made "Enormous Contribution" to Ending Impunity, General Assembly Hears in Briefings on Handover of Work to Residual Mechanism (October 13, 2015), http://reliefweb.int/report/world/international-criminal-tribunals-made-enormous-contribution-ending-impunity-general.

[68] F. Deng, "Africa's internally displaced and the development of international norms: Standards versus implementation", in J. I. Levitt (Ed.), *Africa: Mapping New Boundaries in International Law* (Hart Publishing, 2008), 82; "Number displaced worldwide hits record high – UN report," BBC News (June 18, 2015), www.bbc.com/news/world-33178035.

[69] UNHCR Global Trends 2011: A Year of Crises, at 38–45.

[70] UNHCR Global Trends 2013: War's Human Cost, at 45–9.

[71] UNHCR Global Trends 2014: World at War, at 49–53; Nicholas Crawford et al., Protracted Displacement: Uncertain Paths to Self-reliance in Exile, ODI HPG Report (September 2014), https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.odi.org%2Fsites%2Fodi.org.uk%2Ffiles%2Fodi-assets%2Fpublications-opinion-files%2F9854.xlsx.

[72] "Over 2.1 Million Displaced in Nigeria: IOM," ReliefWeb (2016), http://reliefweb.int/report/nigeria/over-21-million-displaced-nigeria-iom

charged with the likely or foreseeable crimes committed by a plurality of individuals who share a common purpose.[73] Two forms of this "joint criminal enterprise" mode of culpability relax the requirement that the individual intend to commit the underlying crime, requiring instead an intention to further an overall system of criminality, or an intent to carry out a criminal plan along with recklessness as to a crime outside that plan being committed.[74] In 2004, the International Criminal Tribunal for the former Yugoslavia stated that this joint criminal enterprise mode of liability was available in genocide cases.[75] In 2012, the Special Court for Sierra Leone convicted Charles Ghankay Taylor for actions committed as President of Liberia that "assisted or encouraged" the Revolutionary United Front of Sierra Leone, to commit mass atrocities and plunder of resources including diamonds.[76] Revealingly, Libya reportedly funded and supplied forces that committed atrocities, whether affiliated with Taylor, Foday Sankoh, or Omar Hassan al-Bashir.[77] In 2014, the International Crimes Tribunal convicted the leader of a death squad during Pakistan's 1971 civil war, the Bangladesh War of Independence, sentencing him to death for a massacre of hundreds of persons.[78] The Supreme Court of Bangladesh upheld the death penalty for the leader of the political movement Jamaat-e Islami, which collaborated with the Pakistanis in 1971.[79]

[73] *Prosecutor* v. *Tadic*, Case No. IT=94-I-T, Appeals Chamber, Judgment (July 15, 1999), *reprinted in* 38 International Legal Materials 1518 (1999); Michael Newton, "What Is the Significance of the Documents Entered Into Evidence by the Prosecution?", in Michael Scharf & Gregory McNeal (Eds.), *Saddam on Trial: Understanding and Debating the Iraqi High Tribunal* (Durham, NC: Carolina Academic Press, 2006), 183–4.

[74] Tadic, paras. 203–4.

[75] *Prosecutor* v. *Rwamakuba*, *Decision on Interlocutory Appeal Regarding the Application of Joint Criminal Enterprise to the Crime of Genocide*, *Appeals Chamber*, 22 Oct. 2004, para. 31; Newton, "What Is the Significance," 184; *Saddam on Trial* 256–7.

[76] *Prosecutor* v. *Charles Taylor*, Case No. SCSL-03–01-PT, Judgment (26 April 2012), ¶¶ 5–21, www.refworld.org/docid/4f9a4c762.html; Aislinn Laing, "'*Blood diamond*' *trial: the case against Charles Taylor*", *The Telegraph (U.K.)* (June 16, 2011), www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/8578540/Blood-diamond-trial-the-case-against-Charles-Taylor.html;

[77] J. Millard Burr & R. O. Collins, *Darfur: The Long Road to Disaster* (2006) 242–24; D. Brown, "Who is Foday Sankoh?", *The Guardian* (May 17, 2000), www.guardian.co.uk/world/2000/may/17/sierraleone; M. Habboush, "Sudan's Bashir offers to help form new Lybian army", *Reuters Alertnet* (January 7, 2012), www.trust.org/alertnet/news/sudans-bashir-offers-to-help-form-new-libyan-army; Liang, "'Blood Diamond' trial"; *Gérard Prunier*, *Darfur: A 21st Century Genocide* (Penguin, 2008), p. 58.

[78] D. Bergman, "Verdicts Stir Up Controversy over Bangladesh War Crimes Tribunal", *International Justice Tribune* (November 5, 2014), www.justicetribune.com/articles/verdicts-stir-controversy-over-bangladesh-war-tribunal.

[79] Ibid.

The problems confronting such individualized prosecutions for organizational policies or crimes are manifold. First, most individuals escape prosecution because they are not extradited or their states do not submit to tribunals' jurisdiction, and as natural persons they enjoy due-process rights not to be tried and punished with prison terms in absentia.[80] The accused might even be promoted to high office, as occurred in the DRC, Iraq, and Sudan.[81] The ICC has announced that it will suspend or abandon investigations, even when referred to it by the Security Council, if the accused are protected by the relevant state and its allies.[82] Second, even if jurisdiction over the person and the territory exists, the nature of clandestine death squads and other nonstate actors is that they may act independently of their supporters, feign ignorance, avoid wearing uniforms or accepting public responsibility for atrocities, and intimidate witnesses.[83] Third, as mentioned at the outset of this chapter, an individual accused might well lack knowledge of all elements of the crime, even when the organization would know or intend the remaining elements. Lacking knowledge of an element might preclude Rome Statute culpability.[84] Finally, a tribunal may find that joint criminal enterprise culpability is not consistent with the principle of legality or *nullum crimen sine lege*.[85]

Statelets, or regions seeking autonomous governance or being subjected against their will to insurgencies or secessions against the state, can commit

[80] *Cf.* Draft Protocol, art. 46Ebis. Thus, the International Criminal Court convicted only one person in more than 10 years out of a population of more than seven billion on earth. For example, the United States famously "unsigned" the Rome Statute and passed legislation to protect its service members from standing trial in The Hague, by force if necessary.

[81] Saddam and the Nazis, The History Channel, cable television transmission, 2005; Said Aburish, *Saddam Hussein: The Politics of Revenge*, London, Bloomsbury, paperback ed. 2001 22–23, 54–58, 72–100. See also, Mark Fritz, "Ex-CIA Official James Critchfield Dies," *Associated Press*, April 23, 2003.

[82] Reuters, "Sudan's Bashir claims victory over ICC after court shelves Darfur probe," December 13, 2014, www.reuters.com/article/us-sudan-icc-bashir-idUSKBN0JR0K520141213.

[83] "Death squads," in Dinah Shelton (Ed.), *Encyclopedia of Genocide and Crimes Against Humanity*, Vol. 1 (Farmington Hills, MI: Thomson Gale, 2005) 229–30.

[84] As one court stated: "Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefor. . . . [But] it is essential to criminal liability on his part that he actually and personally do the acts which constitute the offense or that they be done by his direction or permission. . . ." *United States* v. *Krupp*, Case No. 10, Trial Transcript (Nuremburg Trib. 1948), reprinted in *Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council No. 10*, Vol. 9 (U.S. Government Printing Office, 1950), 1448.

[85] Khmer Rouge leader Ieng Sary made this argument, unsuccessfully, in 2008. Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 0002, ECC Doc. No. D97/13 (December 8, 2009), para. 1.

international crimes without necessarily being subject to traditional restraints such as World Court jurisdiction or responsible state institutions that might cooperate with the ICC or other tribunal and extradite individuals to it. Yet these statelets can be larger, richer, and more powerful than some states. The Palestinian Authority, for example, had institutions potentially larger and with more resources than those of East Timor (2008 budget of less than $800 million) or Liberia (less than $300 million).[86] The Islamic State in 2015 grew larger than Scotland or Jordan and had more revenue from oil and antiquities trafficking, as well as donations from persons in Qatar, Saudi Arabia, etc. than East Timor or Liberia, using those estimates from 2008.[87] The RCD in the DRC may have been larger than the armies of the CAR or Malian governments.[88] Terrorist movements like the Taliban insurgency in Afghanistan of 1992–1996, the Chechen insurgency in Russia of 1994–1996, and the Kosovo Liberation Army insurgency in Yugoslavia of 1994–1999 were nearly as large as the RCD and larger than the CAR military, for example.[89] An enormous gap in international law may exist if these territories escape most international judicial proceedings due to not being "states." A window for clandestine international crimes may be opened for states desiring to undermine or destroy their neighbors, such as Pakistan in Afghanistan, Albania in Yugoslavia, etc.[90]

Other than terrorism evolving into genocide as with the Nazis and the Islamic State, or corruption as defined in 28I, the extension of Article 46C could have implications for the fight against impunity for enslavement, recruitment of child soldiers, destruction of sacred sites, and torture. For example, the nation-states and their officials that perpetrate enslavement as a crime against humanity may be immune from accountability under various

[86] CIA. The World Factbook 2010, p. 676; CIA. The World Factbook 2008, at 330 (2008), "Fiscal Year 2008 East Timor Budget" East Timor Legal Blog (April 2009), http://easttimorlegal.blogspot.com/2009/04/fiscal-year-2008-east-timor-budget.html; Liberia 2007–08 Budget Fact Sheet (2008), http://docs.google.com/viewer?a=v&q=cache:w5N7fSf8g0cJ:www.emansion.gov.lr/doc/200708budget_fact_sheet.pdf.

[87] Travis, "Why Was Benghazi Saved."

[88] J. Friedman, "Manpower and Counterinsurgency Data Set, to accompany J. A. Friedman, 'Manpower and Counterinsurgency,' *Security Studies* 20(4) (2011): 1–36" http://scholar.harvard.edu/files/friedman/files/friedman-manpower_and_counterinsurgency_data.xlsx.

[89] Ibid.

[90] Cf. C. Hedges, "Serbs Using Land Mines in Effort to Seal Kosovo-Albania Border," *The New York Times*, June 12, 1998, www.nytimes.com/1998/06/12/world/conflict-balkans-albania-serbs-using-land-mines-effort-seal-kosovo-albania.html (Yugoslav officials believed that Kosovo Liberation Army was using Albania as sanctuary from which to attack Yugoslav territory); A. Waheed Wafa, "U.N. Deputy Urges Pakistan to Curb Taliban," *The New York Times*, January 9, 2007, p. A9 (Afghanistan charged Pakistan with harboring Taliban, which it blamed for 124 suicide bombings in 2006).

doctrines, while private organizations would enjoy no such immunity in some cases.[91] Government officials who support terrorist groups such as Boko Haram and the Islamic State that recruit child soldiers and destroy sacred sites might also enjoy immunity under limiting doctrines of international and domestic law, for example.[92] Alleged torturers might make similar arguments, although there is an emerging trend to reject such a ploy.[93] The persons perhaps least likely to fall into the custody of the African court or the ICC would theoretically be accountable, while officials in league with them would be immune. It may help to recognize the accountability of the group that includes officials or governmental agencies, and nonimmune suspects on the ground, but other persons as well.

B. *How Article 46C Could Cover Political and Other Groups*

Given these challenges, it would not be that difficult to clarify Article 46C's application to noncorporate organizations.

A political party, like a partnership or other noncorporate business, could be defined as a legal person. Its policies, knowledge, and conduct could be aggregated or inferred from the statements or decisions of its leaders, or from the repeated actions of its followers. This is already permissible for

[91] E.g., *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1173–75 (DC Cir. 1994) (refusing to find that Germany waived sovereign immunity for jus cogens violations such as enslavement of civilians as a crime against humanity during wartime); *Joo et al.* v. *Japan*, 172 F Supp. 2d 52 (D.D.C. 2003), *aff'd*, 332 F.3d 679 (D.C. Cir. 2003) (sexual enslavement of Korean and other civilian women in territories occupied by Empire of Japan during World War II).

[92] E.g., Arrest Warrant of April 11, 2000 (*Dem. Rep. of Congo* v. *Belg.*), 2002 I.C.J. 3 (February 14) at §§ 70–75; *Yousuf* v. *Samantar*, 699 F.3d 763 (4th Cir. 2012); *Matar* v. *Dichter*, 563 F.3d 9 (2d Cir. 2009); In re Terrorist Attacks of September 11, 2001, 538 F.3d 71 (2d Cir. 2008); *Belhas* v. *Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008); *Plaintiffs A, B, C, D, E, F* v. *Zemin*, 282 F. Supp. 2d 875 (N.D. Ill. 2003); *Fotso* v. *Republic of Cameroon*, No. 12-cv-1415, 2013 WL 3006338 (D. Or. June 11, 2013); *Yousuf* v. *Samantar*, 1:04cv1360 (LMB/JFA), 2011 WL 7445583 (E.D. Va. February 15, 2011). These cases are cited in Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Leiden: Brill, 2015), 107, 156–64. See also Peter Burns & Sean McBurney, "Impunity and the United Nations Convention Against Torture: A shadow play without an ending," *in* Craig Scott (Ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001), 277–8; Lorna McGregor, "Addressing the relationship between state immunity and jus cogens norms: A comparative perspective," in Wolfgang Kaleck et al. (Eds.), *International Prosecution of Human Rights Crimes* (London: Springer, 2006), 69–84.

[93] E.g., *Yousuf* v. *Samantar*, 699 F.3d 763, 777 (4th Cir. 2012); *United States* v. *Emmanuel*, No. 06–20758, 2007 WL 2002452 (S.D. Fla. Nov. 8, 2007); *Regine* v. *Bartle*, Ex Parte Pinochet, 38 I.L.M. 581, 593–5 (H.L. 1999); Pedretti, *Immunity*, p. 110; Burns & McBurney, "Impunity," 282–6.

corporations under 46C, as well as for conspirators, aiders and abettors, and joint criminal enterprise participants under international law and domestic counterparts like the Rome Statute and the U.S. Code. The Rome Statute established criminal responsibility for aiders and abettors and joint criminal enterprises (common purpose/knowing contribution) as well as conspirators.[94] The U.S. Code includes the War Crimes Act defining grave violations of the Geneva Conventions a U.S. offense, as well as sections making conspiracy and aiding and abetting crimes.[95] Civil-law systems such as the Netherlands may also recognize the culpability of those who aid states or other actors who commit international crimes.[96] The Allied Control Council Law No. 10, Article II(a), presumably developed with the participation of civil-law France or even with German legal principles in mind, imposed responsibility on anyone who, while not being accessories or abettors or inciters, "was a member of any organization or group connected with the commission of any such crime . . ."[97]

There are precedents for creating new remedies for victims of criminal organizations. In the 1960s, the US Congress devoted renewed attention to the problem of La Cosa Nostra, the "Mafia," and other "mobsters" and organized criminals who engage in "planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes."[98] The problem addressed was that "large amounts of cash coupled with threats of violence, extortion, and similar techniques were utilized by mobsters to achieve their desired objectives: monopoly control of these enterprises."[99] The "power of organized crime to establish a monopoly within numerous business fields" was repeatedly raised.[100] The law Congress passed, the Racketeer Influenced and Corrupt

[94] Rome Statute of the International Criminal Court, art. 25, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998, UN Doc. No. A/Conf. 183/9, *reprinted in* 37 I.L.M. 999 (1998).

[95] M. John Garcia, Cong. Research Serv., RL 32438, U.N. Convention against Torture (CAT): Overview and Application to Interrogation Techniques 10 (January 25, 2008), available at fpc.state.gov/documents/organization/101750.pdf; *see also*, Charles Doyle, Cong. Research Serv., R41223, Federal Conspiracy Law: A Brief Overview (April 30, 2010), p. 13, available at www.fas.org/sgp/crs/misc/R41223.pdf.

[96] Kelly, "Prosecuting Corporations for Genocide," 340.

[97] Quoted in S. Darcy, *Collective Responsibility and Accountability under International Law* (Ardsley, NY: Transnational, 2007), p. 279.

[98] Sedima, *SP RL* v. *Imrex Co.*, 473 U.S. 479, 526 (1985) (quoting Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, *Banking and Business Law* (1985) 71–2).

[99] Congressional Record 113 (1967), p. 17998.

[100] Congressional Record 115 (1969), p. 6993.

Organizations Act, focuses on criminal organizations which perpetrate a pattern of interstate criminal activities as an enterprise.[101] Its scope extends to "any person employed by or associated with any enterprise engaged in ... interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity," or "who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in ... the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."[102] In cases of murder, arson, and fraud, among others, the law "makes it unlawful to invest, in an enterprise engaged in interstate commerce, funds 'derived ... from a pattern of racketeering activity,' to acquire or operate an interest in any such enterprise through 'a pattern of racketeering activity,' or to conduct or participate in the conduct of that enterprise 'through a pattern of racketeering activity.'"[103]

3. RELIGIOUS GROUPS AND THE PERPETRATION OF CRIMES BY LEGAL PERSONS OTHER THAN CORPORATIONS

Religious foundations or endowments are legal persons that may have policies, whether in writing or inferred as the most reasonable explanation of their adherents' conduct.[104] Such a foundation's knowledge that an offense is to be committed could be proven with evidence that the foundation or institution had knowledge of the crime being certain or likely, and that the foundation's culture "caused or encouraged" it.[105] An institution's culture could be an "attitude, ... course of conduct or practice existing within the ... area of the [institution] in which the relevant activities take place."[106]

International terrorism is an obvious case in which policies, cultures, and practices may make crimes likely because of a religious group's actions. Article 28G of the Draft Protocol defines "terrorism" to include dangerous crimes "calculated or intended" to intimidate government officials, the public, or a public institution, or to disrupt public services such as schools, or to cause a general insurrection or revolution, or to incite or promote such intimidation,

[101] Sedima, op cit., 487–8, 495–6.
[102] Ibid., 483.
[103] Ibid., 508 (Marshall, J., dissenting). See also, Congressional Record 116 (1970), p. 35295.
[104] Draft Protocol, art. 46C(1)–(2).
[105] Ibid., art. 46C(4).
[106] Ibid., art. 46C(7).

disruption, or insurrection.[107] There is a loophole, however, for actions by "organized armed groups" that are "covered by" international humanitarian law.[108] If terrorism rises to the level of civil war, it might cease to be terrorism under this provision, because murder, destruction of public property, kidnapping without trial, torture, rape, and starvation are "covered by" humanitarian law.[109]

One example of terrorism by a religious group that has outraged the conscience of many and led to multinational efforts at suppression and accountability is the campaign by the Lord's Resistance Army of Uganda (the LRA). Accused of waging 18 years of uninterrupted warfare by 2005, leading to possibly hundreds of thousands of deaths as well as the displacement of 400,000 people across three countries, the LRA is a religious group as its name suggests, and operates as an insurgency and terrorist organization with Sudan's sponsorship.[110]

Other notable examples of terrorism include the National Islamic Front (NIF), Boko Haram, Al Qaeda Islamic Army, the Al-Nusra Front, Ahrar al-Sham, the Army of Conquest, the Army of Islam, and the Islamic State. Al Qaeda emerged at the confluence of the NIF, the Muslim Brotherhood, and the Wahhabi *takfiri* movement from Saudi Arabia. The NIF of Sudan grew out of the Sudanese Muslim Brotherhood until it gained power from a more secular government in 1989.[111] The Brotherhood's plan was to clean out the non-Arabs from a "belt" of territory adjoining the majority-Arab populations of northern Sudan, from the region of the Fur and Masalit in the west through the Nuba in the center to the Dinka and Beja further east.[112] The NIF preached "Salvation" for the nation and called its critics the enemies of Islam, a crime punishable by death.[113] In 1991, a global congress of Brotherhood-linked terrorist groups took place in Khartoum; its leader proclaimed the goal of erasing national borders and imposing Islamic law across

[107] Ibid., art. 28G(A)-(B).
[108] Ibid., art. 28G(D).
[109] E.g., ibid., art. 28E.
[110] E.g., Republic of Uganda, Ministry of Health, Internally displaced persons health and mortality survey, Uganda, 2005 ii, 1, 19–20; C. Blattman and J. Annan, "Child combatants in northern Uganda: Reintegration myths and realities", in R. Muggah (Ed.), *Security and Post-Conflict Reconstruction: Dealing with Fighters in the Aftermath of War* (Routledge, 2008) 103–26, 103–8; Peter Eichstaedt, *First Kill Your Family: Child Soldiers of Uganda and the Lord's Resistance Army* (2009), p. xix, 9; E. Mendes, *Peace and Justice at the International Criminal Court* (2010), p. 65; Dep't of State, African Affairs Remarks, U.S. Efforts to Counter the Lord's Resistance Army (December 17, 2011), available at www.state.gov/p/af/rls/rm/2011/178501.htm.
[111] Burr & O'Collins, *Darfur* 39, 67–71, 202–4, 244–9.
[112] Ibid., 202–5.
[113] K. Maluil Jok, *Conflict of National Identity in Sudan* (Frankfurt: Peter Lang, 2013) 54–6.

the region.[114] In 1994, some in the NIF had welcomed Al Qaeda, Hamas, and similar groups from North Africa to Sudan.[115] Over the next decade, Islamic concepts such as *jihad* and *mujahideen* shaped the NIF's ethnic cleansing of non-Arab populations, even finding a place in the constitution of 1998,[116] leading one scholar to conclude: "The raison d'être of the atrocities committed by government-supported Arab militias is the racist, fundamentalist, and undemocratic Sudanese state… Khartoum's genocidal policy in Darfur and the south is also a grab for resources."[117] Sudanese training camps allegedly dispatched assassins and saboteurs to Egypt, Ethiopia, and Saudi Arabia.[118] "Trainees included Egyptians, Sudanese, Eritreans, Palestinians, Yemenis, and Saudis."[119] Hamas became the template for turning Muslim Brotherhood branches into terror groups region-wide.[120] At the same time, the Popular Defense Forces grew in size, later to take key roles in Sudan's southern and Darfur genocides.[121] An NIF ideologue reportedly contacted Rashid al-Ghannouchi, whose Al-Nahdah or Ennahda party later took a leading role in the "Arab Spring."[122] Western Europe as well as the more secular regimes in Egypt, Libya, and Tunisia were suspected to be the targets of all this.[123]

The path from the NIF's Sudan to Al Qaeda and Boko Haram is not difficult to trace. Sudan and Iran supported the Bosnian secession from Yugoslavia, opening up a base of operations for the Afghan and Arab mujahideen to operate in Europe, North Africa, and Western Asia.[124] In the 1980s and

[114] Y. Bodansky, "Iran's Pincer Movement Gives It a Strong Say in the Gulf and the Red Sea," *Defense & Foreign Affairs' Strategic Policy*, March 1992, 10 ff.; H. Travis, "Teaching People to Commit Genocide", Assyrian International News Agency, April 2015, www.aina.org.

[115] Jok, Conflict, p. 232.

[116] Ibid., 54–251.

[117] M. Mutua, "Racism at root of Sudan's Darfur crisis," *Christian Sci. Monitor*, July 14, 2004, www.csmonitor.com/2004/0714/p09s02-coop.html.

[118] Bodansky, "Iran's Pincer Movement," 10 ff.

[119] Ibid.

[120] Ibid.

[121] Ibid. See also, Nsongurua J. Udombana, "When Neutrality Is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan," 1153.

[122] Bodansky, "Iran's Pincer Movement"; Charles Richards, "Soft Words in Sudan Conceal Face of Terror," The Independent (U.K.) (9 June 1993), https://www.independent.co.uk/news/world/soft-words-in-sudan-conceal-face-of-terror-hassan-al-turabi-wears-his-notoriety-lightly-charles-1490494.html.

[123] Bodasky, "Iran's Pincer Movement."

[124] M. S. Beelman, "In Bosnia, Arms Embargo Looks Like a Sieve", *Associated Press/The Daily Courier*, July 31, 1994, A12; Millard Burr & Robert O. Collins, *Revolutionary Sudan: Hasan al-Turabi and the Islamist State, 1989–2000* (Leiden, the Netherlands: Brill, 2003), 142–3; Netherlands Institute for War Documentation, Final Report on "Srebrenica, a 'safe' area - Reconstruction, background, consequences and analyses of the fall of a safe area" (2002), *quoted in* Cees Wiebes, *Intelligence and the War in Bosnia, 1992–1995* (Munster: LIT Verlag, 2003), x`pp. 196–7; Craig Unger, *House of Bush, House of Saud* (2003), 111–13.

1990s, from bases in Afghanistan and Bosnia, Al Qaeda Islamic Army was formed out of various extremist social groups in Arab League countries, notably Egypt and Saudi Arabia.[125] Litigation attorneys offered to represent 2,000 families of victims of the September 11 massacre by Al Qaeda in New York City and Washington DC. They alleged that the "Saudi interests accused of having knowingly facilitated transfers of money to Al Qaeda were named as the principal defendants [and]. . . include[d] three Saudi princes, seven banks, and several international charities. . ."[126] In 2003, Arabic television networks such as Al-Jazeera carried the Al Qaeda message to kill the Jews and Americans around the world.[127] In 2008, the United States recognized al-Shabaab as a foreign terrorist organization; the next year, Al Qaeda announced that all Muslims should join its side in the Somali regional civil war.[128] The Somali capital of Mogadishu had fallen into the hands of Al Qaeda fighters and other jihadists and militias.[129] Reports surfaced in 2001 of bin Laden profiting from the Sierra Leone rebel diamonds.[130] Boko Haram began in 2003 and grew powerful in 2009–2010, after members allegedly traveled to Sudan and Somalia and made contact with Al Qaeda, and Boko Haram later launched an uprising that killed 700 in days.[131]

In 2011 and early 2012, Al Qaeda and allied rebels in Syria obtained arms and men from Sudan, Qatar, Saudi Arabia, Tunisia, Libya, Turkey, and other Persian Gulf, North African, or NATO-member countries.[132] It did not take

[125] J. O. Tamayo, "Experts Had Rejected Possibility of Suicide Hijackings as 'Too Weird,'" *Miami Herald*, September 13, 2001.

[126] A. Gerson, "Terrorism and Genocide: Determining Accountability and Liability", 28 *Thomas Jefferson Law Review* (2005) 79 (Proceedings of the Conference on Law and the Humanities' Representation of the Holocaust, Genocide and Other Human Rights Violations) (citing *Burnett* v. *Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2002); *Barrera* v. *al Qaida Islamic Army* (S.D.N.Y. 2003); *Federal Ins.* v. *al Qaida* (S.D.N.Y. 2003); *Vigilant Ins.* v. *Kingdom of Saudi Arabia*, No. 03 Civ. 8591 (S.D.N.Y. 2003); *Ashton* v. *al Qaeda Islamic Army*, No. 02 Civ. 6977 (S.D.N.Y. 2002); *Salvo* v. *al Qaeda Islamic Army*, No. 03 Civ. 5071 (S.D.N.Y. 2003); *Tremsky* v. *Osama bin Laden*, No. 02 Civ. 7300 (S.D.N.Y. 2002)).

[127] Daily Trust, "PanAfrica; Uganda Arrests Nigerians over Terror Suspicion," Africa News, May 22, 2003. Tal Samuel-Azran, Al-Jazeera and U.S. War Coverage (Peter Lang, 2010), 31–34, 109, 150, http://books.google.com/books?id=Ay8FckfL5vAC&pg=PA31.

[128] Violent Islamist Extremism; Hearing of the Senate Committee on Homeland Security and Governmental Affairs, Federal News Service, March 11, 2009.

[129] "Somalia," in Guy Arnold (Ed.), *The A and Z of Civil Wars in Africa* (Scarecrow Press, 2009), p. 341.

[130] Kaplan, "Carats and Sticks," 608–9.

[131] D. Smith, "In the Shadow of Nigeria's Taliban", *The Mail & Guardian (South Africa)*, January 24, 2011.

[132] J. Schanzer, "Saudi Arabia Is Arming the Syrian Opposition: What Could Possibly Go Wrong?", *Foreign Policy*, February 27, 2012, www.foreignpolicy.com/articles/2012/02/27/saudi_arabia_is_arming_the_syrian_opposition; "Sudan becomes the newest player in Syria's protracted conflict: NYT," Sudan Tribune (August 13, 2013), www.sudantribune.com/spip.php?

long for the rebels to declare a jihad against Syria, a U.N. member state, which they often waged by cleansing Christian populations, destroying churches, executing people without trial, abducting women and other hostages, setting off bombs, looting oil and antiquities and selling them in Turkey and elsewhere, and destroying civilian infrastructure while imposing mass poverty.[133] Having crossed into Syria from Iraq, the Islamic State of Iraq (and Syria) crossed back into Iraq, cleansing Assyrian Christians, Kurds, and Yezidis from Mosul and the roads to Erbil, Kirkuk, and Baghdad, and enslaving Assyrian Christians and Yezidis as a matter of policy.[134] This displaced more than 1.4 million people in Iraq, leaving zero out of the 35,000 to 50,000 Christians and few of the 50,000 to 70,000 Kurds and Yezidis who had lived in Mosul.[135] Radical Sunni clerics who allegedly arrived in northern Iraq from the Persian Gulf countries urged ISIS to cut off water and electricity to Christian villages across the front line, which it did.[136] The total decline in Iraq's Christian population – on an indefinite basis – is expected to reach 95%, from 1.4 million at its peak to 50,000 or so. This parallels the expected disappearance

iframe&page=imprimable&id_article=47635; Hannibal Travis, "Why Was Benghazi Saved, But Sinjar Allowed to Be Destroyed?" 10(1) *Genocide Studies International* (2016) 139–182.

[133] "Commending American Christian Leaders for Standing in Solidarity with Christians and Other Small Religious Communities in Egypt, Iraq and Syria," *Congressional Record* 160 (2014): E769–03, 2014 WL 2050391; "Condemning Kessab Attacks," *Congressional Record*, vol. 160 (2014): E489–03, 2014 WL 1315782; Human Rights Watch, *Syria: Executions, Hostage Taking by Rebels* (October 11, 2013), www.hrw.org/news/2013/10/10/syria-executions-hostage-taking-rebels; International Crisis Group, The Rising Costs of Turkey's Syrian Quagmire, Crisis Group Europe Report N°230, April 30, 2014 10–13, 20–39; L. Morris, "Syrian Armenians, Who Had Been Insulated from War, Forced to Flee After Rebel Offensive", *Washington Post*, April 2, 2014, reproduced in *Congressional Record* 160 (2014): E517; Peace Association of Turkey and Lawyers for Justice, War Crimes Committed Against the People of Syria: Report (Dec. 2013/January 9, 2014), http://pwlasowa.blogspot.fr/2014_01_09_archive.html; K. Sengupta, "We Left Homs Because They Were Trying to Kill Us", *The Independent (U.K.)*, Nov. 2, 2012, p. 42; Society for Threatened Peoples, Written Statement to Human Rights Council, UN Doc. No. A/HRC/22/NGO/143 (February 22, 2013), p. 3; UN Secretary-General Ban Ki-Moon, Situation of Human Rights in the Syrian Arab Republic: Implementation of Human Rights Council Resolution 19/22, UN Doc. No. A/HRC/20/37 (June 22, 2012), p. 5.

[134] S. Res. 530 – 113th Congress (2013–2014): A resolution expressing the sense of the Senate on the current situation in Iraq and the urgent need to protect religious minorities from persecution from the terrorist group the Islamic State of Iraq and the Levant (ISIL); Nina Shea, "Only America Can Save Iraq's Last Christians," Fox News (July 29, 2014), www.foxnews.com/opinion/2014/07/29/only-america-can-save-iraq-last-christians.html.

[135] Shea, "Only America"; "Iraq: 'All the Christians Have Fled Mosul,'" Catholic World Report, June 12, 2014, www.catholicworldreport.com/Blog/3185/iraq_all_the_christians_have_fled_mosul.aspx.

[136] Shea, "Only America"; Alex Mclintock & Scott Spark, "The Last Christians Flee Mosul in Iraq," Australian Broadcasting Corporation (July 24, 2014), www.abc.net.au/radionational/programs/religionandethicsreport/ the-last-christians-flee-mosul-in-iraq/5620674.

of Christianity from the territory of the Palestine Liberation Organization, another alleged participant in the 1993 NIF religious conference, and Christianity's near-disappearance from Turkey after 1924.[137] The Islamic State of Iraq inflicted more violence against civilians in 2011, or "one-sided violence," than the government of Cote d'Ivoire, and more than Libya and Nigeria combined.[138] It perpetrated more such killings in 2010 than the government of Myanmar and the Janjaweed (part of the government of Sudan), combined.[139] Its crimes were on a par with those of the LRA.[140] In 2015, the Committee on the Rights of the Child reported that "children and families belonging to minority groups, in particular Turkmen, Shabak, Christians, Yazidi, Sabian-Mandaeans, Kaka'e, Faili Kurds, Arab Shia, Assyrians, Baha'i, Alawites, who are systematically killed, tortured, raped, forced to convert to Islam and cut off from humanitarian assistance by the so-called ISIL in a reported attempt by its members to suppress, permanently cleanse or expel, or in some instances, destroy these minority communities."[141] This campaign was well underway in 2007.[142]

Instead of insisting that all those contributing to jihad in Syria be punished, some persons in Turkey and the territories of the Arab League aided them. Fighters poured in from Qaeda-held area of Libya,[143] as veterans of Qaeda operations there and in Afghanistan, Pakistan, Bosnia, Chechnya, and Iraq joined the insurgency.[144] Weapons for the terrorists often were paid for by

[137] Mclinktock & Spark, "The Last Christians"; "Iraq: 'All the Christians.'" See also, H. Travis, "Wargaming the 'Arab Spring': Predicting Likely Outcomes and Planning U.N. Responses", 46 *Cornell Journal of International Law* (2013) 75–143, at 79.

[138] Uppsala Conflict Data Project, One-sided violence data set, version 1.4–2012.

[139] Ibid. See also, Udombana, "When Neutrality Is a Sin," 1154–5.

[140] Uppsala Conflict Data Project, One-sided violence data set. The data set refers to about 732 LRA killings in 2008, 1,300 in 2009, and 145 in 2010, versus 510 for the Islamic State in 2008, 518 in 2009, and 571 in 2010. The latter's high point was in 2007 with 1,436, when LRA was blamed for 62, much fewer than in 2008.

[141] U.N. Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Iraq, Mar 5 2015, www.un.org/crc.

[142] U.S. Department of State, International Religious Freedom Report 2006 (March 2007), www.state.gov/g/drl/rls/irf.

[143] *Asia Times* (2012), www.atimes.com/atimes/Middle_East/ML02Ak01.html; D. Sherwood, "Syria Will Be Bloodiest Yet", *The Daily Star*, January 1, 2012, www.dailystar.co.uk/news/view/227911/Syria-will-be-bloodiest-yet/.

[144] N. Kazimi, "Handing Jihadis Cause", *Newsweek* (International Edition), May 9, 2011 (lexisnexis.com "Magazine Stories, Combined" database) (declaring that veterans of al Qaeda's operations in Pakistan/Afghanistan, Iraq, "Chechnya, Bosnia, and a bunch of other jihadist hotspots" were "working between Syria and Baghdad."); Reuters, "Russia Says 15,000 Foreign Terrorists in Syria" (March 8, 2012), www.reuters.com/article/201/03/08/us-syria-russia-idUSBRE82714E20120308; J. Rosenthal, "Al-Qaeda in Rebel Syria", *The National Review*

donors from Saudi Arabia.[145] Instead of targeting that flow, the United States asked Russia to disarm Syria, contrary to its policy on the Iraqi government, its Kurdish region, and the Syrian Kurds.[146] The death toll may rise from an expected 5,400 or 15,000 from a government victory in 2011 or 2012, to a million or more from decades of terror and response as in Angola, Iraq, and the DRC.[147]

Meanwhile, the Popular Front for the Liberation of Eritrea (EPLF) itself emerged in "1970 in a camp of the Palestinian Fatah movement in Amman, Jordan," and by 1989 conquered Asmara.[148]

In addition to Sudan and the Palestinian Authority, Eritrea, the CAR, the DRC, and Nigeria have become among the most unfree and persecution-prone places in the world. According to the State Department, Sudan, the CAR, the DRC, and Nigeria merited a 5 on the "Political Terror Scale" in

(March 8, 2012), www.nationalreview.com/articles/292904/al-qaeda-rebel-syria-john-rosenthal?pg=2 & www.nationalreview.com/articles/292904/al-qaeda-rebel-syria-john-rosenthal/page/0/1?pg=2&splash=; J. Steele, "Diary", 34, No. 6 *London Review of Books* (2012) 44–7, www.lrb.co.uk/v34/n06/jonathan-steele/diary; Watkins, "Sanctions, Saboteurs."

[145] J. Schanzer, "Saudi Arabia Is Arming the Syrian Opposition: What Could Possibly Go Wrong?", *Foreign Policy*, February 27, 2012, www.foreignpolicy.com/articles/2012/02/27/saudi_arabia_is_arming_the_syrian_opposition. See also, As`ad AbuKhalil, "How the Saudi-Qatari Rivalry Has Fueled the War in Syria," *The Intercept* (June 2018), https://theintercept.com/2018/06/29/syria-war-saudi-arabia-qatar/; Seymour Hersh, "The Red Line and the Rat Line, *"The London Review of Books* 36 (April 17, 2014), pp. 21–4, www.lrb.co.uk/v36/n08/seymour-m-hersh/the-red-line-and-the-rat-line ; "Jihadis in Syria use Turkish safe house network," *The Times of Israel* (December 7, 2013), www.timesofisrael.com/jihadis-in-syria-use-turkish-safe-house-network/; Christina Lin, "Chinese stratagems and Syrian buffer zone for Turkey-Qatar pipeline," *The Times of Israel Blogs* (August 1, 2015), https://blogs.timesofisrael.com/chinese-stratagems-and-syrian-buffer-zone-for-turkey-qatar-pipeline/; Roula Khalaf and Abigail Fielding-Smith, "How Qatar seized control of the Syrian revolution," *Financial Times*, May 17, 2013, www.ft.com/content/f2d9bbc8-bdbc-11e2-890a-00144feab7de; David Phillips, Research Paper: Isis-Turkey Links, HuffPost (2015), www.huffingtonpost.com/david-l-phillips/research-paper-isis-turke_b_6128950.html; Lale Sariibrahimoglu, "On the Borderline – Turkey's Ambiguous Approach to Islamic State," *Jane's Intelligence Review* (2014), www.janes.com/images/assets/804/44804/On_the_borderline_-_Turkey_s_ambiguous_approach_to_Islamic_State.pdf.

[146] E. Dermy, "Russia to Keep up Syria Arms Sales", A. France-Presse, August 17, 2011; C. Brauchli, Arms and the World, Common Dreams (January 7, 2012), www.commondreams.org/view/2012/01/07-4.

[147] Associated Press, "UN Security Council Discusses Crisis in Syria", (2012); Reuters, "Syrian Rebel Leader Threatens to Escalate Attacks," Reuters, January 3, 2012. See also, A. France-Presse, "DR Congo calls on world court to 'stop Rwandan war of aggression,'" June 14, 2002, www.namibian.com.na/2002/june/africa/0268BCEAFC.html; G. Burnham, et al., "Mortality after the 2003 Invasion of Iraq: A Cross-sectional Cluster Sample Survey", *The Lancet* (October 11, 2006) 1–8 (study covering first three years of post-2003 war in Iraq)

[148] H. Erlich, "Eritrea's Double Identity," *The Jerusalem Report*, October 31, 1991, p. 31.

2010, indicating extreme levels of persecution on a par with Myanmar or North Korea.[149] Eritrea joined Afghanistan, Chad, Brazil, Burundi, China, Colombia, Egypt, Ethiopia, Iran, Iraq, India, Israel and occupied territories, Kenya, Mexico, Russia, Somalia, Sri Lanka, Syria, Uganda, and some other countries as warranting a 4 on the scale in 2010.[150] Eritrea also had one of the worst levels of malnourishment in the world, at 65% of the total population in 2006–2008.[151]

The rise of warlords, rebel armies, terrorist organizations, statelets, and other nonstate threats to population security and economic growth has arguably driven mass exoduses of civilians. Table 10.1 illustrates this phenomenon as of 2010; I discuss above some estimates published since then.

If entire communities affected by these exoduses at the hands of terrorist groups proved to be unable to reconstitute themselves, this would be a completed genocide according to a broad, originalist reading of the Genocide Convention's Article II, subsections II(b)–II(d).[152] Next to Sierra Leone, Somalia, Mali, the DRC, Chad, and the CAR had the worst rate of under-five mortality in the world, each over 164 deaths per 1,000 births, or 16%.[153]

These events led to widespread terrorist massacres in Africa, ranging from the African embassy bombings of 1998 to the Somali university and other bombings, the Kenyan shopping mall massacre, the Boko Haram attacks on Christians and pro-government Muslims in northern Nigeria and neighboring states, and the Islamic State massacres of Copts and other Christians in Libya and Tunisia. In Nigeria, Boko Haram reported receiving support from persons in Saudi Arabia and Sudan.[154] In Mali, France believed that jihadists such as Ansar al-Dine had received cash from persons in Qatar, who also supported the jihadists in Syria according to the French government. In Afghanistan, the

[149] Political Terror Scale (2011), www.politicalterrorscale.com (filename PTS_2010_oct_25_2011.xls).

[150] Ibid.

[151] FAO Statistics Division, Prevalence of undernourishment in total population (percentage) (2008).

[152] *Prosecutor* v. *Blagojevic & Jokic*, Case No. IT-02–60-T, Trial Chamber, Judgment (January 17, 2005), §§ 666, 675). See also, *Prosecutor* v. *Akayesu*, Case No. ICTR-96–4-T, Trial Chamber I, Judgment (September 2, 1998). www.un.org/ictr/english/judgements/akayesu.html; Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government – Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1943), www.preventgenocide.org/lemkin/AxisRule1944-1.htm. See also, H. Travis, "On the Original Understanding of the Crime of Genocide," *Genocide Studies & Prevention: An International Journal* 7 (2012): 30–55, 35–9.

[153] The UN Inter-Agency Group for Child Mortality Estimation, 2012; Maternal, newborn and child health data by country (most recent year to 2011 with some trend data included).

[154] Smith, "In the Shadow."

TABLE 10.1 *Refugee Flows by Country of Origin at End of 2010*

Afghanistan	3,054,709
Iraq	1,683,575
Somalia	770,148
DRC	476,693
Sudan	379,067
Vietnam	338,698
Myanmar	215,644
Eritrea	205,458
China	184,602
Serbia (and Kosovo)	182,955
Central African Republic	162,755
Turkey	146,793

Source: U.N. High Commissioner for Refugees[155]

Taliban was receiving arms and money from similar sources as Boko Haram and Ansar al-Dine. The Seleka of the CAR as well as Ansar al-Dine procured weapons released by government stockpiles by the Libyan rebels, which included Al Qaeda members.[156] In South Sudan, the horrific atrocities of the White Army insurgents against the newly independent and desperately poor state were supercharged by arms shipments from the NIF regime in Khartoum.[157] Millions are homeless and starving as a result.[158] The country already has more child soldiers conscripted into fighting than Sierra Leone did at the end of its conflict, or 11,000 children separated from their families and almost 1,500 dead, possibly triggering Article II(e) of the Genocide Convention.[159]

[155] UNHCR, Global Trends 2010 (2011), p. 42, www.unhcr.org/4dfa11499.html.

[156] Travis, "Genocide, Counterinsurgency," pp. 190–94; Tracy, "Human Costs."

[157] "Genocide, Counterinsurgency," pp. 194–6; see also, S. Paterno and S. Morgan, "The White Army factor in South Sudan's conflict", Sudan Tribune (January 27, 2014), http://a.next.westlaw.com; Hereward Holland "In South Sudan, tribal militias exact revenge (+video)," Christian Science Monitor (January 17, 2012), 2012 WLNR 1142994.

[158] U.N. Mission in South Sudan, Hunger Could Threaten over Four Million in South Sudan (February 8, 2012), http://webcache.googleusercontent.com/search?q=cache:VJsI5qXyr3gJ:unmiss.unmissions.org/Default.aspx%3Ftabid%3D3481%26ctl%3DDetails%26mid%3D6047%26ItemID%3D52935%26language%3Den-US+sudan+%22four+million%22+hunger+2012&cd=1&hl=en&ct=clnk&gl=us.

[159] U.N. Children's Fund, Press Release, UNICEF Advocate Ishmael Beah Witnesses Impact of Conflict on Children in South Sudan (2015), http://reliefweb.int/report/south-sudan/unicef-advocate-ishmael-beah-witnesses-impact-conflict-children-south-sudan.

4. CONCLUSION

Imposing corporate criminal liability will not solve many of the atrocity-related problems confronting the African continent, because nonstate groups other than corporations may be responsible for a preponderance of these crimes. Armies, parties, fronts, and the like came to the fore in the DRC, Sierra Leone, and Uganda, for example. Religiously inspired groups linked to Sudan and Somalia have perpetrated serious crimes in Nigeria, among other places, while groups linked to persons in Sudan, Qatar, Saudi Arabia, Tunisia, Libya, Turkey have perpetrated similar crimes in Iraq and Syria, among other places. Such groups can form knowledge of their members' acts and adopt policies that may violate international norms, just as corporations do. Culpability for noncorporate organizations is necessary to ensure that perpetrators of population-level crimes such as enslavement, child soldiering, forcible transfer, destruction of essential infrastructure or government institutions, or genocide do not enjoy impunity. Moreover, recognizing broader associational responsibility may avoid impediments to the fight against impunity posed by doctrines of intent, immunity, and effects-based tests for crimes such as corruption, enslavement, murder, or terrorism.

11

The Crime of Aggression in the African Court of Justice and Human and Peoples' Rights

SERGEY SAYAPIN

In accordance with Article 28A(1)(14) of the Malabo Protocol, the International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights shall have power to try persons for the crime of aggression. Article 28M of the Protocol sets out a definition of the crime for the Court. The definition is largely in line with current international law on the subject but also reflects important regional features. This article analyses the substantive provisions of Article 28M, in a comparative fashion, and suggests that it could potentially become, once the Malabo Protocol enters into force, even more efficient than the Rome Statute's provisions on the crime of aggression, as far as African States are concerned.

1. INTRODUCTION

The crime of aggression is a core crime under international law.[1] It was first introduced in the Charters of the Nuremberg[2] and Tokyo[3] Tribunals, and was subsequently invoked in the course of the Nuremberg follow-up trials.[4] Cold

This contribution draws, to an extent, upon chapter 5 of the book and reflects the views of the author alone. The author thanks Professor Noah Weisbord (Florida International University College of Law) for his helpful comments on this chapter's draft.

1 See G. Werle and F. Jessberger, *Principles of International Criminal Law*, 3rd edition (Oxford University Press, 2014), pp. 529–56. See also A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, *Cassese's International Criminal Law*, 3rd edition (Oxford University Press, 2013), pp. 136–45

2 See the Charter of the Nuremberg Tribunal, Art. 6(a). See also: S. Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (T. M. C. Asser Press / Springer, 2014), pp. 40–3, 149–61.

3 See the Charter of the Tokyo Tribunal, Art. 5(a). See also S. Sayapin, supra note 2, pp. 43–4, 161–80.

4 See S. Sayapin, supra note 2, pp. 45, 180–190. See also Y. Dinstein, *War, Aggression and Self-Defence*, 5th edition (Cambridge University Press, 2011), pp. 142–143.

War antagonisms made its prosecution impossible for decades to come: not a single trial involved charges of aggression since the late 1940s. The crime of aggression was included in Article 5 of the Rome Statute of the International Criminal Court (ICC) in 1998, but neither the crime itself nor the conditions for the exercise of the ICC jurisdiction with respect to it were defined until the 2010 Kampala Conference.[5] Even then, the activation of the ICC jurisdiction with respect to the crime of aggression was postponed until 2017, at the earliest, and ICC jurisdiction was made subject to a number of further limitations.[6]

Article 28M of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereinafter referred to as the Malabo Protocol) of 27 June 2014 establishes the jurisdiction of the African Court of Justice and Human and Peoples' Rights (hereinafter referred to as the African Court) with respect to the crime of aggression. The definition of the crime is largely in line with current international law – in particular, with Article 8 bis of the Rome Statute – but it also contains a number of important regional features and innovations. This contribution offers a comparative analysis of the Malabo Protocol's Article 28M against the background of Article 8 bis of the Rome Statute, upon which Article 28M is based, and highlights the latter's specific features and practical implications of its future invocation by the African Court.

2. 'CHAPEAU' OF THE DEFINITION (ARTICLE 28M(A) OF THE MALABO PROTOCOL)

Article 28M(A) of the Malabo Protocol contains a 'chapeau' of the definition, which largely mirrors an analogous provision of the Rome Statute[7] but goes even further, as far as three important elements are concerned:

[5] Ibid., pp. 56–62. See also A. Cassese, 'On Some Problematical Aspects of the Crime of Aggression', 20 *Leiden Journal of International Law* (2007), pp. 841–9; R. S. Clark, 'Negotiating Provisions Defining the Crime of Aggression, Its Elements and the Conditions for ICC Exercise of Jurisdiction Over It', 20 *EJIL* (2009), No. 4, pp. 1103–1115; C. Kress, 'The Crime of Aggression before the First Review of the ICC Statute', 20 *Leiden JIL* (2007), pp. 851–65; C. Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: a Reply to Andreas Paulus', 20 *European Journal of International Law* (2009), No. 4, pp. 1129–1146; S. D. Murphy, 'Aggression, Legitimacy and the International Criminal Court', 20 *EJIL* (2009), No. 4, pp. 1147–1156; A. Paulus, 'Second Thoughts on the Crime of Aggression', 20 *EJIL* (2009), No. 4, pp. 1117–1128; N. Weisbord, 'Conceptualising Aggression', 20 *Duke Journal of Comparative and International Law* (2009), No. 1, pp. 1–68; N. Weisbord, 'Prosecuting Aggression', 49 *Harvard International Law Journal* (2008), No. 1, pp. 161–220.

[6] S. Sayapin, supra note 2, pp. 298–312.

[7] Cf. Art. 8 bis (1) of the Rome Statute: '1. For the purpose of this Statute, 'crime of aggression' means 'the planning, preparation, initiation or execution, by a person in a position effectively

> For the purpose of this Statute, 'Crime of Aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state *or organization, whether connected to the state or not*, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations *or the Constitutive Act of the African Union* and with regard to *the territorial integrity and human security of the population of a State Party* (emphasis added).

It may seem that this introductory provision is a mere restatement of the pre-existing customary law on the subject, including of Article 8 bis (1) of the Rome Statute: it alludes to the modes of criminal conduct listed in the Nuremberg and Tokyo Charters ('planning, preparation, initiation or execution'), reaffirms the Nuremberg and Tokyo Tribunals' conclusions regarding potential defendants' superior standing in their respective State or organisational structures ('person in a position effectively to exercise control over or to direct the political or military action of a state or organization'), and includes only the most significant violations of the Charter of the United Nations or the Constitutive Act of the African Union ('which, by [their] character, gravity and scale, constitut[e . . .] manifest violation[s]' of the UN Charter or the Act) among the acts of aggression for the purpose of the Malabo Protocol.[8] However, Article 28M(A) does deviate from the letter and substance of Article 8 bis (1) of the Rome Statute, because (1) establishes jurisdiction not only with respect to representatives of States but also to those of non-State actors, (2) refers to the Constitutive Act of the African Union, in addition to the Charter of the United Nations, and (3) lists human security of the population of a State Party among protected values. These aspects require some analysis and clarification.

A. *Jurisdiction with Respect to Persons in a Position Effectively to Exercise Control Over or to Direct the Political or Military Action of a State or Organisation*

Since the relevant international trials held in the 1940s, aggression was considered as a 'leadership crime' requiring special subjects – that is,

> to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.'
>
> 2. For the purpose of paragraph 1, 'act of aggression' means 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations [. . .]'

[8] Cf. S. Sayapin, supra note 2, pp. 257–8.

high-ranking civilian and military State officials – and lower-ranking State officials were to be excluded from the range of potential subjects of the crime. Hence, Article 8 bis (1) of the Rome Statute made reference to 'person[s] in a position effectively to exercise control over or to direct the political or military action of a State' – thus limiting its jurisdiction to top-echelon State agents only. Formally, Article 28(M)(A) of the Malabo reproduces this provision, since it establishes the African Court's jurisdiction with respect to the crime of aggression committed by 'person[s] in a position effectively to exercise control over or to direct the political or military action of a state'. However, it should be noted that the efficiency of this provision is seriously impaired by Article 46A bis of the Malabo Protocol ('Immunities'): 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'. This broadly worded provision was designed to shield against prosecution, including on charges of aggression, not only serving AU Heads of State or Government, but also all other senior civilian and military State officials who would typically be involved in such a crime – that is, Ministers of Defence, Heads and members of General Staff, Ministers of Foreign Affairs and of the Interior, directors of special services, members of Parliaments approving an internationally unlawful use of armed force, and even prominent public figures (for example, religious or social leaders) inciting the commission of the crime. Hence, as a matter of practice, Article 28M would unfortunately remain a dead letter, as far as serving senior officials of AU Member States are concerned, until their tenure of office is over, and prosecutions of such individuals under Article 28M would only be possible, if ever, once their official capacities would cease. Obviously, the feasibility and efficiency of such belated prosecutions would depend upon the concerned States' political will and other attendant circumstances.

Formally, Article 28M(1) of the Malabo Protocol also establishes the African Court's jurisdiction with respect to the crime of aggression committed by representatives of non-State actors (organisations) who would use force in violation of international law. Although the military danger of non-State organisations such as Al Qaeda, Daesh, etc. is evident, and Article 28M(A) of the Malabo Protocol certainly constitutes a progressive development of regional international law, and as such is deserving of attention, this author maintains his previously expressed opinion regarding the non-applicability of the elements of the crime of aggression to non-State actors:

> It is understood that Article 8 bis (1) [of the Rome Statute] does not cover (even large-scale instances of) autarkic use of armed force by non-State actors. Unlike some authors [...] this writer does not believe that such cases must be covered by the Rome Statute's definition of the crime of aggression. Since its inception in the theory of international law, the concept of aggression was understood in its relationship with the State [...], and there is no obvious reason for changing this conceptual understanding. Firstly, armed attacks by non-State actors would almost certainly be covered by other relevant rules of international law, including those of the Rome Statute (cf. Articles 6, 7 and 8). Secondly, such uses of force would be almost implausible without, at least, an implicit support or acquiescence from States harbouring the non-State actors perpetrating the attacks – a situation covered by Article 8 bis (2) (g) of the Rome Statute [...]. Subparagraph (g) refers to a State's 'substantial involvement' in the 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [acts of aggression]'. It is submitted that allowing a non-State group to prepare for a large-scale armed attack against persons or property situated in another State should indeed be considered as the host State's 'substantial involvement', because not taking determined measures for repressing such criminal activities would denote the host State's sharing those activities' aims or, at least, acquiescing to them. Displaying a similar tolerance towards a non-State actor's preparation for the commission of a crime under international law – genocide, crimes against humanity or war crimes – may be indicative of the existence of an aggressive *mens rea* on the part of leaders of the host State [...][9]

Hence, in the light of current customary international law, the extension of the African Court's jurisdiction with respect to the crime of aggression to representatives of non-State actors (organisations) appears to be redundant, given that various forms of the use of force by non-State actors are already covered by Articles 28B ('Genocide'), 28C ('Crimes against humanity'), 28D

[9] Ibid., p. 260, footnotes omitted. However, see A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, supra note 1, p. 140: 'Arguably, international criminal liability for aggression might also arise where then armed attack against a state is planned, organized, initiated or executed by individuals belonging to a non-state organization or other organized entity. Nothing precludes non-state organizations form being able to use massively armed force against a foreign state [...] While there are sound arguments for extending criminal responsibility for aggression to instances of massive use of armed force by non-state actors, the ICC Kampala Review Conference took a different approach: the definition of the crime of aggression finally adopted restricts criminal liability [to] persons 'in a position effectively to exercise control over or to direct the political or military action of a state' because of questions over whether current customary international law supported an extension of the crime to non-state or minor official actors'.

('War crimes'), 28G ('Terrorism'), and 28H ('Mercenarism'), and Article 28M (B)(h) of the Malabo Protocol, in and of itself, establishes criminal responsibility for '[t]he sending *or materially supporting* by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State [...]' (emphasis added, see *infra* 3(A)(8)).

B. *The Role of the Constitutive Act of the African Union*

The Constitutive Act of the African Union,[10] adopted at Lomé, Togo, on 11 July 2000, reaffirms the Purposes and Principles of the United Nations[11] and adapts them, respectively, in Articles 3 ('Objectives') and 4 ('Principles'), to African realities. With due regard to those realities, the following rules on the use of force add to relevant provisions of the Charter of the United Nations:[12]

- the African Union is empowered to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity (Article 4(h));
- Member States are empowered to request intervention from the Union in order to restore peace and security (Article 4(j));
- unconstitutional changes of governments should be condemned and rejected (Article 4(p)).

The disjunctive sentence in Article 28M(A) of the Malabo Protocol ('the Charter of the United Nations *or* the Constitutive Act of the African Union', emphasis added) should not be read as juxtaposing the Constitutive Act vis-à-vis the Charter of the United Nations, despite the preposition 'or' used. The Charter of the United Nations is a treaty of prevalent legal force,[13] and placing it before the Constitutive Act is quite appropriate, since the provisions of the Act should not contradict those of the Charter (cf. *infra* 3(A)(1), though). Although the Constitutive Act's more specific rules do not have direct equivalents in the Charter, they should not be interpreted as contravening the Charter but rather should be read in conjunction with it: since Article 52 of the Charter explicitly endorses the operation of regional arrangements, the provisions of the Constitutive Act's Article 4 referred to above should be regarded as additional grounds for internationally lawful uses of force.

[10] For the official English text of the Constitutive Act, see: www.au.int/en/about/constitutive_act (last accessed 29 May 2016)
[11] Cf. Arts. 1 and 2 of the Charter of the United Nations.
[12] Cf. Arts. 2(4) and 51 of the Charter of the United Nations.
[13] Cf. Art. 103 of the Charter of the United Nations.

Consequently, the instances of the use of force in accordance with subparagraphs (h), (j) and (p) of the Constitutive Act's Article 4 are not to be regarded as acts of aggression under Article 28M(A) of the Malabo Protocol, and should not entail individual criminal responsibility.

C. *Human Security of the Population of a State Party as a Protected Value*

Article 28M(A) of the Malabo Protocol concludes with a reference to two specific values protected by the provision against acts of aggression – namely, to 'the territorial integrity and human security of the population of a State Party'. Whereas States' territorial integrity is a well-established value protected by international law against aggression,[14] the notion of 'human security of the population of a State Party' seems to overlap with the definition of crimes against humanity for the purpose of the Malabo Protocol (cf. Article 28C). Since crimes against humanity 'target fundamental, recognized human rights, in particular, life, health, freedom, and dignity' (primary object of the crime) and thereby call into question 'the security and well-being of the world' (secondary object of the crime),[15] treating similar acts, additionally, under the heading of the crime of aggression would, in this author´s opinion, somewhat distort both concepts. It is therefore advisable to limit the notion of aggression to what it traditionally has been – that is, the use of force against the territorial integrity, political independence or other essential features of statehood – and to deal with crimes against the 'human security of the population' under the heading of crimes against humanity.

D. *Other Essential Elements of the 'Chapeau'*

As will be seen below, Article 28M of the Malabo Protocol was almost literally borrowed from Article 8 bis of the Rome Statute – with the latter's substantive advantages and, probably more importantly for practical purposes, limitations. Where the corresponding elements of both provisions overlap exactly, this author's earlier reflections on relevant provisions of the Rome Statute are reproduced, with an understanding that they should also be fully applicable to the Malabo Protocol's respective rules. In turn, linguistic and, especially, substantive differences between Article 28M of the Malabo Protocol and Article 8 bis of the Rome Statute are emphasised, and their legal consequences are shown.

[14] S. Sayapin, supra note 2, pp. 238–9.
[15] G. Werle and F. Jessberger, supra note 1, pp. 333–4.

1. 'For the Purpose of this Statute'

Like Article 8 bis (1) of the Rome Statute, Article 28M(A) of the Malabo Protocol begins with an important reservation to the effect that the definition of the crime of aggression shall apply '[f]or the purpose of [the] Statute [of the African Court]' only. The purpose of including this reservation in both provisions is very practical:

> This restrictive clause was a part of the compromise reached at the First Review Conference, in order to make the new definition workable and not to upset the interests of States, which are not Parties to the Statute. Professor Kai Ambos reports that the United States were preoccupied with making sure that the proposed amendment only affect the ICC Statute, without creating any legal effect beyond the material, personal and temporal fields of its application [...] It must hence be concluded that the definition may not, at this stage, be regarded as claiming universal recognition, neither can it prevent the development, at the national or international levels, of alternative legal theories or rules pertaining to the crime of aggression, even after the entry into force of Article 8 bis [...][16]

Since the Malabo Protocol's definition of the crime of aggression is intended for the purpose of the African Court only, its future application by the Court may, over time, evolve into a regional custom. Moreover, this author believes that the Malabo Protocol's provision on the crime of aggression could, potentially, become even more efficient than its 'parent provision' in the Rome Statute (see *infra* 4).

2. 'Planning, Preparation, Initiation or Execution' of an Act of Aggression

Under Article 28M(A) of the Malabo Protocol, four modes of conduct are criminalised in connection with an act of aggression – planning, preparation, initiation and execution. As these terms have been 'borrowed' from the Nuremberg and Tokyo Charters almost verbatim – with the exception of 'execution,' which replaced the original term, 'waging a war of aggression' – they may now be considered as having a customary value.[17] Notably, the same modes of conduct are criminalised under Article 8 bis (1) of the Rome Statute.

[16] S. Sayapin, supra note 2, pp. 258–9, footnotes omitted.
[17] Ibid., pp. 226–33. See also Y. Dinstein, supra note 4, pp. 141–142.

3. 'Act of Aggression'

Since Article 28M(A) of the Malabo Protocol largely builds upon pre-existing international law – in particular, upon Article 8 bis (1) of the Rome Statute – this author's earlier reflection on the relationship between a State's *act* of aggression and an individual *crime* of aggression appears to retain its relevance:

> It suffices to restate here [. . .] that an act of aggression should be regarded, in the context of Article 8 bis (1), as a *direct* result of perpetrators´ criminal conduct, and not merely as its 'by-product' delivered through the intermediary of a State. The potential perpetrators of the crime are described in Article 8 bis (1) as being *as such* capable of planning, preparing for, initiating or executing an act of aggression. In this logical structure, 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations' referred to in Article 8 bis (2) results immediately from (an aggregate of) individual criminal acts, and 'the State', which uses force against protected values listed in the provision becomes a 'tool' in the perpetrators' hands – an indispensable one, given the nature of the crime at issue, but it still is a 'mechanical' tool, not a subject capable of taking autonomous decisions to the contrary to the perpetrators' will, for they themselves embody the State´s will. In other words, for the purpose of the ICC Statute, a 'crime of aggression' consists in that 'a person in a position effectively to exercise control over or to direct the political or military action of a State' participates in 'planning, preparation, initiation or execution' of an internationally wrongful act involving 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations', the 'character, gravity and scale' of which would warrant the concern of the international community as a whole [. . .][18]

For the author's reservation on the (in)ability of non-State actors to engage in the commission of an act of aggression, see supra 2(A).

4. '[W]hich, by Its Character, Gravity and Scale, Constitutes a Manifest Violation of the Charter of the United Nations or the Constitutive Act of the African Union'

The qualification of a requisite intensity of an act of aggression included in Article 28M(A) of the Malabo Protocol and pertaining to the 'character, gravity

[18] S. Sayapin, supra note 2, pp. 260–1, footnotes omitted. See also Y. Dinstein, supra note 4, pp. 153–154.

and scale' of an act of aggression also restates pre-existing international law – that is, a corresponding sentence of Article 8 bis (1) of the Rome Statute:

> Article 8 bis (1) concludes with an essential provision to the effect that a use of force between States may be deemed to amount to an act of aggression for the purpose of the ICC Statute only if, 'by its character, gravity and scale, [it] constitutes a manifest violation of the Charter of the United Nations' [. . .] In other words, in order to qualify as an act of aggression for the purpose of Article 8 bis (1), a State´s use of force must be so unlawful, devastating and massive as to meet, respectively, the cumulative benchmarks of 'character, gravity and scale' laid down in the 'manifest standard' [. . .] This provision resulted from discussions within the Special Working Group on the Crime of Aggression [. . .] on the requisite intensity of armed force to be involved in an alleged State act of aggression [. . .] in order for such act's authors to be held responsible by the ICC. As Stephan Barriga points out, an explicit aim of this clause is to exclude from the ICC jurisdiction 'not only [. . .] minor border skirmishes and other small-scale incidents but also acts whose illegal character [would be] debatable rather than manifest' [. . .] and hence to limit the Court's jurisdiction to individual acts bringing about 'the most serious' internationally wrongful uses of force [. . .] of 'concern to the international community as a whole' [. . .] It is accordingly understood that inter-State confrontations involving the use of armed force [. . .] but not reaching the cumulative normative threshold articulated in Article 8 bis (1) should not be regarded as acts of aggression for the purpose of the ICC Statute, since, to borrow from S. Barriga's terminology, 'border skirmishes and other small-scale incidents' would conspicuously not meet the 'gravity' and 'scale' requirements [. . .] and, in turn, State acts whose illegality under applicable public international law were 'debatable' (such as the forcible protection of nationals abroad or the *bona fide* 'humanitarian intervention' [. . .]) would not correspond to the 'character' criterion – even if their gravity and / or scale were sufficient. It appears that the threshold was placed at such a high level – and appropriately so – on the one hand, with the purpose of limiting the ICC´s future workload, and, on the other hand, with a view to reinforcing the link between a State act of aggression and a corresponding individual crime [. . .][19]

Notably, Article 28M(A) of the Malabo Protocol, like Article 8 bis (1) of the Rome Statute (in contrast to some of its *travaux préparatoires*), contains no examples of 'manifest violation[s] of the Charter of the United Nations or the Constitutive Act of the African Union'. Its purpose is to set an overall high

[19] S. Sayapin, supra note 2, pp. 261–3, footnotes omitted.

threshold of gravity of an act of aggression, whereas the latter´s more specific definitional elements are included in Article 28M(B).

3. ACT OF AGGRESSION (ARTICLE 28M(B) OF THE MALABO PROTOCOL)

The second paragraph of Article 28M contains a list of acts, which qualify as acts of aggression for the purpose of individual criminal responsibility under the Malabo Protocol. The list is exhaustive and hence corresponds to the principle of legality, as understood in international criminal law.[20] Before proceeding to consider specific examples of acts of aggression,[21] some general remarks are worthwhile.

Like in Article 8 bis (2) of the Rome Statute, the reference to a declaration of war in Article 28M(B) of the Malabo Protocol is superfluous, as the legal significance of relevant rules largely diminished since the middle of the 20th century:

> Since the Second World War, such declarations have in practice been very rare and, besides, they lost their legal significance with the adoption of the 1949 Geneva Conventions [...] The declaration of war must have been recalled in this context with a view to emphasising, once again, the important 'threshold of gravity' of consequences an alleged act of aggression should entail [...] – that is to say, the level of violence of an international armed conflict. Even so, it would have been more accurate to refer to the non-recognition of a subsequent *state* of war by the States involved, and not to a prior or parallel *declaration* thereof, for such a declaration would not, in accordance with international humanitarian law, affect the legal qualification of the difference resulting from an alleged act of aggression as an international armed conflict, irrespective of the duration of that conflict.[22]

Next, unlike Article 8 bis (2) of the Rome Statute, Article 28M(B) of the Malabo Protocol does not make any direct reference to the UN General Assembly resolution 3314 (XXIX). With due regard to this author's critical point with respect to the Rome Statute's provision on the crime of aggression, the absence of the reference to the 1974 UN Definition of Aggression in the

[20] See G. Werle and F. Jessberger, supra note 1, pp. 39–41; A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, supra note 1, pp. 22–36.

[21] On the notion of the act of aggression under international law, see S. Sayapin, supra note 2, pp. 104–9. See also Y. Dinstein, supra note 4, pp. 85–123.

[22] S. Sayapin, pp. 263–4, footnotes omitted, emphasis in the original.

Malabo Protocol should be regarded as an progressive development of international law:

> [A]ll other crimes within the jurisdiction of the ICC (Articles 6–8) have been listed in the Statute as a matter of its own content, which reinforces the Court's *ratione materiae* competence. The definitions of those other crimes were either specifically formulated for the purpose of the Statute (crimes against humanity, Article 7), or classified for its purpose (war crimes, Article 8), or reproduced verbatim from a relevant international treaty (genocide, Article 6). It is uncertain why it was deemed necessary to quote a non-binding document – such as the General Assembly resolution 3314 (XXIX) – in Article 8 bis (2) while the other crimes within the jurisdiction of the Court had been formulated without references to other, even binding, sources of international law (with the exception of the 1949 Geneva Conventions in Article 8(2)(a) of the Statute and their Common Article 3 in Article 8(2)(c) of the Statute).[23]

Finally, it should be noted that most of the acts listed in Article 28M(B) of the Malabo Protocol were borrowed from Article 8 bis (2) of the Rome Statute – and, through its intermediary, from Article 3 of the 1974 UN Definition of Aggression. At the time of negotiating the Rome Statute's provisions on the crime of aggression, there seemed to be no universal recognition of those provisions' legal value:

> It was reported that there had been no unanimity within the Special Working Group on the Crime of Aggression with respect to whether subparagraphs (a) to (g) of the 1974 Definition's Article 3 all represented current customary international law: some members of the Special Working Group 'took the view that that was only true for subparagraph (g)', for its content had already been confirmed by the International Court of Justice [...] Other experts noted that most of the acts listed in Article 3 had been 'reflected in the practice of the Security Council', while for some acts there existed none [...] This is unsurprising: the Security Council is a political body in whose action national interests of its members, especially of permanent members, prevail [...] and the Council may not be expected to apply rules of international law in the same impartial way as a judicial body – such as, in the future, the International Criminal Court – should have to do.[24]

[23] Ibid., p. 264, footnotes omitted, emphasis in the original. See also: S. Sayapin, 'The Definition of the Crime of Aggression for the Purpose of the International Criminal Court: Problems and Perspectives', in 13 *Journal of Conflict and Security Law* (2008), issue 2, pp. 333–52, at 346–7.

[24] Ibid., pp. 264–5, footnotes omitted. See also: S. Sayapin, 'The Definition of the Crime of Aggression for the Purpose of the International Criminal Court: Problems and Perspectives', supra note 23, at 347.

Obviously, the drafters of the Malabo Protocol took the view that the UN Definition of Aggression did represent customary international law, since they integrated its key provisions in Article 28M(B) as a matter of its own law, in line with this author's previous recommendation, for the purpose of the African Court:

> Be that as it may, Article 8 bis (2) could well have done without a direct reference to the General Assembly resolution 3314 (XXIX) but might have simply reproduced the relevant provisions of Article 3 of the 1974 Definition of Aggression as a matter of the Statute's own content. Such a verbatim integration of those provisions in the Rome Statute would have elevated them from the rank of 'soft law' to the level of treaty law binding on the Statute's States Parties – certainly, pending the future entry into force of Article 8 bis [. . .] – and would have helped avoid scholarly critique similar to this author's.[25]

A. *Examples of Acts of Aggression*

The generic definition of an act of aggression in Article 28M(A) is followed by eight specific examples (in subparagraphs (a)–(h)), seven of which almost literally reproduce the relevant provisions of pre-existing international law. The subparagraphs (a)–(h) of Article 28M(B) are crucial, for they represent, for the purpose of the Malabo Protocol, *prima facie* acts of aggression, about which its States Parties to the Statute agreed that such acts '*shall* constitute acts of aggression' (emphasis added) – certainly, provided that they, by their character, gravity and scale, constitute manifest violations of the Charter of the United Nations or the Constitutive Act of the African Union (cf. supra 2(B), 2(D)(4)). A brief analysis of subparagraphs (a)–(g) is offered below.

1. The Use of Armed Forces

Judging by its comprehensive wording, subparagraph (a) of Article 28M(B) seeks to protect the security of States Parties against the broadest possible range of internationally unlawful uses of force:

> (a) The use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations.

[25] S. Sayapin, supra note 2, p. 265, footnotes omitted.

With due regard to this contribution's limited volume, two brief comments should be made here. First, it is likely that the African Court, when dealing with individual cases on charges of aggression in the future, would invoke subparagraph (a) *in almost every single case*, in conjunction with another, more specific subparagraph of Article 28M(B), due to the former's more general character. Hence subparagraph (a) should explicitly protect not only the elements of *statehood* of the State affected by aggression but also other fundamental values, whereas subparagraphs (b)–(h) would criminalise specific objective methods of using force unlawfully against a victim State. Conceptually, since an act of aggression is one gravely inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations (see supra 2(D)(4)), every act of aggression should be regarded as a disruption of *peace* in the world and, specifically, on the African continent– and this aspect appears to be overlooked in subparagraph (a) of Article 28M(B). Second, it is worth noting, that, unlike in Article 28M(A) where the UN Charter is accorded priority, in subparagraph (a), the Constitutive Act of the African Union is listed first and hence seems to have priority over the Charter – if not as a matter of law, then, at least, as a matter of practice. Given the overall good quality of the Protocol's text, it is quite unlikely that the drafters of the Protocol made a technical mistake here. Rather, this could be a subtle way to emphasise the significance of the Constitutive Act as a treaty, which reflects regional realities and accordingly endows the African Court with broad powers in the area of maintaining peace and security in the region.

2. Invasion or Attack, Military Occupation, Annexation

Subparagraph (b) of the Malabo Protocol's Article 28M(B) restates verbatim Article 8 bis (2)(a) of the Rome Statute and reads as follows:

> (b) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.

A closer look at the key notions contained in this provision, which mirrors its 'parent provision' – Article 8 bis (2)(a) of the Rome Statute – exactly, should help elucidate the implications of the entire subparagraph in terms of international law:

> This provision's keyword being 'territory', it protects the territory of States against four modes of internationally wrongful military impact: invasion, attack, military occupation, annexation [...] From the point of view of

> international law, invasion and annexation are grave assaults against the territorial integrity of a State, whose manifest illegality derives from Article 2(4) of the Charter of the United Nations [...] It must be recalled that, since 1945, territorial acquisitions effected by military force in contravention of the Charter have usually been regarded as violations of international law [...] Likewise, 'military occupation' means that restrictions are imposed upon the political independence of a State [...] and 'invasion' implies that the armed forces of a State concerned trespass another State's frontiers illegally, which constitutes a breach of the principle of the inviolability of frontiers [...][26]

It is understood that the term 'the armed forces of a State' should be interpreted in the sense of other applicable international law – more specifically, Article 43 of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

3. Bombardment, Use of Weapons

Like subparagraph (b) of the Rome Statute's Article 8 bis (2), subparagraph (c) of the Malabo Protocol's Article 28M(B) seeks to protect States' territorial integrity, for it mentions 'the territory of another State' twice:

> (c) The bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.

The only difference between, respectively, Article 28M(B)(c) of the Malabo Protocol and its 'parent provision' – Article 8 bis (2)(b) of the Rome Statute – consists in the insertion of a definite article at the beginning of the sentence. Otherwise, the provision inherited all substantive limitations of its original source:

> Again, 'bombardment' and 'the use of any weapons' are actions permissible under international humanitarian law – certainly, with limitations deriving from the well-established principles of proportionality and distinction between combatants and civilians [...] Likewise, any scholarly analysis of this provision should of necessity take into account the rules of international law applicable to the use of specific types of weapons – such as chemical, biological, nuclear and certain conventional weapons [...] Yet, this provision is not about criminalising 'bombardment' or 'the use of [any] weapons' in the

[26] Ibid., p. 266, footnotes omitted. On the notion of belligerent occupation, see: Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), pp. 1–8

sense of international humanitarian law, for it does not cover unlawful attacks against enemy nationals or property – these are criminalised by Article 8 (war crimes) of the Rome Statute. Its *protected object* is different – a State's territory. The criminality of acts covered by subparagraph (b) of Article 8 bis (2) consists in that they are directed against a State's territory, which – along with population and public authorities – constitutes a State's very self [. . .][27]

4. Blockade

Subparagraph (d) of the Malabo Protocol's Article 28M(B) adds 'airspace' to the ports or coasts of a State whose blockade is criminalised under subparagraph (c) of Article 8 bis (2) of the Rome Statute:

(d) The blockade of the ports, coasts or airspace of a State by the armed forces of another State.

This addition is important, since airspace constitutes a part of a State's territory and extends over its entire land, internal and territorial waters,[28] and thus considerably extends the territorial scope of protection against aggression, in comparison to Article 8 bis (2)(c):

The rationale for the criminalisation of blockade lies in the status of ports and coasts as parts of a coastal State's territory [. . .] As in the context of the preceding paragraphs, the qualification of a violent ('by the armed forces of another State') restriction of the coastal State's sovereignty over its territory – including over its territorial sea [. . .] – as aggression is certainly warranted. Moreover, blockade can be used as a basis for attacks [. . .], bombardment or the use of weapons [. . .] against the coastal State, or for an attack on a State's armed forces [. . .], which in themselves qualify as acts of aggression.[29]

5. Attack on a State's Armed Forces

Like subparagraph (d) of Article 8 bis (2) of the Rome Statute, subparagraph (e) of the Malabo Protocol's Article 28M(B) supposedly criminalises the 'first strike' by the armed forces of a State against those of another State:

(e) The attack by the armed forces of a State on the land, sea or air forces, or marine and fleets of another State.

[27] Ibid., p. 267, footnotes omitted, emphasis in the original.
[28] See J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford University Press, 2012), p. 203
[29] See S. Sayapin, supra note 2, pp. 267–8, footnotes omitted.

The substitution of an indefinite article at the beginning of the Rome Statute's Article 8 bis (2)(d) by a definite article in Article 28M(B)(e) of the Malabo Protocol is of a technical nature and should bear no legal implications. The substance of Article 28M(B)(e) appropriately reflects pre-existing international law:

> It seems that this provision applies to the initial armed attack, because any response to such an attack – provided that it complies with applicable international law, in particular, in terms of proportionality – would be regarded as an individual or collective self-defence in the sense of Article 51 of the Charter of the United Nations [...] Although there is no mention of territory in this subparagraph, the reference to the 'land, sea or air forces, or marine and air fleets' may be taken to imply that a State's territory, which includes its land and subsoil, territorial sea, internal waters, [...] and air space, [...] is the ultimate object of an armed attack hereby criminalised. As each of the constituents of territory is defended by a relevant combat branch, an aggressive attack against one of these should be regarded as (at least, an indirect) attack against the territorial object they defend. Hence, the qualification of such an armed attack as aggression does comply with the overall logic of Article 8 bis (2).[30]

6. Internationally Wrongful Use of a State's Armed Forces Present within the Territory of Another State

Subparagraph (f) of the Malabo Protocol's Article 28M(B) builds upon subparagraph (e) of the Rome Statute's Article 8 bis (2) and qualifies as an act of aggression the conduct of a State's armed forces, which had previously arrived in another State with the latter's consent but afterwards acted in a hostile manner either against the receiving State or against a third State:

> (f) The use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the African Union Non-Aggression and Common Defence Pact or any extension of their presence in such territory beyond the termination of the agreement.

The African Union Non-Aggression and Common Defence Pact was adopted on 1 January 2005 and entered into force on 18 December 2009.[31] This

[30] Ibid., p. 268, footnotes omitted.

[31] For the text, see: www.au.int/en/sites/default/files/treaties/7788-file-african_union_non_aggression_and_common_defence_pact.pdf (last accessed 3 June 2016)

document is key for our purpose, because, in addition to examples of acts of aggression listed in the Malabo Protocol, in provides, in Articles 1(c)(ix–xi) three further modes of action, which qualify as acts of aggression:

ix. the acts of espionage which could be used for military aggression against a Member State;
x. technological assistance of any kind, intelligence and training to another State for use in committing acts of aggression against another Member State; and
xi. the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent transnational organised crimes against a Member State.

Although these modes of action are not listed explicitly in Article 28M(B) of the Malabo Protocol, it appears that they should also qualify as individual criminal acts for the purpose of the Malabo Protocol's definition of the crime of aggression, because the Malabo Protocol's Article 28M(B)(f) refers explicitly to the African Union Non-Aggression and Common Defence Pact.

The public danger of the acts covered, respectively, under Article 28M(B)(f) of the Malabo Protocol and Article 8 bis (2)(e) of the Rome Statute lies in the following:

> In addition to dangers of a military character, which are implicit in this subparagraph and which might, in accordance with the other subparagraphs of the definition, themselves qualify as acts of aggression [...], the act in question would also violate the principle of fulfilment of obligations under international law in good faith[...] As the material (*ratione materiae*) regulations for the presence of foreign armed forces in a State's territory are clearly determined in applicable treaties, and their temporal (*ratione temporis*) field of application is always determined (in the treaties themselves), the qualification of a grave [...] breach thereof as an act of aggression would duly conform to international law.[32]

7. Allowing the Use of a State's Own Territory for the Commission of an Act of Aggression Against Another State

Like the preceding subparagraph, subparagraph (g) of the Malabo Protocol's Article 28M(B) also deals with the conduct of States, which accommodate foreign troops or armaments in their territories:

[32] See S. Sayapin, supra note 2, p. 269, footnotes omitted, emphasis in the original.

(g) The action of a State in allowing its territory, which it has placed at the disposal of another State to be used by another State for perpetrating an act of aggression against a third State.

The rationale for regarding such conduct, under both the Malabo Protocol and the Rome Statute, as an act of aggression is as follows:

> In accordance with applicable international treaties, a State's territory may be placed at the disposal of another State for the stationing of armed forces, or the placement of armaments, or for both [. . .] The responsibility of the host State would thereby consist in guaranteeing that the foreign armed forces or armaments would not be used for breaching international law [] In order to qualify as aggression, the allegedly unlawful acts actually perpetrated by the State whose armed forces are stationed, or whose armaments are placed, in the receiving State must be covered by any other substantive subparagraph of Article 8 bis (2). If the host State's relevant officials become aware of such unlawful acts, they must, without delay, resort to lawful – unilateral or multilateral – measures [. . .] available to their State to stop their occurrence, otherwise they may themselves become liable for facilitating or tolerating an act of aggression.[33]

8. Sending Armed Bands, Groups, Irregulars or Mercenaries

Importantly, the conduct referred to, respectively, in subparagraph (h) of the Malabo Protocol's Article 28M(B) and in subparagraph (g) of the Rome Statute's Article 8 bis (2) is the only example of an act of aggression, among those listed, whose customary nature under international law has, so far, been confirmed by the International Court of Justice:

(h) The sending or materially supporting by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Since the conduct in question has been dealt with at length in the ICJ's *Nicaragua* Judgment, the readers should be referred to relevant paragraphs in that Judgment, for details.[34] Additionally, the following considerations on the matter could be useful:

[33] Ibid., pp. 269–270, footnotes omitted.

[34] See *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, International Court of Justice, judgment of 27 June 1986, ICJ Reports (1986) 14, paras. 75–125, 187–209, 227–45.

> While the phrase about carrying out 'acts of armed force against another State of such gravity as to amount to the acts listed above' seems relatively clear in the light of the foregoing analysis, two supplementary observations ought to be made here. Firstly, it is submitted that the phrase 'armed bands, groups, irregulars or mercenaries' should especially cover, in the modern world, private military companies insofar as their staff engage in hostilities on behalf of the employer States or under their control, whereby private military companies may be dealt with under the heading of 'armed groups' [...] The nature of such companies is perceptibly different from that of 'armed bands' and 'irregulars', nor would they normally meet either of the two 'standard' international legal definitions of mercenaries [...] so treating them, for the purpose of Article 8 bis (2), under the generic heading of 'armed groups' is appropriate. Since international law for the regulation of private military companies' status is *in statu nascendi*, States may feel tempted to so frame the legal frameworks applicable to such private companies as to 'outsource' to them some of their own tasks, and thus effectively to exempt themselves from a part of responsibility under international law. The outcomes of the so-called 'Montreux process' remain to be seen [...]
>
> The second substantive comment pertains to the attribution of acts carried out by 'armed bands, groups, irregulars or mercenaries' to the State on whose behalf they act. The rules of attributing such entities' conduct to a State are found, especially, in Articles 5, [...] 7 [...] and 8 [...] of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts [...] The International Law Commission's official Commentary on Article 5 introduces the notion of 'parastatal entities', which 'exercise elements of governmental authority in place of State organs', [...] 'provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned', [...] and directly mentions 'private security firms' as an example of such parastatal entities [...][35]

Obviously, States employ private military and security companies in the exercise of their conventional function – the use of force – with a view to limiting their own responsibility for violations of international law, which are likely to occur in the course of respective armed conflicts. Hence, with a view to ensuring their own security, and to preventing impunity, States Parties to the Malabo Protocol could consider dealing with the employment of private military and security companies in the commission of acts of aggression, in the sense of subparagraph (h) of the Malabo Protocol's Article 28M(B), with due

[35] See S. Sayapin, supra note 2, pp. 270–72, footnotes omitted, emphasis in the original.

regard to Article 5 of the 2001 Articles on State Responsibility. Since the invocation of individual criminal responsibility for the crime of aggression connected with the employment of 'parastatal entities' already has a foundation in international law, such an approach should not be incorrect as a matter of practice. Besides, it is recommended to explicitly mention private military and security companies in subparagraph (h) of the Malabo Protocol's Article 28M(B), when a suitable occasion to amend the provision arises.

4. CONCLUSION

As was shown above, Article 28M of the Malabo Protocol inherited most limitations of its 'parent provision' – Article 8 bis of the Rome Statute, although it does contain some innovative elements reflective of progressive development of international law. The Malabo Protocol was adopted on 27 June 2014 and should enter into force thirty days after the deposit of instruments of ratification by fifteen Member States of the African Union, in accordance with Article 11(1). In accordance with Article 11(2), for each Member State which shall accede to it subsequently, the Protocol and Annexed Statute shall enter into force on the date on which the instruments of ratification or accession are deposited. As of 1 June 2016, the Protocol has been signed by nine Member States of the African Union but has not yet been ratified by a single Member State.[36]

Potentially, though, Article 28M may turn into a powerful provision binding upon 54 States on a large and populous continent, which has been suffering from murderous conflicts for far too long, and surpass the success of Article 8 bis of the Rome Statute as a matter of practice.[37] The latter should, hopefully, enter into force in a foreseeable future, since it has already earned thirty requisite ratifications,[38] and the ICC Assembly of States Parties should be prepared to activate the ICC jurisdiction with respect to the crime of aggression in accordance with its own agenda. Yet, given some African States´ current concerns with respect to the ICC, and with due regard to the ICC´s

[36] For the status of ratifications of the Malabo Protocol, see: www.au.int/en/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_19.pdf (last accessed 4 June 2016)

[37] See *passim* T. Murithi, 'Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court', in G. Werle, L. Fernandez and M. Vormbaum (eds.), *Africa and the International Criminal Court* (T. M. C. Asser Press, Springer, 2014), pp. 179–93.

[38] For the status of ratifications of the Kampala amendments, see: http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ (last accessed 4 June 2016)

principle of complementarity, endowing an efficient regional mechanism of criminal justice – such as the reformed African Court could be – with jurisdiction with respect to the crime of aggression should be regarded as a welcome development, since it would usefully and legitimately release the ICC of at least some of its potential workload (of course, provided that the African Court would exercise its jurisdiction fairly and impartially).

It is this author's hope that the Malabo mechanism would help turn Africa into a more peaceful continent, and that the authors of unlawful uses of force on that continent would be held accountable. True, the provision on immunities of serving AU Heads of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office, which was included in Article 46A bis of the Malabo Protocol, would be a serious impediment to the timely exercise of justice. However, this provision should not prevent prosecutions of former senior State officials, once their tenure is over, and, knowing this, many of such officials should hopefully refrain from exercising their authority in violation of international law, while in office. Besides, quite a number of African States have already enacted domestic provisions criminalising aggression and other crimes against peace,[39] and prospects of domestic 'Habré-style' prosecutions should be another restraining factor.

[39] See S. Sayapin, supra note 2, pp. 207–22. See also S. Barriga, 'The crime of aggression', in M. Natarajan (ed.), *International Crime and Justice* (Cambridge University Press, 2011), pp. 329–34; G. Kemp, *Individual Criminal Responsibility for the Crime of Aggression* (Intersentia, 2010), p. 129; A. Reisinger Coracini, 'Evaluating domestic legislation on the customary crime of aggression under the Rome Statute's complementarity regime', in C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden, Boston, 2009), pp. 725–54

12

Transnational Crimes Jurisdiction of the Criminal Chamber of the African Court of Justice and Human and Peoples' Rights

NEIL BOISTER

1. INTRODUCTION

This section examines the inclusion of transnational crimes within the jurisdiction of the Criminal Chamber of the African Court of Justice Peoples and Human Rights (hereinafter the African Court or Criminal Chamber as suits) by the Statute of the Court as amended by the Malabo Protocol (hereinafter the Statute). Under Article 28(A) of the Amended Statute the Court 'shall have power to try persons for the crimes provided hereunder' inter alia:

(4) 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

If this potentially bold and distinctive expansion of jurisdiction leads to an establishment of a functioning court with an effective jurisdiction, the AU will have taken a major step beyond other regional measures such as the EU's capacity to declare regional offences obliging member states to

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implement them or the quasi-criminal jurisdiction of the Inter-American court of Human Rights.[1]

This expansion arose out of the study by Donald Deya for a criminal chamber within the African Court commissioned by the AU and submitted in 2010.[2] These transnational crimes were included within the amended draft ACJHR protocol released in 2011[3] and in the amended protocol adopted by the African Heads of States and Governments in Malabo, Equatorial Guinea, on 27 June 2014.

This chapter introduces some of the reasons for the expansion of jurisdiction, and some of the substantive, procedural and institutional problems that will need to be overcome to operationalise this new jurisdiction. It begins, however, with the nature of this jurisdiction.

2. A REGIONAL TRANSNATIONAL CRIMINAL COURT PROSECUTING REGIONAL TRANSNATIONAL CRIMES

Fortunately, the heated debate about the Chamber's compatibility with the Rome Statute and the ICC's jurisdiction is not relevant to assessment of this expansion because these transnational crimes were never included in the ICC's jurisdiction[4] and there is no issue of the Chamber being used to protect its leaders from prosecution for core international crimes before the ICC.[5] The inclusion of these crimes within the jurisdiction of the African Court takes us back rather to the debate at Rome about the inclusion of certain treaty crimes within the jurisdiction of the ICC, and many of the arguments raised in regard to the appropriateness of developing international jurisdiction over treaty crimes remain pertinent to exploring what this expansion means and why it was undertaken.[6]

[1] The World Federalist movement is campaigning for a Regional Criminal Court for Latin America.

[2] AU, Legal/ACJHR-PAP/4(II) Rev.2.

[3] AU, Legal/ACJHR-PAP/4(II) Rev.5, Art. 14 (13 November 2011).

[4] C. Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal Justice* (2011) 1067, at 1069–70.

[5] A common criticism – see ibid.

[6] See generally, N. Boister, 'The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics', 3 *Journal of Armed Conflict Law* (1998) 27; D. Robinson, 'The Missing Crimes', in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 497, at 498. For general comment on the relationship between international and transnational crimes in the Protocol see C. Jalloh, 'The Nature of the Crimes in the African Criminal Court', 15 *Journal of International Criminal Justice* (2017) 799.

The transnational crimes inserted into the African Court's jurisdiction are not international crimes in the strict sense of the word. Some are defined in existing AU instruments, some are from more general instruments, and some are sui generis. Some of these crimes are peculiar to Africa. Unconstitutional change of government, for example, is a major concern for Africa and while the African Charter on Democracy Election and Governance (ACDEG),[7] adopted in 2013, obliges AU member States to 'take legislative and regulatory measures to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law', the Protocol creates an explicit regional international crime in this regard.[8]

The treaties that define certain of these actions 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.[9] The possible exception to this is the status crime of mercenarism, because Article 3 of the UN Mercenaries Convention provides that someone who fits the definition of a mercenary 'commits an offence for the purposes of this convention'. However, the Convention imposes legal obligations on States to take action under their domestic law and no international jurisdiction is provided for. If the specific UN or AU crime suppression conventions do not create these crimes, what does?

Interpreting the proposed jurisdiction of the African Court over the transnational crimes depends on how the Criminal Chamber's transnational crimes jurisdiction is conceptualised: is it a stand-alone regional court exercising its own inherent jurisdiction over transnational crimes or is it a delegate of the States parties of the Protocol exercising their delegated jurisdiction. If it is the former then the Criminal Chamber (a) applies its own substantive crimes, (b) establishes its own jurisdiction and (c) applies its own procedures for cooperation, and it does not matter if the State party where the offence occurred has not established the crime, the jurisdiction, or the procedures. If it is the latter then the State party where the offence occurred will (a) have to establish the offence, (b) have to establish the jurisdiction, and (c) have to establish the procedure, before all of these can be delegated to the Court.[10]

[7] Assembly/AU/Dec.147 (VIII) (2007).

[8] See A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 24(3) *European Journal of International Law* (2013) 933–46, at 939.

[9] M. Du Plessis, 'Implications of the AU Decision to Give the African Court's Jurisdiction over International Crimes', 235 *Institute for Security Studies Paper* (June 2012) 1, at 7, notes that they 'are not yet fixed in in the international criminal law firmament.'

[10] See generally N. Boister, 'Treaty Crimes, International Criminal Court?', 12(3) *New Criminal Law Review* (2009) 341–65.

Conceptually, the Court's jurisdiction over transnational crimes fits more aptly into the extant global scheme of transnational cooperation against transnational crime if the Criminal Chamber is seen as the delegate of States parties, working within that system to suppress transnational crimes that until now have only been crimes in national law subject to multilateral obligations to cooperate and not as crimes applying individual criminal liability in international law. Yet that is not what the AU has done. Article 3 of the Protocol states that the Court is vested with original jurisdiction while Article 46E bis (1) says that States Party accept the jurisdiction of the court with respect to the crimes in the Statute. It thus seems clear that the Court has original jurisdiction over these crimes – it is, to coin a phrase, a stand-alone regional transnational criminal court. The complementarity provision Article 46H (1) states that 'the jurisdiction of the Court shall be complementary to that of the national courts, and to that of regional economic communities where specifically provided for by the Communities', which implies that the chamber is to function in regard to these crimes as to others in much the same fashion as the ICC does to States parties of the Rome Statute.

It is the Protocol that lists these crimes, defines them, and expressly provides that the Court shall have the power to try them. This is clarified by article 46B (1) which provides that 'a person who commits an offence under this Statute shall be held individually responsible for this crime' and which 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 supranational crime in the region, rather than just a crime in the domestic law of AU Member States). Du Plessis questions the law-making authority of the AU in this regard, noting that the AU's Constitutive Act,[11] and more specifically, article 4(h), only gives the AU power to take measures 'to intervene in a member State' in respect of the three categories of core international crimes: war crimes, genocide and crimes against humanity, but Nmehielle counters that there is nothing in these provisions limiting intervention to military action.[12] Du Plessis's argument in regard to Article 4(h) only bites if the Criminal Chamber's jurisdiction over transnational crimes is regarded as fundamentally interventionist. Although they do not expressly sanction

[11] 1 July 2000.

[12] M. Du Plessis, 'Implications of the AU Decision to Give the African Court's Jurisdiction over International Crimes', No. 235 *Institute for Security Studies Paper* (June 2012) 1, at 8; V. O. Nmehielle, '"Saddling" the New African Regional Human Rights Court with International Jurisdiction: Innovative, Obstructive, Expedient?', 7(1) *African Journal of Legal Studies* (2014) 7, at 28.

intervention, other principles of the AU Constitutional Act spelled out in Article 4 relate to this goal including the promotion of social justice, promotion of peace and security, human rights, democratic principles and primarily 'the rule of law and good governance'.[13] It would be more appropriate to consider the Criminal Chamber's jurisdiction over transnational crimes as being more in line with the regime in transnational criminal law, by serving as a further venue to prosecute difficult cases with the cooperation of the territorial State. Article 3 of the Constitutive Act does provide for objectives of the promotion of a range of social goods by the Union and in article 3(d) the promotion of 'common positions on issues of interest to the continent and its peoples'; the Protocol does promote a common position – regional prosecution – in regard to certain transnational crimes.

When transnational crimes are moved from a national to a regional jurisdiction that identifies a regional interest; it does not shift these crimes into the general international jurisdiction and, as of yet, there is no general support for doing so. In a sense the AU is more the agent of the State than of the international community in this regard. But in regionalising these crimes it is irreverently challenging the power balance that currently reflects the fact that international criminal law is generated by the international community and transnational criminal law is generated by certain influential states and regions, that in essence it reflects the interest of one State in pursuing individuals who break its laws transnationally. The AU is taking up that interest, on behalf of States within the region. Why is it doing so?

3. THE REASONS FOR ESTABLISHING THE CRIMINAL CHAMBER'S JURISDICTION OVER TRANSNATIONAL CRIMES

This expansion appears to have been undertaken for various reasons.[14]

First, out of regional interest.[15] It was felt necessary to enable Africa to prosecute these crimes like terrorism committed by non-state actors because they are of particular resonance to Africa. One potential group of accused are members of African political and economic elites allegedly involved in transnational crimes who enjoy relative impunity in their own States. The Court

[13] Art. 4(m).

[14] See V. O. Nmehielle, '"Saddling" the New African Regional Human Rights Court with International Jurisdiction: Innovative, Obstructive, Expedient?', 7(1) *African Journal of Legal Studies* (2014) 7–42.

[15] P. Manirakiza, 'The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa', in V.O. Nmehielle (ed.), *Africa and the Future of International Criminal Justice* (The Hague: Eleven International Publishers, 2012) 375, at 394.

may serve to avoid prosecution of African leaders abroad by dealing with these matters in Africa. Commentators have noted the negative reaction in Africa to a French Court's issue of indictments for corruption against five serving African presidents in 2009.[16] The enthusiasm of African states for criminal prosecutions of these individuals before the Court has, however, been questioned.[17] Yet there are few prosecutions in foreign courts of transnational crimes committed by African leaders. African nationals do, however, engage in transnational criminal activity both in African and abroad. Nigerian drug trafficking organisations have, for example, proliferated globally.[18] Foreign nationals engage in trafficking of all kinds in Africa, through Africa, and from Africa. It is more likely that there will be pressure to use the Criminal Chamber to resolve problems of capacity in African states in regard to a swathe of offences of a transnational nature. The temptation of international criminal justice is that it will provide a forum to resolve this problem of incapacity but the Criminal Chamber neither can nor, it is submitted, should it in regard to all but the most serious offences of concern to Africa.

Second, in order to remove impunity from corporations operating in Africa that engage in criminal conduct.[19] Africa's unsatisfactory experience of the implication of corporate entities in certain exploitative crimes that impact negatively in Africa is clearly at the heart of the expansion.

Third, because of inter-African difficulties in cooperation. It is clear that States within Africa are worried about transnational crimes and the political difficulties of extradition. They seek a neutral non-State venue for prosecution (which is very similar to CARICOM's motivation for expanding the jurisdiction of the ICC over transnational crimes).[20] The AU has not, however, backed CARICOM's efforts to expand the jurisdiction of the ICC because it is not a party to the Rome Statute, and because it feels that the Rome Statute does not entirely fill this field of normative endeavour.

Fourth, because of AU legislative activity or pronouncement in regard to the particular crime. Nevertheless, the list is not comprehensive. It omits for example, trafficking in small arms, smuggling of migrants, and the illegal trade

[16] C. Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal Justice* (2011) 1067, at 1069–70.

[17] M. Du Plessis, 'Implications of the AU Decision to Give the African Court's Jurisdiction over International Crimes', No. 235 *Institute for Security Studies Paper* (June 2012) 1, at 2.

[18] See, for example, P. Williams, 'Nigerian Criminal Organizations', in P. Letizia (ed.), *The Oxford Handbook of Organized Crime* (Oxford: Oxford University Press, 2014) 254, at 255 et seq.

[19] See V. O. Nmehielle, '"Saddling" the New African Regional Human Rights Court with International Jurisdiction: Innovative, Obstructive, Expedient?', 7(1) *African Journal of Legal Studies* (2014) 7, at 30.

[20] See the discussion in N. Boister, 'Treaty Crimes, International Criminal Court?', 12(3) *New Criminal Law Review* (2009) 341–65.

in wildlife, all major transnational crimes and subjects of concern for the AU.[21] It also omits participation in an organised criminal group, the key offence in the UN Convention against Transnational Organised Crime,[22] to which every African State is a party except Somalia and the Republic of the Congo.[23]

Fighting impunity is the overall goal[24] of including these crimes within the jurisdiction of the Criminal Chamber. The other goals set out in the preamble relevant to this expansion of jurisdiction do suggest a concern with the maintenance of legitimate internal sovereignty of African States and defence of social and individual rights. The relevant goals include the following: 'respect for democratic principles, human and people's rights, the rule of law and good governance'; 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities'; and 'to promote sustained peace, security and stability on the Continent and to promote justice and human and peoples' rights as an aspect of their efforts to promote the objectives of the political and socio-economic integration and development of the Continent'.[25] While these goals are sufficiently general to justify the enactment of these crimes, they do not cover the goals of specific offences. Where, for example, is respect for the environment which underlies the trafficking in hazardous waste offence? Commenting more generally Du Plessis notes that these crimes will force the Chamber to tackle 'a raft of . . . social ills that plague the continent'.[26] This is but one of a number of potential difficulties with this expansion.

4. CONTEXTUAL FACTORS APPLICABLE TO ALL TRANSNATIONAL CRIMES WITHIN THE JURISDICTION OF THE CRIMINAL CHAMBER WHICH MAY COMPLICATE THEIR APPLICATION

A. *The Importance of Not Undermining Existing Treaty Regimes for the Suppression of Transnational Crime*

The definitions of many of the transnational crimes are drawn from the criminal provisions in treaties that are central to different 'prohibition

[21] See, for example, Action Plan for the Implementation of the African Union Strategy for the Control of Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons; The Migration Policy Framework for Africa, 2006; African Union Decision on Illegal trade in Wildlife, AU Doc. EX.CL/Dec.832(XXV).

[22] 15 November 2000, 2225 UNTS 209, in force 29 September 2003.

[23] Status of Ratification, 1 June 2016.

[24] Preamble paragraph 11.

[25] Preamble paragraphs 9, 10 and 12 respectively.

[26] M. Du Plessis, 'Implications of the AU Decision to Give the African Court's Jurisdiction over International Crimes', 235 *Institute for Security Studies Paper* (June 2012) 1, at 6.

regimes' in transnational criminal law. While there are some variations in the definition of crimes between regional and global suppression conventions, on the whole there is a remarkable degree of consistency. These 'crimes' serve as conditions for the operation of prohibition regimes that serve as bridges for cooperation between States and are the focus of institutional development around the world, of legal practice, and of expertise. African states play an important part in these regimes. The elevation of these transnational crimes to the status of a regional crime in the jurisdiction of the African Court raises the potential difficulty of 'fit' with these existing regimes, which will have to be assessed in regard to each crime. The definition of piracy in Article 28F, for example, is drawn almost verbatim from Article 101 of the 1982 UN Convention on the Law of the Sea.[27] Some of the originating instruments are AU instruments. The definition of terrorism in Article 28 G subparagraph (A) and (B), for example, is drawn from the definition in Article 1(3) of the OAU Convention on the Prevention and Combatting of Terrorism.[28] One problem may be that if the definitions of these offences in the Amended Statute differ from those in the suppression conventions, they will pull African states in conflicting directions when it comes to enacting these offences in their domestic law. The African Court should try to avoid this outcome by attempting through its interpretation of provisions to reinforce these prohibition regimes, not undermine them. For example, one element contained in the rubric of the definition of money laundering in the UN's suppression conventions which is absent from the definition of money laundering in Article 28 I *Bis* of the Statute of the Court is the requirement that the actions criminalised be done 'intentionally'. The Court is thus free to impose this subjective test, or apply more stringent tests sometimes followed in national law in some States parties including negligence based money laundering. If it does so it will be increasing the scope of criminalisation, creating a problem of legality if the case originates in a territory of a State which only requires intention. To some extent this reflects the lowest common denominator nature of the provisions in the suppression conventions. It will be important for the Court to conform its position to the law of the territorial State or face challenges.

B. *The Source of the Primary Rules*

A particular legal problem is that the provision describes certain regulatory crimes but does not provide the standard of legal behaviour from which that

[27] Montego Bay, 10 December 1982, 1833 UNTS 3, in force 6 November 1994.
[28] Adopted at Algiers, 14 July 1999; in force 6 December 2002.

criminal behaviour deviates. So, there are legal ways to supply drugs or off-load waste or deal in natural resources and these ways are partly set out in certain international instruments. However, these are promises by States to other States, not international custom. The actual guidance for individual's on how to regulate their behaviour are set out in the national law of States parties to these instruments. It follows that if an individual is to be prosecuted before the Criminal Chamber for the violation of, for example, the correct way of disposing of waste, regulation of the correct way of disposing of waste will have to have been made in national law of the jurisdiction where it occurs as a pre-condition for that prosecution. If not – there will be no crime. Reliance on a regional instrument to provide the correct way for doing so would be in violation of the principle of legality because those regional instruments may never have been applied in the territory where the disposal was carried out. National legislation will be necessary to provide the yardstick and to be effective it will have to be available in every state. This implies that the AU will have to undertake an exercise in positive complementarity regarding the regulatory standards which these crimes violate.

C. *The Necessity of Criminalisation in National Law*

Several of the crimes listed in the amended Statute are either not crimes or defined differently in the domestic law of African states. This necessitates an exercise in positive complementarity to ensure the legislative enactment of appropriate offences in African states to enable them to cooperate with the criminal chamber.[29] Arguably they are required to do so when becoming party because the Protocol creates offences. The jurisdictional expansion at national level over these crimes will also be necessary to ensure fair warning to potential violators and State cooperation with the Court. It seems that this is not entirely what the drafters of the Protocol had in mind, however. In article 28G's definition of terrorism they include the requirement that the act must violate, in addition to the laws of a 'State Party' (to the Protocol one assumes), the law of the AU itself, or a regional economic organisation recognised by the AU, or international law generally. This suggests that one of the goals of the AU's new jurisdiction is to have a court for the prosecution of these crimes where currently there is none. The notion that terrorism is an international crime, a notion that has been propagated by the Special Tribunal for

[29] M. Du Plessis, 'Implications of the AU Decision to Give the African Court's Jurisdiction over International Crimes', No. 235 *Institute for Security Studies Paper* (June 2012) 1, at 10.

Lebanon, is highly controversial and rejected by most commentators.[30] Its status as a regional African crime depends not on the OAU Convention on the Prevention and Combatting of Terrorism,[31] which simply provides in article 2 (1) for an obligation on States Parties to criminalise terrorism in their national law, but on article 28 of the Statute of the Court. Prosecution in the Criminal Chamber that relies on the regional proscription in the absence of a national proscription of the conduct raises fundamental issue of legality and of notice certain to spawn human rights challenges (possibly even within the human rights jurisdiction of the Court itself). Even if the Criminal Chamber is only used for symbolic prosecution of carefully selected cases, it would be unreasonable to assume that individuals that fall into its jurisdiction will know that the Protocol has promulgated certain crimes that apply to them in the Statute of the Court.

D. *The Absence of a Gravity Threshold*

The most significant problem raised by the inclusion of transnational crimes within the Court's jurisdiction is that no court can hope to cope with prosecution of a large number of cases of these crimes, the vast majority of which are likely to be trivial. This 'gravity threshold problem' is really two problems.

First, the Protocol does not indicate at which stage in the procedure this threshold should be set and managed. Perhaps the most appropriate way of applying such threshold criteria would be through prosecutorial discretion (whether cases are taken up by the prosecutor, by authorised AU organs or submitted by AU member states or individuals or NGOS within those states).[32] The Court also has the power to decide whether a crime is of 'sufficient gravity' to justify admissibility under Article 46 H (2)(d), and to exclude it if a crime is not sufficiently grave.

Second, the Protocol does not provide criteria to set this threshold. For a court with a limited capacity there must be further conditions. It is a problem to which the International Law Commission's scheme for inclusion of the treaty crimes within the jurisdiction of the then proposed ICC was alive, when it recommended that they had to reach a threshold of seriousness in order to

[30] See B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', 24 *Leiden Journal of International Law* (2011) 677.

[31] Adopted at Algiers, 14 July 1999; in force 6 December 2002.

[32] Art. 29 of the Statute as amended by Art. 15 of the Protocol.

fall under the ICC's jurisdiction.[33] How serious a breach is enough for the Court to take it up? That has to be tied back to the Court's goals of fighting impunity and promoting justice and stability. There is little about the definitions of the crimes that is of assistance in establishing such a threshold.

At the moment, the following criteria are being applied:

TABLE 12.1

Crime	Occurrence?	Threshold
piracy	low-moderate	none
terrorism	moderate	none
mercenarism	low	armed conflict/threat to order
corruption	high	crime must be of a 'serious nature affecting the stability of a state, region or the Union'
money laundering	high	Court has power 'to make a determination as to the seriousness of any act or offence.'
human trafficking	high	none
drug trafficking	high	none
transboundary waste	low-moderate	transboundary nature
illicit exploitation of natural resources	moderate	crime must be of a 'serious nature affecting the stability of a state, region or the Union'

Some of these crimes are morally repugnant (human trafficking), but they are not of equal moral repugnance (drug trafficking). The activities themselves are varied although they can be roughly broken down into activities motivated mainly by corporate or individual monetary gain (piracy, mercenarism, corruption, money laundering, people trafficking, drug trafficking, hazardous waste trafficking, illicit exploitation of natural resources) and by attacks on the State and its constitutional order (terrorism, mercenarism, corruption), although as we can see some crimes fit into both categories. Gravity is not an intrinsic element in the way these offences are defined. The amplificatory elements in the core international crimes – systematic and scope in the definitions of crime against humanity, the presence of an armed conflict in the definition of war crimes, the genocidal intent in genocide – are absent. It has thus been questioned whether the transnational crimes 'meet the definition of "most serious crimes of concern to the international community" as understood by Article 5(1) of the Rome Statute.'[34] Although these crimes do

[33] 'Report of the ILC, 45th session' *UNGAOR* 48th Sess. Supp. No. 10 UN Doc. A/48/10 (1993) at 284.

[34] C.J. Naldi and K.D. Magliveras, 'African Union Debates Adding an International Criminal Law Section to Its Court', 28(9) *International Law Enforcement Reporter* (2012) 335.

cause serious social effects, these negative effects are usually the result of the aggregated social harm of large numbers of individual relatively low impact offences rather than of large scale individual offences. Nor does the nature of the victim assist much. While the core international crimes protect individuals from their own cancerous State and State like entities, transnational crimes protect the State and its citizens from other citizens. Some deal with direct harms to individuals, some with harms of an economic kind, some with harms to the State, some with harms to governance, some with harms to resources, and some with harms to the environment.

Taking only the 'worst' cases is desirable because these in penal theory terms have the greatest deterrent and retributive value. A purely empirical comparative measure is probably impossible because the data to make such a relative judgment is simply not available in Africa. There may also be a need in specific cases for the expressive message of fighting impunity to make an example of someone in order to coax the relevant justice system into greater activity. The challenge is to find a suitable general threshold that will enable the court to take into account issues like the socio-economic harm apparently done by the crime, as well as the need for making an exemplary judgment in cases which may not on an absolute scale be among the worst but which are relatively harmful because of, for example, the complete lack of prosecution of such crimes in a State, sub–region or in Africa as a whole. The empirical nature of these offences do, however, suggest a numbers of criteria which loosely applied can serve as criteria for a gravity threshold:

(i) Crimes that 'pose a threat to the peace, order and security of a region' for the reasons listed above or for other reasons may be considered for prosecution.[35] The formula used in some of the crimes in article 28, seems apt: Whether the crime is 'sufficiently serious to affect the stability of a State, region or the Union'.

(ii) Many of these activities have a higher impact when they involve cross-border activity or effects as they involve the interests of different States, different communities. They involve problems of extraterritoriality that provide a reasonable basis for regional concern, and problems of international cooperation to which the Court's jurisdiction might provide a practical solution. Following the definition of 'transnational' in article 3(2) of the UN Convention against Transnational Organized Crime[36]

[35] A condition suggested by Trinidad and Tobago in its failed proposal to the Review Conference of the ICC to include drug trafficking.

[36] 15 November 2000, 2237 UNTS 319, in force 9 September 2003.

(UNTOC), seriousness would be indicated by activity that (a) is committed in more than one State; (b) is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or (d) is committed in one State but has substantial effects in another State.

(iii) The commission of many of these offences requires organisation involving cooperation amongst networks of individuals, sometimes in a transnational context. This organisation provides a multiplier effect justifying a regional response. It facilitates the commission of offences otherwise not possible and increases the harmful social or political impact they have because of the impact on scale and scope. Some guidance on the number of individuals involved, the length of time, the nature of their relationship, and their purpose can be obtained from the definition in article 2(a) of the UNTOC of an 'organised criminal group' as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences … in order to obtain, directly or indirectly, a financial or other material benefit'. A 'structured group' is further defined in article 2 (c) as a 'group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure'. A corporation can be one of the persons involved in such organisation given that Article 46 C provides for corporate criminal liability.

(iv) The definition of serious crime in article 2(b) of the UNTOC as the availability of a maximum punishment of at least four years or more deprivation of liberty at national law in the national jurisdiction where it has occurred may provide some guidance as to what kinds of transnational crime are considered serious but should not be seen as a rigid standard because of the possibility that national law may be unreformed and penalties low for what is regionally considered a serious crime. Moreover, other purely national legal indications of seriousness should if available be taken as a guide.

(v) Serious harm in individual cases may depend on specific considerations like the large volume and value of material involved, the tenure of the activities, their complexity, the size of profits, the potential number of victims and the vulnerability of victims, the presence of violence, corruption or abuse of public office, all of which can lead to higher potential social or political impact. In essence, these elements suggest a quantitative and qualitative assessment from the victim's perspective.

(vi) Some decisions of the ICC's interpreting the Rome Statute's[37] threshold for seriousness suggest that role and position (high rank) of the alleged offenders is a crucial factor when assessing gravity[38] and can transform a trivial crime into a serious crime,[39] while others[40] have rejected reliance on the perpetrator's status. It is submitted that in transnational crimes the identity of the perpetrator is a relevant consideration.

The occurrence of these criteria in regard to a specific crime could be used to assess promotion of that crime into the jurisdiction of the Court as anticipated by article 28 A (2). The presence of all these criteria should not, however, necessarily be required; a nuanced assessment of the case may require only one or a selection to exist before prosecution is justified.

E. *Modes of Responsibility*

The transnational crime suppression conventions usually provide for modes of responsibility as a perpetrator in the definition of the offence itself and do not single out this mode of responsibility in a specific provision. They do usually, however, provide for details regarding different appropriate forms of secondary responsibility. For example, article 27 of the UN Convention against Corruption[41], entitled 'Participation and Attempt', provides in paragraph one for criminalisation in national law of 'participation in any capacity such as an accomplice, assistant or instigator' of a Convention offence, in paragraph two for the optional criminalisation in domestic law of 'any attempt to commit a'

[37] Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), Art. 17(1)(d). See generally Susana Sacouto and Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' (2007) 23 *American University Law Review* 809; Margaret De Guzman "Choosing to Prosecute: Expressive Selection at the International Criminal Court (2012) 33 *Michigan Journal of International Law* 265.

[38] *Situation in the Republic of Kenya* ICC Pre-Trial Chamber II, ICC-01/09–19, 31 March 2010 at [45]; *Situation in the Republic of Cote dIvoire* ICC Pre-Trial Chamber II, ICC-02/11–14, 30 October 2011 at [205]; *Prosecutor v. Lubanga* ICC Pre-Trial Chamber I, ICC-01/04/-01/06, 24 February 2006 at [42].

[39] *Situation on the Registered vessels of the Union of the Comoros, the Hellenic Republic & the Kingdom of Cambodia* ICC Pre Trial Chamber I ICC-01/13–34, 16 July 2015 at [22].

[40] *Situation in the Democratic Republic of Congo* ICC Appeals Chamber, ICC-01/04–169, 13 July 2006 at [76]; *Prosecutor v. Abu Garda* ICC Pre Trial Chamber I, ICC-02/05–02/09–243, 8 February 2010 at [31]; *Prosecutor v. Muthaura, Kenyatta and Ali* ICC Pre Trial Chamber II, ICC-01/09–02/11–338, 23 January 2012 at [47].

[41] 31 October 2003, 2349 UNTS 41, in force 14 December 2005. An ECOWAS Protocol on the fight against Corruption was signed in December 2001 but still awaits ratification.

Convention offence, and in in paragraph three for the optional criminalisation in national law of 'the preparation for a' Convention offence. The Statue of the African Court uses a single consolidated provision, for both core international crimes and transnational crimes, Article 28 N, entitled 'modes of responsibility' which provides:

> An offence is committed by any person who, in relation to any of the crimes or offences provided for in this Statute:
>
> i. Incites, instigates, organises, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute;
> ii. Aids or abets the commission of any of the offences set forth in the present Statute;
> iii. Is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences set forth in the present Statute;
> iv. Attempts to commit any of the offences set forth in the present Statute.

Some of these modes in article 28N such as liability as a co-principal, developed in regard to the core international crimes by the ICC, are unknown in the language of the suppression conventions. Some of these modes such as conspiracy are drawn from the common law and are usually subject to some form of compatibility with basic law provision, if they are included at all, in a suppression convention. In result the Statue of the Court expands the scope of these offences. It may be difficult to reconcile some of the general modes with the specific modes internal to the crimes as defined in the suppression conventions or in Statute of the African Court itself. Article 28N should thus be considered the general provision on modes of responsibility. It covers many of the modes likely to be found in suppression conventions but not all. Taking the example of the UNCAC, it does not cover the specific mode of 'preparation'. In a case where preparation was a possible charge at the national level but not in the Criminal Chamber, the prosecution cannot put that charge because it does not enjoy that substantive jurisdiction but would have to formulate it as an attempt if possible or abandon it. The same reasoning applies to the criminalisation of modes of responsibility such as 'sheltering' a mercenary in the OAU Convention for the Elimination of on Mercenarism in Africa;[42] its status as an OAU Convention does not expand the jurisdiction of the court because neither the

[42] OAU Convention for the Elimination of Mercenarism in Africa, 3 July 1977, CM/817 (XXIX) Annex II Rev.1.

Convention nor the Statute of the Court reveal such an intention, although the specific modes of participation such as 'sheltering, organising, equipping, promoting, supporting or employing mercenaries' may assist in the interpretation of broad modes of participation mentioned in article 28N such as 'facilitation'. Article 28N does cover many of the modes found in the Statute's definitions of the crimes themselves.

TABLE 12.2

Crime	Modes of responsibility covered by article 28N	Modes of responsibility not covered by article 28N
piracy	(voluntary) participation, incitement, (intentional) facilitation	none
terrorism	aid, incitement, encouragement (abet), attempt, conspiracy, organising	promotion, sponsoring, contribution to, command, threat, procurement
mercenarism	participation (direct), finances	recruits, uses, trains
corruption	participation in any of the defined corrupt activities suffices for liability	none
money laundering	participation, conspiracy, attempts, aiding, abetting, facilitating, counselling	association with
human trafficking	participation in any of the defined human trafficking activities suffices for liability	none
drug trafficking	participation in any of the defined drug trafficking and cultivation activities suffices for liability	none
transboundary waste	participation in any of the defined hazardous waste trafficking activities suffices for liability	none
illicit exploitation of natural resources	participation in any of the defined exploitation of natural resource activities suffices for liability	

Sometimes, however, the mode of responsibility internal to the crime is more specific. Article 28 F criminalises 'voluntary participation' and 'intentional facilitation' while article 28N speaks only of 'participation' and 'facilitation'. Generally speaking, following the rule *lex specialis derogat lex generalis* it would not be open to put a charge of, for example, reckless facilitation based on article 28N when article 28F specifically required mens rea in the form of intention. Article 28 N does not cover some modes of responsibility covered in

the specific definitions of the crimes. For example, it does not cover the 'promotion' of terrorism under article 28GB, an inchoate offence that considerably broadens the scope of criminal liability. However, given the specific mention of this mode in the Statute the *lex specialis* rule means that that it was the intention of the States parties to expand the subject matter jurisdiction of the Court to include promotion of terrorism. It follows that the prosecutor would be entitled to put a charge of promotion of terrorism and would not be barred from doing so because of the failure to mention this form in the general provision for modes of responsibility in article 28N. The same reasoning applies to all the definitions that provide for specific internal modes of responsibility additional to those in article 28N.

F. *Punishment of Transnational Crimes*

The suppression conventions are notoriously vague on sentencing, leaving the fixing of penalties to States because it is such a sensitive issue. Where they do make provision, early treaties tend to call for the application of severe penalties, later treaties penalties in proportion to the gravity of offences, while some treaties such as the UN Drug Trafficking Convention, list aggravating factors which suggests a range of penalties from the trivial to severe.[43] State practice varies widely.

TABLE 12.3

Crime	Penalty provisions from suppression conventions	Penalty provisions in state practice
piracy	UNCLOS leaves it to national courts 'to decide upon the penalties to be imposed'.[44]	Heavy terms of imprisonment rising to life;[45] sometimes death.[46]

[43] See N. Boister, *An Introduction to Transnational Criminal Law* 2nd edn, 97.

[44] Art. 105.

[45] Sentences imposed on Somali pirates range from five to twenty years, although a penalty of thirty-three years has been imposed. UNODC, *UNODC and Piracy*, www.unodc.org/easternafrica/en/piracy/index.html last visited 28 September 2011. In 2006, for example, ten Somali pirates were sentenced to seven years in Kenya. *Republic v. Hassan Mohamud Ahmed*, Criminal Case No. 434 of 2006 (1 November 2006). See J. Gathii, 'Kenya's Piracy Prosecutions', 104 *American Journal of International Law* (2010) 416, 417.

[46] 'Yemen sentences Somali Pirates to Death', *BBC News*, 18 May 2010, available at http://news.bbc.co.uk/2/hi/8689129.stm last visited 28 September 2011.

Crime	Penalty provisions from suppression conventions	Penalty provisions in state practice
terrorism	OAU Convention requires punishment 'by appropriate penalties that take into account the grave nature of such offence'.[47]	Heavy terms of imprisonment depending on the activity;[48] sometimes death.[49]
mercenarism	OAU Convention requires punishment as a crime against peace[50] and makes the assumption of command an aggravating circumstance.[51]	Heavy terms of imprisonment have been applied and so has the death penalty.[52]
corruption	OAU Convention gives no guidance as to tariffs.	Practice varies widely with the use of the full range of penalties including fines, forfeiture, and imprisonment up to life.[53]
money laundering	UNCAC requires adequate punishment or punishment that takes into account the gravity of the offence.	Range of penalties for different levels of offences with heavy maximum fines and heavy terms of imprisonment for more serious forms.[54] Provision for confiscation is usually made.

(*continued*)

[47] Art. 2(a).

[48] Art. 94 of Benin's Penal Code allows for penalties of five to ten years imprisonment, in cases where the act was intended to force the State or any of its organs to accomplish or abstain from accomplishing any act falling within its prerogative. Section 10(1) of Cameroon's Law No. 2001–19 of 18 December 2001 permits life imprisonment as a maximum punishment.

[49] In terms, for example, of section 4(2) of Nigeria's Terrorism Prevention Act 2011, when death results from the act of terrorism.

[50] Art. 1(3).

[51] Art. 2.

[52] M. J. Hoover, 'The Law of War and the Angolan Trial of Mercenaries: Death to the Dogs of War', 2 *Case Western Reserve Journal of International Law* (1977) 323, at 328–9, referring to the nine prison terms ranging from 16 to 30 years and four death sentences at the Angolan mercenaries' trial.

[53] See, for example, s 26 of South Africa's Prevention and Combating of Corrupt Activities Act 12 of 2004, which uses a range of maxima for various offences including life. Section VII of the DRC's Penal Code 1940 also uses a range of punishments with quite low maxima to fifteen years but includes confiscation and bans on holding public office.

[54] S 16 of Kenya's Proceeds of Crime and Anti-Money Laundering Act 2009 provides for a maximum term of 14 years or a fine of 5 million shillings or the value of the property laundered, which increases to 25 million shillings when a body corporate is convicted.

Table 12.3 (*continued*)

Crime	Penalty provisions from suppression conventions	Penalty provisions in state practice
human trafficking	Human Trafficking Protocol makes no provision for penalties; suggests denying or revoking a convicted trafficker's entry visas.[55] UNTOC provisions that criminal sanctions should be proportionate to the gravity of the offence and should be taken into account for parole, apply *mutatis mutandis*.	Range of penalties for different levels of offences are available including fines. Heavy maximum penalties are available when the victims are physically harmed.[56]
drug trafficking	The drug conventions emphasise proportionality although the 1988 Convention emphasises that this should be at the severe end of the scale.	The range of penalties which include imprisonment and fines[57] varies and frequently extends to heavy punishments including life.[58] Some AU members apply the death penalty for drug trafficking.[59]
transboundary waste	Bamako Convention does not provide guidance in regard to penalties.	Where national law exists, penalties are low and consist of fines and imprisonment.[60]

[55] Art. 11(4).

[56] For example, Art. 3 of Senegal's ACT No. 2005–6 of 10 May 2005 on the fight against human trafficking and similar practices and the protection of victims, provides for various penalties such as between 2 and 5 years and a fine of half million to 2 million francs for organizing begging. Art. 1 provides penalties of from 10 to 30 years when the offence is committed using torture or barbarism or for harvesting organs, or risks death, or results in permanent disability.

[57] See, for example, s33 of Mauritius's Dangerous Drugs Act no 41 of 2000, which provides for a maximum penalty of a fine of 500,000 rupees and imprisonment not exceeding 10 years for the precursor offence.

[58] See, for example, s4(a) of Kenya's Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (cap 245).

[59] Egypt's Narcotics Law No. 182 of 1960, art. 40. See, for example, D. Williams and V. Allen, 'Egypt Sentences UK Pensioner to death for drug smuggling: Oxford graduate, 74, guilty over £3 million cannabis haul', *Mailonline*, 3 June 2013, www.dailymail.co.uk/news/article-2335211/Egypt-sentences-UK-pensioner-Charles-Raymond-Ferndale-death-drug-smuggling.html. Most death sentences are in practice commuted to life.

[60] See, for example, s144 of Kenya's Environmental Management Coordination Act cap 387 which allows for imprisonment for a term of not more than eighteen months or to a fine of not more than three hundred and fifty thousand shillings or to both such fine and imprisonment.

Crime	Penalty provisions from suppression conventions	Penalty provisions in state practice
illicit exploitation of natural resources	ICGLR 2006 Protocol against the Illegal Exploitation of the Natural Resources provides for imposition of 'effective and deterrent sanctions commensurate with the offence of illegal exploitation … including imprisonment…' It also provides for 'effective and deterrent sanctions and proportionate criminal or non-criminal sanctions including pecuniary sanctions' against corporate bodies.[61]	Penalties are low or non-existent; where they do exist, low penalties are often imposed.[62]

Under the Statute of the Court, Article 43 A (2) provides that the Court may only impose fines and/or penalties of imprisonment (something important for corporate criminal liability), while Article 43 A (4) provides that the Court should take into account factors such as the gravity of the offence and the individual circumstances of the accused person. The Statute is silent on aggravating factors, which should be developed by the Court itself in a subordinate instrument. It is also silent on post-sentencing procedures like parole and the possibility of prisoner transfer to the State of origin; again, the Court will have to develop these in a subordinate instrument. Under Article 43A (5) 'the Court may order the forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State.' This appears to make criminal confiscation (*in personam*) available to the Court, and implies a power to take preliminary measures to trace, freeze and seize assets. It is not clear whether civil forfeiture (*in rem*) or value transfer procedures (where the Court makes an estimation of unlawful profit by the accused and confiscates that amount), are available. Article 46J Bis (2) notes that if a State Party is

[61] Art. 15.

[62] Under Malawi's National Parks and Wildlife Act a maximum custodial sentence of five years is provided for illegal possession of ivory, but fines as low as US$55 have been imposed at first instance – see EIA, *The Enforcement Imperative: Combating the Illegal Trade in Ivory* (2004) 6.

'unable to give effect to a forfeiture order it shall take measures to recover the value of the proceeds, property or profits ordered by the Court to be forfeited', which suggests that value confiscation is available. Under Article 45, restitutionary measures to victims are left to the Rules which will have to consider some of the detailed provisions in this regard in suppression conventions, but Article 45(4) provides expressly that no rights are prejudiced by this provision.

G. *Jurisdiction and Immunity to Prosecution for Transnational Crimes*

The jurisdiction of the Court is laid down in Article 46 E Bis (2) as follows:

2. The Court may exercise its jurisdiction if one or more of the following conditions apply:
   (i) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.
   (ii) The State of which the person accused of the crime is a national.
   (iii) When the victim of the crime is a national of that State.
   (iv) Extraterritorial acts by non-nationals which threaten a vital interest of that State.

The language is slightly muddled but it appears to mean the Court will have jurisdiction if the crime occurs on the territory of an AU Member State or upon a vessel or aircraft registered with an AU Member State (territoriality and ship and aircraft jurisdiction), or if the accused is a national of an AU Member State (nationality jurisdiction), or if the victim is an AU Member State (passive personality jurisdiction), or if the accused are non-nationals who threaten a vital interest of the State from outside its territory (protective jurisdiction). Establishing territorial jurisdiction is a standard obligation in suppression conventions.[63] Establishing nationality jurisdiction is almost always a permissive provision in suppression conventions (but commonly extended to habitual residence). Establishing passive personality jurisdiction is limited to anti-terrorism conventions, and again is permissive. The protective jurisdiction may line up with similar but again permissive principles in suppression conventions.

Arguably the African states which have established these different forms of jurisdiction may delegate it to the African Court. It appears, however, that as

[63] See N. Boister, *An Introduction to Transnational Criminal Law* 2nd edn, 251; R. Clark, 'Jurisdiction over Transnational Crime', in N. Boister and R. Curried (eds), *The Routledge Handbook of Transnational Criminal Law* (Abingdon: Routledge, 2014), at 91.

the African Court enjoys original jurisdiction it will not matter as a strict question of law in the Criminal Chamber if some African states have not adopted these extraterritorial forms of jurisdiction. However, it may lead to arguments based on legality. Moreover, it will become practically problematic if the Court seeks the assistance of the relevant state in the arrest of accused persons and they do not have criminal jurisdiction over those persons. Territoriality is not the issue; it is nationality, passive personality and the protective jurisdiction. Many States do not take these permissive options; to align themselves with the African Court they are going to have to. Article 46 E Bis (2) does not mention the duty generally included in crime suppression conventions to extradite or prosecute, which implies a legal obligation to establish jurisdiction when extradition is not granted. It raises the question of whether an AU Member State on whose territory an alleged transnational criminal is found but refuses to extradite them, will (i) meets its obligations under a suppression convention if it does hand them over to the African Court, and (ii) whether the African Court will lawfully have jurisdiction.

In general, however, the principles enumerated in Article 46 E Bis (2) potentially give it a broad jurisdiction over individuals located in and outside of the AU. Any legal incompatibility of the Court's jurisdiction with the jurisdiction of AU members will be avoided if they have all enacted the relevant offences and subject them to these jurisdictions. This is what is implied by the provision in Article 46H (1) that the 'jurisdiction of the Court shall be complementary to that of national courts as well as Regional Economic Communities where specifically provided for by those Communities'. The Court´s jurisdiction cannot complement a State Party´s non-existent jurisdiction over the crime. This view is reinforced in the detail of Article 46H (2), which grounds admissibility on extant investigation or prosecution, decisions not to do so, double jeopardy, and in Article 46H (3), which is about the quality of national proceedings (shielding, delay, lack of independence), and in Article 46H (4), which is concerned with the state of the domestic criminal justice system, all of which imply the State in question has already enacted the same offence with the same jurisdiction. The difficulty will be exercising extraterritorial jurisdiction over individuals in non-African states who are alleged to be responsible for offering bribes, supplying drugs, trafficking humans, dumping waste etcetera in Africa. The foreign State may have a legal relationship with the territorial African State, and the African State may have a relationship with the African Court, but the foreign State will not (yet) have a legal relationship with the African Court.

Immunity to jurisdiction is of obvious relevance to transnational crimes potentially committed by the holders of senior government offices, such as

corruption. If immunity is removed for office bearers there is an incentive to retain office.[64] The new immunity provision in Article 46Ab is provides:

> No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

Under international law immunity *ratione personae* and immunity *ratione materiae* shield the prosecution of one State's officials in another State's criminal jurisdiction.[65] Placing the listed transnational crimes in the jurisdiction of what is in effect a regional international criminal court will remove immunity both of a material and personal kind for these crimes.[66] The usual immunities available for transnational crimes including diplomatic immunity, the immunity of officials from IGOs and the immunity of officials under domestic law[67] will be removed because of the change of status of these crimes, although only in Africa. Article 46 A *Bis*, however, modifies general international law and grants some of what is removed back again by reinstating personal immunity, at least while in office.[68]

H. *Procedural Issues*

Unlike the system of transnational criminal law, where substantive criminalisation is only a necessary condition for elaborate procedural cooperation by States, the Statute embraces criminalisation in order to establish its jurisdiction. The Statute condenses the complex and pluralistic procedural regimes in the suppression conventions into a few relatively short provisions.

Processing transnational crimes raises a number of specific issues, all of which will require activity by the Court through the adopting of subordinate instruments and the necessity of national legislation. Sub-regional instruments

[64] M. Du Plessis, 'Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders', No. 278 *Institute for Security Studies Paper* (November 2014) 1, at 8.

[65] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports 2002, Para 59; *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)* (2000) 1 AC 147; *Court of Cassation*, Criminal Chamber, Appeal No. 00–87215, Appeal judgment, Decision No. 64; ILDC 774 (FR 2001), 13 March 2001.

[66] See the discussion by M. Du Plessis in 'Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders', No. 278 *Institute for Security Studies Paper* (November 2014), 8.

[67] See Boister, *An Introduction to Transnational Criminal Law* 2nd edn, 273.

[68] See Tladi, Chapter 25, in this volume.

such as those promulgated for purposes of mutual legal assistance by SADEC, ECOWAS, and the Francophonie States may come in useful if some way of utilising them can be worked out. It would be an advantage for the AU to adopt its own mutual legal assistance and extradition instruments, with the role of the Court built into them.

The early phases of investigation of many of these offences will require the use of intelligence led policing techniques, and in particular covert policing activities such as undercover policing and electronic surveillance. At the same time to avoid challenge in the Court it will require the protection of the human rights of those subject to these processes to ensure that evidential material is properly obtained. As the case progresses, stronger legal powers will be required. To respond adequately to a transnational crime like drug trafficking, for example, the pre-trial chamber, trial chamber and appeal chamber envisaged in article 16 will have to be able to exercise all the usual powers to summons drug traffickers, subpoena witnesses, etcetera. Under Article 46 L AU Member States are obliged to cooperate in the provision and the modes of assistance are spelled out. Under Article 46 L (3) the Court is permitted to seek help from non-member states and to conclude agreements to that end. Such agreements will be necessary to ensure effectiveness when the OTP approaches the Pre-Trial Chamber for orders and warrants, for example, under Article 19bis (2), to be applied to individuals outside the AU. Difficult situations will also arise in regard to AU Member States in regard to the Trial Chamber's power under Article 22(A)(7) to questions suspects, victims and witnesses and collect evidence, engage in inspections in loco, if the particular State *loci delicti* has not enacted the particular crime because their own law enforcers will not have that power. The Court cannot rely on the provisions in the suppression conventions to compel assistance from non-AU States because it is not party to these conventions (the AU could sign some of them but could only operate as a party if its Constituent Act made it clear it had the competence to do so on behalf of its members as with the various EU treaties). More ambitiously, the AU could consider actually acceding to the UNTOC,[69] in order to access its procedural cooperation machinery. It would be obliged to declare its level of competence with respect to the matters governed by the Convention when doing so,[70] but by adopting jurisdiction over these offences in the African Court the AU's level of competence would be significant. The AU Secretariat could then approach the UNTOC Secretariat, the UNODC,

[69] Art. 36(2) and (4).
[70] Art. 37(2).

to coordinate activities (and the UNODC is obliged to do so).[71] It could then approach the UNTOC Conference of Parties, which is charged with promoting and reviewing the Convention and doing so in cooperation with regional organisations,[72] to work out how best to make the cooperation machinery in the Convention available to the Court (particularly important for the Courts work with non-AU members).

The prosecutors and judges will have to have the skill set of a successful transnational criminal lawyer, and in particular familiarity with the modus operandi used by traffickers and the different law enforcement issues involved. Article 22(5) provides that the prosecutors have to be 'highly competent in and have extensive practical experience in the conduct of investigations, trial and prosecution of criminal cases.' Article 22C(4) envisages a Principal Defender with experience in domestic or international criminal law; again, this must extend to transnational crime. Article 3(4) provides that judges must be expert in inter alia 'international criminal law'. Questions have already been raised about their expertise in international criminal law.[73] Again, they will also have to be expert in transnational criminal law.

Commentators have raised questions about the funding of this increase in jurisdiction.[74] The ambitious jurisdictional reach has the potential to dilute the funds made available[75] so that prosecutions of crimes that are arguably more important such as genocide or crimes against humanity will be underfunded. And then there is the cost of incarceration. Some funding may come from shares of asset forfeiture. Another way of funding the court's expansive jurisdiction over transnational crimes would be to franchise that jurisdiction. In this model a particular member state of the AU could, if it felt it necessary to transfer prosecution of, for example, a corruption case, out of its territory into the Court to avoid domestic pressure on the Court, be asked to pay for that prosecution and all punishment costs. To take this idea even further, it

[71] Art. 33(2)(c).

[72] Art. 32(1) and (3)(c) respectively.

[73] K. Rau, 'Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights', 97 *Minnesota Law Review* (2012) 669, at 705; M. Du Plessis, 'Implications of the AU Decision to Give the African Court's Jurisdiction over International Crimes', 235 *Institute for Security Studies Paper* (June 2012) 1, at 6.

[74] M. Du Plessis, 'A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes' EJIL Talk; M. Du Plessis, 'Implications of the AU Decision to Give the African Court's Jurisdiction over International Crimes', at 9; K. Rau, 'Jurisprudential Innovation or Accountability Avoidance?', 696–8.

[75] M. Du Plessis, 'Implications of the AU Decision to Give the African Court's Jurisdiction over International Crimes', at 6.

might be possible to make provision for subsidised sponsorship of the particular trial by foreign donors where they felt it was generally in their interest, and extradition was not forthcoming.

5. CONCLUSION

The Statute of AU Court as supplemented by the Malabo Protocol has created a stand-alone regional transnational criminal court. It has a path-breaking jurisdiction over a number of transnational crimes that were formerly only the subject of treaty obligations on States parties under various crime suppression conventions to establish national criminal offences. This novel jurisdiction presents an opportunity for the region to address impunity for these offences. The two challenges the Court faces are both surmountable: to establish a high threshold for admissibility of cases so that only the most serious are addressed by the Court; and to establish a workable system for the policing and prosecution of these offences involving cooperation with States both within and without Africa. If these challenges can be met, the Court will be in a position to make an entirely unique contribution to the suppression of these selected transnational crimes within the region, and to develop a model which other regions which face similar threats might follow.

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Jurisdiction of the Criminal Chamber of the African Court of Justice and African Court of Justice and Human and Peoples' Rights

NEIL BOISTER

1. INTRODUCTION

This chapter examines the inclusion of trafficking in drugs within the transnational crimes jurisdiction of the Criminal Chamber of the African Court of Justice Peoples and Human Rights (hereinafter the Criminal Chamber) established under article 28(1) of the amended Statute of the Court. Drug trafficking is not a crime within the jurisdiction of any other international or regional tribunal and there is thus no practice yet to draw on for interpretive purposes.[1] For this reason, in addition to an orthodox textual analysis, given that the complementarity provision article 46H (1) states that 'the jurisdiction of the Court shall be complementary to that of the national courts, and to that of regional economic communities where specifically provided for by the Communities', the Criminal Chamber can seek guidance in the interpretation of article 28K in the UN drug control conventions[2] and the practice of

[1] In 1989 Trinidad and Tobago precipitated the development of the ICC when it called upon the UN General Assembly to create an ICC with jurisdiction over drug trafficking across national frontiers – see UNGAOR 6th Comm 44th Sess. UN Doc A/c.6/44/SR.38–41 (1989). This effort failed as the ICC evolved into a court with jurisdiction over those crimes for which individual responsibility under international criminal law was clearly established in customary international criminal law. The failure of subsequent efforts to achieve this goal may serve as an unstated rationale for the inclusion of treaty crimes like drug trafficking in the jurisdiction of the African Court. See generally Neil Boister, 'The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics' 3 *Journal of Conflict and Security Law* (1998) 27; Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues Negotiations and Results* (The Hague: Kluwer, 1999) 79, 85–7; Darryl Robinson, 'The Missing Crimes' in Antonio Cassese, Paolo Gaeta and J.R.W.D. Jones (eds.). *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 497, 498.

[2] See generally N. Boister, *Penal Aspects of the UN Drug Conventions* (The Hague: Kluwer, 2001).

AU member States in the implementation of these treaties. This chapter follows suit and resorts for interpretive guidance to the amended Statute of the Court, the terms of the international drug conventions to which AU members are party and selected examples of state practice from AU member States, as well as to regional arrangements made by AU members.

2. RATIONALE FOR INCLUDING DRUG TRAFFICKING IN THE JURISDICTION OF THE CRIMINAL CHAMBER

Freedom from the social ill-effects of non-medical and non-scientific drug use falls within the general goal of promotion of 'development of the Continent' articulated in the Preamble of the amended Statute.[3] Although data is limited,[4] the AU's rolling Action Plan on Drug Control[5] notes that the production, trafficking and use of illicit drugs is a growing challenge in Africa.[6] Similar sentiments have been articulated at a sub-regional level in the ECOWAS Political Declaration on Drug Trafficking and Other Organised Crimes in West Africa and the ECOWAS Regional Action Plan to Address the Growing Problem of Illicit Drug Trafficking, Organised Crimes and Drug Abuse in West Africa.[7] A particular concern is the use by South American drug traffickers of West Africa for transhipment of Cocaine. Tamfuh records:

> Since the US administration got tough on traffickers from Latin America, Africa is increasingly becoming a transit hub for Latin American drugs destined for the Europe and the US, with the Gulf of Guinea playing the key role. West Africa has also become a passageway for illicit drugs from South America. The South American cartels and their local accomplices are gradually turning Central Africa into a stepping stone along their "cocaine route" to Europe by exploiting local weaknesses such as deficient controls at ports, poor traveller inspection equipment, porous land and sea borders and endemic corruption and overwhelming insecurity.[8]

S v Archula,[9] a case involving the trial in Sierra Leone of 18 accused including a number of Colombians for smuggling more than a tonne of cocaine on an

[3] Preambular paragraph 12.
[4] UNODC, *World Drug Report 2015* (Vienna: UNODC, 2015), xiv.
[5] The latest iteration is the AU Plan on Drug Control (2013–2017), CAMDC/EXP/2(V).
[6] Para 12.
[7] Adopted in Abuja in 2008 (extended to 2013).
See www.unodc.org/westandcentralafrica/en/ecowasresponseactionplan.html.
[8] Wilson Y.N. Tamfuh, 'Drugs and Drug Control in Cameroon), in Anita Kalunta-Crumpton (ed.), *Pan African Issues in Drug Control* (Farnham: Ashgate, 2015), 17 at 26.
[9] [2009] SLHC 21, 16 March 2009.

Antonov aircraft disguised as a Red Cross plane through Sierra Leone, is a graphic illustration of the complexity of these operations. West Africa is also a source of methamphetamine smuggled into East and South-East Asia, while East Africa is growing in importance as a transit area for Afghan heroin bound for Europe and elsewhere.[10]

A key priority of the AU's Action Plan is improved criminal justice capacity in the investigation and prosecution of drug-related organised crime.[11] The Criminal Chamber can provide some capacity regarding large-scale drug trafficking offences, but there is a danger that it will be swamped under the potentially huge number of offences, which necessitates caution in selecting cases. In the International Law Commission's scheme for inclusion of the treaty crimes within the jurisdiction of the then proposed ICC, it was recommended that they had to reach a threshold of seriousness in order to fall under the ICC's jurisdiction, a measure designed to prevent the ICC from being overwhelmed by minor cases.[12] There is nothing in article 28K or the drug conventions that serves as a threshold to sift out those cases worth prosecuting from the potentially thousands of cases of no individual moment. Given the Criminal Chamber's potentially enormous jurisdiction it will be necessary to filter out all but the most serious cases. The Court must rely on State authorities exercising a degree of self-discipline in these cases by not submitting cases to the court that are trivial simply because they do not have the wherewithal to prosecute themselves. At the Court itself, the exercise of prosecutorial discretion to screen potential cases will be the main mechanism for doing so (whether cases are taken up by the prosecutor, by authorised AU organs or submitted by AU member states or individuals or NGOS within those states).[13] The Rome Statute's[14] guidance regarding gravity of offences may prove of some use regarding the necessity to prosecute only offences of regional concern and not to overburden the court.[15] The gravity threshold in article 17(1)(d) is

[10] UNODC, *World Drug Report 2015*, (Vienne: UNODC, 2015), xiii.

[11] Para 36(d)(i).

[12] 'Report of the ILC, 45th session' *UNGAOR* 48th Sess. Supp. No.10 UN Doc. A/48/10 (1993) at 284.

[13] Article 29 of the Statute as amended by Article 15 of the Protocol.

[14] Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 5.

[15] See generally Susana Sacouto and Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' (2007) 23 *American University Law Review* 809; Margaret De Guzman "Choosing to Prosecute: Expressive Selection at the International Criminal Court (2012) 33 *Michigan Journal of International Law* 265.

undefined, but in relation to situations the ICC in the *Kenya*[16] and the *Ivory Coast*[17] decisions has held that the role and position (high rank) of the alleged offenders is a crucial factor when assessing gravity. In the *Gaza*[18] case the court felt that that the gravity requirement may be judged in relation to the crime itself or its alleged perpetrators, meaning that the status of the accused could transform a non-serious crime into a grave crime. However, while in *Lubanga*[19] the ICC based admissibility of specific cases on (1) seniority and (2) the systematic or large-scale nature of the conduct, later cases such as *Ntaganda*,[20] *Abu Garda*[21] and *Muthaura*[22] have rejected reliance on the perpetrator's status and taken the view that gravity should involve a quantitative and qualitative assessment from the victim's perspective. Given that in drug trafficking the notional victim is the African Union, State(s) and by extension society itself, some assessment of the scale and nature of the crime, the manner of its commission and its impact on the State and on the community, is indicated. Yardsticks for seriousness that provide a useful guide of scale and impact include the scale of the operation measured by transnationality,[23] involvement of organised criminal groups, tenure of the operation, complexity of the operation, mass of drugs involved, size of profits, the potential number of users, presence of violence, corruption or abuse of public office. The status of individuals whether as key members of the drug trafficking network or as senior officials (given the potential for corruption) and influential members of the community must also be potential indicators of seriousness. These criteria should not be cumulative; a nuanced assessment of the case may require only one or a selection to exist before prosecution is justified. The governing principle should be that it is the illicit drug traffic that is the Chamber's target (something implicitly recognised in the fact that all of the offences within the Criminal Chamber's jurisdiction are supply side offences).

[16] *Situation in the Republic of Kenya* ICC Pre Trial Chamber II, ICC-01/09–19, 31 March 2010 at [45].

[17] *Situation in the Republic of Cote dIvoire* ICC Pre Trial Chamber II, ICC-02/11–14, 30 October 2011 at [205].

[18] *Situation on the Registered vessels of the Union of the Comoros, the Hellenic Republic & the Kingdom of Cambodia* ICC Pre Trial Chamber I ICC-01/13–34, 16 July 2015 at [22].

[19] *Prosecutor v Lubanga* ICC Pre Trial Chamber I, ICC-01/04/-01/06, 24 February 2006 at [42]

[20] *Situation in the Democratic Republic of Congo* ICC Appeals Chamber, ICC-01/04–169, 13 July 2006 at [76].

[21] *Prosecutor v Abu Garda* ICC Pre Trial Chamber I, ICC-02/05–02/09–243, 8 February 2010 at [31]

[22] *Prosecutor v Muthaura, Kenyatta and Ali* ICC Pre Trial Chamber II, ICC-01/09–02/11–338, 23 January 2012 at [47].

[23] As defined in article 2 of the UN Convention against Transnational Organised Crime, 15 November 2000, 2237 UNTS 319, in force 9 September 2003.

3. THE SOURCES OF THE LAW

Although one of its goals is to strengthen legal frameworks[24] the AU's Plan of Action on Drug Control 2013–7 does not address the legal requirements on AU member states under the UN drug control conventions to take steps against the illicit manufacture and trafficking of drugs. Nor, in comparison to some of the other transnational offences in the protocol, is there an AU treaty regarding drug trafficking so the Criminal Chamber will not be enforcing a pre-existing AU definition of the offence. It is the Statute of the Court as amended by the Protocol, which establishes the crime of drug trafficking in the Criminal Chamber's jurisdiction. Article 28K defines 'trafficking in drugs' as follows:

1. For the purposes of this Statute, trafficking in drugs means:
   (a) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;
   (b) The cultivation of opium poppy, coca bush or cannabis plant;
   (c) The possession or purchase of drugs with a view to conducting one of the activities listed in (a);
   (d) The manufacture, transport or distribution of precursors knowing that they are to be used in or for the illicit production or manufacture of drugs.
2. The conduct described in paragraph 1 shall not be included in the scope of this Statute when it is committed by perpetrators for their own personal consumption as defined by national law.
3. For the purposes of this Article:
   (A) "Drugs" shall mean any of the substances covered by the following United Nations Conventions:
      (a) The 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs of 1961;
      (b) The 1971 Vienna Convention on Psychotropic Substances.
   (B). "Precursors" shall mean any substance scheduled pursuant to Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

[24] Para 36(c)(i).

The definition in article 28K reflects the text in selected parts of article 3(1) of the 1988 UN Drug Trafficking Convention[25] (although tailored to suit), which in turn originates in article 36(1) of the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol).[26] The only African States that are not party to the 1988 Convention are South Sudan and Somalia. The fact that almost every AU member State has thus promised to enact these offences, makes the incorporation of the substance of these offences into the Protocol a plausible argument to defence challenges based on the principle of legality. This defence argument might gain some traction though where the State implementing the drug conventions has enacted an offence that bears little or no resemblance to the text of the treaties. The common objectives of these conventions are to specifically limit 'the production, manufacture, export, import, distribution of, trade in, use and possession of' the drugs scheduled under the treaties 'to medical and scientific purposes'[27] and to 'suppress' other illicit activities.[28] The ultimate purpose is to benefit the 'health and welfare of mankind'.[29]

4. THE SUBSTANCES UNDER CONTROL

The first condition for suppression of certain activities regarding drugs is listing (and chemically defining) the drugs regarding which the enumerated actions are illegal. The drug conventions provide a system for the scheduling of substances with dependence producing properties, and for the tabling of precursor substances (substances frequently used in the illicit production or manufacture of drugs).[30] These schedules and tables are continually updated as new substances with similar properties are discovered or invented.

Scheduling identifies the substances subject to control and the appropriate level of control. Thus under the 1961 Convention, Schedule I drugs (more addictive narcotics such as opium) are subject to greater control than those in

[25] Vienna, 20 December 1988, 1582 UNTS 95; in force 11 November 1990.

[26] 30 March 1961, 520 UNTS 151, in force 13 December 1964.

[27] Preambular para 8 and art 4(c), 1961 Convention; preambular para 5 and art 5(2) 1972 Convention.

[28] Preambular paras 5, 10 and 13, and art 2 of the 1988 Convention.

[29] Preambular para 1 of the 1961, 1971 and 1988 Conventions. GA Resolution 69/201, 18 December 2014, preambular para 6. See Richard M. Lines, *The Fifth Stage of International Drug Control: International Law, Dynamic Interpretation and Human rights* (Unpublished PhD Thesis, Middlesex University, 2014), 176–81 [permission].

[30] Scheduling is governed by articles 2 and 3 of the Single Convention; Tabling by article 12 of the 1988 Drug Trafficking convention. See Boister, *An Introduction to Transnational Criminal Law*, 2nd edition, 93; Bernard Leroy, 'Drug trafficking' in Neil Boister and Robert Currie (eds), *The Routledge Handbook of Transnational Criminal Law* (London, 2014), 229, 235.

Schedule II (less addictive narcotics such as codeine). Inclusion in either schedule by the UN's Commission on Narcotic Drugs) (the functional commission of ECOSOC which supervises the application of the international drug conventions) on the recommendation of a WHO Expert Committee in the first instance depends on whether the substance in question is liable to similar abuse to the substances already in that schedule. Schedule III is limited to preparations not liable to abuse, while Schedule IV contains a selection of Schedule I drugs considered particularly liable to abuse (such as heroin) not offset by therapeutic advantage and thus subject to special control measures. In similar manner, psychotropic substances are scheduled in four schedules under the 1971 Convention. Under the 1988 Drug Trafficking Convention, drug precursor substances are arranged in two different tables by the International Narcotics Control Board (the independent body which monitors implementation of the drug conventions). Article 28K (3) of the amended Statute of the Court incorporates by reference the scheduling/tabling system in the drug conventions. It provides that for the purposes of article 28K, '[d]rugs shall mean any of the substances covered by' the Single Convention (as amended by its 1972 Protocol[31]) and the 1971 Convention on Psychotropic Substances,[32] while precursors are those 'substances scheduled'[33] pursuant to article 12 of the 1988 UN Drug Trafficking Convention.

Drug legislation in some AU members refers directly to the international classification system. For example, article 2 of Algeria's 2004 drug law[34] defines 'stupéfiant' as the substances scheduled in the 1961 Convention but separates out 'substances psychotrope' as those substances scheduled under the 1971 Convention. Direct reference of this kind to the international schedules provides a more exact and up-to-date guide than legislation like Nigeria's National Drug Law Enforcement Decree 48 of 1949, which in s10(a) defines the substances which cannot on pain of penalty be imported, manufactured, produced, processed planted or grown as 'the drugs popularly known as cocaine, LSD, heroine or any other similar drugs'.

When it comes to identifying the substance(s) involved in a particular case before the Criminal Chamber, practical issues will abound. Scientific analysis

[31] Protocol Amending the Single Convention on Narcotic Drugs, 1961, Geneva, 25 March 1972, 976 UNTS 3; in force 8 August 1975.

[32] Vienna, 21 February 1971, 1019 UNTS 175; in force 16 August 1976.

[33] It should ideally read 'tabled' as the word 'scheduled' was deliberately avoided by the authors of the 1988 Convention to distinguish precursors from drugs.

[34] Loi no 04–18 du Dhou El Kaada 1425 correspondeant au 25 Decembre 2004 relative à la prévention et à la répression de l'usage et du trafic illicites de stupéfiants et de substances psychotrope.

of substances will be necessary to provide expert evidence in court, but can be provided by national drug analysis laboratories located in certain AU members such as the Forensic Science Laboratory of the South African Police Service. The UN Office of Drugs and Crime (the part of the UN Secretariat which administers all the UN's efforts against transnational crime) can also provide guidance in this regard.[35] Many drugs for illicit supply have been adulterated with other substances and while determining the exact amount of the prohibited substance involved is not critical for conviction, if not determined correctly it can raise issues about whether the substance before the court is the same as that originally seized. Moreover, the correct determination of the weight of the drugs may be important on sentence. Given the impossibility of transferring the substance in its entirety to the Criminal Chamber, it would be prudent for subordinate measures to be adopted that presumed that in any prosecution for one of the defined drug trafficking offences that a sample taken from any substance by means of or in respect of which the offence was allegedly committed possesses the same properties as the substance[36] and that a reasonable estimation of the weight of the drugs involved is permissible as evidence in the Criminal Chamber. Provision will also have to be made in subordinate measures for forfeiture, authorised safe-keeping during the chain of custody of the drugs before and prior to trial[37] and supervised destruction of the substances involved thereafter as is required in article 4(2)(c) of the SADC Protocol on Combating Illicit Drug Trafficking[38] and is the practice in AU member states.[39]

5. LAWFUL AND UNLAWFUL ACTIONS REGARDING CONTROLLED DRUGS

Under the conventions, scheduling does not prohibit scheduled drugs; it is the implementation at a national level of the penal provisions of the

[35] See https://www.unodc.org/unodc/en/scientists/index.html.

[36] See, for example, the provision in s18 of South Africa's Drugs and Drug Trafficking Act no 140 of 1992.

[37] See, for example, s74 of Kenya's Narcotic Drugs and Psychotropic Substances Act 1994, which provides for authorised weighing and safe-keeping of samples of evidence. Incidents in some AU member states indicate how important it is to keep control of the substance prior to trial. See for example *Republic v Nana Amma Martin* reported in *Daily Graphic*, 4 December 2011, in which cocaine became washing powder in police custody – cited in Joseph Appiahene-Gyfani, 'Drugs and Drug Control in Ghana' in Anita Kalunta-Crumpton (ed.), *Pan African Issues in Drug Control* (Farnham: Ashgate, 2015), 37 at 52.

[38] Signed 24 August 1996; in force 20 March 1999, available at http://www.sadc.int/files/1213/5340/4708/Protocol_on_Combating_Illicit_Drug_Trafficking_1996_.pdf.pdf.

[39] See, for example, s19(c) of Kenya's Narcotic Drugs and Psychotropic Substances (Control) Act, 1994.

conventions that prohibits certain actions regarding these drugs. The convention obliges states to criminalise: the drug control scheme as laid down in the UN Conventions requires criminalisation at a national level of (i) a certain action such as 'production', (ii) regarding a certain scheduled substance such as heroin, (iii) so long as that action is not for 'medical or scientific purposes'. The latter division between licit and illicit production of a scheduled drug arises from article 4(c) of the Single Convention's general obligation on States parties 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.' Article 3(1) of the 1988 Drug Trafficking Convention recognises this by providing that the various enumerated actions must be 'contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention'. This echoes the definition of the 'illicit traffic' in article 1(1)(1) of the 1961 Convention as 'contrary to the provisions' of that Convention. It implies that the offences only apply to actions for non-medical and non-scientific purposes. Article 28 K (1) does not explicitly recognise that some of the prohibited actions can be undertaken for licit medical and scientific purposes. It thus could be used to convict an individual pharmaceutical company of 'manufacture' of a scheduled substance even if it is for a 'medical purpose' recognised by the territorial state's national law. This would be contrary to the position under the conventions and under the domestic law of AU members.[40] This lacuna in the amended Statute of the Court can easily be remedied by a subordinate measure to the effect that actions recognised as having licit medical, scientific, and law enforcement purposes, in the drug conventions and in national law, do not fall within the scope of any of the offences in article 28K. This could be addressed through the proposed Elements of Crimes.

6. SUPPLY OFFENCES NOT PERSONAL USE OFFENCES

Drug trafficking as defined in article 28 K (1) is made up of a range of supply related offences.[41] Article 28 K (2) provides that '[t]he conduct described in paragraph 1 shall not be included in the scope of this Statute when it is committed by perpetrators for their own personal consumption as defined by national law.' It thus excludes from the jurisdiction of the Criminal Chamber

[40] For example, s7(1) of Mauritius's Dangerous Drugs Act no 41 of 2000 provides that for 'the purposes of medical or scientific research or teaching or the use of the forensic science services, the Permanent Secretary may authorize a person to cultivate, produce, manufacture, acquire, import, use or hold plants, substances and preparations' that have been scheduled.

[41] See Boister, *An Introduction to Transnational Criminal Law*, 2nd edn, 93.

Court 'use' or 'possession for use', avoiding a potential deluge of cases and the controversy surrounding inroads into personal rights.[42] It might be argued by some that article 28K (2) goes too far. An individual accused could feasibly produce methamphetamine for example, for their own use, and under the exception it would not matter how much they produced, their action would not fall within the jurisdiction of the Court. Inferences from the evidence will, however, circumscribe this exception; the greater the volume of production or weight of the drugs involved the more likely the purpose was to supply.

7. THE DRUG SUPPLY OFFENCE

The elements of the drug 'supply' offence in article 28(K)(1)(a) are as follows:

(a) The perpetrator produced, manufactured, extracted, prepared, offered, offered for sale, distributed, sold, delivered on any terms whatsoever, brokered, dispatched, dispatched in transit, transported, imported or exported. This list reproduces the forms of conduct listed in article 3 (2) of the 1988 Drug Trafficking Convention. Any one or more of these forms of conduct will suffice. Each has its own specific meaning, although they may overlap. 'Production' is defined in the 1961 Convention as the agricultural 'separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained'.[43] 'Manufacture' 'means all processes, other than production, by which the drugs may be obtained and includes refining as well as the transformation of drugs into other drugs.'[44] 'Extraction' is the physical or chemical means of separating and collecting substances from mixtures.[45] 'Preparation' means mixing for use.[46] Although undefined, 'offering' involves tendering a drug to a potential consumer for acceptance or refusal, including as a gift. 'Offering for sale' implies offering for purchase. 'Distribution' ensures that drugs move through the chain of supply from producer to consumer, and 'sale' the disposal of drugs for some consideration. The catchall 'delivery on any terms whatsoever' ensures the inclusion of any form of delivery including constructive delivery through, for example, the transfer of keys to a storage facility. In

[42] See Boister, *An Introduction to Transnational Criminal Law*, 2nd edn, 97.
[43] Article 1(1)(t).
[44] Article 1(1)(n) of the 1961 Convention.
[45] *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*, (New York, 1998, UN Doc. E/CN.7/590; UN Publication Sales No.E.98.XI.5), 54.
[46] Article 1(1)(s) of the 1961 Convention.

'brokerage' agents negotiate on behalf of buyer or seller to facilitate the transaction. 'Dispatch' involves the sending of drugs to a specific destination while 'dispatch in transit' involves sending drugs to a destination outside that territory or to one of which the dispatcher or carrier are ignorant. 'Transport' involves the conveying of drugs from one place to another by any mode through any medium with the specific purpose of carrying to a specific place or person.[47] The 'import' and 'export' of drugs is the 'physical transfer of drugs from one State to another State, or from one territory to another territory of the same State.'[48]

In some AU member states these actions are covered by fewer broader terms. Thus s1(1) of Ghana's Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990, only specifically prohibits 'import' and 'export', while section 3(1) specifically prohibits 'manufacture, produce or distribute', and section 6(1) specifically prohibits 'supply'. Kenya's approach is even more concise with the generic term 'trafficking' used in s4 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, but then in a common formula section 2 gives an expansive definition of 'trafficking' that specifies all of the forms spelled out in the drug conventions. In Kenyan practice there has been some dispute about whether it is necessary to specify in the indictment which specific mode of trafficking listed in that definition has been undertaken so long as one of these forms of action is actually undertaken on the evidence.[49] The better view and the practice that should be followed in the Criminal Chamber is that the charge sheet must disclose the specific form of drug 'supply' alleged so as to guide the prosecution in the evidence they must lead to establish the charge and properly inform the accused of the particular conduct alleged against them.[50]

[47] See for example the analogous interpretation of to 'convey' in s2 of Kenya's Narcotic Drugs and Psychotropic Substances Act in *Mbwana v Republic*, Criminal Appeal No. 259 of 2011, [2014] eKLR, where the court held conveying meant transporting or carrying to a place, and that fleeing from pursuing police did not mean an accused was conveying a drug.

[48] Article 1(1)(m) of the 1961 Convention.

[49] See, *Kimani v The Republic*, Criminal Appeal No. 65 of 2012, [2014] eKLR, para 13.

[50] See, *Wanjiku v Republic* (2002) KlLR 825; *Madline Akoth Barasa & Another v Republic* Criminal Appeal No. 193 of 2005, [2007] e KLR where the Court of Appeal held: 'It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substance. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking.'

(b) Drugs (as scheduled under the 1961 and 1971 Conventions).
(c) Intentionally. While article 28(K)(1)(a) is silent as to mens rea, both the 1961 and 1988 Conventions from which it is derived provide that each of the proscribed acts must be 'committed intentionally'.[51] Although most domestic legislation of AU member states does not specify the state of mind applicable to drug offences, the courts apply subjective mens rea to these offences in the absence of an express contrary statutory intention. While it has been held in Kenya that knowledge that someone is engaged in an act of trafficking is not a part of Kenyan law,[52] in other AU member states it is clear that mens rea is an ingredient of the offence and on the general principle *actus non facit reum nisi mens sit rea* the latter position must be the correct interpretation of the amended Statute. Intention suggests a purpose to engage or at least subjective foresight of a high probability of engaging in one of the listed actions with knowledge of the fact that one is supplying a drug;[53] recklessness in the sense of foresight of a possibility and reconciliation to that possibility will not suffice. In practice evidence of mere possession will not be enough to establish an intent to supply without further additional evidence such as the weight of drugs possessed. The South African Constitutional Court has held that 'If an accused is found to have been in possession of a large quantity of dagga, it might, depending on all the circumstances and in the absence of an explanation giving rise to a reasonable doubt, be sufficient circumstantial evidence of dealing. . .'.[54] The jurisprudence from the AU member states on drug-related offences may prove to be a useful source of persuasive authority in the interpretation and application of the Malabo Protocol.

8. THE DRUG CULTIVATION OFFENCE

The elements of the drug 'cultivation' offence in article 28(K)(1)(b) are as follows:

(a) The perpetrator cultivated. According to the 1961 Convention 'cultivation' includes within its scope the unregulated, illicit, prohibited

[51] Article 36(1) and article 3(1) respectively.
[52] See *Ondaba v Republic*, Criminal Appeal 344 of 2010, [2012] eKLR.
[53] See for example, the Namibian Supreme Court in *S v Paulo and Another* (SA/ 85/ 2011) [2012] NASC 26 (30 November 2012) at [28]: '*mens rea* is an essential ingredient of the offence created by s 2(1)(*a*) of the Act in the sense that an accused person cannot be convicted of dealing in any dependence-producing drug unless he or she knows that the substance in which he or she is dealing is a prohibited drug.'
[54] *S v Bulwhana*, *S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC0 at 396G-H.

cultivation of the opium poppy, coca bush or cannabis plant.[55] Precisely what amounts to the action of cultivation is undefined, but it is usually taken to involve some deliberate fostering of the plant through objectively verifiable actions such as watering and weeding rather than simply witting or unwitting possession of property on which plants grow. In South African law, for example, it is taken to mean 'to promote or stimulate the growth of any plant'.[56]

(b) The opium poppy, coca bush or cannabis plant. Following the definitions in the 1961 Convention, "Opium poppy" means the plant of the species Papaver somniferum L.[57] "Coca bush" means the plant of any species of the genus Erythroxylon.[58] "Cannabis plant" means any plant of the genus Cannabis.[59] These are the definitions used in AU members.[60] It follows that no person could be accused under this offence of cultivating cannabis resin or cannabis oil, which are derived from cannabis by 'production', an action within the scope of the supply offence.

(c) Intentionally. While article 28(K)(1)(a) is silent as to mens rea, both the 1961 and 1988 Conventions from which it is derived provide that each of the proscribed acts must be 'committed intentionally'.[61] It is necessary that the accused must have known the identity of the plant that they were cultivating. If they genuinely thought (which seems unlikely) that they were cultivating a tomato plant rather than cannabis they could not, for example, be found guilty. Finally, it has been pointed out in the South African case of *S v Mbatha*[62] that the application of mens rea in this context entails more than just the intention to stimulate the growth of the plant (which is implicit in the act of cultivating) but in addition an ulterior purpose to sell or supply (deal in) the drug. Given that the cultivation offence in article 28(K)(1)(b) is not simply an analogue of possession and is a more serious offence involving participation in one aspect of the supply side of the drug traffic, it would be useful for subordinate measures to be adopted by the Criminal Chamber making it clear that such ulterior purpose is a necessary element of the mens rea for this offence.

[55] Article 1(1)(i) of the 1961 Convention.
[56] *S v Guess* 1976 (4) SA 716 (A) at 717B-C.
[57] Article 1(1)(p) of the 1961 Convention.
[58] Article 1(1)(e) of the 1961 Convention.
[59] Article 1(1)9c) of the 1961 Convention.
[60] See, for example, the identical definitions in s2 of Kenya's Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (cap 245).
[61] Article 36(1) and article 3(1) respectively.
[62] [2012] ZAKZPHC 23, 2012 (2) SACR 551 (KZP), [29].

9. POSSESSION OR PURCHASE FOR TRAFFICKING

The elements of the possession or purchase for trafficking offence in article 28(K)(1)(c) are as follows:

(a) The perpetrator possessed or purchased. Although undefined, purchase usually involves buying the drugs for consideration, while possession (also a condition relevant to many of the forms of supply discussed above) involves both a physical element (*detentio*) of the drugs, and a mental element (*animus possidendi*), awareness that they are in one's physical control.[63]

The limits of the physical element are difficult to draw. A typical approach is that followed in Seychelles law where it may be established through a continuous act that involves either physical custody or the exercise of control.[64] To put it another way, possession may be actual in the sense that the accused has it in their personal possession or constructive in the sense they knowingly have it in another place, room or conveyance, or in the possession of another person for their or another's benefit.[65] Seychelles' jurisprudence suggests that control should be exclusive before one can be found to be in possession of the drug.[66] But more expansive approaches are taken. In Sierra Leone, for example, proof of the finding of a drug within the immediate vicinity of the accused or on an animal, vehicle, vessel or aircraft that the accused was at the time in charge of or that he accompanied it leads to a presumption that the accused is in possession.[67] It would not be advisable for the Criminal Chamber to take such a rigid position in this regard but to consider the evidence as a whole in deciding whether the accused enjoys effective control or not.

The mental element is complicated because it doubles in function as both an element of the actus reus and of the mens rea. While article 28(K)(1)(a) is silent as to mens rea, both the 1961 and 1988 Conventions provide that each of the proscribed acts must be 'committed intentionally'.[68] The key issue is whether the accused must know they

[63] This is a fairly standard approach – see, for example, the Namibian High Court in *S v Paulo and Another* (CC 10/2009) [2010] NAHC 34 (31 May 2010) at [11]; approved on appeal in *S v Paulo and Another* (SA/ 85/ 2011) [2012] NASC 26 (30 November 2012) at [28].

[64] *Livette Assary v Republic* SCA Criminal Appeal 18/10.

[65] See, for example, s4 of the Kenyan Penal Code.

[66] *Darrel Choisy v The Republic* SCA 11/09 cited with approval in *R v Renaud* [2015] SCSC 491.

[67] Under s52 of Sierra Leone's National Drugs Control Act 2008.

[68] Article 36(1) and article 3(1) respectively.

are in possession of a substance or in addition, know that it is prohibited or even further, know the identity and qualities of that substance. Practice differs. Under Seychelles law the court must be satisfied that the accused had knowledge of the drug they possessed.[69] In Namibia the accused need not be fully aware of the name and nature of drug concerned; animus is satisfied by knowledge of the existence of the thing itself and not its qualities.[70] This permits in principle a mistake of fact of a basic kind to negate a charge (for example, the accused thought cannabis seeds were tomato seeds) but not of a more refined kind (the accused thought it was pure cocaine not cocaine adulterated with washing powder). This is an approach the Criminal Chamber would be advised to take. A common question is how much knowledge is required to establish possession of drugs found within some conveyance that the accused owns or controls or in which they were being carried. A similar issue arises regarding possession of drugs found within a dwelling that the accused owns or controls, lives in or was present in. As Botswana's Court of Appeal has pointed out, in a case involving the discovery of 7894 mandrax tablets secreted in compartments in the boot of a car, '[u]sing innocent people to transport habit-forming drugs is something which, no doubt, is not unknown in the underworld of drugs, but a plea by the driver of a vehicle caught in possession of drugs that he was unaware that they were there is also not unknown.'[71] The practice in some AU members tends to depend on the degree of knowledge that the accused has of the presence of the drugs within the conveyance or dwelling, rather than their degree of control they have over the vehicle. Kenyan law insists that a passenger in a vehicle is not in possession of any drugs found therein unless they enter the vehicle with the full knowledge it is being used to convey drugs.[72] In other AU members control is the issue. In Namibian law, possession of the motor vehicle leads to a strong inference that he or she is in possession of its contents, an inference that place an evidential burden on the accused to raise real doubt that they had no reason to suspect that its contents were illicit.[73] One way of avoiding this problem is to adopt a presumption (rebuttable

[69] *Livette Assary v Republic* SCA Criminal Appeal 18/10.

[70] See, for example, the Namibian High Court in *S v Paulo and Another* (CC 10/2009) [2010] NAHC 34 (31 May 2010) at [13].

[71] *Makoni v the State* (Criminal Appeal No 11/94) [1994] BWCA 19 (14 July 1994).

[72] *Gathara v Republic* [2005] 2 KLR 58.

[73] See, for example, the Namibian High Court in *S v Paulo and Another* (CC 10/2009) [2010] NAHC 34 (31 May 2010) at [14] (the case involved cocaine secreted in the spare-wheel).

or irrebuttable) that the accused is aware that they are in possession of the drugs found in their possession, something common in domestic legislation.[74] A more principled way of alleviating some of the burden on the prosecution is to take the view that once detentio is proved the necessary animus is presumed unless the accused can meet an evidential burden that raises some doubt about their awareness thus shifting the burden onto the prosecution to adduce evidence sufficient to establish beyond reasonable doubt that the mistake was not honest.

(b) Drugs (as scheduled under the 1961 and 1971 Conventions).

(c) With a view to production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation. The implication is that 'possession' or 'purchase' must be for the ulterior purpose of use in the chain of supply, not for personal use. Although offences of this type are common among AU members,[75] such an ulterior purpose may be difficult to prove and for this reason the UN's Official Commentary on the 1961 Convention suggests that states provide for a 'legal presumption that any quantity exceeding a specified small amount is intended for distribution.'[76] Presumptions of this kind are common in post-1961 domestic drug legislation but are vulnerable to constitutional challenges for breaching the presumption of innocence.[77] The Statute does not provide for such a presumption, and it would be more principled to allow proof of evidence such as large quantities of drugs found in the accused's possession as well as other circumstantial

[74] See, for example, s11(2) of Botswana's Habit Forming Drugs Act which provides: 'Any person who is upon or in charge of or who accompanies any vehicle, aircraft or animal, in or upon which there is any habit-forming drug or drug mentioned in section 2 or every plant or portion of a plant from which any such drug can be extracted, derived, produced or manufactured shall, until the contrary is proved, be deemed for the purposes of this Act to be the possessor of such drug, plant or portion of a plant.'

[75] See, for example, s23(2) of Liberia's Public Health Law (5 L.C.L. Rev., title 33) which reads: 'Possession with intent to sell. Any person who possesses or has in his control a narcotic drug with intent to sell such drug, except on written prescription of a physician, dentist, or veterinarian or otherwise in accordance with this chapter, shall be guilty of a felony in the first degree.'

[76] *Commentary on the Single Convention on Narcotic Drugs, 1961* (New York, 1973) UN Publication Sales No. E.73.XI.1, 113.

[77] For example, see *S v Bhulwana* [1995] ZACC 11 where the South African Constitutional Court held that a reverse onus provision in the Drugs and Drug Trafficking Act 1992 in terms of which any person found in possession of more than 115 gm of dagga (cannabis) would be presumed to be dealing in dagga, was unconstitutional because it violated the presumption of innocence.

evidence to serve to shift an evidential burden onto the accused that they did not have such an ulterior purpose.

10. PRECURSOR OFFENCE

The elements of the 'precursor' offence in article 28(K)(1)(d) are as follows:

(a) The perpetrator manufactured, transported or distributed. 'Manufacture' of precursors involves all the processes by which these substances may be obtained including refinement and transformation, 'transport' means the conveying of precursors from one place to another by any mode or medium, and 'distribution' the movement of the substance through the chain of supply from producer to consumer. The practice in the AU in this regard is patchy. South Africa, for example, only penalises the manufacture or supply of a scheduled precursor substance[78] while regulating the import and export of these substances in the normal way.[79]
(b) Precursors (as defined in article 12 of the 1988 Drug Trafficking Convention and Tabled in Tables I or II).
(c) Intentionally. While article 28(K)(1)(a) is silent as to mens rea, both the 1961 and 1988 Conventions from which it is derived provide that each of the proscribed acts must be 'committed intentionally'.[80]
(d) Knowing that they are to be used in or for the illicit production or manufacture of drugs. These offences must be carried out with specific knowledge of the illicit purpose to which these things are to be put in order to avoid extending their scope to innocent suppliers. Establishing knowledge – to know something as a fact – may be difficult and some States have lowered this threshold to suspicion.[81]

11. PARTY LIABILITY AND INCHOATE OFFENCES

Article 28N expands the modes of responsibility for these offences to 'any person who':

i. Incites, instigates, organises, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute;

[78] s3 of the Drugs and Drug Trafficking Act no 140 of 1992.
[79] Under s6 of the International Trade Administration Act no 71 of 2002.
[80] Article 36(1) and article 3(1) respectively.
[81] s3 of South Africa's Drugs and Drug Trafficking Act no 140 of 1992.

ii. Aids or abets the commission of any of the offences set forth in the present Statute;
iii. Is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences set forth in the present Statute;
iv. Attempts to commit any of the offences set forth in the present Statute.

Article 28N covers all of the inchoate and participatory actions provided for in the 1961 Convention and in the 1988 Convention and adds some of its own. The 1961 Convention obliges parties to criminalise 'participation in, conspiracy to commit and attempts to commit' its offences as well as, 'preparatory acts and financial operations' in connection with its offences (although this obligation is subject to any 'constitutional limitations' of the States parties, which indicates that some States parties would not be able to take it up through constitutional incompatibility).[82] The 1988 Convention obliges parties to criminalise the 'organization, management and financing' of the supply offences but without constitutional limitation.[83] Its obligations to criminalise 'public' incitement (through the media),[84] conspiracy and inchoate forms of article 3(1) offences[85] are, however, also subject to the constitutional limitation, as is criminalisation of 'participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any' article 3(1) offence.[86] One difficulty may be that inchoate offences such as conspiracy (an agreement to commit an offence) are common in common law AU members[87] but not in civil law AU members where it may be unknown. It is unclear what the implication of this is for domestic jurisdictions, in civil law states, which would have the first responsibility to prosecute the crimes under the complementarity principle and the failure of which is required before the Criminal Chamber will have jurisdiction over the matter.

12. PUNISHMENT FOR DRUG TRAFFICKING OFFENCES

The amended Statute provides no guidance for the punishment of the offences defined in article 28K. The penal provisions in the drug conventions

[82] Article 36(2)(a)(ii) (inserted by the 1972 Protocol).
[83] Article 3(1)(a)(v).
[84] 1988 *Commentary*, 74.
[85] Article 3(1)(c)(iii) and (iv).
[86] Article 3(1)(c)(iv).
[87] See for example, section 28(a) read with section 5, section 2 and section 26 (1) (a) of the Seychelles Misuse of Drugs Act. The elements are discussed in *Celestine v R* [2015] SCCA 33.

suggest proportionality is an overriding concern although the 1988 Convention emphasises that punishment should be at the severe end of the scale. Article 36(1) of the 1961 Convention provides (i) that all the forms of drug-related conduct enumerated in article 36(1) shall be 'punishable offences' and (ii) 'serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.' The 1971 Convention also adopts this dual punishment regime. Article 3(4)(a) of the 1988 Convention introduces a stronger normative element which can be interpreted as pointing to more severe penalties. It requires that parties must ensure that article 3(1) offences are punished by penalties that consider their 'grave nature', using punishments 'such as' 'imprisonment or other forms of deprivation of liberty', 'pecuniary sanctions' and 'confiscation'. The 1988 Convention also provides a non-exhaustive list of aggravating factors,[88] which may characterise an article 3 (1) offence as 'particularly serious', and which parties must permit their courts to take into account. These include the involvement of an organised criminal group in the offence, the involvement of the offender in other international organised criminal activities, the involvement of the offender in other illegal activities facilitated by the offence, the use of violence or arms by the offender, the holding of public office by the offender, use of minors, commission of the offence in a prison, educational facility, social service facility, and previous convictions. The punitive tendency is sustained at a regional level. For example, article 4(2)(b) of the SADC Protocol provides that domestic legislation in SADC States shall provide for 'maximum custodial sentencing which will serve both as punishment and deterrent and would include provision for rehabilitation.'

Statutory schemes for the punishment of these offences among AU members vary widely, but imprisonment is common and potential punishments heavy. Some employ statutory minima,[89] some statutory maxima,[90] some a range between a minimum and a maximum,[91] and in rare instances penalties are stipulated.[92] The tariff range frequently extends to heavy

[88] Article 3(5).

[89] For example, import and export is liable in terms of s1(1) of Ghana's Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990 'to imprisonment for a term not less than ten years'.

[90] For example, s9 of Zambia's Narcotic Drugs and Psychotropic Substances Act 1993 sets a maximum penalty of ten years imprisonment for cultivation;.

[91] Article 17 of Algeria's 2005 drugs law provides for a range of punishments for supply offences from 10 to 20 years and 5 million to 50 million dinars; s29(1) of the Seychelles Misuse of Drugs Act employs a *minimum sentence of 16 years for a first offence and maximum of 50 years and a fine of SR 500,000 if convicted for a Class B drug*

[92] For example, for Kenya's cultivation offence in s6 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (cap 245) the punishment is stipulated as a quarter of a million

punishments including life.[93] The imposition of fines may be in addition[94] or in the alternative to imprisonment but they are often relative to the value of local currencies and standard of living in local economies and do not provide an Africa-wide frame of reference.[95] Some AU members apply the death penalty for drug trafficking.[96] Although the drug conventions are silent in this regard, human rights bodies have criticised executions for drug offences as violations of international law[97] and the UNODC Executive Director has noted that the weight of opinion is that these offences do not reach the threshold of most serious crimes.[98] Employment of aggravating factors is common and they may include previous convictions,[99] holding public office, membership of a criminal organisation, resort to the use of violence or weapons, involvement of health personnel[100] or even membership of a group organised extraterritorially for the purpose of committing the crime.[101]

Practice in domestic courts differs widely. Considering factors like the volume of the substance involved (on the theory that greater quantity means

shillings or three times the market value of the prohibited planet or a maximum of twenty years or both fine and imprisonment. It has been held in Kenya that the court's do not enjoy a discretion in imposing the maximum sentence – see, *Kimani v Republic*, Criminal Appeal No. 65 of 2012, [2014] eKLR, para 8, 22, following *Kingsley Chukwu -v Republic*, Criminal Appeal No. 259 of 2007.

93 See, for example, s4(a) of Kenya's Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (cap 245).

94 See, for example, s33 of Mauritius's Dangerous Drugs Act no 41 of 2000, which provides for a maximum penalty of a fine of 500,000 rupees and imprisonment not exceeding 10 years for the precursor offence.

95 See, for example, the minimum penalty of 25,000 kwacha (just under 5 USD) for the cultivation offence in s9 of Zambia's Narcotic Drugs and Psychotropic Substances Act 1993.

96 Egypt's Narcotics Law No. 182 of 1960, art 40. See, for example, David Williams and Vanessa Allen, 'Egypt Sentences UK Pensioner to death for drug smuggling: Oxford graduate, 74, guilty over £3 million cannabis haul', *Mailonline*, 3 June 2013, http://www.dailymail.co.uk/news/article-2335211/Egypt-sentences-UK-pensioner-Charles-Raymond-Ferndale-death-drug-smuggling.html. Most death sentences are in practice commuted to life.

97 *Concluding Observations of the United Nations Human Rights Committee*, UN Doc CCPR/CO/84/THA, 8 July 2005, para 14, and *Report of the United Nations Human Rights Committee*, UN Doc A/50/40, 3 October 1995, para 449.

98 UNODC, *Drug Control, Crime Prevention and Criminal Justice: A Human Rights Perspective, Note by the Executive Director*, UN Doc E/CN.7/2010/CRP.6*–E/CN.15/2010/CRP.1, 3 March 2010, paras 25 and 26.

99 Under s 8(2) of Ghana's Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990 two previous trafficking convictions mandates life imprisonment.

100 See, for example, s105 of Cameroon's Law on Narcotics 1997, which provides that penalties are doubled (from a maximum of 20 years for supply in terms of s51).

101 s156(2) of the Criminal Law Codification and Reform Act, Cap 9:23, Zimbabwe.

greater profit deserves greater punishment[102]) and the harmful potential of the particular class of drugs (revealed by its scheduling), supply is usually punished by periods of imprisonment, or fines, or combinations of the two. Courts have, however, emphasised that in drugs cases volume and type of drug are not the only factors to be considered and that other individuating factors must be taken into account when exercising the inherent sentencing discretion of the courts.[103] Punishment of the organisers of the traffic is clearly the target, something colourfully illustrated in the judgment of the Swaziland Supreme Court in *R v Iddi and Others*:[104]

> [35] The above dictum is authority for the proposition that the big kahunas who lead the networks described in (d) above should receive substantial custodial sentences. It is a notorious fact that these faceless bosses who head, control and direct wholesale distribution networks are rarely, if ever caught and brought to book by prosecuting authorities. The small fry, such as these three appellants, are the expendable couriers and mules, defined in the Concise Oxford Dictionary as a courier for illegal drugs, who knowingly, wittingly and willingly, undertake to transport illegal drugs in a number of ingenious ways across international frontiers.

In the final analysis, however, the Criminal Chamber enjoys a complete discretion to make the punishment fit the crime. It would be practical to support the articulation in a subordinate instrument of punishment maxima and aggravating factors, together with detailed guidance emphasising the importance of individuating factors and the overall goal of suppression of the organisation of the traffic. It should be noted, however, that many of these aggravating factors and punishments are apt for the punishment of individuals, but inappropriate to the punishment of corporate entities which is provided for in the Protocol under article 46C. Of course the imposition of penalties on corporate officers who engage in these offences is possible; the more taxing task will be develop a jurisprudence which makes it possible to impose

[102] J. Fleetwood, 'Five Kilos: Penalties and Practise in the International Cocaine Trade' 51 *British Journal of Criminology* (2011), 375, 380. See, for example, the statutory maximum of ten years which was applied at trial for the possession and trafficking of drugs in *Okrasi et al. v Republic of Liberia* [2009] LRSC 34 (23 July 2009) where the accused were arrested in Liberian territorial waters by the French Navy while crewing the MV Blue Atlantic on which 2.4 tons of cocaine was discovered.

[103] See, for example, the discussion in the Malawian High Court in *S v Patel* (Criminal Appeal No. 81 of 2007, [2007] MWHC 40.

[104] [2010] SZSC 37 (27 May 2010).

appropriate financial penalties on these entities themselves or to be more adventurous and order the structural reform of these entities.

Finally, as part of the penalty process the Criminal Chamber will have to exercise the powers of confiscation provided under article 43A(5). Supporting provision will have to be made in subordinate instruments for effective measures for ordering AU members to trace, freeze, and seize the proceeds of crime and to request non-African States to do so.

13. TREATMENT AND REHABILITATION OF DRUG TRAFFICKERS WHO ARE THEMSELVES USERS

On occasion alleged traffickers will also be users and will require treatment and rehabilitation during trial and on disposition. While the amended Statute provides no guidance for the treatment of suspects, accused persons and convicts who are themselves drug dependant, the drug conventions provide guidance in this regard. In terms of article 36(1)(b) of the 1961 Convention (inserted by article 14 of the 1972 Protocol) parties have the discretion to implement measures such as treatment, education, and rehabilitation as alternatives to conviction and punishment or in addition to conviction and punishment, no matter how serious the offence, when the offender is an abuser. Article 3(4)(c) of the 1988 Convention allows parties 'in appropriate cases of a minor nature' to provide as an alternative to punishment measures such as treatment and aftercare for drug users engaged in article 3(1) drug supply offences. Article 4(2)(b) of the SADC Protocol requires provision for rehabilitation. AU members have made provision at a legislative level for these services.[105] These provisions suggest that the Criminal Chamber should ensure that it is in a position to provide accused persons and convicts through the agency of AU members a variety of therapeutic programmes to enable the amelioration of their dependence and their 'social reintegration'.[106] This should be either in addition to punishment or as an alternative (in those rare cases where relatively minor offenders such as drug couriers who are also users are before the court because they have been implicated in a major case).

14. PRACTICAL CHALLENGES IN PROSECUTING DRUG TRAFFICKING OFFENCES

Positive complementarity with AU members regarding the drug trafficking offences is likely to be hampered by the uneven development of anti-drug

[105] See chapter 2 of Algeria's Drug Law of 2005.
[106] 1988 *Commentary*, 88–9.

trafficking legislation across the continent. Many African states retained colonial era cannabis laws at independence because of the low incidence of trafficking of other drugs. While some states have updated their laws others have not.

Operationalizing these offences will also face particular challenges. Regarding formal legal assistance, Article 46 L (1) of the Protocol provides for a general duty of States Parties to co-operate with the Court in the investigation of the crimes defined by the Protocol which thus includes drug trafficking and cultivation. Article 46L (2) provides for a standard list of specific forms of cooperation that can be sought from States Parties including identification of suspects and production of evidence. Importantly it includes an obligation to provide 'any other type of assistance' not prohibited by the law of the requested State. The mini-MLAT in article 7 of the 1988 Drug Trafficking Convention spells out in detail conditions for refusal, and the procedure to be adopted not mentioned in article 46L(2). In practice this has been overtaken at a multilateral level regarding cooperation against drug trafficking by the more complex provisions for assistance in article 18 of the UN Convention against Transnational Organised Crime.[107] At a more practical level, the Criminal Chamber's investigative and enforcement capacity will depend in part on the specialist drug units of AU member state police forces such as the National Drugs Enforcement Agency (NDEA) in the Seychelles. The Protocol does not provide for the kinds of law enforcement cooperation schemes now common in the large crime control conventions. They provide for police cooperation in the form for example, of direct exchange of information. Article 9(1)(a) of the 1988 Drug Trafficking Convention, for example, obliges parties to 'establish channels of communication between competent agencies' regarding article 3(1) drug trafficking offences. These systems are heavily conditioned by the interest of States. Their success is aligned to the enthusiasm (or lack thereof) regarding the particular transnational crime. The development of trust between different police forces is the other key condition to their success. In order to enjoy success the officials of the African court are going to have to insert themselves into this 'transnational subculture of policing'[108] while negotiating effectively with the interests of the large powers such as the United States that police drugs

[107] The United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209, in force 29 September 2003.

[108] See Ben Bowling and James Sheptycki, 'Global Policing and Transnational Rule with Law' (2015) 6(1) *Transnational Legal Theory* 141, 152.

globally. Moreover, national police forces in African States have problems of their own: inadequate resourcing, training, weak law enforcement structures, shortage of detection and forensic capabilities, and corruption have, for example, all been identified by the ECOWAS Regional Action Plan as problems.[109] Evidence in some cases implicates officials in drug trafficking in certain African countries and prosecutors before the Criminal Chamber may find themselves working in a hostile environment where cooperation from local officials is not forthcoming.[110] The Criminal Chamber will also have to rely on the legality within the domestic law of the AU members of specialist policing tactics like controlled delivery and undercover operations, surveillance, joint investigation teams, all of which are provided for in the UN Drug Conventions[111] and in some AU members.[112] AU members have on occasion had difficulties in engaging in international cooperation in drug trafficking cases where much of the enforcement action has been undertaken by foreign law enforcement,[113] but they are becoming more adept at transnational policing of drug trafficking and the Criminal Chamber should be able to tap that expertise.[114] Protection of human rights during enforcement must also be guaranteed. The UN's Commission on Narcotic Drugs notes that enforcement of drug offences must respect:

[109] Thematic Areas 1–3.

[110] See for example, Joseph Appiahene-Gyfani, 'Drugs and Drug Control in Ghana' in Anita Kalunta-Crumpton (ed.), *Pan African Issues in Drug Control* (Farnham: Ashgate, 2015), p. 37 at pp. 50–2 who cites various examples implicating officials in major drug trafficking operations in Ghana. See also Peter Gastrow, *Termites at Work: Transnational Organized Crime and State Erosion in Kenya* (2011), http://www.ipinst.org/images/pdfs/ipi_epub-kenya-toc.pdf, p. 3 who alleges Kenyan police collusion with foreign drug traffickers.

[111] See Leroy, 'Drug Trafficking, 238–9; controlled delivery is provided for specifically in article 4 (2)(i) of the SADC Protocol.

[112] See, for example, s34 of Sierrra Leone's National Drugs Control Act 2008.

[113] In *Okrasi et al v Republic of Liberia* [2009] LRSC 34 (23 July 2009) where the accused were arrested in Liberian territorial waters by the French Navy while crewing the MV Blue Atlantic on which 2.4 tons of cocaine was discovered. The conviction was reversed on appeal by the Supreme Court and the case sent for retrial because none of the prosecutions witnesses had been eyewitnesses to the discovery of the cocaine on board the Blue Atlantic but has simply recounted the version of events relayed to them by the French Naval officers, which account was dismissed as hearsay as the French officers were not present to give the evidence in court (pp. 26–30).

[114] See for example *JN alias GU*, UNODC Case No, NGAx003, Nigeria, UNODC case law database http://www.unodc.org/cld/case-law-doc/drugcrimetype/nga/2009/jn_alias_gu.html? and *Criminal Case No. 1365 of 2004*, UNODC No.Kenx002, Kenya, UNODC case law database http://www.unodc.org/cld/case-law-doc/drugcrimetype/ken/criminal_case_no_1365_of_2004.html?

> a range of rights, including the right to health, to the protection of the child, to private and family life, to non-discrimination, to the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, and the right not to be subjected to arbitrary arrest or detention.[115]

Many of these challenges could be addressed by provision at the AU level for a law enforcement cooperation scheme such as that envisaged in article 6 of the SADC Protocol and a more detailed scheme of legal assistance using the provisions in the UN Convention against Transnational Organised Crime as a guide, because they are not specific to any particular offence.

15. CHANGES IN GLOBAL DRUG CONTROL

The final challenge for the Criminal Chamber is adapting to changes in international drug control itself. Drug laws have been subject to constitutional challenges at a national level although unsuccessfully,[116] and there is growing pressure to reform the UN Drug Conventions,[117] although it is uncertain how much support for reform there is in Africa itself. If, however, a substance was rescheduled or de-scheduled that would not require any further amendment of the amended Statute as the Criminal Chamber's jurisdiction expands and contracts in material terms depending on what substances are scheduled in the existing schedules under the drug conventions.

16. CONCLUSION

The inclusion of drug trafficking and drug cultivation within the jurisdiction of the African court's criminal chamber is an entirely novel development; these offences are not within the jurisdiction of any other international tribunal. This development is designed to respond to the dramatic increase in drug trafficking in parts of the continent, which presents a serious challenge for the AU and its member states. Developing the relationship between the court's jurisdiction over this crime and the international drug control system based on the UN drug conventions will lead the African court into uncharted territory. The crimes in article 28(1) are not, however, conceptually

[115] CND, *Drug Control, Crime Prevention and Criminal Justice: A Human Rights Perspective*, 3 March 2010, UN Doc E/CN.7/2010/CRP.6–E/CN.15/2010/CRP.1, 2010, 8.
[116] *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002).
[117] See Leroy, 'Drug Trafficking', 244–6.

challenging. Their elements are well known and understood in national jurisdictions throughout Africa. The Court faces two major difficulties: first, to ensure that only serious drug trafficking and serious drug cultivation offences are taken up into the jurisdiction of the court, and second, to articulate effectively with the existing specialist law enforcement procedures and institutions directed towards drug law enforcement. The challenge will be not to be overcome by trivial offences while at the same time being ineffective against the truly serious offences.

14

The Crime of Piracy

DOUGLAS GUILFOYLE AND ROB MCLAUGHLIN

1. INTRODUCTION

Article 28A(5) of the Protocol includes the crime of piracy within the jurisdiction of the Court. Piracy is defined in Article 28F in the following terms:

> Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private boat, ship or a private aircraft, and directed:
> i. on the high seas, against another boat, ship or aircraft, or against persons or property on board such boat, ship or aircraft;
> ii. against a boat, ship, aircraft, persons or property in a place outside the jurisdiction of any State
>
> (b) any act of voluntary participation in the operation of a boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

This definition is drawn from the Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS);[1] indeed, the provisions are identical save for the addition of the word 'boat' to Article 28F. As discussed below,

This chapter draws on previously published work, in particular Douglas Guilfoyle, 'Article 101' and 'Article 103' in Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart, 2017). The chapter also draws on research completed during drafting of the United Nations Office on Drugs and Crime's *Maritime Law Enforcement Handbook* (2017), including detailed written reviews and comments from, inter alia, Justice Anthony Fernando, Wayne Raabe, Brian Wilson, and Patricia Jimenez Kwast.

[1] United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3 (UNCLOS).

Article 101 UNCLOS is often thought of less as a crime creating provision and more as a jurisdictional one providing broad authority to criminalise certain conduct, the detail of which must necessarily be filled in by national law. This chapter will address first the legal history underlying this drafting, then the elements of the offence set out and, finally, we consider some of the difficulties in interpreting and applying the present provision as drafted, and how they might be resolved.

2. LEGAL HISTORY

Contrary to popular belief, the current international law applicable to piracy is not of ancient origin. Certainly, references to piracy in classical Graeco-Roman writings date to at least 400 BC. It was thus said of King Minos of Crete: 'It is likely he cleared the sea of piracy as far as he was able, to improve his revenues.'[2] Famous historical episodes of piracy include the Barbary Corsairs and piracy in the Caribbean in the 16th to early 19th centuries. However, the term 'piracy' only acquired some settled legal meaning relatively recently. Historically, the word was often used simply to denounce the maritime violence of one's political enemies, whether lawful or not.[3]

The law of piracy as stated in UNCLOS is the result of various twentieth century attempts to codify aspects of existing international law. Accurately defining piracy for the purposes of public international law through such an exercise proved an exceptionally difficult task due to diverse and contradictory historical source material. One set of codifiers were thus moved to state that, 'An investigator finds that instead of a single relatively simple problem [defining piracy], there are a series of difficult problems which have occasioned [at different times] a great diversity of professional opinion.'[4] The complete suite of articles dealing with piracy in UNCLOS (Articles 100–107; and Article 110) follow very closely the drafting of the equivalent provisions of the 1958 Geneva Convention on the High Seas (Articles 14–22).[5] Indeed, the High Seas

[2] P. de Souza, *Piracy in the Graeco-Roman World* (Cambridge: Cambridge University Press, 2002), 15 (quoting Thucydides 1.4); see further T. Paige, 'Piracy and Universal Jurisdiction' 12 *Macquarie Law Journal* (2013) 131.

[3] Harvard Research in International Law, 'Draft Convention on Piracy', 26 *American Journal of International Law (AJIL)* Supplement (1932) 739–885, at 796, 806–7 (Harvard Draft Piracy Convention).

[4] Harvard Draft Piracy Convention, 764.

[5] Convention on the High Seas 1958, 450 UNTS 11.

Convention provisions were adopted during the UNCLOS negotiations with little dissent or debate.[6] The drafting history is well-summarised by Shearer:

> [P]iracy received its first comprehensive definition … in Art. 15 Geneva Convention on the High Seas of 1958 … That definition, and the ancillary provisions relating to piracy in Arts 14 and 16–21, were based on the preparatory work of the United Nations International Law Commission [in 1950–1956] … which, in turn, drew on the Draft Convention on Piracy prepared by the Harvard Research in International Law published in 1932.[7]

Indeed, the Harvard Research further drew on work done by Ambassador Matsuda in 1926 for the League of Nations Committee of Experts project on codification of international law.[8] What is generally not appreciated is that the drafting proposals of 1926, 1932 and 1950–6, which culminated in the High Seas Convention provisions, were not, realistically, codification efforts. This is for the simple reason that the source materials on which they had to rely (national legislation and court decisions, State practice, the writings of jurists) were so contradictory as to make codification impossible.[9] Matsuda provided only very limited explanation of his drafting choices in 1926 and appears to have approached the question without detailed historical research. The subsequent work of the Harvard Researchers has been accurately described as 'frankly non-codifying but *de lege ferenda*' and the later (and decisively influential) work of the International Law Commission as 'legislative'.[10] The point is further made by reference to the numerous historical controversies over the definition of the offence of piracy itself.

These controversies included: the geographical scope of the offence; whether politically motivated acts could be piracy; and whether States could commit piracy. These questions are discussed below in relation to the relevant elements of the offence. In general terms, early definitions of piracy stressed that it was simply robbery on the high seas without letters of marque or other

[6] References to piracy in the *travaux préparatoires* are sparse. See, uniquely, Cambodia's suggestion that the piracy provisions of the Geneva Convention 1958 were a 'dead letter' and did not need inclusion: *UNCLOS III, 38th Plenary Meeting*, UN Doc. A/CONF.62/SR.38 (1974), at 53. The word is most commonly used to describe illegal or unregulated resource exploitation, see e.g. *UNCLOS III, 35th Plenary Meeting*, UN Doc. A/CONF.62/SR.35, 1974, at 42; *UNCLOS III, 31st Plenary Meeting*, UN Doc. A/CONF.62/C.2/SR.31,1974, at 61; *UNCLOS III, 45th Plenary Meeting*, UN Doc. A/CONF.62/C.2/SR.45 1974, at 11.

[7] I. Shearer, 'Piracy', Max Planck Encyclopedia of Public International Law, available online at: http://opil.ouplaw.com/home/EPIL, at 12.

[8] League of Nations Committee of Experts for the Progressive Codification of International Law, 'Questionnaire No. 6: Piracy' 20 *AJIL Special Supplement* (1926) 222–9, at 228–9.

[9] A. Rubin, *The Law of Piracy* (2nd ed: Transnational Publishers, 1998), at 331–372.

[10] Ibid., at 353.

State sanction.[11] As Lauterpacht put it, '[P]iracy in its original and strict meaning is every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (*animo furandi*).'[12] Lauterpacht went on to observe that this approach was less than entirely accurate as 'cases … not covered by this narrow definition' were considered piratical, including 'unauthorised acts of violence, such as murder … committed on the open sea without intent to plunder'.[13]

Nonetheless, following this 'codification' work and its widespread acceptance, including the piracy provisions' re-enactment in successive treaties, the piracy provisions of UNCLOS are now taken to reflect customary international law.[14] That said, the UNCLOS provisions are not necessarily exhaustive of custom in that Article 105 refers only to the adjudicative jurisdiction of the courts of the flag State of a warship that captures pirates. However, it is generally accepted that customary international law grants universal jurisdiction to all States to prosecute piracy suspects, irrespective of whether a warship of their nationality captured them, and that UNCLOS has not abrogated this power.[15] This is of limited relevance in the present context insofar as Article 46E bis of the Protocol restricts the jurisdiction of the Court to a series of bases (such as flag State or active or passive nationality jurisdiction) not including universal jurisdiction. This, however, poses no problem in itself for the Court. The jurisdiction it exercises is one delegated to it by member States. Those member States themselves may, without violating the general principle, choose to exercise universal jurisdiction over piracy on a limited basis or subject its exercise to preconditions. Thus, for example, many national laws limit the actual exercise of jurisdiction over piracy to cases affecting the national interest in some manner. Equally, there is no legal obstacle to conferring on an international court jurisdiction over piracy which falls short of full universal jurisdiction even if theoretically such a jurisdiction could be delegated to it by its member States.

[11] League of Nations Committee of Experts, 'Piracy', at 222 et seq.

[12] H. Lauterpacht, *Oppenheim's International Law* (5th ed, Longmans, 1937), vol. I, 486.

[13] Ibid.

[14] D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), at 31–2; Shearer, 'Piracy', at 3, 13; contra Rubin, *The Law of Piracy*, at 331–72. Note also the preamble to the High Seas Convention (stating that the parties drafted the Convention '[d]esiring to codify the rules of international law relating to the high seas').

[15] R. Geiß and A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford: Oxford University Press, 2011), 149–51.

In the period 2008–2013 piracy off the coast of Somalia was a particular cause of concern, and was (and continues to be) treated in numerous United Nations Security Council resolutions.[16] These invariably affirmed that the relevant law is that which is set out in UNCLOS,[17] typically stating that the Security Council affirms 'that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 . . ., sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities.'[18] This appears an unequivocal assertion that the UNCLOS definition now reflects customary law.

3. ELEMENTS OF THE PRIMARY OFFENCE

The difficulty posed by incorporating the UNCLOS definition of piracy into the statute of a criminal court is that UNCLOS defines a *jurisdiction* over piracy. It does not, necessarily, define an *offence*, or at least not with the specificity many modern legal systems would require. To take but two examples: the concept of 'illegal act of violence' is, at best, question begging (illegal under what system of law?); and the idea of 'intentionally facilitating' is left undefined and is not necessarily known to all legal systems. To some extent, this is to be expected. UNCLOS as a widely ratified instrument intended for universal adoption could not possibly spell out in detail a crime capable of direct translation into every conceivable national legal system. At best it could set the parameters within which States could validly define and punish acts of piracy. The ways in which States incorporate the offence of piracy into their national law will vary widely. There is no single right way to conduct the exercise, and it must always be done within the broader context of

[16] SC Res. 1814, 15 May 2008; SC Res. 1816, 2 June 2008; SC Res. 1838, 7 October 2008; SC Res. 1846, 2 December 2008; SC Res. 1851, 16 December 2008; SC Res. 1897, 30 November 2009; SC Res. 1918, 27 April 2010; SC Res. 1950, 23 November 2010; SC Res. 1976, 11 April 2011; SC Res 2020, 22 November 2011; SC Res. 2077, 21 November 2012; SC Res. 2125, 18 November 2013; SC Res. 2184, 12 November 2014; SC Res. 2446, 10 November 2015; SC Res. 2316, 9 November 2016; SC Res. 2383, 7 November 2017; SC Res. 2442, 6 November 2018; and *Statement by the President of the Security Council*, UN Doc. S/PRST/2010/16, 2010. On the decline of Somali piracy see: *Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia*, UN Doc. S/2015/776, 2015, at 3.

[17] However, the Security Council has noted that acts constituting piracy could also be covered by offences under Art. 3 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, 1678 UNTS 201. See e.g.: SC Res. 2020, 22 November 2011, § 13 of preamble; Geiß and Petrig, *Piracy and Armed Robbery at Sea*, supra note 14, at 153–65. Somali piracy, based on ransoming hostages, may also violate Art. 1 International Convention against the Taking of Hostages 1979, 1316 UNTS 205.

[18] SC Res. 2316, 9 November 2016, § 5 of preamble.

national criminal law in order to be coherent with other aspects of that law. In most cases, the UNCLOS provisions on piracy will be incorporated into national criminal law by passing laws implementing Articles 100 to 107 of UNCLOS with necessary modifications to suit the relevant national system. Nonetheless, a number of national legal systems have adopted national laws that use the UNCLOS definition with only minimal amendments.[19] This suggests the theoretical problems in applying the UNCLOS text directly in concrete criminal cases may be somewhat overstated. The 'primary' offence described in Article 28F is contained in sub-paragraph (a). This offence has a series of elements which must be met in order for an offence of piracy to be made out. The offence of piracy thus requires:

(1) any illegal act of violence, detention, or depredation;
(2) for private ends;
(3) from a private ship against another ship (which could be a non-private ship such as a warship); and
(4) occurring on the high seas or in a place outside the jurisdiction of any State.

These are addressed in turn below.

A. *An Illegal Act of Violence, Detention or Depredation*

First, piracy requires an 'illegal' act or acts 'of violence or detention, or any act of depredation' (the latter usually being defined as plunder, pillage, robbery or damage).[20] Despite the reference to 'acts', a single prohibited act can constitute piracy.[21] Thus piracy may be made out by proving an act of: violence, detention, or robbery. Each of these potentially piratical acts should be construed separately and not cumulatively. One should note that the word 'violence' is wide enough to cover any illegal act of force and thus it does not have to be of a particular severity or result in a particular level of physical injury or damage. Further, 'detention' operates as an autonomous concept and requires no violence per se. Thus, in a situation where the crew do not resist and there is no physical violence by the pirates, but the crew is nevertheless 'detained' by being locked in a compartment, this first element would be made out. An act of either violence or detention alone is sufficient: no robbery need be intended. Conversely, piracy may be committed through robbery

[19] E.g. s 369(1), Merchant Shipping Act 2009 (Kenya); s 51 Crimes Act 1914 (Australia).
[20] E.g. *Oxford English Dictionary* (2nd ed, Oxford: Oxford University Press, 1989).
[21] Geiß and Petrig, *Piracy and Armed Robbery at Sea*, supra note 14, at 60.

without violence or detention where, for example, pirates come aboard a vessel undetected in order to steal loose valuables.

Some ambiguity was introduced when the qualification 'illegal' was inserted into the earlier wording of the Harvard Draft Convention by the International Law Commission.[22] The best view is either that this serves to emphasise that the act must 'be dissociated from a lawful authority' or is ordinarily left to the national law of the prosecuting State.[23] For a prosecution before an international court, the former consideration is obviously the more important. It opens the important possibility that where an act of violence, detention, or depredation is for some reason lawful in accordance with the flag State law applicable on either the alleged pirate vessel, or the alleged victim vessel, then it cannot be defined as piratical. Consider the following example. Imagine two yachts meet at sea and a person from one (yacht A) is invited aboard the other (yacht B) by its master. Assume then that the master of yacht B, threatens the person invited aboard from yacht A with a knife. If the person from yacht A reacts in self-defence and breaks the arm of the master of yacht B, this is not an illegal act of violence because it was an act carried out in lawful self-defence. The example described would thus not constitute piracy.

B. *Private Ends*

Second, the relevant illegal acts must be 'committed for private ends by the crew or the passengers of a private ship or a private aircraft'. The key concepts here are threefold. The first two relate to the 'two ship' element of the offence discussed below. These are: (a) that piracy must be committed from a *private* vessel (UNCLOS by definition excludes the possibility of warships or government vessels committing piracy *unless their crew have mutinied*);[24] and (b) that piracy involves the crew or passengers of that private vessel committing the piratical acts against a second victim vessel or persons or property aboard (as discussed further below). Thirdly, and contentiously, piratical acts must be 'committed for private ends'. There are two views as to the meaning of this phrase. Some authors have maintained that this requirement excludes all acts committed with political motives from being piratical; others have argued that

[22] M. McDougal and W. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, 1962), at 811; Rubin, *The Law of Piracy*, at 366–7.

[23] M. Nordquist, S. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. III (Martinus Nijhoff, 1995), at 201.

[24] Art. 102, UNCLOS. See further D. Guilfoyle, 'Article 102' in Proelß (ed), *The United Nations Convention on the Law of the Sea*, (Oxford: Hart Publishing, 2017) at 744–746.

all acts of violence that lack state sanction are acts undertaken for private ends.[25] The question then is whether the determining factor in judging 'private ends' should be the subjective motivation of the pirate (contrasting the idea of 'private ends' with 'political purposes') or whether their acts are objectively sanctioned by a State (contrasting 'private ends' with 'public authority'). The question is returned to below (in section 6) in relation to challenges in the interpretation and application of the crime, but it is worth noting that in the few cases where national courts have been required to rule on the issue in criminal cases they have consistently upheld the proposition that unlawful violence on the high seas cannot be justified or excused from being piracy on the basis that it was committed with a political motive.[26] This approach would seem sensible. It is not apparent why the law of piracy should include, in effect, a defence that would excuse unlawful and dangerous acts on the high seas because they advance a political agenda. However, we should nonetheless note that some incidents of violence at sea which were dealt with only at the diplomatic level - such as the *Santa Maria* in 1961– were assessed and analysed at the time by reference to a possible exception for actions in the course of civil war 'insurgency' (discussed further in Section 6).[27]

C. *The Two Ship Rule*

Third, the act of piracy must be directed either 'against another ship or aircraft, or against persons or property on board such ship or aircraft' (in relation to events on the high seas) or 'against a ship, aircraft, persons or property' (in relation to events occurring in 'a place outside the jurisdiction of any State'). This is frequently described as the 'two ship rule': generally piracy requires that

[25] Geiß and Petrig, *Piracy and Armed Robbery at Sea*, supra note 14, at 61; see further Y. Tanaka, *The International Law of the Sea* (2nd ed, Cambridge: Cambridge University Press, 2016), at 380–1.

[26] Hof van Cassatie van België/Cour de cassation de Belgique (Court of Cassation of Belgium), *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, 19 December 1986 (1988) 77 ILR 537, 540; and *Institute of Cetacean Research v. Sea Shepherd Conservation Society* (725 F 3d 940 (9th Cir. 2013)), 944. Civil proceedings in some older insurance law cases have occasionally held that motives are the distinguishing factor in assessing 'private ends'. See: *Republic of Bolivia v. Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 and *Banque Monetaca and Carystuki v. Motor Union Insurance Co Limited* (1923) 14 Lloyd's Law Reports 48 as discussed in Peter MacDonald Eggers, 'What is a Pirate?: A Common Law Answer to an Age-Old Question' in Douglas Guilfoyle (ed), *Modern Piracy: Legal Challenges and Responses* (Cheltenham 2013), at 263–5. These cases did not however involve determining the criminal liability of individuals and should be treated with caution.

[27] On the *Santa Maria* (which was not piracy as it did not meet the two ship rule), see inter alia, the debate in the UK House of Commons in HC Deb 24 January 1961 vol. 633 cc32–5.

there be two vessels involved – the pirate vessel and a victim vessel. The alternative, regarding acts committed *from a private vessel* against persons or property outside the jurisdiction of any State, is considered below (at 3.D).

Situations involving illegal or violent conduct on the high seas in which there is only one ship involved – for example, where passengers or crew within a vessel mutiny and illegally seize control of that vessel – are not considered piracy under UNCLOS or, indeed, Article 28F of the Protocol. Such conduct is nevertheless likely to be an offence under some other law, for example, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).[28] Under the SUA Convention, for example, state parties agree that '[a]ny person commits an offence if that person unlawfully and intentionally … seizes or exercises control over a ship by force or threat thereof or any other form of intimidation'; it is a further offence to injure or kill anyone in the course of so doing.[29] The SUA Convention was drafted in the wake of the *Achille Lauro* incident in which passengers hijacked a vessel and in the course of attempting to intimidate the government of Israel, killed a hostage aboard.[30] Of course, the SUA Convention binds only those States party to it and has no direct application under the Court's statute. One should note that while piracy is subject to universal jurisdiction as a matter of customary international law most 'terrorist' offences under treaties are subject only to some form of 'prosecute or extradite' obligation, which applies only as between those States which have ratified the relevant treaties.[31]

D. *'On the High Seas' or 'Outside the Jurisdiction of Any State'*

Finally, piratical acts must take place 'on the high seas' or in 'a place outside the jurisdiction of any State'. For the purposes of the offence of piracy in Article 28F paragraph (a)(i), the relevant acts must take place on the 'high

[28] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, 1678 UNTS 201 (SUA Convention) as amended by the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21.

[29] Art. 3(1)(a) and (g), SUA Convention.

[30] See generally: LA McCullough, 'International and Domestic Criminal Law Issues in the *Achille Lauro* Incident: A Functional Analysis' 36 *Naval Law Review* (1986), 53–108; M. Halberstam, 'Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety' 82 *American Journal of International Law* (1988), 269–310.

[31] See e.g. Arts 6(4), 7 and 10, SUA Convention and further discussion in: Douglas Guilfoyle, 'Piracy and Terrorism' in Panos Koutrakos and Achilles Skordas (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Oxford, 2013), at 50–1.

seas'. It is regrettable the term is not defined in the Protocol as it might give rise to the impression that piracy can only be committed outside waters under national jurisdiction. This is not so. Under UNCLOS, the provisions of the law sea relating to piracy apply not only to the high seas but to all maritime areas outside national waters (that is, internal waters, territorial seas and archipelagic waters)[32] including the contiguous zone and Exclusive Economic Zone (EEZ).[33] This follows from the fact that the EEZ is not a zone in which a coastal State enjoys sovereignty, merely certain sovereign rights; conversely, a variety of high seas freedoms and powers (though not all of them) enjoyed by the international community generally continue to operate in the EEZ.[34] Again, it is worth noting that the UNCLOS rules on piracy are accepted as stating customary international law;[35] therefore they could be taken into account in interpreting the Protocol under Charter Article 31(1)(c) on the law applicable before the Court.

A consequence of the high seas requirement is that acts otherwise capable of constituting 'piracy' but which take place within a States' internal waters, territorial sea or archipelagic waters are not acts of piracy under international law. Such acts of violence, detention or depredation between vessels are matters for the national law of the relevant coastal State, and the flag State, to judge according to their own legislation and are not matters of international concern or universal jurisdiction. The term 'armed robbery at sea' is usually used by the International Maritime Organisation (and more recently by the UN Security Council) to refer to such acts of violence against shipping within the territorial sea or in ports, even if no 'robbery' occurs.[36]

The reference to 'other place[s] outside the jurisdiction of any State' was included in order to cover acts 'committed by a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory.'[37] In

[32] On the legal status of such waters see further: Arts. 2, 8 and 49, UNCLOS; and Tanaka, *The International Law of the Sea*, Chapters 2, 3 and 5; D. Rothwell and T. Stephens, *The International Law of the Sea* (2nd ed, Hart, 2016), Chapters 2, 3 and 8.

[33] Art. 58(2), UNCLOS.

[34] Tanaka, supra note 32, Chapter 4; Rothwell and Stephens, supra note 32, Chapter 4.

[35] Guilfoyle, Rubin, supra note 14.

[36] See International Maritime Organization, 'Piracy and Armed Robbery Against Ships', available at:www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx; and e.g., preambular SC Res 2316, 22 November 2011, preamble and §§ 1, 4, 6, 7, 12, 13, 14, 18, 27, 28, 30, 33. Compare Art. 1 (2)(a), Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (the definition of 'armed robbery against ships' includes acts against a single ship, and need not involve robbery).

[37] *Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea*, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 282 (Art. 39).

1980 and 1982 during the UNCLOS negotiations Peru proposed the deletion of these words as unnecessary given that, as discussed above, the law of piracy clearly applied to the EEZ and thus areas within State jurisdiction.[38] As the Peruvian proposal was rejected it might be inferred that the Conference considered the terra nullius argument still had some merit (or considered the issue insufficiently serious to merit the amendment).[39] This provision could apply in, for example, the unlikely event that a new island was created through a volcanic eruption, which was not claimed by, and thus not under the jurisdiction of, any State. If a vessel attacked persons or property ashore (for example, shipwrecked passengers) this would constitute piracy. It is also conceivable that that this provision could bring within the definition of piracy a mutiny of the crew against the master of a vessel which occurred in such a place.[40] Otherwise it could only encompass acts on the shores of the unclaimed sector of Antarctica (sovereign claims over the rest of the landmass are 'frozen' but not extinguished by the Antarctic Treaty).[41]

4. THE OFFENCE OF VOLUNTARY PARTICIPATION IN A PIRATE CRAFT

Article 28F(b) of the Protocol (and Article 101(b) of UNCLOS) define a secondary type of piracy offence – one that does not require the actual commission of an offence in the sense of Article 28F, paragraph (a). This offence focuses upon presence in, and participation in the running of, a 'pirate boat, ship or aircraft'. An oddity of Article 28F(b) is that this critical phrase is not defined. Presumably the intention was implicitly to rely upon the definition found in Article 103 UNCLOS, and recognised as custom on the basis outlined above. Article 103 of UNCLOS provides:

> A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101 [the principal definition of piracy]. The same

[38] Nordquist, Nandan and Rosenne (eds), *United Nations Convention on the Law of the Sea 1982*, at 183–4. See the documents reproduced in: Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents*, vol. V (Oceana Publications, 1984), at 66, 69 and 73.

[39] R, Churchill, 'Piracy Provisions of the UN Convention on the Law of the Sea' in Koutrakos and Skordas (eds.) *The Law and Practice of Piracy at Sea*, at 20.

[40] Nordquist, Nandan and Rosenne (eds), *United Nations Convention on the Law of the Sea 1982*, at 201.

[41] Ibid.; see further: Bernard H. Oxman, 'The Antarctic Regime: An Introduction' 33 *University of Miami Law Review* (1978) 285–97 at 294; Art. 4 Antarctic Treaty 1959, 402 UNTS 71.

applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

For the reasons discussed above, this must be taken to be the applicable definition at customary international law and is therefore capable of application under Article 31(1)(c) of the Statute to interpret Article 28A5(b) of the Protocol. The reason for the addition of the word 'boat' is unclear, but it may be intended to cover small boats working either on their own or as part of a team with a pirate 'mothership' as was common during the Somali piracy crisis of 2008–13.

On this basis the following may be considered a pirate vessel:

- the vessel in which the pirates travel to a place to commit an act of piracy, or travel from the place where they have committed an act of piracy;
- a vessel in which people are travelling, where it is believed, on reasonable grounds, that the people in that vessel are intending to commit an act of piracy; and
- any vessel which the pirates have already taken through an act of piracy and which they are still in control of – most generally by still being aboard that vessel. However, once a pirated vessel is no longer in the control of pirates, it ceases to be a pirate vessel.

Some important issues for maritime law enforcement agents, prosecutors, and judges to consider in applying this definition include:

- who can be treated as a 'person in dominant control' and what are the indicators of this state of affairs;
- how does the relevant jurisdiction deal with the issue of 'intent' / 'intended'; and
- which factors may prove or disprove whether a pirated vessel was still under the dominant control of those guilty of its initial pirating at the time of its seizure by maritime law enforcement agents.

These questions are returned to below. On any approach, however, under this provision it is plain that persons not directly involved in the commission of illegal acts of violence, detention or depredation may also be held liable for piracy. It may criminalise some of those who support the capacity of others to commit piracy – for example, deckhands or cooks on board a pirate ship, who have joined the ship knowing it is a pirate ship.

The offence created involves 'any act of voluntary participation in the operation of a boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft'. Several of the key elements of this offence can

only be properly understood in light of general criminal law concepts (such as complicity or common purpose) normally supplied by the 'general part' of criminal law. While a range of 'modes of responsibility' are acknowledged in Article 28N of the Protocol they are not further defined and will require elucidation by the Court.[42]

To be convicted of an offence created on the basis of Article 28F(b), the elements contained in the Article 103 UNCLOS definition of a pirate vessel need to be established. Thus the prosecution would generally be required to establish (to the requisite standard of proof) that each of the accused were:

(a) involved in an act, severally or jointly, of;
(b) voluntary;
(c) participation;
(d) in the operation of that ship; and
(e) that ship
    (i) has been used to commit any illegal act of violence or detention, or any act of depredation, committed for private ends by its crew or its passengers and has remained under the control of the persons who committed those acts; or
    (ii) is intended by the person in dominant control to be used for the purpose of committing, for private ends, any illegal act of violence, detention or depredation.

In the present context, neither the Protocol nor UNCLOS provides a specific definition of 'voluntary participation' in relation to piracy (although we might presume it to have a volitional or intentional element), or any precise detail as to what acts constitute 'operation' of a vessel. Similarly, any analysis of whether a person had 'knowledge of facts making [the vessel] a pirate ship' will to a large extent depend upon the way in which the Court defines the level of criminal responsibility it considers most closely analogous to 'knowledge'. The words 'act of voluntary participation' should require at the least the participatory presence of each of the pirates arrested on board a pirate ship. In some circumstances it will not be justified to convict all persons found on board a pirate ship on the basis that they are all pirates. Some act of participation by each of the pirates, whether by way of firing or holding a

[42] See generally: G. Fletcher, 'The Theory of Criminal Liability and International Criminal Law' 10 *Journal of International Criminal Justice* (2012), 1029–44; E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012); D. Guilfoyle, *International Criminal Law* (Oxford: Oxford University Press, 2016), Chapter 12; and A. Fernando, 'An insight into piracy prosecutions in the Republic of Seychelles' 41 *Commonwealth Law Bulletin* (2015), 173.

weapon, jettisoning goods, manoeuvring the ship, taking care of supplies or being on the lookout with binoculars, for example would suffice.[43]

An appropriate source of law on both questions might be Article 30 of the International Criminal Court Statute. Article 30 provides that a person has intent if: '(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.' In relation to knowledge, Article 30 provides: '"knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.' On such an approach it would be enough to intentionally engage in the operation of a vessel, with awareness of the fact either that:

(a) it has been used to commit an act of piracy and remains under the control of the persons who committed those acts; or
(b) it is intended by the person in dominant control of it to be used for the purpose of committing an act of piracy.[44]

Thus if the prosecution were to proceed based on Article 28F(b), they will have to prove either that at the time of the act of voluntary participation that the ship had already been used for a pirate attack in the past (and remained under the control of the same group of pirates) or that it was intended to be used for such an act in the future. On the first possibility, a ship that had been used by one set of pirates for purposes of piracy and sold off to another set of pirates (but which has not yet been used in a pirate attack) would not be a pirate vessel for the purposes of a prosecution under Article 28F(b). The prosecution must prove not only that a vessel had been used to commit one or more of the acts referred to in Article 28F(a)(i) or (ii) but also that it remained under the control of the persons who committed those acts at the time of the accused's act of voluntarily participation in the operation of that vessel.

On the alternative possibility, the vessel was intended by the person in dominant control to use it for the purpose of committing an act of piracy in the future, it would suffice to prove that the accused had knowledge of that intent at the time he or she voluntarily participated in the operation of the ship.

Similarly, if the suspect had voluntarily participated in the operation of the ship, but without knowledge that the ship had been or was to be used for the

[43] Such acts may serve as evidence in national jurisdictions of participation in a joint enterprise or in a plan with a common criminal intention. See e.g.: *R v. Houssein Mohammed Osman & Ten Others* (CR 19/2011), Supreme Court of Seychelles, 12 October 2011, § 29, available online at: www.unicri.it/topics/piracy/database/.

[44] Art. 103, UNCLOS.

purpose of committing acts of piracy, that person may not necessarily be made liable. Thus, if that person had voluntarily participated in the operation of a ship with the intention of carrying out some other illegal purpose, such as smuggling of arms, narcotics or contraband, then his or her conduct would not fall within Article 28F(b).

5. THE OFFENCE OF INCITING OR INTENTIONALLY FACILITATING AN ACT OF PIRACY

The final type of piracy offence in Article 28F(c) (also found in Article 101(c) of UNCLOS) is the offence of 'any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)'.

This could criminalise the acts of those who organise or finance pirate raids,[45] including their activities ashore, as the geographical limitations of Article 28F(a) of the Protocol - or indeed of Article 101 (a) of UNCLOS - are not reproduced here.[46] It was noted by the Netherlands in 1956 that the International Law Commission's drafting – in omitting reference to the high seas – would allow this provision to apply elsewhere.[47] The International Law Commission did not respond to the suggestion that the drafting be made consistent to prevent such a result.

A number of commentators have therefore taken the view, based on its plain language, that Article 101(c) of UNCLOS could apply to acts committed ashore.[48] The same logic would apply to Article 28F(a). This contention has leant some strength by the idea that Article 101 sets out a general definition of piracy in international law applicable beyond the Convention (as described in

[45] See e.g.: SC Res. 2316, 9 November 2016, § 19 and also §§ 4, 5, 11, 18, 21–3 and §§ 6 and 21 of preamble.

[46] See: International Maritime Organization, 'Piracy: Elements of National Legislation Pursuant to the United Nations Convention on the Law of the Sea, 1982, Submitted by the Division for Ocean Affairs and Law of the Sea (UN-DOALOS)', IMO Doc. LEG 98/8/3 (2001), noting these provisions 'do not explicitly set forth any particular geographic scope'.

[47] *Comments by Governments on the Provisional Articles Concerning the Régime of the High Seas and the Draft Articles on the Régime of the Territorial Sea Adopted by the International Law Commission at Its Seventh Session*, UN Doc. A/CN.4/99 and Add. 1–9, 1956, reproduced in: ILC Yearbook (1956), vol. II, at 62, 64. The role of the International Law Commission in drafting the relevant treaty law provisions was discussed above at notes 7 and 10.

[48] A. Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy of Somalia' in Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (Leiden 2011), at 157–8; Geiß and Petrig, *Piracy and Armed Robbery at Sea*, at 64. Arguing the contrary: J. Bellish, 'A High Seas Requirement for Inciters and Intentional Facilitators of Piracy Jure Gentium and Its (Lack of) Implications for Impunity', 15 *San Diego International Law Journal* (2013), 115–62.

para. 1 above). At least one appellate court in the United States has thus held that acts of aiding and abetting piracy need not occur on the high seas and are subject to universal jurisdiction even when committed on land.[49]

As is the case for the Article 101(b) offence, proof of the elements of this offence will be subject to the definitional approach taken to concepts such as 'incite' or 'facilitate'. For example, the term 'facilitate' may in the relevant jurisdiction not be a term of legal art at all use will need to be made of other modes of criminal liability such as 'aid and abet', 'conspire', 'incite', or 'procure'.

6. CHALLENGES IN THE INTERPRETATION AND APPLICATION OF THE CRIME

A number of possible challenges in interpreting and applying the crime of piracy within the framework of the Statute, as amended by the Protocol, have been discussed above. Principally these arise from the absence of definitions of key concepts such as that of a pirate boat, ship or aircraft which – in a law of the sea context – are normally supplied by other treaty provisions. The most likely technique for resolving such ambiguities would be to treat the relevant provisions of UNCLOS as stating customary law and as thus being capable of application under Article 31(1)(c) of the Statute. (See the discussion in sections 3.3 and 4, above.)

The remaining possible challenges are several. The first is the definition, as a matter of criminal law, of concepts such as 'voluntary participation', knowledge, intent, inciting and facilitating. Normally such concepts would be filled in by the detail of the relevant national legal system. The Court will only be able to fall back on the compendium of undefined concepts contained in Article 28N of the Protocol. It may be that in giving meaning to Article 28N the Court will have to rely on the concept of general principles of law derived from national legal systems ('general principles'), as acknowledged under Article 31(1)(d) of the Statute. General principles have in the past been relied upon as a secondary source of law in deriving or deducing the elements of international crimes where no other source of international law stipulates their content.[50] The second is the role of universal jurisdiction and powers of arrest over pirate vessels on the high seas. These should not be of direct concern to

[49] *United States v. Ali*, Case No. 12–3056, US Court of Appeals, District of Columbia Circuit, Decided 11 June 2013; overruling *United States v. Ali*, Criminal Case No. 11–0106, Memorandum Opinion of 13 July 2012, 885 F.Supp. 2d 17 (2012).

[50] Guilfoyle, *International Criminal Law*, at 6–7; see for example, Article 21(1)(c), Rome Statute of the International Criminal Court 1998, 2187 UNTS 3.

the court insofar as the Court is one of limited jurisdiction and for the reasons discussed above (in section 2) the concept of universal adjudicative jurisdiction will not be relevant in proceedings before the Court. There is the possibility a defendant might claim they were arrested on the high seas in some manner in violation of international law (such as Articles 105 and 110, UNCLOS on powers of arrest and prosecution over pirates) and therefore they should not be prosecuted. These are complex issues of marginal relevance to the interpretation of the current Statute and will not be discussed in detail here. Briefly, though, one should note there is a possible textual argument arising under Article 105 UNCLOS that only the flag State of the government vessel which captures a pirate should be able to prosecute that pirate.[51] On its face this would preclude transfer of a suspect to a regional court. However, the argument is unsupported by State practice. During the Somali piracy crisis numerous States prosecuted pirates transferred into their custody by foreign governments' warships.[52] This practice conclusively suggests that the drafting of UNCLOS was not understood by the parties to exclude or replace the universal jurisdiction of every State to prosecute a pirate subsequently found within its territory.[53]

Finally, as noted briefly above (at 3.B), a key controversy in interpreting UNCLOS has been whether the words 'for private ends' exclude politically motivated violence from being piracy. The relevance of the point is that if this is the case, political protestors - even those who commit life-endangering acts of violence at sea – may have a meretricious defence to a charge of piracy. Conversely, a person *prima facie* guilty of extreme acts of violence constituting piracy may claim as a bar to their prosecution that they had underlying political motives (such as striking back at an international community which has pillaged their fishing grounds).[54] Debate over the correct interpretation of

[51] See discussion at note 14.

[52] See: *Report of the Secretary-General on the Situation with respect to Piracy and Armed Robbery at Sea off the Coast of Somalia*, UN Doc. S/2016/843, 7 October 2016, paras. 38–43; D. Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options' 10 *Journal of International Criminal Justice* (2012), 767–96 at 791–2; S. de Bont, 'Murky Waters: Prosecuting Pirates and Upholding Human Rights Law' 7 *Journal of International Law and International Relations* (2011) 104–45 at 113 and 133–40; and Eddy Somers, 'Prosecution of Alleged Pirates in the 1982 Law of the Sea Convention: Is Outsourcing the Solution?' 47 *Revue Belge de Droit International / Belgian Review of International Law* (2014), 111–28.

[53] Art. 31(3)(b), Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

[54] An argument occasionally made by Somali pirates but not, to our knowledge, in court proceedings. See e.g.: D. Guilfoyle, 'Somali Pirates as Agents of Change in International Law-making and (2012) 1 *Cambridge Journal of International and Comparative Law* (2012), 81–106 at 82–4.

the words 'for private ends' tends to become bogged down in unproductive debate over the meaning of the historical sources; it is thus necessary to provide a reasonably detailed account of their origins as part of the definition of piracy.

The words 'for private ends' have a complex and contested history in the definition of piracy, but do not enjoy a particularly long pedigree.[55] Their earliest use in any textbook definition in English appears to date to 1892, when they were used in Joel Prentiss Bishop's influential work on criminal law in the phrase 'for gain or other private ends of the doers' seemingly as a synonym for piratical intent to plunder or rob.[56] No earlier sources or case law use the term nor any meaningful equivalent.[57] The phrase appears, without any explanation of its origin, in the League of Nations Committee of Experts Draft Provisions for the Suppression of Piracy of 1926.[58] It was either independently invented or (more likely) lifted from Bishop's textbook. Article 1 of the League's Draft Provisions provided:

> Piracy occurs only on the high sea and consists in the commission for private ends of depredations upon property or acts of violence against persons. It is not required [...] that [such] acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.

The meaning of this provision, however, is not obvious on its face. The words '*purely* political object' were intended to be construed narrowly. As the Chairman of the League Committee put it (in an uncontested summation of the position of the drafter):

[55] See generally: Guilfoyle, 'Piracy and Terrorism'.

[56] See J. Bishop, *New Commentaries on the Criminal Law*, vol. I (8th ed, TH Flood and Co, 1892), 339, § 553 and vol. II, 617, § 1058. The phrase does not appear in previous editions (under different titles). The author cites two authorities for his definition: *United States v. Palmer*, 16 U.S. 610 (1818); and *United States v. Terrell*, Hemp 411. The former, at least, does not use the phrase 'for private ends'. We have been unable to locate the latter. On Bishop's influence as a scholar see CS Bishop, 'Joel Prentiss Bishop. LL.D' (1902) 36 *American Law Review* 1–8; he was quoted internationally on piracy, e.g. in G. Schlikker, *Die Völkerrechtliche Lehre von der Piraterie und den ihr Gleichgestellten Verbrechen* (Buchdruckerei R. Noske, 1907), at 43.

[57] The copious review of classical authorities in the eighteen-page footnote in *United States v. Smith*, 18 U.S. 153 (1820), 163–80 does not contain the English phrase or any equivalent in French or Latin. The quotes tend to focus on either the lack of state sanction or intention to plunder (*depredendi causa*, *pour piller*, etc.).

[58] League of Nations Committee of Experts, 'Piracy', at 228–9.

> In the general case, whether the crime of piracy has been committed follows from the character of the acts. If acts of violence or depredation are committed, there is piracy, regardless of the motives for those acts. Nevertheless, the rapporteur has admitted an exception for acts committed for a purpose which is political and *solely political*.[59]

The concrete case that this exception was designed to cover was a particular historical difficulty: the status of insurgents in civil wars who attacked foreign shipping on the high seas. Article 4 of the League's Draft Provisions thus stated: 'Insurgents committing acts of the kind mentioned in Article 1 must be considered as pirates *unless* such acts are inspired by *purely political* motives.'[60] In case law at the time insurgent forces in a civil war could take to the seas to attack vessels of their own nationality (or of the government they sought to overthrow) and reasonably expect to be treated by third States into whose power they might fall either as belligerents or as political asylum seekers, but not as pirates.[61] Such acts might be considered 'purely political'. Where insurgents attacked foreign shipping, it was well known that they risked prosecution as pirates. This is important because attacking foreign shipping to fund an insurgency could be thought political; in the minds of the League Committee, however, it would seem such acts were not necessarily *purely political*.

The 1932 Harvard Research definition of piracy also adopted the words 'for private ends' to exclude certain cases from being piracy. Despite the drafters acknowledging that '[s]ome writers assert that such illegal attacks on foreign commerce [on the high seas] by unrecognized revolutionaries are piracies in the international law sense; and [that] there is even judicial authority to this effect', they preferred the view that such cases were governed by a special rule of the laws of war, not the law of piracy.[62] Nonetheless, it is clear that their use

[59] 'Minutes of the League of Nations Committee of Experts for the Progressive Codification of International Law, Second Session, 14th Meeting, 20 January 1926' in: S. Rosenne, *League of Nations Committee of Experts for the Progressive Codification of International* Law *(1925–8)*, vol. 1 (Oceana Publications, 1972), at 124. Authors' translation and emphasis ('D'une manière générale, c'est d'après le caractère des actes que l'on peut déterminer le crime de piraterie. Si des actes de déprédation ou de violence sont commis, il y a piraterie, quel que soit le motif de ces actes. Toutefois, le rapporteur a admis une exception pour les actes commis dans un dessein politique et uniquement politique').

[60] League of Nations Committee of Experts, 'Piracy', at 228 (emphasis added).

[61] Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 33–7. See for a practical example the acquittal of Mohamed Saad before British Courts in *Regina v. Tunkoo Mohamed Saad and ors* (1840) 2 Kyshe (Cr.) 18, discussed in Rubin, *The Law of Piracy*, 226–30.

[62] Harvard Draft Piracy Convention, 857, see also 786; see further Guilfoyle, 'Piracy and Terrorism', 40–3.

of the words 'for private ends' was principally intended to exclude such cases from being covered by the definition of piracy and was not necessarily intended to have a wider effect.

The International Law Commission took the words 'for private ends' straight from the Harvard Research into its own Articles concerning the law of the sea, but its commentaries to the articles contain no explanation of the reasons for including the term or its intended meaning.[63] The International Law Commission rapporteur François, in speaking to his initial draft, made the point that requiring intention to rob (*animo furandi*) would overly narrow the definition, and he appeared to endorse the Harvard Research position that 'it seems best to confine the common jurisdiction [over piracy] to offenders acting for private ends only', thus excluding cases involving government warships or civil war insurgencies.[64] In International Law Commission debate on the draft article, some members of the Commission took the view that the words 'for private ends only' would be unduly narrowing and should be removed, but appeared to have in mind that the definition should include attacks by State vessels.[65] This view did not prevail.

Despite this rather ambiguous history, it is held by some commentators that the requirement that piracy be committed for 'private ends' means that any politically motivated acts cannot be piracy.[66] This was plainly not the view of the League of Nations Committee, and it is far from certain the authors of the Harvard Draft Convention necessarily intended to support such a broad proposition. An alternative view 'is that any act of violence not sanctioned by State authority is one for "private ends", the correct dichotomy being not "private/political" but "private/public"'.[67] It is submitted that this view is more

[63] International Law Commission, 'Commentaries to the Articles Concerning the Law of the Sea', 28 (Art. 39).

[64] International Law Commission, 'Summary Records of the Meetings of the 7th Session', ILC Yearbook (1955), vol. I, 40–1.

[65] Ibid., 42–3 (comments of Mr. Amado and Mr. Krylov).

[66] McDougal and Burke, *The Public Order of the Oceans*, 822. See further B. Dubner and C. Pastorius, 'On the Ninth Circuit's New Definition of Piracy: Japanese Whalers v. the Sea Shepherd: Who are the Real Pirates (i.e. Plunderers)?' 45 *Journal of Maritime Law and Commerce* (2015), 415–43, arguing against the conclusion that violent environmental protest can be piracy in *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, US Court of Appeals (9th Circuit), 725 F 3 d 940 (2013), 944.

[67] D. Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' 59 *International and Comparative Law Quarterly* (2010), at 141–69, 143. See further M. Bahar, 'Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations' 40 *Vanderbilt Journal of Transnational Law* (2007), at 1–86, 30; Geiß and Petrig, *Piracy and Armed Robbery at Sea*, at 61. Note in particular the change in the French text from 'buts personnels' in Art. 15 High Seas Convention to 'fins privées' in Art. 101 UNCLOS.

consonant with the history of the codification efforts, which appear to have intended only a narrow exception consistent with the central idea that '[a]ccording to international law, piracy consists in sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons.'[68]

The latter approach is supported by both the *Castle John* case and *Institute of Cetacean Research v. Sea Shepherd* in which different national courts both held it was no defence to a charge of piracy that maritime violence was motivated by political (environmental) protest.[69] International practice now supports the view that politically motivated violence against civilians is in all circumstances unacceptable, and in the event of ambiguity in a treaty provision such as Article 28F this should clearly be the preferred interpretation.[70] As noted, historically, the private ends requirement existed only to exclude certain acts of insurgency or civil war from being considered piracy (strictly a question of the laws of war).[71] The exception should thus be interpreted narrowly.

[68] League of Nations Committee of Experts, 'Piracy', at 223; quoted in Harvard Draft Piracy Convention, at 775.

[69] Hof van Cassatie van België/Cour de cassation de Belgique (Court of Cassation of Belgium), *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, 19 December 1986 77 ILR 537, (1988), 540; and *Institute of Cetacean Research v. Sea Shepherd Conservation Society* (725 F 3d 940, 944 (9th. Cir. 2013)). See further Tanaka, *The International Law of the Sea*, at 380–1.

[70] Guilfoyle, *Shipping Interdiction*, at 38–40; compare G. Gidel, *Le Droit International Public de la Mer: Le Temps de Paix*, vol. I (1932), at 326.

[71] Guilfoyle, *Shipping Interdiction*, at 33 and 36–8; D. O'Connell, *The International Law of the Sea*, vol. II (Oxford: Clarendon Press, 1984), at 975–6; Gidel, *Le Droit International Public de la Mer*, at 320 and 324.

15

The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights

Article 28G of the AU's Malabo Protocol 2014

BEN SAUL

1. INTRODUCTION

The proposed African Court of Justice and Human Rights is set to become the first regional court to have jurisdiction over a crime of 'terrorism', with the adoption of article 28G of the Malabo Protocol 2014. No international criminal court, nor any other regional tribunal, can presently adjudicate terrorism cases. The closest body is the hybrid Special Tribunal for Lebanon, established by agreement of the United Nations and Lebanon and including a minority of international judges. But that tribunal is only competent to apply Lebanese criminal law to specific, geographically and temporally confined events.[1] A war crime of terrorism has also been prosecuted before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the hybrid Special Court for Sierra Leone (SCSL),[2] but those tribunals do not have jurisdiction over a general crime of peacetime terrorism.

[1] Art. 2 Statute of the Special Tribunal for Lebanon, SC Res. 1757 (2007). The STL has, however, interpreted Lebanese domestic terrorism offences in the light of a purported customary international crime of transnational peacetime terrorism: Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Prosecutor v Ayyash et al.* (STL-11–01) Appeals Chamber, 16 February 2011, § 85. For a critique see B. Saul, 'Legislating from a Radical Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' 24 *Leiden Journal of International Law* (2011) 677–700, at 677.

[2] Judgment, *Prosecutor v Galić* (ICTY-98–29-T), Trial Chamber, 5 December 2003; Judgment, *Prosecutor v Galić* (IT-98–29-A), Appeals Chamber, 30 November 2006; Judgment, *Prosecutor v Milošević* (IT-98–29/1-T), Trial Chamber, 12 December 2007; Judgment, *Prosecutor v Brima et al.* (SCSL-04–16-T), SCSL Trial Chamber, 20 June 2007; Judgment, *Prosecutor v Fofana et al.* (SCSL-04–14-T), Trial Chamber, 2 August 2007; Judgment, *Prosecutor v Fofana et al.* (SCSL-04–14-T), Appeals Chamber, 28 May 2008; Judgment, *Prosecutor v Sesay et al.* (SCSL-04–15-T), Trial Chamber, 2 March 2009; Judgment, *Prosecutor v Taylor* (SCSL-03–1-T) Trial Chamber, 26 April 2012. See B. Saul, 'Terrorism' in M. Zgonec-Rožej and J.R.W.D. Jones (eds), *Blackstone's International Criminal Practice* (Oxford: Oxford University Press, forthcoming).

Even at the normative level, there is still no agreement on an international crime of terrorism to guide regional criminal justice initiatives. This is so despite episodic efforts since the League of the Nations through to the ongoing negotiations, since 2000, on a UN Draft Comprehensive Terrorism Convention.[3] No crime of terrorism was included in the ICC Statute in 1998 and African states were divided on whether to include it within the ICC's jurisdiction. Of the 34 states that spoke in favour of including terrorism, 11 were African;[4] of the 23 states that spoke against, 3 were from Africa.[5]

At the regional level, there are five instruments that require national criminalization of a general crime of terrorism.[6] At least some African states are parties to the instruments adopted by three of the relevant regional organizations, including the Arab League Convention on the Suppression of Terrorism 1998, the Organisation of the Islamic Conference (OIC) Convention on Combating International Terrorism 1999 (now an instrument of the Organisation of Islamic Cooperation), and the Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism 1999 (now an instrument of the African Union [AU]).

As discussed in the next section, the Malabo Protocol's crime of terrorism is closely modelled on the OAU Convention, which reflects certain historical experiences and understandings of terrorism in Africa, including a concern to exclude liberation and self-determination violence from the legal concept of terrorism. This chapter then examines the drafting history of the Malabo Protocol's terrorism offence, its elements, the extended modes of criminal liability, and the clauses excluding self-determination struggles, armed conflicts governed by international humanitarian law (IHL), and political or other justifications. In doing so it discusses a range of technical, criminological and

[3] See B. Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006).

[4] *Official Records of the UN Diplomatic Conference of Plenipotentiaries on an ICC, Rome*, UN Doc. A/CONF.183/13, vol. III, 15 June–17 July 1998, (Algeria, Benin, Burundi, Cameroon, Comoros, Congo, Egypt, Ethiopia, Libya, Nigeria, Tunisia).

[5] Ibid. Ghana, Morocco and Senegal.

[6] Arab Convention on the Suppression of Terrorism (adopted 22 April 1998, entered into force 7 May 1999); Convention of the Organization of the Islamic Conference (OIC) on Combating International Terrorism (adopted 1 July 1999, entered into force 7 November 2002); Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism 1999 (adopted 14 July 1999, entered into force 6 December 2002) 2219 UNTS 179 (hereafter 'OAU Convention'); Shanghai Cooperation Organisation (SCO) Convention on Combating Terrorism, Separatism and Extremism of 2001 (adopted 15 June 2001, entered into force 29 March 2003); European Union (EU) Framework Decision on Combating Terrorism 2002/475/JHA (13 June 2002), Official Journal L 164 (22 June 2002), 3–7.

human rights issues, and contextualizes the offence within the context of international and regional practice.

2. BACKGROUND IN OAU COUNTER-TERRORISM INITIATIVES

The inclusion of a crime of terrorism in the Malabo Protocol was the culmination of over two decades of African regional counter-terrorism cooperation that began in 1992. Until the early 1990s, many African states primarily conceived of terrorism as repressive colonial state violence against African peoples by western powers, including during the decolonization wars from the 1950s to the 1980s. By contrast, violence relating to national liberation or self-determination was often seen as justifiable or excusable, even where terror tactics were used, and western labelling of liberation movements as 'terrorists' was vehemently rejected.[7] Terrorism was also a label applied by African states to the apartheid regime in South Africa and to various Israeli actions, such as the occupation of the Egyptian Sinai in the 1973 Arab-Israeli war.[8] African states were typically indifferent to non-state terrorist acts targeting western or foreign interests in Africa.[9] The OAU condemned Israel's surprise rescue of Israeli hostages at Entebbe Airport in 1976, from an airliner hijacked by Palestinians, as aggression against Ugandan sovereignty and territorial integrity.[10] It also expressed solidarity with Libya in the face of UN Security Council condemnation and sanctions for Libya's suspected involvement in the PanAm aircraft bombing over Lockerbie, Scotland in 1988.[11]

The 1990s brought a sea-change in African government attitudes to terrorism, following the rise of Islamist extremists endangering various states in North and West Africa (including Algeria, Tunisia, Morocco, Egypt, Sudan, Mali, Mauritania, Nigeria and Senegal) and East Africa (especially Somalia, Kenya and Tanzania).[12] Algeria took the lead in promoting regional counter-terrorism cooperation, prompted by concerns about transnational support for

[7] M. Ewi and A. du Plessis, 'Criminal Justice Responses to Terrorism in Africa: The Role of the African Union and Sub-Regional Organizations' in A.M. Salinas, K. Samuel, and N. White (eds) *Counter-Terrorism: International Law and Practice*, 993, at 996.

[8] M. Ewi and A. du Plessis, 'Counter-terrorism and Pan-Africanism: From Non-Action to Non-Indifference' in B. Saul (ed), *Research Handbook on International Law and Terrorism* (Cheltenham: Edward Elgar, 2014) 734, at 735, 737–8. See Assembly of Heads of State and Government of the OAU Res 70 (X), 27–28 May 1973.

[9] Ewi and du Plessis, *Counter-Terrorism and Pan-Africanism*, supra note 8, at 735.

[10] Assembly of Heads of State and Government of the OAU Res 83 (XIII), 2–6 July 1976, § 1.

[11] Ewi and du Plessis, *Counter-Terrorism and Pan-Africanism*, supra note 8, at 739–41. See Council of Ministers of the OAU Res 1525 (LX), 6–11 June 1994, § 2.

[12] Ewi and du Plessis, *Criminal Justice*, supra note 7, at 993.

Islamist militants in Algeria's civil war (1991–8),[13] a threat itself catalyzed by the Algerian military overruling democratic elections won by the Islamic Salvation Front in 1991.

Accordingly, in 1992, for the first time, the OAU called for stronger cooperation and coordination among African states to counter extremism and terrorism, to prevent hostile activities against other states, and to refrain from supporting violence against the stability and territorial integrity of other states.[14] In 1994, at the initiative of Tunisia, the OAU adopted a Declaration on a Code of Conduct for Inter-African Relations which, for the first time in Africa, condemned 'as criminal all terrorist acts, methods and practices' and resolved to increase 'cooperation in order to erase this blot on security, stability and development'.[15] The Declaration also reiterated international legal obligations 'to refrain from organizing, instigating, facilitating, financing, encouraging or tolerating activities that are terrorist in nature or intent, and from participating in such activities in whatsoever manner', including by preventing terrorist training camps, indoctrination centres and sanctuaries.[16] It further called for the prosecution or extradition of terrorist offenders, albeit without requiring states to criminalize a regionally consistent terrorist offence.[17]

A. *OAU Convention on the Prevention and Combating of Terrorism 1999*

Terrorist acts continued to escalate, including high profile attacks such as the attempted assassination of President Mubarak of Egypt by Islamists in Addis Ababa, Ethiopia in 1995, with Sudanese complicity, and the Al Qaeda bombings of the United States embassies in Kenya and Tanzania in 1998. The OAU responded by adopting the OAU Convention on the Prevention and Combating of Terrorism in 1999.[18] The OAU Convention was drafted by

[13] Ewi and du Plessis, *Counter-Terrorism and Pan-Africanism*, supra note 8, at 741.

[14] See OAU Assembly of Heads of State and Government, Resolution 213 (XXVIII), 29 June–1 July 1992, §10.

[15] OAU Assembly of Heads of State and Government, Declaration on a Code of Conduct for Inter-African Relations, 13–15 June 1994, AHG/Decl.2 (XXX), §.10.

[16] Ibid. §.15.

[17] Ewi and du Plessis, *Criminal Justice*, supra note 7, at 999.

[18] Art. 2(a) OAU Convention. See generally H. Boukrif, 'Quelques commentaires et observations sur la Convention de l'Organisation de l'Unite africaine sur la Prevention et la Lutte Contre le Terrorism' *African Journal of International and Comparative Law* (1999) 753; R.G. David, 'Le terrorisme: cadre juridique au plan de l'Union Africaine' in SOS Attentats (ed), *Terrorisme, victimes et responsabilité pénale internationale* (Paris: Calmann-Lévy, 2003), at 102; I. Kane,

a sub-committee of the OAU Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, comprising five states (Algeria as chair, Burundi, Namibia, Senegal and Tanzania), in collaboration with the OAU legal division.[19] At the time, few African states had already enacted specific criminal laws against terrorism. Algeria, chairing the drafting committee, had criminalized subversive or terrorist acts in September 1992.[20] Egypt had also criminalized terrorism in July 1992,[21] a definition which heavily influenced the Arab League Convention 1998. The drafting of the OAU Convention was in turn influenced by Algeria's leadership,[22] the Arab League Convention 1998 and the OIC Convention 1999 (with partially overlapping

'Reconciling the Protection of Human Rights and the Fight against Terrorism in Africa' in A.M. Salinas, K. Samuel, and N. White (eds), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012) 838, at 841–8; Ewi and du Plessis, Criminal Justice, supra note 7, at 1000–4; Ewi and du Plessis, Counter-Terrorism and Pan-Africanism, supra note 8, at 734; Jolyon Ford, *African Counter-Terrorism Legal Frameworks a Decade After 2001* (Institute for Security Studies, Pretoria, 2011); M. Ewi and K. Aning, 'Assessing the Role of the African Union in Preventing and Combating Terrorism in Africa' 15 *African Security Review* (2006) 32.

[19] Boukrif, supra note 18, at 753.

[20] Art. 1 Legislative Decree No. 92–03 of 30 September 1992 on Combating Subversion and Terrorism (Algeria), amended and supplemented by Legislative Decree No. 93–05 of 9 April 1993; reproduced in Art. 87 bis of Ordinance No. 95.11 of 25 February 1995, amending and supplementing Ordinance No. 66.156 of 8 June 1966 and enacting the Penal Code: 'any offence targeting state security, territorial integrity or the stability or normal functioning of institutions through any action seeking to:

- Spread panic among the public and create a climate of insecurity by causing emotional or physical harm to people, jeopardizing their lives or freedom, or attacking their property;
- Disrupt traffic or freedom of movement on roads and obstruct public areas with gatherings (this has reference to roadblocks as a modus operandi used by the GIA);
- Damage national or republican symbols and profane graves;
- Harm the environment, means of communication or means of transport;
- Impede the activities of public authorities and bodies serving the public, or the free exercise of religious and public freedoms; and
- Impede the functioning of public institutions, endanger the lives or damage the property of their staff, or obstruct the implementation of laws and regulations.'

[21] Art. 86, Law No. 97 of 18 July 1992 on Terrorism (Egypt): 'any use of force or violence or any threat or intimidation to which the perpetrator resorts in order to disturb the peace or jeopardize the safety and security of society and of such nature as to harm or create fear in persons or imperil the lives, freedoms or security; harm the environment; damage or take possession of communications; prevent or impede the public authorities in the performance of their work; or thwart the application of the Constitution or of laws or regulations.'

[22] M. Ewi, 'The Role of Regional Organizations in Promoting Cooperation on Counter-Terrorism Matters: The European and the African Institutions in a Comparative Perspective' in L. van den Herik and N. Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge: Cambridge University Press, 2013) 128, at 148.

memberships between the three regional groupings),[23] and a concern to accommodate civil and common law traditions.[24]

The preamble to the OAU Convention describes terrorism as a 'serious violation of human rights', particularly rights to physical integrity, life, freedom and security, and notes that it impedes socio-economic development by destabilizing states. It also notes the dangers to state stability and security, and the links between terrorism and organized crime (including arms and drug trafficking and money laundering). Article 1(3)(a) defines a '[t]errorist act' as any domestic criminal act 'which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage'. Such act must be 'calculated or intended to':

(i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
(ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
(iii) create general insurrection in a State.

Terrorist acts are further defined to include various extended modes of criminal liability, including 'any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to' above (Article 1(3)(b)). As discussed below, the Malabo Protocol virtually replicates this definition.

As in the Arab League and OIC Conventions,[25] article 3(1) of the OAU Convention excludes 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces'. This exclusion exists despite article 3(2) stating that '[p]olitical, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act' – an exclusion borrowed from the language of the UN General Assembly's 1994 Declaration

[23] Ibid. at 149.
[24] Boukrif, supra note 18, at 756.
[25] Arts. 2(a) and 2(a) respectively.

on Measures to Eliminate International Terrorism.[26] The exemption reflects the heightened importance of national liberation struggles in African political histories, even if excessive liberation violence could still be prosecuted, for instance, as war crimes or crimes against humanity. It could even exclude, for instance, Al Shabaab attacks on AU peacekeepers in Somalia, 'on the pretext that they are fighting a foreign invasion and domination by foreign forces'.[27] There is, however, no exclusion in the OAU Convention of conduct in armed conflict covered by IHL.

States are then required to criminalize terrorist acts (article 2); eliminate political or other motives as a defence (article 3); establish extensive jurisdiction over the offences (article 6); investigate (article 7) and prosecute or extradite (article 8) suspects (thus addressing the problem of impunity). States must also cooperate in a range of ways (article 4), including exchange of information (article 5) and mutual legal assistance (Section V).

The OAU Convention shares some elements of the Arab League and OIC definitions, is more restrictive in other respects, and is more expansive in other ways. In addition to the national liberation exception, the OAU Convention follows the Arab and OIC Conventions in referring to instilling fear in the public; endangering life, physical security or freedom; harming public or private property, or the environment; and endangering 'natural resources' (the Arab and OIC Conventions refer comparably to a 'national resource').

The OAU Convention appropriately requires an underlying harmful act to also be 'a violation of the criminal laws of a State Party', whereas the Arab League and OIC Conventions more loosely extend to any act or violence that causes the requisite harm. It also does not reproduce the vague element from the OIC Convention of 'threatening the stability, territorial integrity, political unity or sovereignty of independent States'.

On the other hand, the OAU Convention goes further than the other treaties by referring to acts against 'cultural heritage';[28] or which disrupt public or essential services or create a public emergency; or that create 'general

[26] GA Res. 49/60, 9 December 1994, Annex, § 3: 'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them'.

[27] Ewi and du Plessis, *Criminal Justice*, supra note 7, at 1001.

[28] Algeria's 1992 domestic law definition, supra note 20, more narrowly mentions damage to 'national or republican symbols and… graves'.

insurrection' in a state. The latter offence reorients terrorism as a national security or political offence,[29] focused on protecting governments from rebellion or revolution, or averting civil war. The references to public or essential services bear some resemblance to the Algerian and Egyptian national definitions of 1992, with the Algerian law mentioning disruption to traffic, communication, transport, public authorities and public institutions, and the Egyptian law referring to damage to communications or impeding public authorities.[30]

Further, whereas the Arab and OIC Conventions focus on the terrorization of people, the OAU Convention includes an alternative 'special intent' (or motive) element of coercing or inducing a government, body or institution. A similar element was included in the UN Terrorist Financing Convention half a year later, in December 1999,[31] and has since appeared in the UN Draft Comprehensive Terrorism Convention, the EU Framework Decision on Combating Terrorism 2002, and in various national terrorism offences.[32]

The definition of terrorist offences in the OAU Convention have been criticized on human rights grounds as being vague and over-broad, and infringing the principle of legality[33] (which requires sufficient specificity and predictability in the definition of offences).[34] The protected targets are wide and ill-defined. 'Inducing' a government to adopt or abandon a particular standpoint is a basic aim of democratic politics, sometimes occasioned by overzealous acts of protest which amount to criminal violence but fall short of the concept of terrorism and which ought not be treated as such. Regarding acts which create a 'public emergency' or a 'general insurrection' as terrorism conflates national security or emergency laws with terrorism, eroding any meaningful distinction between these categories. There have also been concerns about the impact on the right to strike.[35]

[29] See also Kane, supra note 18, at 842, 849–51.

[30] Supra notes 20–1.

[31] Art. 2(1)(b) International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (hereafter 'Terrorist Financing Convention 1999').

[32] See Saul, *Defining Terrorism*, supra note 3, at 266–8.

[33] Kane, supra note 18, at 842.

[34] See, e.g., *Kokkinakis v Greece* (1993) 17 EHRR 397, § 52; *Castillo Petruzzi et al. v Peru* [1999] IACHR 6 (30 May 1999), § 121.

[35] *Sub-Commission on the Promotion and Protection of Human Rights, Terrorism and Human Rights: Additional progress report prepared by Kalliopi K. Koufa*, UN Doc. E/CN.4/Sub.2/2003/WP.1, 8 August 2003, § 78.

B. *Subsequent AU Counter-Terrorism Developments*

Several normative developments at the regional level, also potentially relevant to the interpretation of the Malabo Protocol terrorism offence, should be mentioned. The definition and exception in the OAU Convention supply the operative norms for an AU Protocol 2004 to the OAU Convention 1999,[36] spurred in part by concerns about the slow domestic implementation of the Convention. The Protocol 2004 creates no new offences, but aims to enhance the implementation of the Convention and to coordinate and harmonize African efforts to prevent and combat terrorism.[37] States undertake to implement a range of measures on terrorist training and financing, mercenarism, weapons of mass destruction, compensation for victims of terrorism, preventing the entry of terrorists, and exchange of information and cooperation.[38] The Protocol forbids the torture or degrading or inhumane treatment of terrorist suspects, but asks States to 'take all necessary measures to protect the fundamental human rights of their populations against all acts of terrorism'.[39] It tasks the AU's Peace and Security Council with harmonizing and coordinating African counter-terrorism, and states undertake to submit regular reports to the Council.[40]

At a 'soft' law level, the AU developed an African Model Anti-Terrorism Law in 2011[41] to stimulate and guide domestic implementation of international counter-terrorism obligations. While the model law defines 'terrorist act' by reference to UN and AU instruments, its other cumulative elements of definition significantly narrow the scope of liability and bring African practice more into line with international standards. In particular, relevant treaty offences must be intended 'to intimidate the public or any section of the public or compel a government or international organization to do or refrain from doing any act and to advance a political, religious or ideological cause, if the act':

(a) involves serious violence against persons;
(b) involves serious damage to property;

[36] Protocol to the OAU Convention on the Prevention and Combating of Terrorism (adopted 8 July 2004) (hereafter '2004 Protocol').
[37] Art. 2(2) 2004 Protocol, and pursuant to Art. 3(g) Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002).
[38] Art. 3(1) 2004 Protocol. The Convention also supplies a basis for extradition (art. 8) and contains a dispute settlement provision: art. 7.
[39] Art. 3(1)(k) and (a) 2004 Protocol, respectively.
[40] Arts 4–5 and 3(1)(h)–(i) 2004 Protocol, respectively. Regional mechanisms play a complementary role: Art. 6 2004 Protocol.
[41] African Model Anti-Terrorism Law, (endorsed 30 June–1 July 2011) (hereafter 'Model Law').

(c) endangers a person's life;
(d) creates a serious risk to the health or safety of the public or any section of the public;
(e) involves the use of firearms or explosives;
(f) involves exposing the public to any dangerous, hazardous, radioactive or harmful substance, any toxic chemical or any microbial or other biological agent or toxin;
(g) is designed to disrupt, damage, destroy any computer system or the provision of services directly related to communication infrastructure, banking and financial services, utilities, transportation or key infrastructure;
(h) is designed to disrupt the provision of essential emergency services such as the police, civil defence and medical services; or
(i) involves prejudice to public security or national security.[42]

While these elements overlap in significant respects with the acts mentioned in the OAU Convention, they tend to be more tightly circumscribed (for example, 'serious' violence, property damage, or risk to public health). In broad terms they are drawn from the elements of the Terrorist Financing Convention 1999. In addition, the further specific intent or motive element is required of a 'political, religious or ideological cause', which is drawn from some common law jurisdictions (such as the UK, Canada, Australia, New Zealand and South Africa) and partly reflects the UN General Assembly's 1994 Declaration (which refers to 'political purposes').

While the Model Law remains broad in other respects – such as an ambiguous reference to 'prejudice to public security or national security' – it is narrowed in an important way by the inclusion of a 'democratic protest' defence (excluding any act that is the result of 'advocacy, protest, dissent or industrial action' and which does not cause certain types of serious harm to people or property).[43] Unlike the OAU Convention, the Model Law further excludes 'acts covered by international humanitarian law, committed in the course of an international or non-international conflict by government forces or members of organized armed groups',[44] while also replicating the exemption for liberation or self-determination struggles.[45]

More generally, the AU's Plan of Action on the Prevention and Combating of Terrorism in Africa of 2002 makes further recommendations in the criminal field to states, including specific suggestions for legislative and

[42] Model Law, supra note 41, § xxxix.
[43] Ibid. § xl(a).
[44] Ibid. § xl(c).
[45] Ibid. § xl(b).

judicial measures.[46] These include measures in relation to investigation and prosecution, criminalization and punishment, evidence, judicial capacity building, harmonization of laws, extradition and mutual legal assistance, exclusion of the political offence exception to extradition, establishment of jurisdiction, extended modes of criminal liability (to place the mastermind, the apologist, the accomplice, the instigator and the sponsor of a terrorist act on the same pedestal as the perpetrator'); dissemination of propaganda; and terrorist financing.

3. DEFINITION AND ELEMENTS OF TERRORIST CRIMES

A. *Drafting History*

The Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, which recommended in 2006 that the African Court be granted criminal jurisdiction,[47] did not enumerate which crimes the Court should have jurisdiction over. The Habre case primarily concerned the Convention against Torture. The AU Assembly subsequently requested, in February 2009, the AU Commission to study the implications of the Court being empowered to try 'international crimes, such as genocide, crimes against humanity and war crimes',[48] but again no mention was made of terrorism.

In February 2009 the AU Commission asked the Pan African Lawyers Union (PALU) to provide recommendations. PALU proposed the first draft of the Protocol in its June 2010 report to the Commission.[49] No general crime of terrorism was included and the only operative reference to terrorism was in the war crime of 'acts of terrorism' (which was ultimately excluded from the Malabo Protocol as adopted in 2014). There was also a preambular reference to terrorism, which reiterated the AU's 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities, unconstitutional changes of governments

[46] *Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa*, High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa, Algiers, Mtg/HLIG/Conv.Terror/Plan.(I), 11–14 September 2002, §§ 12–13.

[47] *Report of the Committee of Eminent African Jurists on the Case of Hissene Habre*, available online at www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pdf (visited 31 March 2016), § 39.

[48] AU Assembly, Decision on the Implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction, Decision Assembly/AU/Dec.366 (XVII), § 8.

[49] Draft Supplementary Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, April 2010, Legal/ACJHR-PAP/4(II) Rev.2.

and acts of aggression'. That wording was retained through to the final Protocol as adopted in June 2014.

The first draft of June 2010 was reviewed by the AU Commission's Office of Legal Counsel in June 2010 and considered in 'validation' workshops with AU organs and Regional Economic Communities in August and November 2010. The crime of 'terrorism' appeared for the first time in the November 2010 draft Protocol.[50] The offence was drawn almost verbatim from the OAU Convention, including its extended modes of criminal liability, the liberation/self-determination exception, and the exclusion of political or other motives. Like the OAU Convention, the draft did not exclude conduct in armed conflict covered by IHL.

The only significant change of language between the OAU Convention and the draft Protocol was in the description of the underlying acts. Whereas the OAU Convention stipulates that an act must be a violation of national criminal law, the draft Protocol added to that formulation the alternatives of an act being a violation of 'the laws of the African Union or a regional economic community recognized by the African Union, or by international law'.[51]

The draft Protocol was considered further at a meeting of government experts in November 2011 and a May 2012 draft of the Protocol was endorsed by a meeting of Ministers of Justice and Attorneys-General in July 2012.[52] By that the stage the draft Protocol contained one further amendment to the terrorism provision: acts covered by IHL, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, were not to be considered as terrorist acts. Such acts were thus left to be regulated by the special law (*lex specialis*) of IHL, including war crimes liability. As noted earlier, in 2011 the AU had adopted the African Model Anti-Terrorism Law, which excluded acts covered by IHL.

Thereafter the final adoption of the draft Protocol was delayed because of lingering controversies over the definition of the crime of unconstitutional change of government, the scope of immunities, and financing issues. There were, however, no further changes to the terrorism offence when the Protocol

[50] *Fifth Meeting of Government Experts on Legal Instruments on the Transformation of the AU Commission in AU Authority and on the Review of the Protocols relating to the Pan African Parliament and the African Court on Human and Peoples' Rights*, ACJHR-PAP/4(II) Rev.2., 8–12 November 2010, Annex: Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, draft Art. 28A(9)-(11).

[51] Ibid., draft Art. 28A(9)(a).

[52] *The Report, The Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General*, EX.CL/731(XXI), 9–13 July 2012, Annex: Draft Protocol on the African Court of Justice and Human and Peoples' Rights (revisions up to 15 May 2012).

was adopted in June 2014. There was also little opportunity for civil society input into the AU's internal drafting process.[53]

B. *Definition of the Crime of 'Terrorism' and Interpretive Issues*

As adopted, the Malabo Protocol confers jurisdiction over the crime of 'terrorism' in article 28A(1)(6) and defines the crime of 'terrorism' in article 28G as follows:

> For the purposes of this Statute, 'terrorism' means any of the following acts:
>
> A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
>   1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
>   2. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
>   3. create general insurrection in a State.
> B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to(3).
> C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.
> D. The acts covered by international Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.
> E. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.

[53] M. Du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes', Institute for Security Studies Paper (No. 235)(June 2012), at 11.

As mentioned, the definition is drawn largely verbatim from the OAU Convention and consequently the drafting debates, and subsequent interpretation and practice surrounding that instruments since 1999, are relevant in shedding light on the Malabo Protocol offence. At the same time, practice under the OAU Convention is scarce; African states have been slow in both ratifying and domestically implementing it, and prosecutions and recorded judgments concerning its terrorist offences are rare.

The complex, compound definition of terrorism in the Malabo Protocol gives rise to numerous interpretive issues. The elements of the definition of terrorism are:

- An underlying act that violates national criminal law, AU law or African regional economic community, or international law; and
- Danger to life, physical integrity or freedom; or serious injury or death to a person or group; or damage to public or private property, natural resources, environmental or cultural heritage; and
- A special intent, or motive, to: (1) intimidate, put in fear, coerce or induce a government, body, institution, the public (or part of it); or (2) disrupt a public or essential service, or create a public emergency; or (3) create general insurrection.

The Malabo Protocol does not require any transnational element to the crime of terrorism, such that purely domestic terrorism comes within the jurisdiction of the African Court. This contrasts with, for instance, the approach of the international counter-terrorism conventions,[54] the UN Draft Comprehensive

[54] The treaties typically do not apply where an offence is committed in a single state, the offender and victims are nationals of that state, the offender is found in the state's territory and no other state has jurisdiction under those treaties: Art. 5(1) Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219 (hereafter 'Tokyo Convention 1963'); Art. 3(3)-(4) Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971), 860 UNTS 105 (hereafter 'Hague Convention 1970'); Art. 3(5) Hague Convention 1970 as amended by the Convention on the Suppression of Unlawful Acts relating to International Civil Aviation 2010 (adopted 10 September 2010, not yet in force) (hereafter 'Beijing Convention 2010'); Arts 4(2)-(5) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (adopted 23 September 1971, entered into force 26 January 1973), 974 UNTS 178 (hereafter 'Montreal Convention 1971'); Art. 4(1)-(2) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992), 1678 UNTS 221 (hereafter 'Rome Convention 1988'); Art. 1(2 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992), 1678 UNTS 304 (hereafter 'Rome Protocol 1988'); Art. 13 International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force

Terrorism Convention, and the nascent customary international crime of terrorism identified by the Special Tribunal for Lebanon.[55]

In light of protracted international debates about state versus non-state terrorism, it may be observed that any individual may bear criminal responsibility for the crime of terrorism, whether a state official or agent, members of non-state terrorist groups, or lone individuals. However, heads of state or government, and senior officials based on their functions, enjoy immunity from jurisdiction during their tenure in office pursuant to article 46A bis of the Malabo Protocol. There is also corporate criminal liability of legal persons, but not states, under article 46C of the Protocol.

1. '"Terrorism" Means Any of the Following Acts'

It is immediately apparent that there are technical problems of poor drafting. Article 28G begins by indicating that terrorism 'means any of the following acts', before listing paragraphs A to E. However, it is evident that the intended meaning 'terrorism' is actually confined to paragraphs A (the definition of terrorism) and B (extended modes of liability), whereas paragraphs C and D instead refer to what is *not* terrorism (liberation struggles and armed conflict), while paragraph E excludes political justifications.

(a) 'any act which is a violation of the criminal laws of a state party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law'

A more troubling ambiguity stems from the cross-referencing of acts that are unlawful under other regional or international laws. As noted earlier, underlying acts must be 'a violation of criminal laws of a State party', which is tolerably clear (even allowing for disparities in domestic criminalization of relevant conduct). By contrast, the Malabo Protocol departs from the OAU Convention by also referring to 'the laws of the African Union or a regional economic community recognized by the African Union, or by

3 June 1983), 1316 UNTS 205 (hereafter 'Hostages Convention 1979'); Art. 14 Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) (hereafter 'Vienna Convention 1980'); Art. International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) (hereafter 'Nuclear Terrorism Convention 2005'); Art. 3 International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001), 2149 UNTS 256 (hereafter 'Terrorist Bombings Convention 1997'); Art. 3 Terrorist Financing Convention.

[55] Interlocutory Decision on the Applicable Law, *Prosecutor v Ayyash et al.* (STL-11–01), Appeals Chamber, 16 February 2011, § 90.

international law'. Problematically, unlike the reference to national laws, these are not required to be violations of 'criminal' regional or international laws, but could conceivably extend to breaches of any regional or international treaty or customary law.

In an instrument establishing criminal liability, such ambiguity may fail to meet the requirements of the principle of legality recognized in article 7(2) of the African Charter on Human and Peoples' Rights[56] and article 15 of the International Covenant on Civil and Political Rights.[57] The principle of legality requires an offence to be sufficiently certain to enable a person to prospectively know the scope of their legal liabilities.[58] International and African regional law cover a vast range of areas; African instruments alone span such diverse subjects as fertilizer development, trade promotion, energy, transport, investment, youth, statistics, public service, and plant health, among many others.[59]

There is thus a risk that the Malabo Protocol may invite law enforcement authorities to reclassify breaches of ordinary regional and international law as terrorist crimes, where they in truth have little to do with terrorism. As a general rule, to satisfy the principle of legality, this element of the definition of terrorism should be restrictively interpreted as referring only to 'criminal' breaches of regional or international law (including the other crimes under the Malabo Protocol itself). This would also harmonize with the requirement that breaches of national law be criminal, and reflect the policy intention that the terrorism label should be reserved for serious (that is, criminal) breaches. UN Security Council resolution 1566 (2004), for example, confines its conception of terrorism to underlying acts that are crimes under the international counter-terrorism conventions. Notably, the South African law implementing the OAU Convention, on which the Malabo Protocol is based, imposes more stringent conditions on the character of the underlying criminal act, by requiring the 'systematic, repeated or arbitrary use of violence'.[60]

[56] Adopted 27 June 1981, entered into force 21 October 1986, 21 ILM 58, 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

[57] The prohibition on retrospective criminal punishment in Art. 15 encompasses the principle of legality.

[58] *Kokkinakis v Greece* (1993) 17 EHRR 397, § 52; *Castillo Petruzzi et al. v Peru* [1999] IACHR 6 (30 May 1999), § 121.

[59] See list of AU treaties available online at www.au.int/en/treaties (visited 31 March 2016).

[60] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

(b) 'WHICH MAY ENDANGER THE LIFE, PHYSICAL INTEGRITY OR FREEDOM OF, OR CAUSE SERIOUS INJURY OR DEATH TO, ANY PERSON, ANY NUMBER OR GROUP OF PERSONS' This element of the definition is reasonably objective, tightly circumscribed, embodies the core of terrorism, and is broadly unobjectionable.[61] Causing death or serious bodily injury is the essence of terrorism as defined in the Terrorist Financing Convention 1999, Security Council resolution 1566 (2004),[62] and the UN Draft Comprehensive Terrorism Convention.[63] Serious injury is not limited to 'bodily' injury (as in the aforementioned UN instruments), such that the Malabo Protocol could extend to serious psychological injury or mental suffering, such as that typically resulting from hostage taking or witnessing mass casualty attacks on others.

The Malabo Protocol adds the alternative limb of acts endangering life, which could occur even when no death or injury is caused, but is of a comparable gravity to those harms. Examples might include, for instance, acts endangering public health or safety, such as the release of toxins into a human water supply, or chemical, biological or nuclear attacks, which do not actually result in death or injury in the circumstances.

This element of the definition also provides an alternative limb of endangering 'physical integrity or freedom'. This expression is somewhat vague and ill-defined. The African Charter of Human and Peoples' Rights includes a right to integrity of person within the same provision protecting the right to life[64] and this element should be understood in that light.

The reference to danger to a person's 'freedom' is more ambiguous and in principle could encompass all political or civil liberties (such as freedoms of

[61] Lord Carlile of Berriew QC, *The Definition of Terrorism*, UK Independent Reviewer of Terrorism Legislation (CM 7052), March 2007, at 40 (referring to comparable elements in the UK definition).

[62] SC Res. 1566 (2004), § 3: 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism'.

[63] Its definition of terrorism is settled; disagreement persists on the exceptions: see Saul, *Defining Terrorism*, supra note 3, at 184–90.

[64] Art. 3 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' The 2002 definition of terrorism in the EU Framework Decision on Combating Terrorism likewise refers to 'physical integrity', which is drawn from the right to physical and mental integrity of the person in Article 3 of the Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009) (which primarily concerns medical and biological issues).

expression, opinion, conscience religion, assembly, association, and so on). In the context of an element focused on violence against the person, the better approach is to restrictively interpret it as referring to the various kinds of unlawful *deprivation of liberty*. These include, for example, unlawful or arbitrary detention, hostage taking, abduction, kidnapping for ransom, and enforced disappearance.

For all of the above alternatives, the Malabo Protocol refers to acts which 'may' endanger or cause the relevant harms. However, an instrument establishing criminal liability should be restrictively interpreted. Speculative, hypothetical or distant risks of the respective harms are not sufficient. There should be a *reasonable likelihood* that acts 'may' have those results.

(c) 'or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage'

This alternative element of the definition shifts the focus from danger to persons to damage to various types of property or certain other objects. The Malabo Protocol covers *any* 'damage' to property or these objects, and is not limited to 'serious' harm. In this respect it departs from international practice. For example, the UN Draft Comprehensive Terrorism Convention is confined to acts causing 'serious' damage to public or private property or 'major economic loss'. South African law also requires 'substantial' damage to property, natural resources, or environmental or cultural property.[65]

Caution is thus warranted; the crime of terrorism should be reserved for more serious harms rather than any ordinary or trivial damage to property, resources, or environmental or cultural heritage. This is particularly the case given that, unlike the African Model Anti-Terrorism Law 2011, the Malabo Protocol does not contain a 'democratic protest' exception, which contemplates the ordinary kinds of robust political protests in a democratic society which sometimes result in public disorder and property damage. There is a need for prosecutorial discretion to be sensibly exercised in this regard.

Damage to Property

Plainly, attacks on property, even where they do not cause injury to persons, are common methods instrumentally utilized by terrorists to pursue their goals. Examples could include attacking government buildings or schools at night, on the weekend, or after warnings to evacuate are given (thus avoiding civilian casualties); or attacking public utilities such as energy, water,

[65] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

sanitation, transportation or communications infrastructure.[66] Such attacks not only cause fear but can result in major economic losses.

Whereas terrorists commonly attack public targets, private property may also be the focus of attacks (as was the case on 11 September 2001, when Al Qaeda attacked commercial buildings in New York). Terrorists may also target private businesses or non-governmental organizations that support their adversaries, such as contractors or donors to governments, or NGOs that provide education or healthcare services that a terrorist group opposes.

The Malabo Protocol does not define 'property'. Useful reference may be made to the UN Draft Comprehensive Terrorism Convention, which likewise refers to damage to public or private property and non-exhaustively enumerates such property as 'including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment'. An ordinary interpretation of the term 'property' encompasses not only physical property (such as buildings, vehicles, and infrastructure such as roads, railways, ports, airfields and public spaces (such as parks, sports fields and the like)) but also intangible economic and financial assets (and potentially even intellectual property).

Thus 'cyber' attacks which damage computer or electronic networks could fall within the definition. These might include attacks on computers controlling physical infrastructure (for instance, to disable a dam, water supply, or transport network), digital records of economic transactions or assets (such as banking, financing, investment, or taxation), and other proprietary data (such as plans of military weapons, industrial espionage, or public health records). Caution is, however, warranted in regarding harmful cyber activities as 'terrorism'; such acts are very diverse, many fall short of the gravity of terrorism, and the emphasis should remain on acts that endanger or intimidate people. That, after all, is a defining characteristic of terrorism.

Damage to Natural Resources

The Malabo Protocol does not define the closely related concepts of 'natural resources' or 'environmental heritage'. 'Natural resources' may be usefully understood by reference to the definition in the African Convention on the Conservation of Nature and Natural Resources, namely 'renewable resources, tangible and non-tangible, including soil, water, flora and fauna and non-renewable resources'.[67] Reference may also be made to African regional law

[66] See also the examples given by Carlile, supra note 61.

[67] Art. 5(1) African Convention on the Conservation of Nature and Natural Resources (Revised Version) (adopted 1 July 2003) 1001 UNTS 3.

on the right of peoples to freely dispose of their wealth and natural resources,[68] and to international law on permanent sovereignty over natural resources.[69] A further, more specific link may be made to the separate crime of the 'illicit exploitation of natural resources' in article 28L bis of the Malabo Protocol.

Illustratively, the African Commission on Human and Peoples' Rights has previously found violations of the right to freely dispose of natural resources. In *Social and Economic Action Rights Centre (SERAC) v Nigeria* (2001), the Commission found that Nigeria had 'facilitated the destruction of Ogoniland' and its people's well-being by approving, and supporting with military violence, private oil exploitation that contaminated the environment (water, soil and air) and harmed human health.[70] In another case, *Endorois Welfare Council v Kenya* (2010), the Commission held that Kenya's approval of tourism and mining projects unlawfully interfered in the traditional lands and resources (such as water and minerals) of an indigenous community, which depends on them for their survival.[71]

In the context of terrorism, damage to natural resources (or indeed the partly overlapping category of 'environmental heritage') could be caused by activities such as the illicit exploitation or trade in oil,[72] minerals (such as diamonds or gold), timber,[73] and wildlife.

Damage to Environmental Heritage

As regards 'environmental heritage', international instruments, including in Africa, generally do not attempt to legally define the 'environment'.[74] The African Charter on Human and Peoples' Rights refers only to a people's 'right to a general satisfactory environment favourable to their development' (article 24). The Malabo Protocol elsewhere includes a crime of the 'trafficking in

[68] Art. 21 African Charter on Human and Peoples' Rights.

[69] GA Res. 1803 (XVII), 14 December 1962.

[70] African Commission on Human and Peoples' Rights (ACHPR), *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACHPR Communication No. 155/1996, 2001 AHRLR 60 (27 October 2001), § 58.

[71] ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, ACHPR Communication No. 276/2003, 2009 AHRLR 75 (4 February 2010), §§ 263–8.

[72] SC Res. 2199 (2015) condemned, in the context of the conflict in Syria and Iraq, 'any engagement in direct or indirect trade, in particular of oil and oil products, and modular refineries and related material, with ISIL, ANF and any other individuals, groups, undertakings and entities designated as associated with Al-Qaida'.

[73] SC Res. 1521 (2003) banned log exports from Liberia; SC Res. 2036 (2012) banned the export of charcoal from Somalia.

[74] P. Birnie and A. Boyle, *International Law and the Environment* (2nd edn., Oxford: Oxford University Press, 2002), at 3.

hazardous wastes' (article 28L), which in turn cross-refers to 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.[75] Article 28L additionally mentions radioactive wastes subject to international control.

In the international environmental law context, references to environmental effects, impacts or damage typically address harm to flora, fauna, soil, water (fresh and sea), landscape, cultural heritage, ecosystems and the climate, as well as dependent human socio-economic systems, health and welfare.[76] This encompasses a very wide range of legal norms and regimes, addressing natural resources, biodiversity, endangered and migratory species, deforestation and desertification, Antarctica, world heritage areas, oceans, international watercourses, climate change, ozone, the marine environment, and pollution and waste.[77] A few instruments require states to criminalize certain conduct, such as trade in or possession of endangered wild fauna or flora species, or maritime pollution.[78]

For both resources and the environment, the Malabo Protocol does not criminalize *lawful* damage to natural resources that is inevitably caused by their exploitation (such as by mining or logging), or lawful damage to the environment (for instance, caused by regulated development), but harms caused by predicate acts that are either criminal under national law, or criminal or otherwise illegal under African or international law.

Damage to Cultural Heritage

The Malabo Protocol does not define 'cultural heritage'. Reference may be made to the international standards developed by UNESCO,[79] by which

[75] Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998) 2101 UNTS 177 (hereafter 'Bamako Convention').

[76] Birnie and Boyle, supra note 74, at 4.

[77] Ibid.

[78] Respectively, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 1 March 1973, entered into force 1 July 1975) 993 UNTS 243 (hereafter 'CITES') and the International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184 (hereafter 'MARPOL').

[79] Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151; Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3; Convention on the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 1; UNESCO, Declaration on the Intentional Destruction of Cultural Heritage (17 October 2003); see also

cultural heritage may be tangible (such as buildings, monuments, landscapes, books, works of art, and artefacts) or intangible (such as oral traditions, folklore, performing arts, songs, rituals, languages and traditional knowledge). Tangible heritage may be movable (such as paintings, sculptures, coins, manuscripts, clothes, and documents); immovable (such as monuments and archaeological sites); or underwater (shipwrecks, ruins and cities). There are also specific regimes prohibiting the illicit trade in cultural property[80] and providing for the restitution of stolen or illegally exported cultural objects.[81]

In the context of terrorism, there are numerous examples of terrorist organizations damaging cultural heritage, including in Africa. In Mali, for example, Islamist militants attacked ancient Sufi shrines, mosques, historic monuments, libraries and manuscripts in Timbuktu in 2012, precipitating an ICC investigation into a suspect surrendered by Niger in 2015.[82] Elsewhere, the Islamic State has systematically destroyed 'idolatrous' cultural heritage, including museums, mosques and historic monuments (such as Palmyra in Syria), and illegally traded artefacts for profit. In Afghanistan, archaeological sites have been illegally excavated, looted and vandalized,[83] including the Taliban's notorious destruction of the Bamiyan Buddhas. In Iraq, museums have been looted and the cultural heritage of religious minorities attacked.[84]

Special Intent/Purpose/Motive Requirement

In addition to proving damage to one or more of the protected interests discussed above, the Malabo Protocol requires proof of one of three alternative special intentions, purposes or motives ('is calculated or intended to').

Art. 15(1)(a) International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) 993 UNTS 3 (hereafter 'ICESCR') (cultural rights are interpreted to include cultural heritage).

[80] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 (covering inventoried and declared property).

[81] UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 1 July 1998) 34 ILM 1322 (covering all objects).

[82] M. Lostal, 'ICC opens a case for the destruction of cultural heritage in Mali' (2 October 2015) available online at www.globalpolicy.org/home/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html (visited 1 April 2016). The suspect is Ahmad Al Mahdi Al Faqi. The Islamist groups involved were Ansar Dine, Al-Qaeda in the Islamic Maghreb (AQIM) and the Movement for Unity and Jihad in West Africa (MUJAO).

[83] Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations: Afghanistan, E/C.12/AFG/CO/2–4 (7 June 2010), § 44.

[84] CESCR, Concluding Observations: Iraq, E/C.12/1994/6 (30 May 1994), § 12. See also Angola, E/C.12/AGO/CO/3 (1 December 2008), § 40.

However, there is no further special intent requirement of a political, religious or ideological purpose, unlike in the African Model Anti-Terrorism Law 2011, the UN Declaration of 1994, and some common law systems (including South African law). Consequently, the Malabo Protocol also covers privately-motivated violence, such as acts driven by profit, family disputes, jealousy, revenge and so forth;[85] another example is a gangland stabbing to intimidate the community or a rival gang.[86] As such, some of what is distinctive about terrorism – its political or public orientation – is lost. This approach is, nonetheless, consistent with some other international and regional approaches, including the Terrorist Financing Convention 1999, Security Council resolution 1566 (2004), and the UN Draft Comprehensive Terrorism Convention.[87]

(d) 'and is calculated or intended to ... 1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles' The first option is broadly consistent with international practice, in that the Terrorist Financing Convention 1999, Security Council resolution 1566 (2004), and the UN Draft Comprehensive Convention all comparably refer to acts intended 'to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'.[88] The Malabo Protocol nonetheless blurs the clarity of the international approach in a number of respects and widens the scope of liability.

First, it is not limited to the public, governments and international organizations, but extends to any 'body or institution', without defining them. The latter could include, for instance, social organizations such as NGOs, trade unions, media, or religious groups – although these would arguably already be well covered by the reference to a 'segment' of the general public.

[85] See generally B. Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient – Or Criminalizing Thought?' in A. Lynch, E. MacDonald and G. Williams (eds), *Law and Liberty in the War on Terror* (Sydney: Federation Press, 2007), at 28.

[86] D. Anderson QC, *The Terrorism Acts in 2012*, UK Independent Reviewer of Terrorism Legislation (July 2003), at 58.

[87] See also *Prosecutor v Ayyash*, supra note 1.

[88] The Security Council resolution additionally requires that the act is committed 'with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons', but this largely repeats the alternative notion of intimidating a population.

Whereas the international instruments focus on the *intimidation* of the public or *compulsion* of a government or international organization, the Malabo Protocol supplements these with the alternative intentions of 'fear', 'force', or 'induce'. Moreover, it does not reserve particular intentions for specific groups or entities, but extends *all* of the intentions to *any* of the protected targets. Thus, a government may be intimidated or put in fear, while the public may be coerced, and so on. The term 'induce' also sets the bar of terrorism considerably lower than the other terms (intimidate, fear, force, or coerce). Further, some other regional instruments raise the bar higher by requiring, for example, 'serious' intimidation or 'undue' compulsion.[89] South Africa's terrorism law refers to acts which 'unduly compel' a target.[90]

Significantly, the Malabo Protocol follows the international approach in shielding all governments from terrorism, regardless whether a government is democratic or human rights-respecting. As mentioned earlier, there is no democratic protest exception for less harmful violent acts, as in the African Model Anti-Terrorism Law 2011. More importantly, there is also no exception or defence for acts of morally justifiable rebellion or resistance against repressive authoritarian, tyrannical, dictatorial or military governments.[91] A UK court held that where a terrorism law unambiguously covers all governments, it cannot be interpreted to imply an exception or defence for terrorist acts motivated by morally just causes.[92]

(e) 'AND IS CALCULATED OR INTENDED TO ... 2. DISRUPT ANY PUBLIC SERVICE, THE DELIVERY OF ANY ESSENTIAL SERVICE TO THE PUBLIC OR TO CREATE A PUBLIC EMERGENCY' This special intention is an alternative to the element of intimidation or coercion above. As such, it considerably lowers the threshold for establishing the crime of terrorism. For example, a criminal act (say, vandalism) which damages property (such as a bus stop) in order to disrupt a public bus could qualify as terrorism. Again, mere disruption is sufficient, without *serious* disruption being required. By contrast, South Africa's terrorism law demands 'serious' disruption or interference with essential services.[93]

[89] EU Framework Decision on Combating Terrorism (adopted and entered into force 13 June 2002) 2002/475/JHA.

[90] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

[91] See generally Saul, *Defining Terrorism*, supra note 3, at chapter 2; Carlile, supra note 61, at 43–5.

[92] Court of Appeal of England and Wales, *R v F* [2007] EWCA Crim 243, §§ 19–40.

[93] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

Again, proper exercise of prosecutorial discretion will be vital in ensuring that ordinary, relatively harmless crimes are not re-characterized as terrorism. Likewise, there is a risk that that unruly democratic protest or industrial action may be captured by the offence. For instance, public servants on strike over labour conditions, who damage property (such as a chair, desk or computer) in a government building, and disrupt the work of their department, could be regarded as terrorism.

The provision is unusual in that it is not reflected in other international or regional instruments. As noted earlier, the UN Draft Comprehensive Convention non-exhaustively defines property to include damage to a public place or public transport system, or a state or infrastructure facility, but these are cast as types of damage rather than as specific or ulterior intentions. The result is that disruption of public or essential services need not also intimidate the public or coerce a government; the fact of disruption is enough to establish terrorism.

The provision covers three different categories. 'Any public service' covers services provided by a government (directly or through privately contracted providers) in any area, such as health care, education, social security, housing, social services, libraries and cultural services, public broadcasting, mail, and regulatory authorities (from car registration to tax inspection).

'Any essential service' could include utilities such as water, energy, sanitation, emergency services (including hospitals, ambulances, fire services and police), communications, transport, prisons and air traffic control.[94] Certain electronic services could also be covered under one or both categories, from mobile and internet communications to banking facilities.

By way of example, South Africa's terrorism law non-exhaustively defines an 'essential service, facility or system' to include electronic systems (including an information system); telecommunications, banking or financial services or systems; systems for the delivery of essential government services; systems for essential public utilities or transport providers; and an essential infrastructure facility.[95] It further (non-exhaustively) defines an 'essential emergency service' to include police, medical or civil defence services, a definition shared by the African Model Anti-Terrorism Law 2011. While the latter does not also specifically mention other 'essential services', it does

[94] Some examples of essential services in the different context of international labour law are given by the International Labour Organization (ILO), *Freedom of Association: Digest of Decisions and Principles* (5th ed, Geneva, 2006), § 585.

[95] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

enumerate instances of such services, including communication infrastructure, banking and financing services, utilities, transportation or key infrastructure, as well as computer systems.

The concept of a 'public emergency' is well articulated in the international and regional jurisprudence on derogation under human rights treaties.[96] A public emergency is 'a situation of exceptional and [actual or] imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community',[97] and where normal responses are inadequate.[98] Severe terrorist threats, such as that confronted by the United Kingdom from Al Qaeda after the 11 September 2001 attacks on the United States, may qualify as a public emergency.[99] South Africa's terrorism law, which implements the OAU Convention definition on which the Malabo Protocol is based, imposes the additional stringent condition that a public emergency must be 'serious'.[100]

(f) 'AND IS CALCULATED OR INTENDED TO ... 3. CREATE GENERAL INSURRECTION IN A STATE' This alternate limb of the definition is one of the broadest. It conflates terrorism with other distinct species of political violence. The concept of insurrection is also described in different national laws as rebellion, revolution or other public security offences concerning challenges to a state's political authority or constitutional order. Given the exclusion of armed conflicts from the Malabo Protocol terrorism crime, this element is concerned only with insurrections beneath the intensity threshold of a non-international armed conflict. Classically, insurrection is regarded under national law as an archetypal political offence exempt from extradition (unless atrocious, indiscriminate or disproportionate means are used).

Whereas crimes of insurrection in domestic law commonly protect a particular state from violence, the Malabo Protocol (and OAU Convention on

[96] Art. 4 International Covenant on Civil and Political Rights (adopted 16 December 1966 entered into force 23 March 1976) 999 UNTS 171 (hereafter 'ICCPR'); Art. 15 European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221. There is, however, no derogation clause in the African Charter on Human and Peoples' Rights: see African Commission on Human and Peoples' Rights, *Media Rights Agenda and Others v Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998), §§ 67–8.

[97] *Lawless v Ireland* (No. 3) (1961) 1 EHRR 15, at 31.

[98] *The Greek Case*, European Commission on Human Rights, Application Nos. 3321/67, 3322/67, 3323/67 and 3344/67 (1969).

[99] *A and Others v United Kingdom*, Application No. 3455/05, ECtHR (19 February 2009), § 179.

[100] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

which it is based) internationalizes the offence of insurrection to protect *any* state. Again, no distinction is drawn between insurrection against democratic governments and those against authoritarian or repressive ones. The Malabo Protocol shields even totalitarian regimes from insurrectionist violence.

This contrasts starkly with the separate crime in the Malabo Protocol of 'unconstitutional change of government' (article 28E), which was controversial in the drafting because of the proposed criminalization of 'popular uprising'. Reference to popular uprising was ultimately omitted because of concerns about repressing legitimate resistance. Moreover, the crime in article 28E is limited to acts against 'democratically elected governments'. The drafters seem to have overlooked similar concerns in the context of terrorism, by criminalizing insurrection as terrorism regardless of whether a state is democratic. This was probably because the Malabo Protocol unreflectively adopted the OAU Convention definition.

An insurrection may or may not use terrorist methods, in the sense of deliberate or indiscriminate violence against civilians or other protected objects. The Malabo Protocol treats all insurrections utilizing violence as terrorism, even those which only target state authorities (such as military, intelligence, security or police officials), avoid indiscriminate or atrocious attacks, and spare civilians. In doing so, it conflates the question of the legitimacy of resort to violence with the legitimacy of the means and methods used. Given the cautious drafting of article 28E, restraint should be exercised by prosecutors in utilizing the insurrection element of the terrorism crime in article 28G, such as by only prosecuting insurrections where violence is disproportionate or indiscriminately targets civilians.

C. *Extended Modes of Criminal Liability*

Article 28G(B) of the Malabo Protocol further defines the crime of terrorism to include '[a]ny promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in subparagraph (a)(1) to (3)'. The provision replicates the extended modes of criminal liability for terrorism in the OAU Convention.

The inclusion of these extended modes of criminal liability is both largely unnecessary and technically problematic. The extended modes were necessary in the OAU Convention because that instrument dealt solely with the crime of terrorism, designed for implementation in domestic law, and accordingly there were no common or general provisions on extended liability which the instrument could fall back upon. Extended modes otherwise vary in

national law, and the OAU Convention aims to encourage domestic harmonization and transnational cooperation on commonly identified forms of criminal participation.

In contrast, the Malabo Protocol demarcates a regional court's jurisdiction over a bundle of different crimes and contains a common provision on extended modes of liability. Article 28N sets out the 'modes of responsibility', and addressed fully in a separate chapter, is applicable to all crimes in the Protocol:

> An offence is committed by any person who, in relation to any of the crimes or offences provided for in this Statute:
>
> i. Incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute;
> ii. Aids or abets the commission of any of the offences set forth in the present Statute;
> iii. Is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences set forth in the present Statute;
> iv. Attempts to commit any of the offences set forth in the present Statute.

Unlike terrorism, most of the other crimes in the Malabo Protocol are not defined to include their own specific modes of extended liability, but rely on the common modes in article 28N. There are only a few crime-specific exceptions to this general approach (such as recruiting, using, financing or training mercenaries in article 28H(2)) – as well as some troubling omissions (such as the failure to specifically include direct and public incitement to genocide, as required by the Genocide Convention 1948).

The combination of the terrorism-specific modes of extended liability in article 28G(B) and the general modes of extended liability in article 28N both creates grave confusion and overly broad criminal responsibility. In means, for instance, that a person may be liable for inciting incitement to terrorism; or attempting to attempt terrorism; or aiding the aiding of terrorism, and so on.

Oddly, one of the most important terrorism-specific extended offences, financing terrorism, is not found in the terrorist crimes in article 28G(B) at all (though it does appear as a separate offence in the African Model Anti-Terrorism Law 2011), while financing any offence under the Malabo Protocol is found in the general provision on extended liability in article 28N. Only the 'threat' to commit terrorism is appropriately located in article 28G(B) (and does not appear in the general provision concerning all crimes).

Given this confusion, two interpretive approaches are available. The first would be to treat articles 28G(B) and 28N as mutually exclusive and regard the former as the only forms of extended liability applicable to terrorism. This - straight-forward approach treats article 28G(B) as the more special law (*lex specialis*) relevant to terrorism, thus displacing the general provision applicable to other crimes, particularly given that most other crimes do not have their own specific modes of extended liability. As noted above, however, this would have the disadvantage of excluding one of the most important forms of extended liability for terrorism, namely terrorist financing, unless it can be characterized under some other mode (such as sponsoring, contributing to, or aiding).

The alternative approach is to consider, in the first instance, applying the terrorism-specific modes of extended liability in article 28G(B), then falling back on the general provision in article 28N to fill any gaps or plug any holes left by the former provision (for instance, concerning financing). The former provision remains the *lex specialis* but is flexibly supplemented (rather than displacing) by the latter.

In international law, there are three points of comparison for the Malabo Protocol. Firstly, the ICC Statute recognizes the following extended modes of criminal responsibility: commission and joint commission; ordering, soliciting, or inducing; aiding, abetting or assisting; intentionally contributing to the commission of a crime by a group; and attempt.[101]

Secondly, most of the international counter-terrorism instruments recognize a number of bases of liability: (a) threats;[102] (b) attempts;[103] (c) organizing or directing others;[104] (d) participating as an accomplice;[105]

[101] Art. 25, ICCSt.

[102] Art. 1(a) Hague Convention 1970; Art. 1(2) Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 2(1)(c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977), 1035 UNTS 167 (hereafter 'Protected Persons Convention 1973'); Art. 3(2)(c) Rome Convention 1988; Art. 2(c) Rome Protocol 1988; Art. 7(e) Vienna Convention 1980; Arts. 2(2)(a)-(b) Nuclear Terrorism Convention 2005.

[103] Art. 1(a) Hague Convention 1970; Art. 1(3)(a) Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 1(2)(a) Montreal Convention 1971; Art. 2(1)(d) Protected Persons Convention 1973; Art. 3(2)(a) Rome Convention 1988; Art. 2(a) Rome Protocol 1988; Art. 1(2)(a) Hostages Convention 1979; Art. 7(f) Vienna Convention 1980; Art. 2(3) Nuclear Terrorism Convention 2005; Art. 2(2) Terrorist Bombings Convention 1997; Art. 2(4) Terrorist Financing Convention 1999.

[104] Art. 1(3)(b) Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 2(4)(b) Nuclear Terrorism Convention 2005; Art. 2(3)(b) Terrorist Bombings Convention 1997; Art. 2 (5)(b) Terrorist Financing Convention 1999.

[105] Art. 1(b) Hague Convention 1970; Art. 1(3)(c) Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 1(2)(b) Montreal Convention 1971; Art. 2(1)(e) Protected Persons Convention 1973; Art. 3(2)(b) Rome Convention 1988; Art. 2(b) Rome Protocol 1988;

(e) knowingly assisting another to evade investigation, prosecution or punishment;[106] (f) agreeing with one or more persons to commit an offence;[107] or (g) otherwise contributing to or participating in the commission of an offence by a group.[108] The latter mode is found in article 25(3)(d) of the ICC Statute, which was modelled on the Terrorist Bombings Convention 1997.[109] The scope of extended criminal liability expanded over time.[110] Up to the 1990s, the sectoral treaties were limited to criminalizing commission, attempt, and participation. Since the Terrorist Bombings Convention 1997, it became an offence in new (and amended) treaties to organize or direct others to commit an offence, or to contribute in any other way to the commission of an offence by a group acting with a common purpose (article 2(3)).[111]

Thirdly, again in a terrorism-specific context, the UN Security Council has required states to bring to justice not only those who 'perpetrate' terrorist acts, but also those who participate in 'financing, planning, preparation... or in supporting terrorist acts'.[112] It has further required states to combat foreign terrorist fighters, namely by criminalizing those who (a) travel or attempt to travel to a foreign state for 'for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training'; (b) finance such travel, or (c) organize, facilitate or recruit for such travel.[113] Finally, it has encouraged (but not required) states to prohibit incitement to terrorism.[114]

Art. 1(2)(b) Hostages Convention 1979; Art. 2(4)(a) Nuclear Terrorism Convention 2005; Art. 2(3)(a) Terrorist Bombings Convention 1997; Art. 2(5)(a) Terrorist Financing Convention 1999.

[106] Art. 1(3)(d) Hague Convention 1970 as amended by the Beijing Protocol 2010.

[107] Art. 1(4)(a) Hague Convention 1970 as amended by the Beijing Protocol 2010.

[108] Art. 1(4)(b) Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 7(g) Vienna Convention 1980; Art. 2(4)(c) Nuclear Terrorism Convention 2005; Art. 2(3)(c) Terrorist Bombings Convention 1997; Art. 2(5)(c) Terrorist Financing Convention 1999.

[109] Art. 2(3)(c) Terrorist Bombings Convention 1997.

[110] A. Sambei, A. du Plessis and M. Polaine, *Counter-Terrorism Law and Practice: An International Handbook* (Oxford: Oxford University Press, 2009), at 34.

[111] See, e.g. Art. 2 Terrorist Financing Convention 1999; Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (adopted 14 October 2005; entered into force 28 July 2010) (hereafter 'Protocol 2005 to the Rome Convention 1988'), inserting Art. 3 *quater*; Protocol 2005 to the Rome Protocol 1988, inserting Art. 2 *ter*; Art. 1(4)-(5) Beijing Convention 2010.

[112] SC Res. 1373 (2001), § 2(e).

[113] SC Res. 2178 (2014), § 6.

[114] SC Res. 1624, 14 September 2005, § 1.

D. *Exclusion of Liberation or Self-Determination Struggles*

Article 28G(C) of the Malabo Protocol provides that 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts'. This exclusionary provision follows in the footsteps of the OAU Convention, the Arab League Convention, the OIC Convention, and the African Model Anti-Terrorism Law 2011. The OIC also continues to argue for the inclusion of such a provision in the UN Draft Comprehensive Terrorism Convention, while Pakistan (an OIC member) lodged a reservation upon signing the Terrorist Bombings Convention 1997 purporting to exclude self-determination movements from its application.

The provision is rooted in Africa's historical experience of colonialism and decolonization struggles, as well as contemporary sympathizers for fellow travellers such as the Palestinians. Most African peoples have now attained independence, with the important exception of the people of Western Sahara, occupied by Morocco, and some small European possessions (such as the Spanish territories of Ceuta, Melilla and the Canary Islands near Morocco; Portuguese Madeira off the Moroccan coast; and the French Réunion off Madagascar). In this sense, in practice the provision may prove to be of largely symbolic value.

However, to the extent that African states become victims of foreign occupation (by other African states or foreign states), it will retain its significance. Africa has experienced a number of inter-state wars in recent years, including Uganda's partial occupation of the Democratic Republic of the Congo, conflicts between Ethiopia and Eritrea, and foreign interventions in Libya. In this respect, article 28G(C) elaborates that liberation or self-determination struggles can include 'armed struggle against colonialism, occupation, aggression and domination by foreign forces'.

The provision does not exempt liberation or self-determination struggles from other international or regional criminal liabilities, including for war crimes and crimes against humanity (including elsewhere under the Malabo Protocol). The provision does not, therefore, confer impunity on liberation movements, but reflects a political concern not to label and stigmatize such just causes as 'terrorist', even if their methods are excessive. Again, this reflects the acute sensitivities of the decolonization period, in which liberation forces were sometimes branded and delegitimized as 'terrorists' by colonial powers.

By contrast, none of the 18 or so international counter-terrorism treaties excludes liberation or self-determination violence, while regular UN General

Assembly resolutions since the mid-1990s also do not exempt it. As such, certain conduct not regarded as terrorism under the Malabo Protocol may also still be criminal under transnational counter-terrorism instruments (regulating, for example, terrorist bombings, terrorist financing, nuclear terrorism, or attacks on targets such as diplomats, aircraft, airports, ships and maritime platforms, among others).

The precise legal scope of the provision must be determined by resort to the international law concepts it references. The term 'peoples' classically refers to the whole population of a colonized or occupied territory, rather than minority or indigenous groups forming a sub-set of it. A people may be represented by a movement recognized by the United Nations, or the relevant regional organization. The right of 'self-determination' entitles a people to 'freely determine their political status and freely pursue their economic, social and cultural development',[115] and African human rights law reiterates the right.[116] It can include a right to claim independent statehood, as well as other forms of political organization.

The provision further refers to 'the struggle waged by peoples *in accordance with the principles of international law*' (emphasis added). The latter qualifying phrase may be interpreted in two different ways. Firstly, it may refer to the international law right of peoples to wage a struggle for liberation or self-determination; that is, to the legal entitlement to pursue those goals. Secondly, it may refer to the legality of the *means or methods* by which a people struggles for those goals. Both are plausible interpretations and both limit the benefit of the provision to those acting lawfully ('in accordance with' international law). It is self-evident that the exclusionary provision cannot be claimed by those who do not enjoy a right of self-determination in the first place; it is more difficult to determine when a people entitled to self-determination would lose the benefit of the exclusionary provision because they utilized means or methods of struggle which were not in accordance with international law. (The Malabo Protocol's other exclusionary provision,

[115] Art. 1(1) ICCP and ICESCR.

[116] Art. 20, African Charter on Human and Peoples' Rights: '1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. 3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.'

concerning armed conflict covered by IHL, excludes all hostile acts in conflict, not just those in conformity with IHL.)

The distinction is historically significant because of long running divisions amongst states within the United Nations about the permissible means of pursuing self-determination. Many decolonized states claimed that there existed a right of people to resort to armed struggle to secure self-determination, while primarily western states opposed such a right; an intermediate view held that liberation movements were entitled to use violence in response to violent repression of their self-determination right by a colonial power. Even if the former view were correct, it would still not exempt liberation fighters from other international criminal liabilities, including for war crimes, genocide or crimes against humanity. Again, on this approach the provision is more about political labelling than criminal liability per se.

Where such struggles involve armed conflicts under IHL, they will already be excluded by article 28G(D) of the Malabo Protocol (discussed below) – either as international conflicts between liberation forces and a state party to Additional Protocol I of 1977, or as non-international conflicts between state forces and a liberation movement qualifying as an organized armed group under IHL. Given the existence of a more specific exclusion for armed conflicts covered by IHL, article 28G(C) should be understood as excluding liberation or self-determination struggles that neither rise to the intensity of an non-international armed conflict, nor involve 'organized armed groups' participating in such conflicts.

Struggles beneath the intensity of armed conflict could include, for example, low level, sporadic or intermittent violence (including attacks on civilian or governmental personnel or objects), civil unrest or disorder, or violent protests, demonstrations, rallies and the like. Violence during armed conflicts by liberation movements that are not 'organized armed groups' could include, for example, the sporadic participation of civilians in hostilities, including individual resistance in occupied territory.

E. *Exclusion of Acts Covered by IHL*

The Malabo Protocol provides that '[t]he acts covered by international Humanitarian Law, committed during an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts' (article 28G(D)). In this respect it departs from the OAU Convention and instead follows the approach of the African Model Anti-Terrorism Law 2011. This is also consistent with the approach in recent international counter-terrorism treaties, which exclude

the activities of armed forces during armed conflict, as those terms are understood under IHL, which are governed by that law.[117] The International Committee of the Red Cross has further endorsed this approach in the negotiations for the UN Draft Comprehensive Terrorism Convention.[118] The effect of the provision is to exclude such acts from being treated as terrorism and to defer to the special law (*lex specialis*) of IHL.

The provision applies where there exists an international or non-international armed conflict. Those categories are defined by IHL, particularly the Geneva Conventions of 1949, Additional Protocols I and II of 1977, and customary IHL. An international conflict involves military hostilities between two or more states, or an occupation of foreign territory even in the absence of hostilities.[119] An international conflict can also be constituted by hostilities between a state party to Additional Protocol I of 1977 and a self-determination movement representing a people,[120] as is the case between Morocco (occupying the Non-Self-Governing Territory of Western Sahara) and Polisario (representing the Saharawi people).[121]

[117] Art. 3 *bis* Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 4(2) Nuclear Terrorism Convention 2005; Art. 19(2) Terrorist Bombings Convention 1997; Art. 2(1)(b) Terrorist Financing Convention 1999; Art. 3 Protocol 2005 to the Rome Convention 1988 (adding Art. 2 *bis* (2)); Amendment 2005 to the Convention on the Physical Protection of Nuclear Material 1980 (adopted 8 July 2005, not yet in force) (hereafter 'Amendment 2005 to the Convention on the Physical Protection of Nuclear Material 1980'), inserting Art. 2(4)(b). Many of the earlier treaties do not explicitly address the issue: see *R v Gul (Appellant)* [2013] UKSC 64, §§ 47–8.

[118] International Committee of the Red Cross, *Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law* (Geneva: International Institute of Humanitarian Law, 2002).

[119] Common Art. 2, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949; entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949; entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949; entered into force 21 October 1950) 75 UNTS 135 (hereafter 'Third Geneva Convention'); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949; entered into force 21 October 1950) 75 UNTS 287 (hereafter 'Geneva Conventions').

[120] Art. 1(4) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977; entered into force 7 December 1978) 1125 UNTS 3 (hereafter 'Protocol I').

[121] In June 2015 Polisario deposited a unilateral declaration of adherence to the Geneva Conventions and Protocol I under the procedure provided for in article 96(3) of Protocol I. The depository state, Switzerland, duly notified the declaration to states parties, formally accepting the first ever article 96(3) declaration. See B. Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' (2015) 27 *Global Change, Peace and Security*, available online at www.tandfonline.com/doi/

A non-international conflict exists where there are 'intense' military hostilities between a state and an organized armed group.[122] Such conflicts may include civil wars within a state's territory or hostilities between a state and a non-state group on another state's territory. It can also include hostilities between national liberation or self-determination forces and a state which is not a party to Protocol I.

The Malabo Protocol excludes acts committed only by government (armed) forces or organized armed groups. These are significant limitations. The exclusion of acts by 'government forces' must be interpreted to refer to state *armed* forces, which can include regular military personnel as well as militias or resistance movements 'belonging' to the state and which are under responsible command, respect IHL, carry weapons openly, and display an identifying insignia.[123] It would not exclude acts by any government officials (such as civilian police or intelligence officers, or other public servants), or loosely affiliated paramilitaries not controlled by the state.

Likewise, only acts by 'organized' armed groups are excluded and again the provision refers to IHL concepts. Under IHL, factors relevant in considering whether a group is 'organized' include: the existence of a command structure, disciplinary rules and mechanisms, and a headquarters; control of territory; the ability of the group to procure, transport and distribute weapons and military equipment, and to recruit and militarily train fighters; the ability to plan, coordinate and carry out military operations, including troop movements and logistics; the ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and

pdf/10.1080/14781158.2015.1075969 (last visited 31 March 2016); B. Saul, 'Many Small Wars: The Classification of Armed Conflicts in Spanish Sahara (Western Sahara) in 1975–76' (2016) *African Yearbook on International Humanitarian Law* 85.

[122] Art. 3 Geneva Conventions; Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadic* (IT-94–1), 2 October 1995, § 70. Additional Protocol II may also apply where the armed group controls territory. Factors relevant to the intensity of a conflict include 'the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed': Judgment, *Prosecutor v Limaj et al.* (IT-03–66-T), 30 November 2005, § 90. Also relevant are the type of weapons and military equipment used, the calibre of munitions, the number of fighters and type of forces, the number of casualties and extent of destruction, and the scale of civilian displacement: Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadic* (IT-94–1), 2 October 1995, § 60.

[123] Art. 4(2) Third Geneva Convention.

conclude agreements (such as cease-fire or peace accords).[124] Also relevant are the number of fighters and designated zones of operation.[125]

On the above test, it is certainly possible for 'terrorist' organizations to constituted organized armed groups involved in a non-international armed conflict. However, individual civilians who take a direct part in hostilities, for instance by sporadically attacking state forces, but who are not part of an organized armed group, will not be covered by the exclusion. Likewise organized criminal violence by gangs or drug cartels will not be excluded.

Moreover, the provision excludes acts by government forces and organized armed groups only where 'committed in the course' of an armed conflict. The act must therefore have a nexus to the conflict; not every act of violence that occurs in an area affected by conflict is excluded. For instance, a government soldier on weekend recreational leave who murders someone would not be excluded under the provision.

The effect of the provision is to completely exclude the relevant acts from the crime of terrorism under the Malabo Protocol. The exclusion applies where acts are 'covered by' IHL, but is not limited to acts that are *in conformity* with IHL (as proposed by the OIC in current negotiations over the UN Draft Comprehensive Terrorism Convention). Thus acts which comply with or violate IHL are equally excluded. Thus proportionate, discriminate attacks directed only against military targets are exempted, but so are deliberate attacks on civilians or perfidiously feigning civilian status to mount a suicide bombing attack against state forces.

This does not mean that the Malabo Protocol confers impunity on those who violate IHL. Rather, acts in armed conflict are left to be regulated by IHL, other international criminal laws (such as those on genocide, torture and crimes against humanity, and international human rights law insofar as it applies, including extraterritorially). IHL already prohibits, and often criminalizes as war crimes, much terrorist-type conduct in armed conflict.[126] This includes, for example, deliberate or indiscriminate attacks on civilians and civilian objects; reprisals; the use of prohibited weapons (including incendiaries, or chemical or biological weapons); perfidy; attacks on cultural property, objects indispensable to civilian survival, or works containing dangerous forces (including dams, dykes and nuclear facilities); or through illegal detention,

[124] Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadic* (IT-94–1), 2 October 1995, § 60.
[125] Judgment, *Prosecutor v Limaj et al.* (IT-03–66-T), 30 November 2005, § 90.
[126] See H. Gasser, 'Acts of Terror, "Terrorism" and International Humanitarian Law' 84 *International Review of the Red Cross (IRRC)* (2002) 547.

torture or inhuman treatment. The Malabo Protocol brings many war crimes under IHL within the jurisdiction of the African Court.

The Malabo Protocol does not, however, contain a further exemption for state military forces in peacetime that is found in some recent international counter-terrorism treaties. Some of these treaties include an exception for the activities of military forces (in peacetime) when exercising their official functions.[127] Official duties could include law enforcement, evacuation operations, peace operations, UN operations, or humanitarian relief.

F. *Exclusion of Certain Defences*

The Malabo Protocol follows the OAU Convention (article 3(2)), recent international counter-terrorism conventions,[128] and UN resolutions[129] in proclaiming that '[p]olitical, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act' (article 28G(E)). The foremost effect of this provision in a criminal law instrument is to preclude such motives from being pleaded as a defence to a criminal charge, so as to justify the accused's conduct and exonerate them from liability.

The wording of the provision would not, however, prevent a convicted person from explaining their motives by way of mitigation in sentencing. Pleas in mitigation are not 'defences' as such, but part of the ordinary criminal process of calibrating the punishment to fit the crime, considering all relevant circumstances. There is plainly a difference in moral and legal culpability, for example, between a rebel wounding a member of the Gestapo in an attempt to overthrow Hitler in Nazi Germany, and a Boko Haram Islamist in Nigeria conscripting child suicide bombers to indiscriminately kill civilians.

Ordinary criminal law defences remain unaffected. Strangely, the Malabo Protocol does not mention the availability of criminal law defences to crimes within the Court's jurisdiction, other than to exclude the relevance of official position, affirm command responsibility, and exclude the defence of superior orders (article 46B(2)-(4)). By contrast, the ICC Statute affirms the grounds

[127] Art. 3 *bis* Hague Convention 1970 as amended by the Beijing Protocol 2010; Arts. 3–4 Plastic Explosives Convention 1991; Art. 4(2) Nuclear Terrorism Convention 2005; Art. 19(2) Terrorist Bombings Convention 1997; Art. 3 Protocol 2005 to the Rome Convention 1988 (adding Art. 2 *bis* (2)); Amendment 2005 to the Convention on the Physical Protection of Nuclear Material 1980, inserting Art. 2(4)(b).

[128] Terrorist Bombings Convention 1997, article 5; Terrorist Financing Convention 1999, article 6; International Convention for the Suppression of Acts of Nuclear Terrorism 2005, article 6.

[129] See, e.g., GA Res. 49/60, 9 December 1994.

excluding criminal responsibility as including mental disease or defect, intoxication, self-defence, duress, and other grounds deriving from international law and general principles of law (article 31). For example, there have been cases where hijacking by persons escaping imminent threats of death or serious injury as a result of persecution abroad have been excused by a defence of necessity.[130] The issues concerning defences that would be available to suspects have been taken up by a different author for a different chapter contained in this volume.

There are two further possible legal implications of the exclusion of political or other motives under the Malabo Protocol. First, the provision might suggest that the crime of terrorism should not be regarded as a 'political' offence for the purpose of refusing an extradition request. The Malabo Protocol does not otherwise expressly 'depoliticize' its terrorism offence for extradition purposes – unlike some recent international counter-terrorism treaties.[131] Contrarily, the absence of an express provision depoliticizing terrorism in the extradition context could indicate that the issue remains one to be determined by national law – as is the case under many of the earlier international counter-terrorism treaties. The latter approach is preferably because restrictions on protections (such as the political offence exception to extradition) should not be made by implication in the absence of express words.

Secondly, the provision could similarly have a bearing on whether an offence is treated as 'serious non-political crime' in considering whether to exclude a person from refugee protection under article 1F of the Refugee Convention 1951. Again, the Malabo Protocol does not expressly purport to exclude all terrorist offenders from refugee status. The exclusion of political motives as a criminal defence is certainly a relevant factor, but as in the

[130] Court of Appeal of England and Wales (Criminal Division), *R v Abdul-Hussein* [1998] Criminal Law Reports 570; Court of Appeal of England and Wales, *R v Safi* [2003] EWCA Crim 1809; US Court for Berlin, *US v Tiede*, Criminal Case 78–001 (1980) 19 *International Legal Materials* 179; see also Court of Appeal of England and Wales (Criminal Division), *R v Moussa Membar* [1983] Criminal Law Reports 618; UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses*, HCR/GIP/03/05, 4 September 2003, § 22; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.3, January 1992, §§ 159–61.

[131] Art. 8 *bis* Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 15 Nuclear Terrorism Convention 2005; Art. 11 Terrorist Bombings Convention 1997; Art. 14 Terrorist Financing Convention 1999; Protocol 2005 to the Rome Convention 1988, inserting Art. 11 *bis*; Amendment 2005 to the Convention on the Physical Protection of Nuclear Material 1980, inserting Art. 11A.

extradition context, not determinative. The UNHCR cautions that every act labelled as 'terrorism' is not automatically excludable under article 1F(b); the test is whether it constitutes 'serious non-political crime' in the context and circumstances.[132]

Notably, the AU's African Model Anti-Terrorism Law 2011 recommends that national laws exclude any act that is the result of 'advocacy, protest, dissent or industrial action' and which does not cause certain types of serious harm to people or property.[133] Strictly such provision would operate as an exception to the definition of terrorism, rather than as a democratic protest 'defence'. It would have the same effect of precluding criminal responsibility for terrorism. It remains to be seen whether such exclusion could be included in any Elements of Crimes of Rules of Procedure developed by the AU to give effect to the Malabo Protocol.

4. CONCLUSION

The crime of terrorism in article 28G of the Malabo Protocol is closely modelled on the offences in the OAU Convention 1999. As such, it replicates the problematic features of that earlier instrument, without critical reflection on its continuing appropriateness, particularly given the well-known human rights concerns and post-9/11 normative developments.

Certainly some elements of the crime of terrorism are clearly expressed and focus on objectively serious harms, such as death, serious injury or other public dangers. Consistent with international practice, the crime is also capable of targeting instrumental violence to intimidate or coerce governments, international organizations, or populations. The exclusion of acts in armed conflict is also welcome, since it preserves the primacy of the special regime of IHL that is best adapted to regulating intense armed violence. The exclusion of liberation or self-determination violence distinguishes the African approach from general international practice, although it reflects Africa's historical experience. In practice it will often be of little consequence because excessive liberation violence can still be prosecuted as war crimes or crimes against humanity (though those crimes do not cover lesser liberation violence outside armed conflict or not constituting a systematic or widespread attack on civilians).

[132] UNHCR, *Guidelines on International Protection No. 5*, HCR/GIP/03/05, 4 September 2003, § 26; UNHCR, *Background Note on the Application of the Exclusion Clauses*, HCR/GIP/03/05, 4 September 2003, § 81.

[133] African Model Anti-Terrorism Law 2011, § xl(a).

Other elements of the African crime of terrorism are, however, ambiguous or over-broad and potentially infringe the principle of legality and other human rights protected in African and international law. The underlying unlawful acts are open-ended and imprecise, referring to violations of any African or international law. The threshold for damage (to property, resources, or environmental or cultural heritage) is too low and may sweep up minor harms. So too does merely 'inducing' a government set a low threshold and potentially interfere in protected political expression or action. There is an unhelpful conflation of terrorism with other political violence, such as insurrection, regardless of whether terrorist methods are used, or whether acts aim to overthrow repressive regimes and restore democracy and human rights. The problem is compounded by the absence of a democratic protest exception, as found in the African Model Anti-Terrorism Law 2011. The extended modes of criminal liability confusingly compound the general provision on extended liability in the Malabo Protocol, generating great uncertainty and unpredictability about the scope of liability.

All of this suggests a need for great caution to be exercised by prosecutors and judges when considering characterizing violence as terrorism. As the UN Security Council and General Assembly have repeatedly affirmed, counter-terrorism efforts must always comply with fundamental international human rights law obligations. Interpretively, the African crime of terrorism must also be read down to ensure compatibility with African human rights law; the latter is the higher law prevailing over the former in the event of inconsistency.

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The Crime of Mercenarism

A Challenge for the Judges of the New African Court

JOSÉ L. GÓMEZ DEL PRADO

1. INTRODUCTION

In 2014 the African Union adopted a Protocol whereby, when it enters into force will: (a) merge into one single judicial assembly the African Court on Human and Peoples' Rights and the Court of Justice of the African Union; (b) vest the new Court with international criminal jurisdiction competent to hear all cases relating to the crimes specified in the Statute of the Court, elaborated by the African Union (AU) which are contained in the 2014 Protocol, mercenarism being one of them. To this end, Article 28 H of the Statute provides a definition of the crime of Mercenarism.

For over sixty years mercenaries have been utilized particularly against the struggle of the peoples of Africa for self-determination.[1] They have intervened in the internal affairs of the new African nations after decolonization and in plundering the natural resources of the continent.

The Organization of the African Unity (OAU), the United Nations and the international community at large have attempted to legally control, both under International Criminal Law (ICL) and International Humanitarian Law (IHL) the activities of mercenaries in order to solve problems that have impacted the African continent both in the struggle of their peoples for self-determination and in the reaping of their natural resources.

An analysis of the new definition of mercenarism contained in Article 28H of the 2014 African Union Protocol raises a number of questions as to the adequacy of its provisions in dealing with the phenomenon and the links between old forms and new forms of mercenarism, namely: the foreign mercenaries of the 1960s and 1970s, (the dogs of war), and the new

[1] The beneficiaries of the right to self-determination are peoples not States. See UN Doc. A/70/330, 19 August 2015, para. 39.

commercial enterprises, (the private military and security companies and their soldiers for hire), that have mushroomed, particularly in Africa.

Due attention to this issue also fails because of the lack of national and regional measures in Africa, aimed at controlling both categories of performers of mercenaries that is those individuals implicated in mercenary activities and those of commercial private military and security companies carrying mercenary-like activities.

It raises some doubts as to whether by including *mutatis mutandi* the prerequisites of the definition of a mercenary, contained in Article 47 of Additional Protocol I to the Geneva Conventions (IHL) and Articles 1 and 2 of the International Convention on the Recruitment, Use, Financing and Training of Mercenaries (ICL), into the new definition of mercenarism, Article 28 H of the 2014 African Union Protocol will be operative enough to succeed in prosecuting individuals involved in mercenary activities.

A. *Mercenary Activities in Africa: The Return of Mercenaries in the Twentieth Century*

The modern state system and ideals of national patriotism, which developed in Europe in the nineteenth century contributed to stigmatizing and marginalizing individuals fighting for money rather than for loyalty to their countries. It is for this reason that mercenaries and their activities had practically disappeared[2] in Western European countries.

In Africa, however, commercial trading companies from European colonial countries with their own private military forces continued to seize the natural resources of the continent.[3] In the second half of the Twentieth century, the struggle of the African colonies for their independence, brought the private armies back again: they were actively involved in plundering the resources of the African continent and in fighting against the liberation movements for self-determination. Measures aimed at controlling and regulating their activities have been at the origin of the development of international and African regional treaties.[4]

[2] K. Suter, 'Mercenaries in Warfare', Global Directions, www.Global-Directions.com.

[3] A. Musah, J. Fayemi, *Mercenaries: An African Security Dilemma* [London: Pluto Press, 2000] at 17.

[4] The 1907 Hague Convention Respecting War on Land already contained prohibitions prohibiting mercenary recruitment on national territory, J.L. Taulbee, 'Myths, Mercenaries and Contemporary International Law', Vol. 15, No. 2 *California Western International Law Journal* 1985.

The actions carried out at the beginning by foreign mercenaries, often called soldiers of fortune or dogs of war, recruited to defend geopolitical interests of colonial powers as well as that of mining companies have soon turned into activities conducted by private military and security companies closely linked with the interests of the mining sector.[5] The traditional utilization of mercenaries has undergone a metamorphosis: old forms and new forms are presently intermingled.[6]

The decolonization period of 1960 opposed Western European countries to peoples subjected to alien domination and exploitation in the Third World, particularly in Africa. Mercenaries were recruited by colonial powers to crush liberation movements fighting for their independence,[7] first in the former Belgian Congo followed by interventions in a large number of other African countries.[8] The right of peoples to self-determination became an important issue at the United Nations.

Mercenary activities are specifically mentioned in instruments dealing with questions such as the development of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the United Nations Charter[9] and the Definition of Aggression. United Nations has considered the use of mercenaries 'as a means of violating human rights and impeding the exercise of the right of peoples to self-determination'.[10]

[5] In the 1990s the post-apartheid period saw the establishment of private military and security companies by former military officers and soldiers. See UN Doc. A/HRC/18/32, Para. 10.

[6] PMSCs are nothing new in history. They are the reincarnation of the 'condotierri' (land mercenarism) and 'corsairs' (Private Men O-War, sea mercenarism) of the Renaissance who had combined the two skills of mercenaries: military and commercial know how. At the Renaissance, the State employed the condotierri by signing a contract (condotta) in the presence of a notary to form a corporation. The contract stipulated the amount (prestanza) that allowed the condottiere to buy the weapons and equipment and to hire the men (freelance). The contract (condotta) fixed also the nature of the activity and the number of soldiers (freelances) as well as the duration. See, P. Clapeau, 'Les Mercenaires', Collection Histoire, Ed. Ouest France, 2006. For the similarities between corsairs and to-day's contractors of PMSCs see, J. Gómez del Prado, 'Private Security Companies: The mercenaries or corsairs of the XXIst century?' Alai-amlatina, International website, 2006.

[7] United Nations, General Assembly resolution 1514 (XV), of 14 December 1960.

[8] Such as: Angola, Benin, The Comoros, Congo-Brazzaville, Côte d'Ivoire, Equatorial Guinea, Former Congo Belgian, Guinea, Kenya, Liberia, Mozambique, Nigeria, Rwanda and the Region of the Great Lakes, Senegal, Sierra Leone, Somalia and Zaire.

[9] United Nations, General Assembly resolution 2625 (XXV) of 12 November 1970.

[10] United Nations, General Assembly resolution 3314 (XXIX) of 14 December 1974. Also, International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment.C.J. Reports 2005*, p. 168. The right of peoples to self-determination is contained as Article 1, in the International Covenant on Economic, Social and Cultural Rights and in the International Covenant on Civil and Political Rights.

In accordance with the Declaration on Principles: '*Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State*'.

Article 3 (g) of United Nations GA resolution 3314 (XXIX) states that '*The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein*' can be considered as an act of aggression. This same text has been incorporated in the Amendments to the Rome Statute of the International Criminal Court, adopted in Kampala, 11 June 2010.[11]

The use of mercenaries by States to intervene in other countries' affairs violates the ability of many Western European and Third World countries, who are UN Member States, to control private violence at the international level.[12] This question is at the origin of the provisions contained in IHL and International and African Criminal Law treaties aimed at controlling mercenarism.[13]

The international community continues to be divided on the issue of mercenarism, but particularly regarding the accountability and regulation of private military and security companies (PMSC) contracted by States to operate in zones of conflict or other countries' affairs.[14] Such companies recruit highly trained military personnel; who often resign or take leave of absence to fulfil a given contract.[15]

[11] Article 8 bis, Crime of Aggression, United Nations, Ref. C.N. 651.2010 TREATIES – 8 Depository Notification.

[12] C. Kinsey, 'International Law and the Control of Mercenaries and Private Military Companies', Cultures & Conflicts [En ligne], English documents, mis en ligne le 26 juin 2008, consulté le 12 décembre 2015. URL: http://conflits.revues.org/11502.

[13] The recruitment, use, financing and training of mercenaries which had been retained by the International Law Commission in its Draft code of crimes against the peace and the security of mankind in 1991 did not appear in the final draft of the Commission. This crime was not included either in the Rome Statute of the International Criminal Court of 1998.

[14] The strongest opposition is from the United Kingdom and the United States of America from where come most of the private military and security companies (some sixty per cent according to some estimates) and other Western Group countries who favor the International Code of Conduct for Private Military and Security Companies instead of a binding UN treaty. This opposition is particularly manifested at the debates of the United Nations Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies. See UN Doc. A/HRC/WG.10/3/2.

[15] This has been the case for British, Canadian, Peruvian, Chilean and militaries of many other countries armed forces. See for instance, K. Fallah, 'Corporate actors: the legal status of mercenaries in armed forces', Vol. 80, No. 863 *International Review of the Red Cross* (September 2006), para. 600; UN Doc. A/HRC/7/7/Add.4, paras. 23–4.

The Nigerian Civil War, which took place from 1967 to 1970 as consequence of the secession of Biafra from Nigeria, had a strong international involvement due to the oil resources, as had been before in the former Belgian Congo in 1960 for other mineral resources in the province of Katanga.

It is against this background that the Luanda Trial to judge foreign mercenaries recruited by the National Liberation Front of Angola (FNLA) to fight against the Popular Movement for the Liberation of Angola (MPLA) took place June–July 1976. The People's Revolutionary Court of Angola pronounced four death sentences and condemned nine of those convicted to prison. The main charges against these foreigners were those of crime against peace and of being mercenaries.

Their indictment for being mercenaries relied on Angolan law based essentially on a number of United Nations resolutions on the matter of implementing the UN Declaration on the Granting of Independence to Colonial Countries and Peoples[16] as well as UN GA res. 3103(XXVIII) on Basic Principles of the legal status of the combatants struggling against colonial and alien domination and racists régimes.[17] These Principles state that the use of mercenaries 'is a criminal act and the mercenaries should be accordingly be punished as criminals.'[18]

In Africa, the Organization of African Unity has taken a number of actions and adopted such instruments as the 1972 OAU Convention for the Elimination of Mercenaries in Africa,[19] which incorporated provisions of the United Nations resolutions mentioned above, and the 1977 OAU Convention for the Elimination of Mercenarism in Africa.[20] The 1977 OAU Convention entered into force on 22 April 1985; with thirty-one States so far having ratified it. The 1977 Convention is based on a draft elaborated by the International Commission of Inquiry on Mercenaries that followed the Luanda Trial in 1976.

[16] UN GA. Resolutions 2548(XXIV); 2395(XXIII); 2465(XXIII)

[17] UN GA. Resolution 3103(XXVIII).

[18] G. H. Lockwood, 'Report on the Trial of Mercenaries: Luanda, Angola June, 1976', Vol. 7, No 3 *Manitoba Law Journal* (1977), pp. 183–202. The author formed part of an international commission of inquiry composed by 51 personalities from 37 different countries from the different regions of the world. By setting up such independent commission the Angolan government drew the attention of the international community to make an objective assessment of the trial on mercenaries. In 1976 in Luanda, the first measures were taken for the adoption of a draft convention, elaborated by the International Commission of Inquiry on Mercenaries, which was sent to the Angolan Government, the Organization of the African Union and the United Nations.

[19] OAU Doc. CM/433/Rev. L, Annex 1(1972), University of Minnesota, Human Rights Library.

[20] OAU Doc. CM/817 (XXIX) Annex II Rev.1, Organization of African Unity, African Union, www.au.int.

At the international level, during 1960 and 1970, Nigeria has been the main mover against mercenarism both in IHL and in ICL.

At the International Committee of the Red Cross Plenipotentiary Conference for the Adoption of Article 47 of Protocol I Additional to the Geneva Conventions of 1949, which took place from 1974 to 1977, Nigeria proposed for discussion that a person participating in an armed conflict to be considered or defined as a mercenary.[21]

At the United Nations, Nigeria officially requested that the matter of mercenaries be discussed at the General Assembly. In 1989, based on a document elaborated by an Ad Hoc Committee, the UN General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

In Africa there have been over 330 armed conflicts for the period covering 1989–2014. The quasi totality of such armed conflicts with some rare exceptions, such as the conflict between Ethiopia and Eritrea, have been intrastate conflicts. One disturbing factor, reported by the Uppsala Conflict Data Program,[22] is the involvement of external actors in such conflicts.

This is not a new phenomenon. However, as we have witnessed in the past in different parts of the world, the proportion of foreign actors in intrastate armed conflicts, as proxies, freelancers, contractors, PMSCs, mercenaries, soldiers for hire, foreign fighters or any others is increasing. In 2014 the proportion of such actors was the highest since World War II.[23]

Considering the prevalent involvement of foreign military actors in the African continent the importance, therefore, of a good definition of mercenarism that would embrace all the different categories, or at least the most important ones, of foreign actors' involvement in internal armed conflicts.

In 2014, the Assembly of Heads of State and Government of the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

This important regional instrument broadens the jurisdiction of the new African Court of Justice and Human Rights (ACJHR) to 14 crimes under international law, including the crime of mercenarism and other transnational

[21] States at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts reluctantly agreed to introduce the theme of mercenaries, K. Fallah, 'Corporate actors: the legal status of mercenaries in armed conflict', www.icrc.org/eng/assets/files/other/irrc_863_fallah.pdf

[22] T. Pettersson, & P. Wallensteen, 'Armed Conflicts, 19462014', Vol. 52(4) *Journal of Peace Research* (2015), 536–50.

[23] Ibid., T. Pettersson, & P. Wallensteen.

crimes often connected with mercenary activities such as terrorism, human trafficking, piracy, war crimes and illicit exploitation of natural resources.

The provisions contained in Article 28H of the 2014 African Union Protocol, proposing to the African Union Court a new text for its interpretation of the crime of mercenarism and application of the sanctions for the offences incurred, is a new attempt at the African regional level to deal with this phenomenon.[24]

Article 47 of Additional Protocol I to the Geneva Conventions of 1949 and Article 1 and 2 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries are the main sources of the new Article 28 H.

B. *Article 28 H of the 2014 African Union Protocol*[25]

1. Similarities and Differences with Article 47 of Additional Protocol I and Article 1 and 2 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries

Article 28 H is structured along the lines of Articles 1 and 2 of the 1989 International Convention against the Recruitment, Use, Financing and

[24] Contrary to the International Criminal Court, the African Union Court will be empowered to consider cases of mercenarism and of illicit exploitation of natural resources.

[25] African Union, Daft Protocol on Amendments to the Protocol on the Statute of The African Court of Justice and Human Rights, STC/Legal/Min/7(I) Rev. 1 Page 25;

Article 28H Mercenarism

1. For the purposes of this Statute:
   a) A mercenary is any person who:
      i. Is specially recruited locally or abroad in order to fight in an armed conflict;
      ii. Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;
      iii. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
      iv. Is not a member of the armed forces of a party to the conflict; and
      v. Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
   b) A mercenary is also any person who, in any other situation:
      i. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
         1. Overthrowing a legitimate Government otherwise undermining the constitutional order of a State;
         2. Assisting a government to maintain power;
         3. Assisting a group of persons to obtain power; or
         4. Undermining the territorial integrity of a State;

Training of Mercenaries[26] incorporating with some minor changes the provisions therein.

The 1989 International Convention, ratified by 33 out of 189 United Nations Member States,[27] has with minor changes, incorporated in its text the provisions of Article 47 of Additional Protocol I of 1977 to the Geneva Conventions. These provisions are also contained in Article 3 of the 1977 OAU Convention against Mercenarism, ratified by 31 out of 54 Member States[28] of the African Union.

According to Art. 47 of Additional Protocol I to the Geneva Conventions, which has been ratified by 174 States,[29] during an international armed conflict mercenaries, as non-State armed groups, are obliged to respect applicable international humanitarian rules. In an international armed conflict, mercenaries do not enjoy the right to combatant or prisoner-of-war status.

It should be recalled that IHL does not forbid war: it tries to regulate the conduct of the parties in armed conflicts and to protect and assist all victims of armed conflicts.

Now, to protect the right of peoples to self-determination enshrined in its Charter, the United Nations has adopted instruments to fight against mercenary activities and the crime of mercenarism. These actions have been developed within the context of *Jus ad bellum* or the prerequisites, established

ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;
iii. Is neither a national nor a resident of the State against which such an act is directed;
iv. Has not been sent by a State on official duty; and
v. Is not a member of the armed forces of the State on whose territory the act is undertaken.

2. 2. Any person who recruits, uses, finances or trains mercenaries, as defined in paragraph (1) (a) or (b) above commits an offence.
3. A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence.

[26] Adopted by the UN General Assembly, Res. 44/34, 4 December 1989, Articles 1 and 2.

[27] Arzerbaïjan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cuba, Cyprus, Georgia, Guinea, Honduras, Italy, Liberia, Libya, Maldives, Mali, Mauritania, New Zealand, Peru, Qatar, Republic of Moldova, Saudi Arabia, Senegal, Seychelles, Suriname, Syrian Arab Republic, Togo, Turkmenistan, Ukraine, Uruguay, Uzbekistan, Venezuela. United Nations, Treaty Series, Vol. 2163, p. 75.

[28] Algeria, Benin, Burkina Faso, Cameroon, Chad, The Comoros, Congo, Democratic Rp. of Congo Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Libya, Lesotho, Liberia, Madagascar, Mali, Nigeria, Niger, Rwanda, Senegal, Seychelles, Sudan, Tanzania, Togo, Tunisia, Zambia, Zimbabwe.
www.africa-union.org

[29] ICRC, www.icrc.org/ihl.nsf/INTRO/470.

in the United Nations Charter, under which States may resort to the use of armed force.

Article 47 stipulates six prior conditions for a person to be accused of being a mercenary. The six prerequisites of Article 47, developed within the context of *Jus in bello*, have also been incorporated, mutatis mutandi, in Article 28 H 1.a).

Under Article 28 H, the six cumulative conditions stipulated in Article 47 of Additional Protocol I[30] necessary in order for an individual to be accused of being a mercenary apply in two types of situations:

- when a person fights in an armed conflict.
- in any other situation, stipulated in Article 28 H 1.b) which comprises activities, purposes, acts, and offences in which a person may participate.

Contrary to the 1989 International Convention, Article 28 H has integrated all the six requirements contained in Article 47 of Additional Protocol I of 1977 to the Geneva Conventions[31] which relate to taking a direct part in hostilities[32] with the following change: The sixth condition in the provisions

[30] United Nations, *Treaty Series*, Vol. 1125, No. 17512; Article 47:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
   (a) is specially recruited locally or abroad in order to fight in an armed conflict;
   (b) does, in fact, take a direct part in the hostilities;
   (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
   (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
   (e) is not a member of the armed forces of a Party to the conflict; and
   (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

[31] According to Article of 47 Additional Protocol I of 1977 to the Geneva Conventions mercenaries do not enjoy the status of prisoners of war because of the shameful character of mercenary activity: mercenaries are solely motivated by private gain. However, they are entitled to a fair trial, (Customary Law). The United States, however, has stated that it does not consider the provisions of Article 47 of Additional Protocol I to be customary. Cited in ICRC Customary IHL – Rule 108 Mercenaries, www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter33_rule108

[32] The US Air Force Commander's Handbook asserts that the United States has regarded mercenaries as combatants entitled to prisoner-of-war status upon capture. This shows that a State is free to grant such status. The Handbook also states that 'the US government has always vigorously protested against any attempt by other nations to punish American citizens as mercenaries'. This statement does not undermine the current rule to the extent that these protests were made with respect to persons who did not fulfill the stringent conditions of the definition of mercenaries contained in Article 47 of Additional Protocol I, which was adopted by consensus. Cited in ICRC IHL – Rule 108 Mercenaries.

of Article 47 namely: b) *does, in fact, take a direct part in the hostilities*, has been included in the wording of paragraph 3 of Article 28H which reads as follows:

> 3. A *mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence.* This provision applies in both types of situation: in direct participation in hostilities and in concerted acts of violence.

The specification relating to direct participation is not contained in Article 1 of the 1989 International Convention.

Article 28 H of the AU 2014 Protocol incorporates the provisions included in Article 1. paras.1 and 2. of the 1989 International Convention with the following changes:

> The last part of the sentence in Article para. 1 (b) of the 1989 International Convention which reads '*substantially in excess of that promised or paid to combatants of similar ranks and functions of that party*', has not been retained;
>
> The term '*significant*' before '*private gain*', included in Article 1 para. 2. (b) of the 1989 International Convention also has not been retained. Article 28 H para1. b) ii. reads: '*Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation*'.
>
> Article 2 of the 1989 International Convention has been incorporated as paragraph 2 of Article 28 H with minor editorial changes. It reads as follows:
>
> 2. *Any person who recruits, uses, finances or trains mercenaries, as defined in paragraph (1) (a) or (b) above, commits an offence.*
>
> 2. *More specifically similarities and differences with Article 1 and 2 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries with regard to Situations*

In non-international armed conflicts non-State armed groups may be prosecuted under domestic law for taking part in hostilities.

Article 28 H para. 3 of the 2014 AU Protocol stipulates: '*A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence*'.

This provision applies to both types of situations envisaged in Article 28 H: direct participation in hostilities, which is particularly dealt with in the provisions of Article 47 of Additional Protocol I in situations of an international armed conflict, and concerted acts of violence, more specifically in the

provisions of the 1989 International Convention[33] indicated in Article 28 H 1. b) such as:

1. *Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State; 2. Assisting a government to maintain power 3. Assisting a group of persons to obtain power; or 4. Undermining the territorial integrity of a State;*

In addition of fulfilling the condition of *participating directly in hostilities* the person must fulfil the following five prerequisites stipulated in Article 28 H 1. a) namely:

i. *Is specially recruited locally or abroad in order to fight in an armed conflict;*

This provision has exactly the same wording as that of the 1989 International Convention.

ii. *Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;*

As mentioned before, the last sentence of the 1989 International Convention, namely 'substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party' has not been retained in Article 28 H.

iii. *Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict:*
iv. *Is not a member of the armed forces of a party to the conflict; and*
v. *Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.*

[33] UN General Assembly, Res. 44/34, 4 December 1989, Article 1 para. 2:

> A mercenary is also any person who, in any other situation:
>
> (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
> (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
> (ii) Undermining the territorial integrity of a State;
> (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
> (c) Is neither a national nor a resident of the State against which such an act is directed;
> (d) Has not been sent by a State on official duty; and
> (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

These provisions are exactly the same, word by word, as those of the 1989 International Convention.

Concerning the other four situations contained in Article 28 H para. 1. b) the requirements to be fulfilled contained in this sub-paragraph b) are:

i. *Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:*
   1. *Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;*

These provisions have the same wording as that of the 1989 International Convention

2. *Assisting a government to maintain power;*
3. *Assisting a group of persons to obtain power;*

The above-mentioned two aims for the African context are innovative. They are creative provisions that were not contained in previous international criminal instruments. They consider situations such as those of Angola and Sierra Leone and more recently that of Zaire in the 1990s during the conflict for power opposing Mobutu[34] and Kabila[35]. The offence 'assisting a group of persons to obtain power' may be interpreted in conjunction with under Article 28 E of the AU Protocol which stipulates that an intervention by mercenaries to replace a democratically elected government is a Crime of Unconstitutional Change of Government.

> *or 4. Undermining the territorial integrity of a State; ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation; iii. Is neither a national nor a resident of the State against which such an act is directed; iv. Has not been sent by a State on official duty; and v. Is not a member of the armed forces of the State on whose territory the act is undertaken.*

All five provisions above mirror exactly those of the 1989 International Convention with the exception of the word 'significant' before 'private gain' which has not been retained in Article 28 H para. 1. b) (ii).

[34] For example: in 1997 Mobutu hired the so-called 'White Legion' in order to keep power against Kabila. See K. O'Brien, 'Private Military Companies and African Security' [A. Musah, J. Fayemi (ed.)], *Mercenaries: An African Security Dilemma* [London: Pluto Press, 2000] at 55–9.

[35] Mercenaries and private security companies were particularly involved in both sides. See K. O'Brien, 'Private Military Companies and African Security' [A. Musah, J. Fayemi (ed.)], *Mercenaries: An African Security Dilemma* [London: Pluto Press, 2000] at 55–9.

2. GENERAL COMMENTARY

Paragraph 1. (a) of Article 28 H has integrated, like other international and regional instruments on mercenarism, the six elements stipulated in Article 47 of Additional Protocol I concerning a situation of armed conflict. One may raise the question as to whether these prerequisites are essential or are obstacles to condemn individuals for mercenary activities.

The fact that Article 47 was adopted in 1977 by consensus, one year after an Angolan Court had pronounced four death sentences and condemned nine foreign mercenaries to prison may be an indication that the stringent measures, adopted at the Plenipotentiary Conference in Geneva, might have been a relief for many governments utilizing this form of indirect implication in armed conflicts.

The need to control the activities of mercenaries in Africa was developed not under the scope of *Jus in bello* of IHL but within the aegis of the United Nations under *Jus ad bellum*. Mercenarism, therefore, should be dealt with under such scope and should not be a matter of the status that may be accorded to the individual under *Jus in bello*[36] which is the exception and not the rule in the non-international armed conflicts: the new forms of armed conflicts taking place in the twenty-first century, particularly in Africa.

Under IHL, non-State armed groups, including mercenaries and other actors such as foreign fighters or contractors of PMSC do not enjoy combatant immunity: they may be prosecuted under domestic law for mere participation in hostilities.

The six elements contained in the definition of mercenaries are to be applied at the same time in a cumulative manner, not only in a situation of international armed conflict, but in any other of the following four situations, envisaged in Article 28 H, under *Jus ad bellum*: 'overthrowing a legitimate Government or otherwise undermining the constitutional order of a State; assisting a government to maintain power; assisting a group of persons to obtain power; or undermining the territorial integrity of a State'.

The elaboration of Article 28 H afforded a great opportunity to abandon the conditions of fulfilling the definition of mercenary that were introduced in Article 47 of Additional Protocol I and which have since then been retaken by in other international conventions regarding mercenaries.

These prerequisites are extremely difficult to prove. Each of the requirements necessary to arrive at the definition, if they were to be applied

[36] F. Hampson, 'Mercenaries: Diagnosis Before Proscription', Vol. 22, No. 3 (1991) *Netherlands Yearbook of International Law*, 3–38.

individually, would be very difficult to prove in a court. To apply the six of them cumulatively is an impossible task.

To add to this difficulty, it should be noted that the lacunae in ICL are not rectified in domestic legislations.[37]

For the African region, a major exception to the point made above in regard to the inadequacy of domestic legislation, is the South African Regulation of Foreign Military Assistance Act of 1998 which prohibits the activities mentioned in Article 28H.[38] It should be noted that South Africa is neither a party to the 1977 OAU Convention nor to the 1989 International Convention.[39]

In other States such as The Comoros, in spite of being a party to the 1977 OAU Convention, mercenarism is not specifically prohibited under domestic law.[40] The Comoros is a country that has suffered greatly from mercenary activities. Mercenaries have committed grave human rights violations on its people including on their right to self-determination.

No specific legislation, either, addressing the activities of mercenaries and / or PMSCs has been adopted in the following African countries: Botswana, Burkina Faso, Cameroon, Côte d'Ivoire, Ghana, Democratic Republic of the Congo, The Gambia, Kenya, Lesotho, Mali, Mauritius, Morocco, Namibia, Nigeria, Senegal, Sierra Leone, Swaziland, Tunisia, Uganda and Zimbabwe.[41]

Angola is the only country, where a Luanda Court, in 1976, charged the defendants with the crime of being mercenaries. At the time no international definition had been adopted and the Angolan domestic law was based on United Nations resolutions. In other cases, such as in South Africa, the defendants were charged with mercenary activities; in Equatorial Guinea for crimes against the Head of State and against the form of government; and in Zimbabwe for arms smuggling.[42]

For a charge of mercenarism to be effective, the recruitment of the individual must have been specifically to fight in an armed conflict and 'in a concerted act of violence'. Such specificity, however, is usually not indicated in the clauses of a contract for this purpose, as members of the UN Working

[37] UN Doc. E/CN.4/2004/15, para. 38.

[38] To understand the developments of its internal legislation concerning mercenaries and private military companies one must refer to the implication of the former governments of the apartheid period in the internal affairs of the countries of the region. See UN Doc. A/HRC/18/32/Add.3.

[39] UN Doc. A/HRC/27/50/Add.1.

[40] UN Doc. A/HRC/27/50/Add.1.

[41] UN Doc. A/HRC/24/45, paras. 22–5, and UN Doc. A/HRC/27/50 Survey Francophone Africa, Scope of the legislation. paras. 15–44.

[42] UN Doc., A/HRC/18/32/Add.2, paras. 23–7 and UN Doc., A/HRC/18/32/Add.3, paras. 17–23 and 34–6.

Group on the use of mercenaries were able to observe during their fact-finding missions to several countries including Chile, Ecuador, Fiji, Honduras and Peru.

Furthermore, the individual must be motivated by private gain *to take part in the hostilities (armed conflict)*, or in other situations (*overthrowing a legitimate Government or otherwise undermining the constitutional order of a State*; *assisting a government to maintain power*; *assisting a group of persons to obtain power*; *Undermining the territorial integrity of a State*).

The motivation is another prerequisite difficult to prove. For many of the mercenaries such as Bob Denard, if private gain was important, there were also a number of other reasons as well, such as serving their own government.

Many of the individuals recruited by PMSCs for security tasks in the Iraqi and Afghan armed conflicts and who could have fallen under definition of mercenary, were there for a combination of personal egoistic and altruistic motivations, reasons, sentiments or desires, which operated simultaneously.

One of the main reasons for accepting the job these individuals mentioned first, before even referring to the high remuneration they received, was the risk of danger and to be able to feel the adrenaline when involved in a dangerous situation.[43] For others, such as former Peruvian or Chileans military personnel the main reason was to be able to provide a better living standard to their families: education for their children or to be able to pay the hospital bills for their parents.[44]

It is interesting to note that contrary to Article 28 H of the 2014 AU Protocol, Article 1 of the draft produced by the International Commission on Inquiry on Mercenaries, in Luanda, Angola, June 1976, defines simply what is the crime of mercenarism; by whom it may be committed (individual, group, association, representatives of state, the and the State itself); the purpose (opposing self-determination); the means (armed violence) and the activities performed (organize, finance, supply, etc.). It does not try to elaborate a definition of the type of person. There are advantages of departing first from the crime in the definition and not from the person, as does Article 28 H.

The draft proposed then to concentrate on the actor, who commits the crime (the possible offenders: individual, group, association, representative of

[43] Guerriers à Louer, Temps Present, Program of the Swiss TV, 2005.

[44] Interviews of members of the UN Working Group on the use of mercenaries with former militaries, who had been recruited by private companies to provide security in conflict zones in Afghanistan or Iraq, during their respective missions to Peru and Chile. Also, see the reports of the UN Working Group. UN Doc. A/HRC/7/7/Add.2 and A/HRC/7/7/Add.4.

a state, the State itself); the acts that may be committed (organize, finance, etc.); the aim (opposing self-determination); the means employed (military armed violence) and finally the foreign character of the offenders and the personal motivation or reason (personal gain).[45]

For what should be more important in the definition of the crime should be the act committed rather than the motivation. The motivation or reasons, whether emotional, financial or ideological, are less important than the fact that the offence has been perpetrated.

Another of the requirements in the definition is that such private gain has to be material compensation and must have been promised specifically by or on behalf of a party to the conflict: and not by someone else, which is not often the case.

In the contracting, there is often a labyrinth of diffused responsibility. Many contracts for mercenary activities are outsourced by a 'given government' or by a 'given mining company' or by a 'given private security company'. The group or company contracted, be mercenaries or a commercial private military and security company, may in their turn sub-contract the job to another company, some times in the same country but often in Third World countries because they are cheaper.

Mercenaries, contractors of PMSC's as well as foreign fighters are non-State armed individuals with military skills intervening in armed conflicts in countries that usually but not always are not their own.

Currently, an individual cannot be considered as a mercenary if he is a national of a party to the conflict or a resident of a territory controlled by a party to the conflict. However, this element of the definition does not take into consideration the phenomenon of nationals from the diaspora acting against their own country, a matter that has already been raised by the UN Special Rapporteur on the use of mercenaries.[46]

Also, employees of PMSC from USA or any of the other countries involved in the Iraq or Afghan conflicts, engaged either individually or by PMSCs, and

[45] Draft Convention on the Prevention and Suppression of Mercenarism (Draft produced by the International Commission of Inquiry on Mercenaries, in Luanda, Angola, June 1976), Vol. 22:3 616 *Virginia Journal of International Law*.

[46] E. Bernales Ballesteros, UN Doc. E/CN.4/2002/20, paragraph 88. This paragraph states that: 'For 40 years the Cuban authorities had been the victims of acts of aggression and terrorist acts committed by its nationals based on foreign territory or acting in return for pay from foreign organizations based abroad'. The Special Rapporteur had also noted that during his missions to the successor countries to the former Yugoslavia it had sufficed to obtain the nationality of any other country of the region in the conflict to cease to be considered as a mercenary.

who had committed human rights violations, could not been considered as mercenaries since they were nationals of a party to the conflict.[47]

Another prerequisite for the definition is that the individual is not a member of the armed forces of a party to the conflict. However, most mercenaries have been former or active members of the armed forces of their respective countries and have been working directly or indirectly for States geopolitically or economically interested in a given conflict although not officially involved. Recently a large number of militaries active in the armed forces of their respective countries, or reservists, take a leave of absence or vacation to work for PMSCs contracted in armed conflicts.

The new Article 28 H makes explicit reference to the individual's direct participation in two types of situations: in an armed conflict or in a concerted act of violence.

The references in the contracts that are usually signed by individuals engaged for this type of operations avoid mentioning direct participation. They refer to 'hazardous environment', 'a high-risk environment, including (. . .) risks and hazards of war', etc. The individual is usually contracted as an independent contractor to provide security but not as a mercenary or individual to fight.[48]

Under *Jus in bello* the statute of mercenaries may be considered irrelevant, if they do not take part in combat, since they continue to be considered as civilians, even if they are carrying weapons.

The Geneva Conventions and their Additional Protocols of 1977 do not provide a definition of 'direct participation in the hostilities'. However, the commentary on Additional Protocol I indicates that 'direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.'

This commentary raises a number of questions as to the activities that can be entrusted to mercenaries or to employees of PMSCs in situations of armed conflict[49] such as security, logistics, training and intelligence gathering. Logistical activities such as food or laundry services, plumbing, etc. may not fall under direct participation in the hostilities.

[47] It is interesting to note that foreign fighters (another non-State armed group) mobilizations from the diaspora may include nationals of a party to the conflict. See, UN Doc. A/70/330, paragraph 87.

[48] UN Doc. A/HRC/7/7/Add.2, paras. 27–8.

[49] J. Gómez del Prado, 'A United Nations Instrument to Regulate and Monitor Private Military and Security Companies', Vol. I, No. 1 *Notre Dame Journal of International, Comparative and Human Rights Law* (Spring 2011), at 10.

Under IHL employees delivering these services to the armed forces in an armed conflict, if captured, would fall under the category of prisoners-of-war, provided the forces they are accompanying have authorized them[50] in their tasks. However, the transportation of weapons and other military commodities, intelligence, strategic planning, or procurement of arms, performed by PMSCs may be considered as participation. In the US Naval Handbook, gathering intelligence is classified as direct participation in hostilities.

The second type of situations relating to concerted acts of violence, such as: overthrowing a legitimate Government or otherwise undermining the constitutional order of a State; assisting a government to maintain power; assisting a group of persons to obtain power; or undermining the territorial integrity of a State, as in the case of a situation of an international armed conflict, can be applied to both individuals as well as to employees of PMSC who, in the past, have been involved in African countries.

The African history is rich in both examples. Bob Denard[51] is undoubtedly the most well-known mercenary intervening in Africa as far as foreign individuals or bands are concerned. He carried out activities in zones of French geopolitical interests such as the former Belgian Congo (in support of the separatist State of Katanga in 1960–3), Gabon, Benin, and The Comoros, where he established his own private military company and organized a coup d'Etat. In 1995, a French court in Paris sentenced him for his involvement in The Comoros attempted coup d'Etat.[52]

Other well-known mercenaries such as Jacques Schramme and Mike Hoare had also conducted mercenary activities in the former Belgian Congo.

François Richard Rouget, a former French soldier with South African nationality, who had collaborated with Bob Denard in The Comoros, was the first mercenary prosecuted under the South African Regulation of Foreign Military Assistance Act. Rouget was found guilty of recruiting former members of the South African Defence Forces to carry out military activities in Côte d'Ivoire[53] and sentenced to a fine of R100 000. In 2011, Rouget was hired by

[50] L. Cameron, 'Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation', Vol. 88, No. 863 *International Review of the Red Cross* (September 2006), at 593.

[51] S. Weinberg, '*Last of the Pirates: In Search of Bob Denard*', (London: Pantheon, 1994).

[52] Le Monde, 21 June 2006, 'Bob Denard est condamné à cinq ans de prison avec sursis'. It is interesting to note that in the course of Denard's trial a former head of the foreign intelligence service admitted that Bob Denard had used parallel structures and undertaken a number of undercover operations in situations when the special services had not been able to do so.

[53] UN Doc. A/HRC/18/32/Add.3, para. 34.

Bancroft Global Development, a PMSC indirectly financed by the US State Department, to train troops in Somalia fighting against Al Quaeda.[54]

In the 1990s, military operations in the internal affairs of African States which had been carried out at the beginning of the decolonization period by foreign mercenaries began to be conducted by legally established private companies which provided, among other things, highly skilled military operations, advice and training. This coincided with the dismantling process of the apartheid apparatus in South Africa.

One of the pioneers of the global privatized military industry and the most emblematic of them in establishing a new operational model[55] was the company Executive Outcomes (EO). It was integrated by militaries of the elite South African Defence Forces of the apartheid period with strong links to mining and oil corporations operating in Africa.[56]

In the early 1990s EO was contracted by the Angolan government to fight the National Union for the Total Independence of Angola (UNITA) insurgents and recapture the oil facilities, which had been seized by them. The Angolan Government also gave the company a contract to train its armed forces. Previously, in the 1980s, militaries of the South African Defence Forces had intervened in support of UNITA against the same Angolan government.

In 1995, the Government of Sierra Leone hired EO to fight the Revolutionary United Front (RUF), clear the rebels from the capital region as well as train the country's armed forces. In addition, EO also operated in other African countries such as Uganda, Kenya and Congo. EO's interventions in the internal affairs of African countries may have pushed the South African Government, concerned with the possible impact of the activities of these companies on its foreign policy, to adopt the Regulation of Foreign Military Assistance Act in 1988.[57]

Despite the fact that the South Africa Regulation of Foreign Military Assistance Act of 1988 contains the strongest provisions on mercenarism, it has had little impact on PMSCs. South Africa does not control the export of services by South African PMSCs. A large number of companies have relocated abroad and many nationals continue to be recruited to work in zones of armed conflict.

[54] New York Times 'U.S. Relies on Contractors in Somalia Conflict', 10 August 2011.
[55] UN Doc. E/CN.4/1997/24, paras. 95–9.
[56] P.W. Singer, '*Corporate Warriors: The Rise of the Privatized Military Industry*', (Cornell University Press: Itacha, 2003), at 101.
[57] UN Doc. A/HRC/18/32/Add.3, paras. 10–13.

In 2004, an attempted coup d'Etat in Equatorial Guinea involving many South Africans, most of them former employees or executives of PMSCs, was organized from South Africa. This, together with the fact that a large number of South African PMSC had been contracted in Iraq, prompted the authorities in 2005 to adopt new legislation to replace the Regulation of Foreign Military Assistance Act.[58]

The 2004 attempted coup in Equatorial Guinea is a clear illustration of the blurring between categories and situations as well as a good example of the close ties between mercenaries and certain PMSCs. The organizer, Simon Mann, a former British Officer, as well as Nick du Toit and other persons involved had previously worked for EO in operations conducted in Angola and Sierra Leone. Two other persons were part owners of Meteoric Tactical Systems, a company providing security to the Swiss Embassy in Iraq.[59]

A. *Limitations of Article 28 H of the 2014 African Union Protocol with Regard to the Definition of Mercenarism in Article 1 of the 1977 OAU Convention*

Article 1. DEFINITION of the 1977 OAU Convention contains in its paragraph 2 a number of elements defining the crime of mercenarism that, regretfully, have not been included in Article 28 H of the 2014 African Protocol.

These refer to natural or juridical persons which: may be an 'individual', 'group', 'association', 'representative of a State' or 'a State itself'.

The following activities covered by the crime of mercenarism included in sub-para. (a) of the 1977 OAU Convention Article 1 have not been retained either in Article 28 H. These are: 'shelter' (. . .), 'organize', (. . .) 'assist', (. . .) 'equip', (. . .) 'promote, support or in any manner employ bands of mercenaries', or activities such as: 'enlists, enrolls or tries to enroll in the same bands' which are much wider than the term 'recruits' embodied in Article 28 H.

Similarly, in Article 28 H the provision contained in the 1977 OAU Convention that 'Any person, natural or juridical who commits the crime of mercenarism (. . .) commits an offence considered as crime against peace and security in Africa (. . .)' has not been retained.

[58] UN Doc. A/HRC/18/32/Add.3, paras. 39–41.

[59] R.Y. Pelton, '*Licensed to Kill*', [Crown Publishers, New York: 2006]; UN Doc. A/HRC/18/32/Add.2, paras. 18–20; A. Roberts, '*The Wonga Coup*', [Public Affairs, New York: 2006].

If the reference to juridical persons such as groups, associations had been included in the new definition of mercenarism of the 2014 AU Protocol it would have made it possible to implicate corporate responsibility and legally pursue not only individual mercenaries or employees of PMSCs but the companies themselves for mercenary activities.

B. *Positive Aspects and Loopholes in Article 28 H of the 2014 African Union Protocol in Relation to Problems Arising from Activities Conducted by Private Military and Security Companies*

The introduction by the African Union Protocol of the crime of mercenarism at the international/regional level of Africa is a very positive move indeed. Particularly because in 1991, the United Nations abandoned the recommendation by the International Law Commission to maintain it in the code of crimes against the peace and the security of mankind. This crime was not included either in the Rome Statute of the International Criminal Court of 1998 and, therefore, is not among the international crimes to be judged by the International Criminal Court.

It may be also noted that, once the 2014 Protocol is in force, the fact that Article 28 H of the AU 2014 Protocol integrates, with some changes, the provisions contained in Article 1.1 and 2. of the 1989 International Convention may facilitate its application, not only in the 31 African States who are presently parties to the 1977 OAU Convention for the elimination of mercenarism in Africa but also in 25 additional States parties to the 1989 International Convention.[60] In this connection, the African Court will be in a position to interpret and apply a large array of regional and international instruments.

The new definition of merceranism in Article 28 H can be considered as a good effort to consolidate in one regional criminal instrument the regional norms already contained in the 1977 OUA Convention.[61] It is, however, more

[60] These States Parties are: 1 African State (Mauritania); 4 Western European States (Belgium, Cyprus, Italy and New Zealand); 8 Latin American States (Barbados, Costa Rica, Cuba, Honduras, Peru, Suriname, Uruguay and Venezuela); 5 Eastern European States (Belarus, Croatia, Georgia, Moldova and Ukraine) and 6 Asian States (Azerbaijan, Maldives, Qatar, Saudi Arabia, Turkmenistan and Uzbekistan).

[61] According to Kamari Clarke the new Article 28 H has not amended the 1977 OAU Convention. The 1977 instrument being irrelevant, the new African Court should not apply the expanded definition of mercenarism contained in the 1977 OAU Convention. The 1977 OAU Convention could be relevant to the new African Court as a third subsidiary source to interpret the 2014 AU Protocol. Views expressed in an exchange of correspondence with the author on this issue.

consistent with the definition of the 1989 International Convention on mercenaries which retains almost word by word those of IHL, Article 47 of Additional Protocol I.

There are, however, as mentioned above some major drawbacks. One of them springs from the integration of the definition of the 1989 International Convention.

Within this context, it may be noted that the IHL provisions of Article 47 that could have been pertinent for situations of international armed conflicts in the second half of Twentieth century, confronting regular armies, are not for the intrastate armed conflicts of the twenty-first century.

Article 28 H integrates in its provisions how the African Court, from a regional perspective, may consider activities committed by mercenaries. It does not spell out sufficiently clearly, however, the accountability and control of those activities carried out by a major actor: PMSCs.

Article 28 H has not incorporated the qualifications of the compensation, contained in the 1989 International Convention, which to 'substantially in excess of that promised or paid to combatants of similar rank and function in the armed forces of the party' or 'significant'. This can be considered positive, for their inclusion would have made even more difficult to prove the motivation of a person concerning mercenarism.

However, in order for an individual to be accused of the crime of mercenarism Article 28 H, has kept the references to 'direct participation', included in the 1977 OAU Convention, regarding the involvement of an individual in 'hostilities' of an armed conflict or in a 'concerted act of violence'. The 1989 International Convention did not foresee such prerequisites.

Also, to be regretted is the fact that the definition of Article 28 H has not kept provisions contained in Article 1 of the 1977 OAU Convention relating to natural or juridical persons; and a number of additional activities such as sheltering, organizing, assisting, equipping, promoting, or employing band of mercenaries and can be considered a major drawback. These elements have been excluded from that definition as well as the reference in the Convention that the offence of mercenarism can also be considered as a crime against peace and security in Africa.

Mercenarism is a complex phenomenon encompassing not only direct participation in the acts stipulated in the international treaties dealing with the problem but in many other dimensions such as involvement in illicit exploitation of natural resources, illicit trafficking and activities of PMSC. The reports of the UN Special Rapporteur on the use of mercenaries have often mentioned the link between mercenarism and terrorism, trafficking in

migrants and women, trafficking in weapons and taking forcible control of valuable natural resources.[62]

With regard to terrorism and illicit trafficking it appears that the 'Islamic State (ISIS)' has been recruiting 'foreign fighters'[63] (a term that recalls the foreign mercenaries of the 1960s) from many Western countries.[64] ISIS largely finances itself from the terrorist activities of this non-State armed groups that are the foreign fighters, such as the illicit trafficking in weapons and natural resources (oil); in the trafficking of refugees and migrants, and in the kidnapping of rich Syrians whose families pay their ransom.[65]

In this connection, it should be underlined that when the African Court of Justice and Human Rights enters into force, its Judges will be in a position to establish the links between offences defined in its Statute, such as the crimes of terrorism, piracy, trafficking in persons, illicit exploitation of natural resources or aggression with the crime of mercenarism, as an aggravating circumstance, if the first crime has been committed by individuals that fulfil all the conditions contained in Article 28 H. This is also a very positive aspect.

In a number of intrastate conflicts in Africa, such as Angola, Sierra Leone, Liberia and Zaire/Democratic Republic of Congo the illicit exploitation of natural resources by armed groups and mercenaries has been a major factor.[66]

The Judges of the Court, however, might not be able to establish such a link if a PMSC has committed the crime.

The United Nations Special Rapporteur on the use of mercenaries attempted without success to cover all such complex activities, including PMSCs involvement, into a revised definition of mercenaries contained in the 1989 International Convention proposing that that instrument be amended.

His recommendations have not been followed by any of the States parties to the Convention, given the lack of enthusiasm of the international community for that treaty which continues to have a low rate of ratification.

The UN Working Group on the use of mercenaries, which took over the mandate of the Special Rapporteur in 2005, did not follow this path. Indeed, it considered that it was fruitless to concentrate its efforts at trying to arrive at a

[62] See, for example, UN Doc. E/CN.4/2001/19, para. 74.

[63] As mercenaries, foreign fighters are non-State armed groups that intervene in armed conflicts and can be linked in a number of illegal activities. For the similarities and differences between mercenaries and foreign fighters, see UN Doc. A/70/330, paras. 9–19.

[64] The terrorist organization Boko Haram in Africa acts similarly.

[65] L. Napoleoni, 'Asi se financia el terror yihadista', Article of El País, 16 November 2015.

[66] Amnesty International Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, 2016, page 16.

definition of mercenarism, which presents many loopholes exploited by the Western States from where these companies operate.

Instead, it considered that given the large-scale involvement of PMSC, particularly in the Afghan and Iraq armed conflicts, their activities ought to be regulated and monitored at the international, regional and national level by an international legal binding instrument.

Such instrument ought to indicate what activities individuals, employees and PMSC may carry out and what activities are to be proscribed by the State as the only authority holding the monopoly of the use of force.[67]

While continuing to promote the ratification of the 1989 International Convention, the Working Group concentrated mainly on the activities carried out by PMSCs. It has drafted a new proposed instrument, separate from those that regulate the activities of mercenaries. This draft instrument aims at controlling the use of force internationally by the private sector.[68]

The problem of defining mercenarism is tied up with political problems associated with the unwillingness of States to prohibit the use of mercenaries. Western States, which have resisted attempts to label PMSCs as mercenaries, are not willing either to accept that PMSCs be regulated and monitored by a binding international instrument.[69]

Instead, they have promoted parallel international initiatives with the Swiss Government, the International Committee of the Red Cross[70] and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) aimed

[67] S. Shameen, 'The State as the holder of the right to use force', Paper presented at the Regional Latin American and Caribbean consultation on the effects of PMSCs', UN Doc. A/HRC/7/Add.5, 2007. Also, H. Wulf, 'The Privatization of Violence: A Challenge to State Building and the Monopoly of Force', 18, no. 1 *Brown Journal of World Affairs* (2011), at 137–49.

[68] The draft instrument is being considered by a UN intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. See the last report available of the Intergovernmental working group UN Doc. A/HRC/WG.10/3/2, 2 September 2014.

[69] These commercial corporations have made all attempts to dissociate any connotation of the term 'mercenary' from their activities. At a given point, they named themselves Private Military Companies, then Private Security Companies and finally they have kept the name of Private Security Providers, a more neutral term which allows them to propose their services to international humanitarian organizations.

[70] The Montreux Document, Département federal des affaires étrangères de la Confédération Suisse. International Committee of the Red Cross, www.icrc.org.

at developing a not binding International Code of Conduct that is acceptable to PMSCs.[71]

As already mentioned above, no specific legislation regarding PMSCs has been adopted in any of the African countries surveyed by UN Working Group on the use of mercenaries.[72]

One exception is Angola following the Luanda Trial that condemned nine mercenaries to prison sentences and three executions for fighting in the National Liberation Front of Angola (FNLA) against the Popular Movement for the Liberation of Angola (MPLA) and also put in motion measures for adopting African regional instruments regarding mercenaries. The other is South Africa, which has convicted six of the eight individuals who have been charged with the crime of mercenarism.[73]

So far no African State has mentioned either specific legislation prohibiting mercenary activities or specific convictions in their replies to the United Nations' request through the UN Working Group on the use of mercenaries for its database following the proposal made by the UN Human Rights Council on this matter.[74]

3. CONCLUDING OBSERVATIONS

Article 28 H contained in the 2014 AU Protocol will empower the Judges of the African Court to deal with cases related to violations of regional and international law for offences of mercenarism. This new article has incorporated with minor changes the prerequisites contained in the 1989 International Convention.

This new definition of mercenarism, however, which contains the same preconditions as those embodied in previous international and regional instruments, will be difficult to apply.

Assisting a government to maintain power and assisting a group of persons to obtain power are two innovative provisions that have taken into consideration situations not foreseen in any other former international or regional instruments dealing with mercenary activities. A more explicit provision regarding conflicts of violence for expropriation of natural resources could have also been included in the new definition.

[71] Such initiatives have finalized in the establishment of an International Code of Conduct Association for Private Security Providers' Association, based at Geneva, see www.icoca.ch/en/icoc-association.

[72] UN Doc., A/HRC/27/50 paras. 67–75.

[73] UN Doc., A/HRC/18/32/Add.3, para. 34.

[74] UN Doc., A/HRC/24/45 paras. 13 and 22–5.

The foreign character of the performer (mercenary, freelance, proxy, foreign fighter) is of particular importance in most cases, with the exception of those in which individuals of the same diaspora may commit mercenary activities. Taking into account the changing patterns of international security in internal and international conflicts and the close links between mercenary activities and those of certain private military and security companies, as the case of Equatorial Guinea has demonstrated, the revision of Article 28 H afforded a great opportunity to include clauses encompassing PMSCs at the regional level as the UN Working Group on the use of mercenaries has encouraged.

There has been a blurring between activities traditionally carried out by mercenaries and those of PMSC's in zones of armed, low intensity conflicts or other situations as numerous examples show in Africa.[75] One of the most recent examples has been reported by the UN Monitoring Group on Somalia and Eritrea regarding the PMSC Saracen that provided military training and equipment to the Puntland Maritime Police Force in violation of the UN Security Council arms embargo.[76] However, Article 28 H continues to deal exclusively with the old concept of mercenaries adopted in international treaties – IHL and ICL.

The activities giving rise to the crime of mercenarism such as organize, finance, supply, equip, train, promote, support, enlist, enrol, etc. ought also to be spelled out in Article 28 H.

The definition could have included all possible actors that may commit the crime of mercenarism: individual, group, association, company or representative of state that have already been identified in other international/regional instruments.

The process of revision of all existing OUA conventions, which has taken place for the adoption of the 2014 AU Protocol, provided an opportunity to abandon the requirements in the definition of a mercenary contained in Article 47 of Additional Protocol I, replicated also in the 1989 International Convention and the 1977 OAU Convention. The prerequisite of motivation as well as the need of a definition accumulating six indispensable requirements could have been abandoned.

Our present globalized world encourages the privatization of violence and the privatization of wars. These trends pose difficult dilemmas to African governments still in a period of building the control of the monopoly of force

[75] Such as: Angola, Sierra Leone, and Equatorial Guinea to mention a few.
[76] UN Doc. A/HRC/24/45/Add.2, paras. 28–36.

by State institutions.[77] The corporate actors that are the PMSCs and their industry continue to be self-regulated in Africa as elsewhere in the world.

As has been pointed out, PMSCs 'will continue to find recruits from national and international force pools. This is due to the fact that, firstly, they pay considerably more than a national soldier is paid and, secondly, because they offer the kind of life that many professional soldiers desire, not the dreariness of routine duties and constant training for an operation that may never come'.[78]

A framework of *Jus ad bellum*, under Article 28 H of the 2014 Protocol, could have offered and encouraged governments to adopt provisions aimed at establishing the accountability of the PMSC as well as at regulating them to indicate the activities that such companies may carry out and those that they cannot. Such initiative is important for African States where PMSCs have already been a threat in the past, continue to be in the present and might also be in the future since governments may be unable to control PMSCs in a given situation.

In this context, the AU could have followed the conclusions adopted at the UN Regional Meeting for Africa held at Addis Ababa on regulation and monitoring of PMSCs.[79] At that consultation government representatives participating at the Meeting had arrived at a consensus regarding the existing legal gap at the international level vis-à-vis the activities of PMSCs and had expressed a high level of support for the ongoing efforts towards the elaboration of an international instrument for the accountability and regulation of PMSCs.

Western States, particularly the United States of America and the United Kingdom, where the majority of these companies come from, as well as other States such as the Russian Federation or China, which may have moved towards a 'governing at a distance' model[80] by which a number of public functions in the security area have been privatized while always retaining

[77] H. Wulf, 'The Privatization of Violence: A Challenge to State Building and the Monopoly of Force', 18, no. 1 *Brown Journal of World Affairs* (2011), at 137–49. The author suggests three-level monopoly of force to counter the assault on the Westphalian nation-state system because of world globalization.

[78] K. O'Brien, 'Private Military Companies and African Security' (A. Musah, J. Fayemi (ed.)), *Mercenaries: An African Security Dilemma* (London: Pluto Press, 2000) at 71.

[79] UN Regional consultation for Africa on the activities of mercenaries and private military and security companies: regulation and monitoring, 3–4 March 2010, UN Doc. A/HRC/15/25/Add.5.

[80] M. Caparini, 'Applying a Security Governance Perspective to the Privatization of Security', in (A. Bryde & M. Caparini (eds.)), *Private Actors and Security Governance* (Muenster: Lit: 2007).

necessary control, will inevitably be able to rely on a strong national army with a capacity superior to control such companies. In contrast, African States continue to have weak state structures[81] in matters of military defence forces and, therefore, need a robust regional and national framework to protect and comply with international law. Unfortunately, this has not been totally provided by the developments in national, and regional law to date.

The Judges of the new African Court will be confronted with two major challenges regarding the crime of mercenarism. Firstly, to apply the definition of mercenarism with its six prerequisites to non-State armed groups or individuals, such as foreign fighters, proxies, freelance, contractors, and PMSCs, to mention just a few. Secondly, to establish the possible links between mercenarism and other crimes contained in the Statute such as, terrorism, piracy, trafficking in persons, illicit exploitation of natural resources or aggression.

[81] Singer, supra note 56, page 9.

17

Combating Corruption Effectively?

The Role of the African Court of Justice and Human Rights

JOHN HATCHARD

THE CHALLENGE

The object of this chapter is to explore critically the potential effectiveness of the International Criminal Law Section of the African Court of Justice and Human Rights (the Court) in dealing with the crime of 'Corruption'. Given their close connection, the chapter also considers another crime within the jurisdiction of the Court, namely 'Money Laundering'.[1]

In many ways, corruption is the most significant of the crimes within the jurisdiction of the Court. Its importance lies in the fact that it is a continent-wide phenomenon which constantly affects millions of people. In their daily lives, ordinary people face petty corruption, including the payment of bribes to public officials for services they are entitled to obtain free of charge. They are also the victims of 'grand corruption' where senior public officials illegally acquire massive personal wealth. This comprises two main activities: (i) the receipt of bribe payments directly or through intermediaries; and (ii) the embezzlement and misappropriation of state assets. As a result billions of dollars have been stolen by African leaders and laundered around the world with disastrous economic consequences for the victim states and their citizens.

Not surprisingly, numerous studies have indicated that corruption is one of the main concerns of people in African states. For example, a 2016 survey by the Pew Research Centre found that broad majorities of people in Nigeria, Kenya and South Africa named government corruption as a major and continuing problem.[2]

[1] In fact the corruption-related offences are the only ones to which the money laundering provisions apply.

[2] R. Wike, K. Simmons, M. Vice and C. Bishop *In Key African Nations, Widespread Discontent with Economy, Corruption*, Pew Research Center, November 2016, at 4–5.

International efforts to combat corruption are not new. As long ago as 1975 the United Nations General Assembly (UNGA) adopted Resolution 3514 which condemned all corrupt practices, including bribery. This was followed by the UNGA Declaration against Corruption and Bribery in International Commercial Transactions.[3] Then in Resolution 55/61 of 4 December 2000, the UNGA noted the need for a specific legal instrument against corruption and this resulted in the adoption of the United Nations Convention against Corruption (UNCAC) which came into force on 14 December 2005. The vast majority of African states are parties to the UNCAC. The African Union Convention on Preventing and Combating Corruption (the AU Anti-Corruption Convention) was adopted in July 2003 and entered into force on 5 August 2006.[4] Forty of the fifty-five AU members have ratified the Convention.[5] Both Conventions require States Parties to criminalise a series of corruption-related offences and to enact provisions facilitating the recovery of the stolen assets. In addition, each African State is a member of the Financial Action Task Force (FATF) 'family'[6] and is required to implement the anti-money laundering requirements set out in the 2012 FATF Recommendations, including enacting money laundering offences.

The result is that most African states have in place national laws criminalising a range of corruption and money laundering offences and providing for the recovery of stolen assets. In addition, many have established anti-corruption institutions with a mandate to prevent and/or to investigate and prosecute corruption.

Yet despite this activity, there have been very few (and even fewer successful) prosecutions of senior public officials in national courts. This raises the question as to why national anti-corruption laws and institutions have seemingly proved ineffective. This is important as it will help assess the prospects of

[3] UNGA Resolution 51/91 of 16 December 1996.

[4] The Southern African Development Community (SADC) Protocol Against Corruption was signed in August 2001. This has similar provisions to the AU Convention. The ECOWAS Protocol of the Fight Against Corruption has yet to come into operation. For an analysis of the Conventions see C. Nicholls, T. Daniel, A. Bacarese and J. Hatchard, *Corruption and Misuse of Public Office* (3rd edn., Oxford, Oxford University Press, 2017) chapters 15, 16 and 19.

[5] As at 20 October 2018. There are some key omissions. For example, Equatorial Guinea is not a party to either the UNCAC or the AU Convention. This is particularly ironic given the involvement of the Second Vice-President, Teodoro Obiang in grand corruption (Section Part 4 below) and the fact that the amendment to the Protocol was signed in Malabo, the capital of Equatorial Guinea.

[6] I.e. either a member of FATF itself or a member of a FATF-style regional body. Equatorial Guinea is a member of the regional body *Groupe d'Action contre le blanchiment d'Argent en Afrique Centrale* (GABAC).

the Court in making a meaningful contribution to prosecuting corruption and related money laundering.

The answer lies in the fact that those seeking to combat grand corruption must confront the most powerful and influential individuals in any society for those taking (or benefitting from) the bribes or looting state assets are those who hold political power (or have access thereto). Why else would the bribe be paid? Who otherwise could authorise the looting? It is also these same individuals who 'control the controls'.[7] For example, some senior state officials enjoy unique political influence and control over the criminal justice system. This enables them to ensure that corruption and money laundering-related investigations and/or prosecutions do not proceed, at least without their approval.[8] This control may also extend to influencing members of the judiciary in the manner in which they deal with such cases.[9] Given the importance of international cooperation in investigating corruption cases with a transnational element, they can also control or prevent mutual legal assistance being provided to other states.[10]

It follows that addressing such challenges requires the development and use of techniques and strategies designed to:

(a) Successfully prosecute those who commit acts of corruption; and
(b) Take the profit out of corruption through either the forfeiture of the proceeds of crime and/or the payment of compensation to the people of the victim state.

These are very ambitious aims yet, in practice, some important steps are being taken to address them.[11] This raises the question as to whether, and if so to what extent, the Court can make a meaningful and effective contribution to supporting these aims.

[7] Some of these are explored in J. Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham: Edward Elgar, 2014), at 279–82.

[8] This is fully explored in Hatchard, ibid., at 151–61.

[9] See, for example, the Chiluba case noted in Section 4 below. For another disturbing example see the report of the International Legal Assistance Consortium *Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya* (2010), available online at www.ilac.se/2010/04/20/ilac-and-ibahri-calls-for-radical-reform-of-kenya%E2%80%99s-justice-system-in-major-report/ (visited 30 November 2016) at 31.

[10] For an interesting example see the decision of the Court of Appeal of Kenya in *KACC v First Mercantile Securities Corp* [2010] eKLR: available online at http://kenyalaw.org/Downloads_FreeCases/76031.pdf (visited 30 November 2016).

[11] For example, see the Obiang case discussed in Section 4 of this chapter.

The chapter is divided into five sections: Section 1 explores the scope of the corruption offences themselves whilst Section 2 considers the relevant provisions relating to investigations, sentences and asset recovery. Section 3 reviews the limitations on the jurisdiction of the Court whilst Section 4 provides a series of case studies which explore the potential impact of the Court on combating grand corruption. Finally, Section 5 provides an analysis of the potential effectiveness of the Court in combating corruption and money laundering.

1. THE CORRUPTION OFFENCES

Article 28A(1) of the Statute provides the Court with the power to try persons for the crime of 'Corruption'. The meaning and scope of the word has caused some debate. Today, the best known (and most widely accepted) definition is that of Transparency International i.e. 'the misuse of entrusted power for private gain'.[12] Its multi-faceted nature is emphasised in the SADC Protocol Against Corruption which states that 'corruption' includes 'bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others'.[13]

This approach is reflected in Article 28I of the Statute which provides no definition of 'corruption' but instead refers to a series of individual 'acts of corruption'. This has the advantage of providing prosecutors with a range of possible alternative charges. For example, bribery is often challenging to prove because of the secrecy surrounding the case and the identity of those involved. On the other hand, the offence of illicit enrichment i.e. where a senior public official or family member has a significant increase in their assets which they cannot reasonably explain in relation to their income, may be easier to prove.[14]

The Article 28I provisions are largely based on those found in the UNCAC and/or the AU Convention, so are likely to be already part of national legislation in many States. A notable addition and potentially serious restriction on the jurisdiction of the Court is that the offences are 'deemed to be acts

[12] See further Transparency International *The Anti-Corruption Plain Language Guide* (2009) which contains a useful set of standardized definitions of key words and phrases. Available online at www.transparency.org/whatwedo/publication/the_anti_corruption_plain_language_guide (visited 29 November 2016).

[13] Article 1.

[14] This constitutes a corruption related offence: see Article 28I(1)(g) and (2). The scope of the offence is discussed below.

of corruption' only if they are of 'a serious nature affecting the stability of a state, region or the Union'.[15] This point is discussed in Section 3 below.

A. *Bribery in the Public Sector*

Article 28I(1)(a) addresses so-called passive bribery and provides that an act of corruption is:

> The solicitation or acceptance, directly or indirectly, by a public official his/her family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.

The act of corruption can be undertaken by a variety of individuals. The term 'public official' is not defined but presumably the intention was to follow the definition provided in Article 1 of the AU Anti-Corruption Convention, i.e.:

> any official or employee of the State or its agencies including those who have been selected, appointed or elected to perform activities or functions in the name of the State or in the service of the State at any level of its hierarchy.[16]

This seems wide enough to also encompass members of the military: a particularly significant point given the instances of grand corruption involving senior officers.[17]

Given that the Statute requires the act of corruption to be of a 'serious nature', in practice it is likely that the Court will inevitably focus attention on those in the highest echelons of government and the military. The drafters of the Statute were clearly aware that corruption-related offences often involve others individuals and entities. Thus, unlike the UNCAC and the AU Convention, the Article also specifically extends liability to family members of the public official. Cases such as that involving members of the Abacha family (see Section 4 below), highlight the potential importance of this extended jurisdiction. However, there is no indication as to who is included in the term 'family member'. Here a potentially helpful definition is provided by the FATF i.e.: 'individuals who are related to a

[15] Article 28I(1).
[16] Article 1(1).
[17] For example, the Abacha case discussed in Section 4 below.

public official either directly (consanguinity) or through marriage or similar (civil) forms of partnership'.[18]

The scope of the term 'any other person' is also not indicated. Here the definition provided by the FATF of a 'close associate' is helpful, i.e.: 'individuals who are closely connected to a public official, either socially or professionally'.[19] This emphasises the 'you can't do it alone' principle i.e. the reality that grand corruption requires the active assistance, willing or otherwise, of other senior public officials and/or influential individuals.[20]

The passive bribery offence consists of 'the solicitation or acceptance of goods of monetary value or other benefit … in exchange for any act or omission in the performance of [the public official's] public functions'. A 'benefit' is widely defined so as to include a gift, favour (presumably including a sexual favour), promise or advantage.[21] There must also be a causal link between the paying of the bribe and the action or failure to act on the part of the public official. The benefit can be for the public official or for any other person or entity. This reflects the reality that bribe payments are often paid to third parties. This includes through the use of off-shore companies and trusts which allow the bribe-taker to conceal their beneficial ownership and control of the proceeds of corruption.

Article 28(I)1(b) addresses active bribery i.e.

> The offering or granting, directly or indirectly, to a public official, his/[her][22] family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.

Here the offering or granting of the corrupt payment must be for the benefit of another person or entity. The inclusion of an 'entity' is potentially of considerable importance owing to the continued problem of combating the bribery of

[18] See FATF Guidance Paper *Politically Exposed Persons (Recommendations 12 and 22)* (2013), available online at www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf (visited 29 November 2016), at 5. There is some confusion here in that Article 28N extends liability for corruption offences to any person who 'Incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute'. Further, an offence is also committed by any person who aids or abets the commission of any of the offences; is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences or attempts to commit any of the offences.

[19] Ibid.

[20] See, for example, the Chiluba case noted in Section 4 below.

[21] The meaning of 'advantage' is discussed below.

[22] The word is omitted in the text of the Statute.

public officials by corporate entities. Several international efforts seek to address this problem, albeit with limited success. Thus the OECD Anti-Bribery Convention[23] requires Parties to criminalise the bribery of foreign public officials. Whilst all have done so, there remains a marked reluctance on the part of many of them to prosecute the bribe-payers.[24] On rare occasions, prosecutions in victim states have led to the conviction of some foreign companies for bribery. For example, Acres International (a Canadian company) and Lahmeyer International (a German company) were both convicted in the Lesotho High Court of bribery in connection with the obtaining of contracts for the Lesotho Highlands Water project.[25]

Given that Article 46C provides that the Court has jurisdiction over legal persons, there is seemingly no reason why a foreign company cannot be subject to prosecution for bribery. However, to what extent this may constitute an additional deterrent to undertaking such activity is questionable. In practice, it is the threat of prosecution/conviction and possible subsequent debarment that has led to even the most powerful companies agreeing to settlements with prosecutors in which they agree to pay a fine in exchange for either a conviction for a non–corruption related offence or an agreement not to prosecute.[26]

B. *Bribery in the Private Sector*

Article 28I(1)(e) provides that an act of corruption is:

> The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works

[23] The Organization for Economic Cooperation and Development *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* came into force on 15 February 1999. The 41 parties to the Convention are involved in some two-thirds of world exports and almost 90 per cent of total foreign direct investment outflows. South Africa is the only African state to be party to the Convention. Article 16 of the UNCAC also requires States Parties to establish as a criminal offence the bribery of foreign public officials and officials of public international organizations.

[24] For example, in 2015 there was 'Active enforcement' in only four convention countries, i.e. Germany, Switzerland, the United Kingdom and the United States: Transparency International *Exporting Corruption, Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery* (2015) available online at www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd (visited 28 November 2016), at 4.

[25] See Hatchard, *supra* note 8, at 251–4.

[26] See J. Hatchard, 'Combating the Bribery of Foreign Public Officials and the "Art of Persuasion": The Case of Alstom and the Energy Sector' 28 *Denning Law Journal* (2016) 109–37, at 121 et seq. Available online at www.ubplj.org/index.php/dlj/article/view/1278 (visited 29 November 2016).

> for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties.

In contrast to the bribery provisions regarding the public sector, this provision combines both active and passive bribery. It also refers to any 'undue advantage' rather than a 'benefit': a phrase that also appears in the trading in influence provision in Article 28I(1)(f). The term is not defined but it appears in several other anti-corruption instruments, including the UNCAC and Council of Europe Criminal Law Convention on Corruption[27] albeit without any definition. However both the Legislative Guide to the UNCAC[28] (the Legislative Guide) and the Explanatory Report on the Criminal Law Convention on Corruption (the CoE Explanatory Report),[29] provide some assistance as to its meaning. The Legislative Guide indicates that an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary and that it does not have to be given immediately or directly to the official. However, the undue advantage or bribe must be linked to the official's duties.[30]

The CoE Explanatory Report also notes that the:

> undue advantage will generally be of an economic nature, the essence of the offence being that a person is, or would be, placed in a better position than that prior to the offence and that the official was not entitled to the benefit. Such advantages might consist of, for example, holidays, loans, food and drink, or better career prospects.[31]

The Report also suggests that the word 'undue' should be interpreted as something that 'the recipient is not lawfully entitled to accept or receive'. It adds that '[f]or the drafters of the Convention, the adjective 'undue' aims at excluding advantages permitted by the law or administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts'.[32]

It is not clear as to why Article 28I does not adopt a consistent terminology in respect of a key element of the offences. However, in essence, there is seemingly considerable overlap between both approaches.

[27] Articles 21 and 7, respectively.
[28] UNODC *Legislative Guide for the Implementation of the United Nations Convention Against Corruption* New York, 2006.
[29] Council of Europe, *Explanatory Report on the Criminal Law Convention on Corruption*, Strasbourg, 27 January 1999.
[30] Ibid., § 196 et seq.
[31] CoE Explanatory Report, § 37.
[32] Ibid., § 38.

Curiously, there is no indication as to the requisite mens rea for the bribery offences. Other international anti-corruption instruments require proof that the act was 'committed intentionally' and arguably the Court should follow this lead.[33]

As regards corporate criminal liability, Article 46C provides that:

> 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 [and that] a policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.

It adds that corporate knowledge of the commission of the offence 'may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation'.

C. *Abuse of Functions*

Article 28I(1)(c) addresses the offence of the abuse of functions in the following terms:

> Any act or omission in the discharge of his or her duties by a public official, his/her family member or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party.

The Article is taken verbatim from the AU Convention. It is essentially a 'quality control' provision that addresses a serious breach of duty or abuse of functions where the act or omission goes beyond the need for mere disciplinary action against a public official. Such a provision is potentially extremely useful in that it can encompass a range of 'misconduct in public office' scenarios. For example where a public official awards a lucrative government contract to a company of which s/he is a secret beneficiary; or arranges for the sale of government land to a company owned or controlled by his/her family at a price far below the market value; or the improper disclosure by a public or private sector official of classified or privileged information.[34]

[33] Note that Article 46B(3) which makes clear that any offence committed by a subordinate 'does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof'.

[34] For a detailed analysis of this offence see J. Hatchard, 'Combating Corruption: Some Reflections on the Use of the Offence and the Tort of Misconduct/Misfeasance in a Public Office' 24 *Denning Law Journal* (2012) 65–88.

Unlike the bribery provisions, the Article refers to a benefit being for the public official or a 'third party'.[35] Presumably this term is intended to have the same meaning as 'for another person or entity' and it is surprising that once again the drafters did not adopt a uniform approach.

D. *Trading in Influence*

Article 28I(1)(f) provides for the offence of trading in influence in the following terms:

> The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.[36]

The elements of the offence are essentially the same as the private sector bribery provisions save for the fact that it involves the use of real or supposed influence in order to obtain an undue advantage for a third person from performing functions in the public or private sector. As paragraph 64 of the CoE Explanatory Report puts it:

> Criminalizing trading in influence seeks to reach the close circle of the official … to which s/he belongs and to tackle the corrupt behaviour of those persons who are in the neighbourhood of power and try to obtain advantages from their situation, contributing to the atmosphere of corruption.

Thus, unlike bribery, the influence peddlers are 'outsiders' who cannot take decisions themselves but misuse their real or alleged influence on other persons. Here family members of the official are the obvious 'peddlers' in this respect.

The exercise in influence, whether successful or otherwise, must be in consideration of an undue advantage[37] whilst the improper influence applies to the decision making of any person performing functions in either the public or private sectors.

[35] The term is also used in respect of the diversion of property offence in Article 28I(1)(d).
[36] This provision is taken directly from the AU Convention, Article 4(1)(e).
[37] See the earlier discussion on the meaning of this term.

E. *Illicit Enrichment*

Article 28I(1)(g) provides that 'Illicit enrichment' is an act of corruption. For the purposes of the Statute this means:

> the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.[38]

Extending the scope of the offence to 'any other person' presumably is meant to include family members or persons associated with a public official or even to a company owned or controlled by that public official. This is a sensible step in that it reflects the reality that bribes are often paid to such persons.

The wording suggests that once the prosecution has proved that the accused has enjoyed a 'significant increase' in his/her assets, the legal burden rests on that person to provide a reasonable explanation to the court as to how the assets were acquired or otherwise face conviction. Given the challenges of prosecuting corruption successfully, such an approach has much value.

However, such a provision affects the presumption of innocence enshrined in fair trial provisions in the African Charter on Human and Peoples' Rights.[39] Further, Article 46A provides for the 'Rights of the Accused' and specifically states that 'The accused shall be presumed innocent until proven guilty according to the provisions of this Statute'. It may therefore be necessary to read down the provision so as to place the evidentiary rather than a legal burden on the accused.[40]

F. *Diversion of State Assets*

The history of the looting of state funds by leaders and their families makes Article 28I(1)(d) of particular significance. This crime is defined as follows:

[38] This reflects the definition on Article 1(1) of the AU Convention.

[39] Although in the view of the European Court of Human Rights: 'It is not contrary to the European Convention for national legislation to relieve the prosecution of the obligation to prove certain facts by proving a set of other related facts, creating a presumption of fact against the accused.' X *v UK* Application No 5124/71, Collection of Decisions, ECHR, July 1972, 135. See also the views of the Court of Appeal of Hong Kong in *Attorney General v Hui Kin-hong* [1995] 1 HKCLR 227.

[40] See L. Muzila, M. Morales, M. Mathias, and T. Berger, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, World Bank 2012, available at https://star.worldbank.org/star/sites/star/files/on_the_take-_criminalizing_illicit_enrichment_to_fight_corruption.pdf (visited 29 November 2016), at 25 et seq.

> The diversion by a public official, his/her family member or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position.

Such an offence covers a wide range of activities including fraud, obtaining by deception, embezzlement and theft by public servant.

G. *Money Laundering*

Article 28A provides that the Court has the power to try persons for the crime of money laundering. Article 28I *bis* divides money laundering into three stages:[41]

(i) The placement stage: i.e. the 'Conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action';
(ii) The layering stage: i.e. the 'Concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences. . .'; and
(iii) The integration stage: i.e. the 'Acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences'.

Whilst a separate offence for the purposes of the Statute, the Article applies only to the predicate offence of 'corruption'.[42] Addressing the link between corruption and money laundering is now seen as an international imperative.[43] All African States are part of the FATF 'family' either as members of the main body or of a FATF-style regional body. In 2012, the

[41] This provision is taken from Article 6 of the AU Convention.
[42] This is a curious limitation given that several of the other Article 28A crimes also almost invariably involve money laundering: for example, the three trafficking offences.
[43] See, for example, the FATF Report *Laundering the Proceeds of Corruption* (Paris, 2011) which provides a helpful analysis of the most common methods used to launder the proceeds of grand corruption: see, in particular 16 et seq. Available online at www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf (visited 29 November 2016).

FATF *Recommendations* were published[44] which set out the framework for anti-money laundering efforts and which are of universal application. They provide a complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and international cooperation. In particular they require all states to implement a series of anti-money laundering measures including putting in place effective criminal laws.[45] A rigorous system of peer review has ensured that most African states have the required legislation in place. This means that any state through which the proceeds of corruption are laundered has the power to prosecute the launderers.

2. INVESTIGATIONS, SENTENCES AND ASSET RECOVERY

A. *Evidence Gathering*

Investigations into grand corruption cases, the laundering of the proceeds of crime and their recovery will almost inevitably require assistance from both the victim state and other states both within and outside of Africa. Article 46L (1) therefore requires States Parties to 'co-operate with the Court in the investigation and prosecution of persons accused of committing the crimes defined by this Statute'.

The secrecy surrounding such offences together with the power of senior public officials to 'control the controls', means that evidence gathering within the victim state may be extremely challenging. Much may depend upon the assistance (or otherwise) of national anti-corruption commissions and financial forensics and intelligence units.

In addition, whistle-blowers may play a key role in revealing the wrongdoing. This calls for effective protection provisions for those individuals reporting corruption or giving evidence before the Court. Here the introduction of rules providing for the 'non-disclosure or limitations on the disclosure

[44] The *FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*. The Recommendations were updated in October 2016. Available online at www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (visited 30 November 2016).

[45] Recommendation 3 states: 'Countries should criminalise money laundering on the basis of the … Palermo Convention [UNCAC]. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences'. The Glossary to the Recommendations makes it clear that 'For the purposes of assessing compliance with the Recommendations, the word *should* has the same meaning as *must*' (emphasis in the original).

of information concerning the identity of witnesses' might be considered.[46] This will require the Court to perform a difficult balancing act between admitting potentially vital evidence from anonymous witnesses whilst at the same time protecting the right of accused persons to confront their accusers.[47] Whether the Court will be in a position to offer effective protection to individual whistle-blowers is also unclear. The development of 'super-whistle-blowers' as epitomised by the leaking of the Panama Papers, may prove to be a more effective source of information and evidence for the Court.

As regards evidence located outside the victim state, the Court is empowered 'to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose'.[48] Article 46L(2) provides that:

> States Parties shall comply without undue delay with any request for assistance or an order issued by the Court, including but not limited to:
>
> (a) The identification and location of persons;
> (b) The taking of testimony and the production of evidence;
> (c) The service of documents;
> (d) The arrest, detention or extradition of persons;
> (e) The surrender or the transfer of the accused to the Court;
> (f) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.

It is surprising that the provision omits specific reference to the power to require the production of relevant documents and records, including government, bank, financial, corporate or business records. Secrecy lies at the heart of corruption and money laundering and documentary evidence of this nature is almost invariably essential to a successful investigation and prosecution.[49]

The lack of clear provisions as to the procedure for obtaining such assistance is a matter of concern. It is essential that investigators have the power to obtain rapidly relevant evidence located in other states (or prevent its destruction) or to seek the freezing of the proceeds of crime before they are moved to another jurisdiction(s). Whilst the Office of the Prosecutor may seek additional information from States and others,[50] the power to make a formal

[46] See, for example UNCAC Article 32(2).
[47] See Article 46A(4)(e).
[48] Article 46L(3).
[49] Compare the equivalent list in Article 46(3) of the UNCAC.
[50] i.e. Organs of the AU or the United Nations, intergovernmental or non-governmental organisations or other reliable sources: see Article 46G(2).

mutual legal assistance request is seemingly only available to the Court under Article 46L. The power of the Office of the Prosecutor to seek mutual legal assistance from the start of an investigation is an absolute necessity.[51]

There is clearly much work to be done on addressing the area of mutual legal assistance especially in relation to corruption and money laundering offences. The very detailed provisions on mutual legal assistance contained in the UNCAC can provide a helpful model here.[52]

B. *Penalties and Asset Recovery*

The Court can impose 'prison sentences and/or pecuniary fines'.[53]

Given that the object of corruption and money laundering is for the offender(s) to enjoy the fruits of their criminality, the power to order the forfeiture of proceeds of crime is attractive. In this respect, Article 43A(5) provides that the Court may also order 'the forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State'. This reflects the fact both the UNCAC and AU Convention have strong provisions requiring States Parties to have in place asset recovery mechanisms, with the return of assets being a fundamental principle of the UNCAC.[54]

Article 43A is complemented by Article 45(2) which provides that:

> ... the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims including restitution, compensation and rehabilitation.

A system of conviction-based asset forfeiture is attractive in that offenders are subject to a criminal conviction, face a prison sentence and, as part of their sentence, are also liable to an order for the confiscation of their proceeds of corruption. However such a system is premised on a criminal conviction. In practice, this may not be possible. Setting aside the very real challenges of proving the case to the criminal standard, a prosecution will be impossible

[51] An additional point is that MLA requests in sensitive cases will often require strict confidentiality: something that may not be available if an order of the Court is required. Presumably the Office of the Prosecutor will be in a position to obtain the necessary assistance from forensic accountants and other experts in undertaking what will almost inevitably involve complex financial investigations.

[52] See Article 46.

[53] Article 43A(1) and (2). In imposing sentences and/or penalties, 'the Court should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person'.

[54] Article 51. Chapter V of the Convention is devoted to 'Asset Recovery'.

where the suspect is unavailable (dead, unfit to stand trial, outside the jurisdiction etc.) or subject to the immunity provision.[55]

Given these realities, limiting the Court to a conviction-based asset recovery mechanism is unnecessary and out dated and the provisions in the Statute are likely to prove of little value in practice. The use of non-criminal asset forfeiture is now increasingly common as this allows action to be taken directly against the proceeds of crime without the need for a criminal conviction, thus avoiding the immunity provision in the Statute.[56] In addition, a state may bring a civil action against a wide range of individuals and entities involved in the corruption schemes and/or laundering of the proceeds of crime. This has also proved effective and again such a power might have been provided to the Court.[57] As discussed below, some of those involved in grand corruption cases are now seeking to reach settlements with prosecutors which involve the return of (at least part of) the proceeds of corruption in exchange for an agreement to defer or withdraw a prosecution.[58] Whether this power is available to the Office of the Prosecutor is unclear but it is one which might be usefully explored.

3. LIMITATIONS ON THE JURISDICTION OF THE COURT

There are two key limitations on the jurisdiction of the Court over corruption offences.

A. *The 'Serious Nature' of the Acts*

Of the fourteen offences included in the Statute, 'corruption' is only one of two which includes as a prerequisite that the acts are of 'a serious nature affecting the stability of a state, region or the Union'.[59] Given the prevalence of grand corruption and the need to prevent a flood of cases, it is perhaps understandable for a restriction to be placed on cases coming before the Court. However it is not clear as to why it is not simply left to the Court to determine which cases it chooses to pursue.

The well-known deleterious consequences of 'grand corruption' potentially make any such case one of a serious nature. The additional element which

[55] See Section 3 below. On a more positive note, Article 28A(3) provides that 'The crimes within the Jurisdiction of the Court shall not be subject to any statute of limitations'.
[56] For example, see the *Obiang* case in Section 4 below.
[57] For example, see the *Chiluba* case in Section 4 below.
[58] For example, see the *Obiang* case in Section 4 below.
[59] The 'Illicit exploitation of natural resources' includes a similar restriction: see Article 28L *bis*.

triggers a decision by the Court is that the act(s) of corruption *affects the stability* of a state, region or the Union. The interpretation of the italicised words is important. Does the phrase require evidence that the corruption-related activity has led to the actual destabilisation (whatever that means) of the State or is it in respect of a *potential threat* to its stability? The evil of grand corruption is that it often threatens the political and/or economic stability of a state. This is emphasised in the Preamble to the UNCAC where the States Parties to the Convention express their concern '... about the seriousness of the problems and *threats posed* by corruption to the *stability* and security of societies ...' and further express their concern:

> ... about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that *threaten the political stability* and sustainable development of those States (emphasis added).

In the light of the UNCAC Preamble, it is hoped that the Court will adopt a flexible interpretation of 'stability'. It is surprising that the drafters of Article 28I did not see fit to do so.

There is a further difficulty as to how the fact of the 'instability' is to be proved. This is presumably a matter for the Court to determine[60] but any case may get bogged down in preliminary arguments over this issue.

The scope of a 'region' is nowhere explained. Given the positioning of the word after 'state', the drafters presumably meant to refer to a geographical area that includes multiple jurisdictions.[61] This might cover a case, for example, involving senior military officers who loot vast sums of money allocated for defence equipment required to fight a terrorist group in the country. Their failure to provide the necessary equipment then enables the terrorist group to extend their activities into neighbouring states.[62]

[60] The Office of the Prosecutor will also need to make a preliminary decision as to whether there is a reasonable basis to proceed with an investigation: see Article 46G(3).

[61] Although an argument could be mounted that corruption in a particular region within a state could destabilize it: for example where corruption by leaders in the oil producing region of a state divert revenues from the sale of the oil and gas which leads to severe economic instability in the entire state.

[62] It has been alleged that the atrocities perpetrated by the Boco Haram terrorist group in Nigeria, Chad and Cameroon were facilitated by the diversion of vast sums of money allocated to the Nigerian military for arms and equipment by senior military officers. This prevented the Nigerian armed forces from dealing effectively with the terrorist threat. That military officers were involved in grand corruption is highlighted by the report that the former Chief of Air Staff, Air Marshal Adesola Amosu; Air Vice Marshal Jacob Adigun, former Chief of Accounts and Budgeting of the Air Force; and Air Commodore Olugbenga Gbadebo, former Air Force Director of Finance and Budget, pleaded guilty to the corruption charges filed against them by

Corruption on the part of officials of international organisations is another area of concern. Whether such officials are covered by the term 'public official' in Article 28I is uncertain. Equally uncertain is how an act of corruption can affect the stability of the African Union.

The money laundering offence does not include this requirement.[63] This is significant, especially given the increasing international efforts of the FATF and G20 to combat corruption-related money laundering.[64] Given their focus on requiring transparency as to the beneficial ownership of companies and trusts coupled with the impact of the 'super-whistle-blowers', the money laundering offence arguably holds out a greater promise of a successful prosecution than the corruption-related offences.

B. *The Immunity Provision*

The impact of the Court is significantly reduced by the general immunity provision in Article 46A. This provides that:

> No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

In practice this effectively excludes the jurisdiction of the court from hearing cases relating to acts of corruption or money laundering involving senior state officials during their tenure of office.[65] The Statute provides no indication as to the scope of the term 'senior state officials' but inevitably it will protect those

the Economic and Financial Crimes Commission (EFCC) and agreed to jointly forfeit 33 properties in Nigeria and the UK. See further: www.aljazeera.com/programmes/countingthecost/2015/03/corruption-blights-nigerian-army-fight-rebels-150320160800536.html (visited 29 November 2016).

[63] Although the Court may determine that a case is inadmissible where it is not of 'sufficient gravity' to justify any further action: see Article 46H(2)(d).

[64] For example, the establishment of a regular joint G20 Anti-Corruption Working Group-FATF Experts Meeting on Corruption: see www.fatf-gafi.org/publications/corruption/documents/g20-acwg-fatf-october-2016.html (visited 29 November 2016).

[65] Article 46C.2. The Article is in stark contrast to the Rome Statute of the International Criminal Court, Article 27 of which specifically provides: '1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

who are most likely to be involved in grand corruption as well as encouraging them to remain in office for as long as possible.[66]

Whilst constitutional immunity is commonplace in customary international law for serving heads of state and government, extending immunity to 'senior state officials' is extremely unusual and has resulted in considerable criticism. For example Amnesty International asserts that the immunity clause essentially promotes and strengthens the culture of impunity that is already entrenched in most African countries and stands to bring the whole statute into disrepute 'as it will be portrayed (and may indeed have been intended) as a way to protect senior politicians from accountability for their crimes'.[67] However, as noted above, the corruption-related offences also apply to a range of other individuals and entities who are not subject to the immunity clause. It means that family members, the bribe-payers or those who trade in influence as well as those who launder the proceeds of corruption are all liable to prosecution. Given the 'you can't do it alone' principle and their often close involvement in grand corruption, the power to prosecute such persons is a potentially a valuable addition to the work of the Court.[68]

As regards the private sector, Article 46C provides the Court with jurisdiction over legal persons, with the exception of states. Further it is empowered to exercise its jurisdiction where, *inter alia*, 'the victim of the crime is a national of that State' or where the case involves 'Extraterritorial acts by non-nationals which threaten a vital interest of that State'.[69] This suggests the possibility, for example, of the prosecution of a company (or its agents) from within or outside Africa for the bribery of a foreign public official. Of course, this is subject to the 'act of corruption' being of a 'serious nature affecting the stability of the State' (Article 28I(1)) as well as threatening 'a vital interest of that State' (Article 46E *bis*).

[66] There is no indication as to the meaning of the phrase 'senior state officials'. Some guidance may be found in the definition of a Politically Exposed Person' found in the Glossary to the 2012 FATF Recommendations i.e.'. . . individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials'.

[67] Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expended Africa Court* (2016), available online at www.amnesty.org/en/documents/afr01/3063/2016/en/ (visited 29 November 2016), at 27. See also the Southern African Catholic Bishops' Conference Briefing Paper 359 *The African Court of Justice and Human Rights: Protecting Africans, or Just Africa's Leaders?* August 2014.

[68] It may be that the wide scope of Article 28N as regards 'Modes of Responsibility' might also apply.

[69] Article 46E *bis* (2)(c) and (d).

4. CASE STUDIES

The Court has jurisdiction only with respect to crimes committed after the entry into force of the Protocol and Statute.[70] Thus it is likely to be some years before it has to consider a case involving corruption or money laundering. However, three case studies involving grand corruption by African leaders usefully illustrate the potential scope and limitations of the Court. The cases are described as if the Court is in operation and the respective States had accepted its jurisdiction.[71]

A. *The Obiang Case*

Teodoro Nguema Obiang Mangue (Obiang) is First Vice-President of Equatorial Guinea.[72] In 2014 his criminal activities were described in a United States Department of Justice press release as follows:

> Through relentless embezzlement and extortion, Vice President Nguema Obiang shamelessly looted his government and shook down businesses in his country to support his lavish lifestyle, while many of his fellow citizens lived in extreme poverty… After raking in millions in bribes and kickbacks, Nguema Obiang embarked on a corruption-fueled spending spree in the United States.[73]

The press release continues:

> [Obiang] received an official government salary of less than $100,000 but used his position and influence as a government minister to amass more than $300 million worth of assets through corruption and money laundering, in violation of both Equatoguinean and U.S. law. Through intermediaries and corporate entities, Nguema Obiang acquired numerous assets in the United States.

1. How the Court Might Deal with Such a Case

Given the appalling extent of Obiang's criminal activities, these represent a clear example of corruption of a 'serious nature' and its deleterious impact on

[70] As required under Article 46E(1).
[71] Under Article 46E *bis*.
[72] At the time of the proceedings, he was Second Vice-President.
[73] US Department of Justice Press Release, 10 October 2014, available online at www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased (visited 29 November 2016).

the economic well-being of the people of the country affects the 'stability' of Equatorial Guinea. However his position as a Vice-President makes him a 'senior state official' and consequently the immunity provision in Article 46A will apply and no charges can be brought against him during his tenure of office.[74] Patience is a virtue here as it is not clear as to when his tenure will expire. Until then, the Court is powerless to act against him or his looted assets.

2. The Alternatives

The case highlights the importance of having effective asset recovery powers in place. Even if the criminal forfeiture route is not available, the power to take away the profit from the senior public official represents a powerful weapon in the armoury of those seeking to combat corruption. The Obiang case is a prime example.

In 2012 civil forfeiture proceedings were launched in the United States, not against Obiang himself but against his assets located there which were suspected of being proceeds of crime.[75] This resulted in a civil forfeiture settlement with the Department of Justice in which Obiang agreed to sell his $30 million mansion located in Malibu, California, a Ferrari automobile and various items of Michael Jackson memorabilia purchased with the proceeds of corruption. Some of these proceeds of crime were to be returned to the people of Equatorial Guinea.[76]

Given the extent and impact of his corrupt activities, a court that is powerless to deal with individuals such as Obiang (either through a criminal prosecution or effective asset recovery powers) has little chance of commanding respect and influence.

B. *The Abacha Case*

Sani Abacha seized power in a military coup in Nigeria in 1993 and until his death in 1998 he and his family were involved in the widespread looting of

[74] He is the son of the President of Equatorial Guinea who has been in power since 1979.

[75] See *United States v One Michael Jackson Signed Thriller Jacket and Other Michael Jackson Memorabilia; Real Property Located on Sweetwater Mesa Road in Malibu, California; One 2011 Ferrari 599 GTO*. The Stipulation and Settlement Agreement is available online at www.justice.gov/sites/default/files/press-releases/attachments/2014/10/10/obiang_settlement_agreement.pdf (visited 29 November 2016).

[76] The 10 October 2014 press release explains that 'Of those proceeds, $20 million will be given to a charitable organization to be used for the benefit of the people of Equatorial Guinea. Another $10.3 million will be forfeited to the United States and will be used for the benefit of the people of Equatorial Guinea to the extent permitted by law'.

state assets with estimates varying between US$3 billion and US$5 billion. As with the Obiang case, the scale of the grand corruption was enough to satisfy the 'serious nature' requirement of Article 28I. In 2005 the Federal Supreme Court in Switzerland ruled[77] that $480 million should be returned to Nigeria 'as obviously of criminal origin' and also found that the Abacha family and their accomplices were a 'criminal organisation'.[78] In 2010, an Indian national, Raj Bhojwani was convicted in Jersey of money laundering in connection with the Abacha case and sentenced to six years imprisonment.[79]

1. How the Court Might Deal with Such a Case

The untimely death of Abacha prevented any prosecution of him before the Court. However, his national security adviser and several members of Abacha's family were all involved in the looting of the state assets and their laundering around the world.[80]

As regards the national security adviser, his immunity from the jurisdiction of the court ended with his tenure of office. Abacha's family members did not enjoy any such immunity. Charges of abuse of functions under Article 28I(1)(c) and illicit enrichment under Article 28I(1)(g) (amongst others) and money laundering would be possible against them all. In addition Mr Bhojwani could face money laundering charges. Conviction would then empower the Court to order the forfeiture and return of the proceeds of crime

2. The Alternatives

The case demonstrates the importance of the use of money laundering charges in tackling grand corruption cases. This is a case in which the prime offender was not available to stand trial. Even so, in the absence of any legal action elsewhere, the Court would have power to convict all those involved in assisting Abacha in looting and laundering the assets and to order the recovery

[77] Swiss Federal Court decision (1A.215/2004/col), 7 February 2005. For a full account of the case see Nicholls et al., *supra*, note 5 at §§ 11.11 et seq.

[78] Pursuant to Article 260 of the Swiss Penal Code.

[79] *Attorney-General for Jersey v Bhojwani* [2010] JCA 188. For a useful analysis of the case see J. Kelleher and P. Sugden, 'Money Laundering in Jersey: A Case Analysis: *Att Gen v Bhojwani*' *Jersey & Guernsey Law Review* (2011), available online at www.jerseylaw.je/publications/jglr/Pages/JLR1106_Kelleher.aspx#_ftn6 (visited 27 November 2016). See also www.bailiwickexpress.com/jsy/news/jersey-committed-fighting-money-laundering-new-appeal-rejected/#.WD1aRtSLSt8 (visited 29 November 2016).

[80] One scheme is detailed by Rix, J. in *Compagnie Noga et d'Exportation SA v Australia and New Zealand Banking Group* Queen's Bench Division (Comm), 27 February 2001, unreported.

of the proceeds of crime. In this respect, it might play a useful role if alternative approaches are not available or utilised elsewhere.

C. *The Chiluba Case*

Between 1991 and 2001 Frederick Chiluba was President of Zambia. During his period in office he was involved in the large-scale looting of state assets and these were laundered on a global scale. He was assisted by numerous senior public officials, lawyers and corporate entities.[81] Upon leaving office, his successor, Levy Mwanawasa, established a Task Force on Corruption to investigate the case and a prosecution was launched in 2004 with Chiluba being charged with several counts of theft by a public servant. In 2008, Mwanawasa died in office and was succeeded by Rupiah Banda who was known to be more supportive of Chiluba. In 2009 Chiluba was acquitted in the Lusaka Magistrate' Court on all charges, a verdict that was greeted with much scepticism by civil society organisations.[82]

1. How the Court Might Deal with Such a Case

As a former head of state, Chiluba did not enjoy the benefit of the immunity provision. The Court has a complementary jurisdiction to national courts[83] although any case against Chiluba would be inadmissible 'if it is being investigated or prosecuted by Zambia' or has been investigated and the State has decided not to prosecute 'unless the decision resulted from the unwillingness or inability of the State to carry out the investigation or prosecution'.[84] In the Chiluba case, the concern focused on possible political pressure that was brought to bear on the trial magistrate.[85] In such circumstances, it is open to

[81] The full details are provided in the lengthy judgment of Peter Smith J. in *Attorney General for Zambia v Meer Care & Desai* [2007] EWHC 952 (Ch). The case also provides an excellent example of the 'you can't do it alone' principle with the role of numerous individuals and companies involved in the looting and laundering of the assets being fully chronicled.

[82] For a critique of the decision see 'Press Statement on the Acquittal of Dr. Frederick Chiluba and the General Justice System n Zambia Delivered by 17 Civil Society Organisations on 30th September 2009': available online at http://gndhlovu.blogspot.co.uk/2009/09/press-statement-on-acquittal-of-dr.html (visited 30 November 2016).

[83] Article 46H(1).

[84] Article 46H(2). Article 46H(3) sets out the principles upon which the Court is to determine the matter.

[85] The Court may also determine that a case is inadmissible where it is 'not of sufficient gravity to justify further action': Article 46H(2)(d). This is not relevant to corruption cases given the 'serious nature' requirement in Article 28I.

the Court to determine that the 'proceedings were ... undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court'.[86] How such a situation is to be proved is not explored but it does open up the possibility of the Court having jurisdiction in a Chiluba-type situation.[87]

2. The Alternatives

The political will to act against former heads of state or senior government officials may vary from time to time depending upon the policies of the incumbent regime. As the Chiluba case demonstrates, it is essential to 'seize the moment' and take advantage of the political will to act. Article 53 of the UNCAC requires state parties to take the necessary measures '... to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired' through the commission of a convention offence. In 2006 the Government of Zambia brought a civil action in the High Court of England and Wales against Chiluba and the other conspirators in which it sought the recovery of the stolen assets.[88] Judgment was entered for the plaintiffs but, with the death of President Mwanawasa, the order was not enforced (and has never been enforced) in Zambia.

It follows that the jurisdiction of the Court may still be importance in cases where the political will to deal with grand corruption is not forthcoming in the victim state.

5. CONCLUSIONS

Millions of people in African states remain the victims of corruption. Untold billions of dollars have been looted by state officials and laundered through and into compliant jurisdictions around the world. The work of the FATF and G20 coupled with the development and strengthening of the UNCAC and AU Conventions, amongst others, highlight the fact that there is a growing international consensus to take action against corruption and money laundering. Even so, much still needs to be done.

The fundamental question is whether the establishment of a supranational court in Africa can make a significant contribution to addressing the two challenges of:

[86] Article 46H(3)(a).

[87] In fact several senior government officials involved with Chiluba in the corruption were successfully prosecuted in Zambia.

[88] See *supra*, note 82.

(a) Successfully prosecuting those who commit acts of corruption; and
(b) Taking the profit out of corruption by either the forfeiture of the proceeds of crime and/or the payment of compensation to the people of the victim state.

At one level, providing the Court with a jurisdiction over 'Corruption' is an attractive idea, the more so given the fact that there is currently no other international court that has jurisdiction to try such offences. Further, suggestions that the jurisdiction of the International Criminal Court be expanded, either explicitly or by implication, to include corruption offences have made no headway.[89]

A. *Punishing Those Who Commit Acts of Corruption*

African states have an appalling record of tackling grand corruption. As noted earlier, there have been very few prosecutions of senior public officials (and even fewer successful prosecutions). Further, several key states have not ratified the AU Convention whilst others have not incorporated the UNCAC provisions into their domestic law. The fundamental challenge is to generate the political will on the part of African leaders to 'persuade' them of the need to take active steps to combat corruption. Whether the Court has the persuasive power to do so through the use of the criminal law is debatable.

The approach in Article 28I of dividing 'corruption' into a series of separate offences is helpful. It highlights its multi-faceted nature and addresses the key conduct that constitutes 'grand corruption'. It also provides prosecutors with a range of possible charges. Yet the limitations contained in Article 28I are disappointing and serve only to undermine the anti-corruption mandate of the Court.

The requirement that the act of corruption is of a 'serious nature affecting the stability of a state, region or the Union' seems to serve little purpose other than to severely limit the cases which can be heard by the Court. No doubt much time and energy will be wasted on arguments as to the meaning and scope of this obscure phrase.

The immunity clause represents an even more serious challenge for the Court. As Amnesty International points out, it 'promotes and strengthens the

[89] The fact that several African states, including Burundi, The Gambia and South Africa have announced their withdrawal from the International Court of Justice is a worrying sign that some African states are not supporters of international courts. The fact that 'corruption' is outside the jurisdiction of the ICC, at least prevents any issues concerning overlapping jurisdictions and competing obligations.

culture of impunity that is already entrenched in most African countries. . .'.[90] In essence it protects (at least during their time in office) senior public officials from being accountable for their crimes.

On the face of it, these effectively undermine the power of the Court to punish those who commit acts of corruption. However, the linking of corruption to money laundering provides a possible escape route. The fact is that the proceeds of grand corruption are inevitably laundered both domestically and internationally, thus potentially giving rise to money laundering charges. This is significant in that the money laundering offence does not have the 'serious nature' limitation attaching to it. Further such a charge may also help investigators avoid the secrecy surrounding grand corruption in that information about, and evidence of, money laundering can be obtained from outside the victim state and thus beyond the control of the suspects.[91]

As regards the immunity provision, this does not offer any protection to the wide range of individuals and entities who also fall within the scope of the corruption and money laundering offences. This includes the bribe-payers, including multi-national corporations, as well as family members of the corrupt senior public official.

In essence, despite the serious limitations in the Statute, a successful prosecution for corruption or money laundering of those *involved with* the senior public official(s) in their grand corruption schemes is feasible. This will provide the 'teeth' that the Court will otherwise lack.

A potential practical problem concerns the obtaining of effective international cooperation. This is an essential prerequisite in prosecuting the corruption offences and money laundering. The Court will need to establish a procedure for seeking mutual legal assistance both for the purposes of the trial and for enabling prosecutors at the earliest available opportunity to obtain evidence and to freeze the suspected proceeds of crime no matter where in the world the evidence or proceeds are located.

B. *Asset Recovery*

Taking away the profit is the key strategy in the fight against corruption. This is emphasised in Article 51 of the UNCAC which makes the return of assets a

[90] See note 68 above.

[91] For example, corporate entities providing information about the bribe-seekers and takers as part of a settlement with prosecutors: see *supra*, note 27.

'fundamental principle' of the Convention. The development of the Stolen Assets Recovery Initiative (StAR) further emphasises its importance.[92]

Providing the Court with the power to order the forfeiture of the proceeds of corruption and their return to their rightful owners is therefore welcome. However, setting aside the practical challenges of making asset recovery effective, restricting the power to conviction-based asset forfeiture is disappointing and significantly reduces the usefulness of the Court. It is unfortunate that more thought was not given to providing the Court with the power to recover stolen assets through a system of non–conviction based asset forfeiture or to extend its power to order reparations to the victims of corruption without the need for a criminal conviction.

A possible way forward is to provide prosecutors with the power to agree settlements with the criminals (albeit with judicial approval) in which the return of the proceeds of corruption to the people of the victim state takes place in exchange for the withdrawal of criminal charges. This approach has led to a series of 'deals' with senior African public officials, perhaps the most notable being that involving Teodoro Obiang. Here this approach neatly avoided the immunity provision in the Constitution of Equatorial Guinea and has led to the recovery of millions of dollars-worth of stolen assets and the repatriation of significant sums to the people of Equatorial Guinea. Similarly corporate bribe-payers have agreed to pay hundreds of millions of dollars to settle corruption cases.

C. *The Way Forward*

Overall the discussion in this chapter indicates that the Court faces significant challenges if it is to contribute effectively to the vital challenges of prosecuting grand corruption and obtaining the return of stolen assets. However, it has been argued that linking the corruption offences to that of money laundering at least offers the opportunity for the Court to make some progress. Even so, given that its jurisdiction is in respect of crimes committed after the entry into force of the Statute, it may be many years before its effectiveness will become apparent.

Reliance on the criminal law alone to combat corruption is both out dated and unrealistic. Further it may be questioned as to whether such a jurisdiction for the Court is even necessary. Developing an African court to address

[92] The United Nations Office for Drugs and Crime and World Bank launched this initiative in 2007 with the aim of helping developing countries recover stolen assets. The international legal framework underpinning the Initiative is provided by the UNCAC.

African problems is an admirable objective. Replacing the ICC with an African court is understandable and has some merit. Yet corruption is not within the mandate of the ICC and is very different to the international crimes set out in Article 28A.

The reality is that every day, millions of people throughout Africa are the victims of corruption and that addressing the problem effectively calls not for just an African response but a global response. This is starkly demonstrated with the release of the Panama Papers which highlighted the involvement of states around the world in facilitating the laundering of the proceeds of corruption and which provide unprecedented information about those responsible for grand corruption. Further, information is being provided by multinational corporations to investigators detailing their involvement in the bribery of African public officials and identifying the bribe-takers. Today there is unprecedented action on the part of many states to take effective action against African kleptocrats and those assisting them. Whether the Court will be able to contribute meaningfully to these global efforts to combat corruption and money laundering remains to be seen.

18

Money Laundering and the African Court of Justice and Human and Peoples' Rights

CECILY ROSE

1. INTRODUCTION

The inclusion of money laundering within the jurisdiction of the African Court of Justice and Human and Peoples' Rights (African Court) is novel and innovative.[1] But if the African Court eventually exercises its jurisdiction over the offence of money laundering, it would not, in fact, be the first international criminal court or tribunal to undertake financial investigations in connection with criminal prosecutions. One of the International Criminal Court's (ICC) earliest situations, in the Democratic Republic of the Congo (DRC), required it to investigate money laundering by armed groups and organized crime groups engaged in the exploitation of mineral resources in Ituri.[2] The ICC Prosecutor considered that the exploitation of natural resources in the region was, in part, fuelling the alleged atrocities, and that the international banking system was facilitating money laundering in this context.[3] Even though the ICC lacked the capacity to charge individuals for money laundering itself, the Prosecutor viewed such financial investigations as, nevertheless, playing an important role in the prevention and prosecution of atrocities within the court's jurisdiction.[4]

The inclusion of the offence of money laundering in the African Court's Amended Protocol on the Statute of the African Court allows prosecutors at

[1] African Union, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Exp/Min/IV/Rev.7 (May 2012), art. 28I*bis*.

[2] Second Assembly of States Parties to the Rome Statute of the International Criminal Court, Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo, 8 September 2003, 3–4.

[3] ICC Press Release, 'Communications Received by the Office of the Prosecutor of the ICC' (No.: pids.009.2003-EN), 16 July 2003, 3–4.

[4] Ibid.

the Court to go beyond the ICC's use of financial investigations in a supporting capacity. The African Court would not only be in a position to support the prosecution of other crimes through money laundering investigations, but it would also be able to bring charges against the accused for the very act of money laundering. This would bring a number of benefits. By prosecuting money laundering as well as corruption, the African Court would be able to highlight the detrimental impact of economic crimes, which can play a structural role in fuelling the perpetration of atrocities such as war crimes and crimes against humanity, as seen in the DRC. In addition, by virtue of the fact that the African Court, like the ICC, operates on the basis of the principle of complementarity, its jurisdiction over money laundering could also, at least in theory, have the effect of prompting more domestic law enforcement actions regarding money laundering. Convictions for money laundering at the African Court could also potentially facilitate the identification, freezing, and seizure of assets that may be repatriated or used for the purpose of reparations for victims.

But a number of significant obstacles, both jurisdictional and evidentiary, may stand in the way of successful prosecutions of money laundering at the African Court. From a jurisdictional standpoint, defence counsel can be expected to raise arguments about violations of the principle of *nullum crimen sine lege* on account of the absence of any customary international legal norm prohibiting money laundering. In addition, the narrow scope of the offence of money laundering, as set out in the Amended Protocol, would prevent prosecutors from bringing charges in any context other than corruption of a 'serious nature affecting the stability of a state, region or the Union'.[5] Despite the fact that many other crimes within the African Court's jurisdiction can generate proceeds that are laundered, the Amended Protocol restricts the offence of money laundering to proceeds generated from serious forms of corruption. This means that acts of money laundering in connection with other crimes, besides serious, high-level corruption, would have to be prosecuted at the national level. Finally, not all of the possible preconditions for the exercise of jurisdiction by the African Court would be relevant or viable for the prosecution of money laundering, thus potentially further restricting the prosecutor's ability to bring charges for such conduct.[6] Although the Court may, in theory, exercise its jurisdiction based on the nationality of victims as well as the effects of extraterritorial acts (the passive personality and protective

[5] Amended Protocol, art. 28I(1) (chapeau).
[6] Ibid., art. 46E*bis*.

principles, respectively), in practice these jurisdictional preconditions will not be workable in the money laundering context.

From an evidentiary perspective, complex financial investigations could be expected to strain or exceed the prosecution's human and financial resources. In addition, prosecutors conducting such investigations would likely be heavily dependent on cooperation not only from states parties, but also non-state parties with no legal obligation to comply with requests for assistance in obtaining evidence, freezing assets, etc.[7] Because many major banking centres lie outside of Africa in non-states parties, the Court's inability to oblige cooperation may significantly impede its capacity to gather evidence. Moreover, some non-states parties may be reluctant, in the first place, to cooperate with investigations that could undermine their own domestic law enforcement efforts.

This chapter begins by explaining why prosecuting money laundering at the African Court would not only be novel, but could also be beneficial for the Court's exercise of criminal jurisdiction more broadly (Section 2). The following sections address the jurisdictional and evidentiary challenges that could arise during the course of investigations and prosecutions (Sections 3 and 4), before exploring the possibility that money laundering prosecutions could facilitate asset recovery and repatriation (Section 5).

2. WHY PROSECUTE MONEY LAUNDERING AT THE AFRICAN COURT?

Calls for international prosecution of money laundering have been relatively rare. But this does not necessarily mean that international courts could not or should not undertake prosecutions of this offence. In fact, financial investigations concerning money laundering have already been carried out by the Special Court for Sierra Leone and the ICC for various reasons other than bringing criminal charges. The international legal framework for combating money laundering has, however, always been premised on the notion that domestic courts are responsible for prosecuting the offence of money laundering. Various international instruments require or call on states to criminalize money laundering in their domestic legal systems, and to cooperate with other states in prosecuting offenders through extradition and mutual legal assistance. While numerous international treaties require states to criminalize money laundering, they do not actually create any international criminal liability for this offence. They assume that enforcement is a matter for domestic rather than international courts.

[7] Ibid., art. 46L.

The widespread domestic criminalization of money laundering began following the adoption of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention) as well as the 40 Recommendations of the Financial Action Task Force (FATF), which were first issued in 1990.[8] Treaty provisions addressing money laundering have since multiplied, and expanded in scope, with the conclusion of the 2000 United Nations Convention against Transnational Organized Crime (UNTOC) and the 2003 United Nations Convention against Corruption (UNCAC), as well as a number of regional anti-corruption treaties, including the African Union Convention on Preventing and Combating Corruption (AU Convention).[9] The 1988 Vienna Convention and the 1990 version of the FATF Recommendations were both narrow in scope in that they addressed money laundering in the sole context of drug trafficking, meaning that these instruments targeted the laundering of the proceeds of drug trafficking alone. But UNTOC and UNCAC include broader provisions on money laundering that call upon states to criminalize the laundering of the proceeds of 'the widest range of predicate offences'.[10] At a minimum, states parties must establish as predicate offences the criminal offences set out in the Conventions themselves (eg organized crime, bribery, etc).[11] Likewise, later versions of the FATF 40 Recommendations have also called on states to criminalize money laundering in relation to all serious offences.[12]

The Amended Protocol builds on the 1988 Vienna Convention, UNTOC, UNCAC, and the AU Convention on Preventing and Combating Corruption, but at the same time it also points anti-money laundering enforcement in a notably different direction. Moreover, it does so without the benefit of scholarly debate about the merits and drawbacks of this potential shift. The Amended Protocol builds on these treaties by adopting very similar language – Article

[8] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95; Financial Action Task Force, 'International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations' (February 2012).

[9] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209; United Nations Convention against Corruption (adopted 11 December 2003, entered into force 14 December 2005) 2349 UNTS 41. The regional anti-corruption treaties include African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006) (2004) 43 ILM 5; Inter-American Convention against Corruption (adopted on 29 March 1996, entered into force 6 March 1997) (1996) ILM 724.

[10] UNTOC art. 6(2)(a), UNCAC art. 23(2)(a).

[11] UNTOC art. 6(2)(b); UNCAC art. 23(2)(b).

[12] FATF 40 Recommendations, Recommendation 3.

28I*bis* of the Amended Protocol replicates the language in the AU Convention's money laundering provision, which itself strongly resembles the relevant provisions of the 1988 Vienna Convention, UNTOC and UNCAC.[13] But, as will be discussed in Section 3.B, the Amended Protocol also departs from the current approach to criminalizing money laundering by narrowing the scope of the offence to the laundering of 'the proceeds of corruption and related offences' – an apparent reference to Article 28I on corruption. The Amended Protocol also points anti-money laundering enforcement efforts in a notably different direction by granting a regional court criminal jurisdiction over an offence that has always been prosecuted at the domestic level. In doing so, the drafters of the African Court could not draw upon or benefit from previous discussions among state officials about the potential wisdom or pitfalls of this shift because the negotiators of the Rome Statute barely contemplated the possibility of granting the ICC jurisdiction over money laundering.

While the negotiators of the Rome Statute debated the inclusion of transnational crimes like drug trafficking and terrorism at relatively great length, the possibility of including money laundering attracted very little attention. Some states apparently supported the inclusion of money laundering in the Rome Statute, and Nigeria even expressed this view orally at the Rome Conference.[14] But the negotiators never seriously considered including money laundering in the Rome Statute, nor did they consider revisiting this issue at the Review Conference in Kampala in 2010.[15] Given that the negotiators lacked sufficient time at the Rome Conference to settle higher-priority issues like the inclusion of drug trafficking and the definition of aggression, money laundering understandably received very little attention.[16] As a result, the merits and drawbacks of prosecuting money laundering were never fully debated by states (or by NGOs and scholars) during the Rome Conference or before the inclusion of money laundering in the Amended Protocol of the African Court. At the Rome Conference, the limited amount of time available for negotiations appears to have precluded the inclusion of transnational crimes, such as drug trafficking and money laundering. By contrast, time

[13] 1988 Vienna Convention art. 3(1)(b); UNTOC art. 6; UNCAC art. 23; AU Convention art. 6.

[14] A. Schloenhardt, 'Transnational Organised Crime and the International Criminal Court: Towards Global Criminal Justice' 24 *University of Queensland Journal* (2005) at 93, 120.

[15] Ibid.

[16] P. Robinson, 'The Missing Crimes' in A. Cassese et al. (ed) *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford: Oxford University Press, 2002) at 497, 506.

constraints appear to have had the opposite effect with respect to the drafting of the Amended Protocol – transnational crimes were included *en masse*, with seemingly little debate about the reasons or consequences.

Had there been such a debate among states during the drafting of either the Rome Statute or the Amended Protocol, then delegates might have discussed the potential benefits to prosecuting money laundering at international courts, as well as the serious jurisdictional and evidentiary problems that might arise. They might have noted, for example, that prosecutors could benefit from the ability to link economic crimes with the commission of other international and transnational crimes. Economic crimes such as corruption and money laundering can be among the structural causes of violence, and yet prosecutors at international criminal courts and tribunals lack jurisdiction over these types of systemic injustices.[17] The same is true in the broader field of transitional justice, which has also tended to overlook economic crimes.[18] Truth and reconciliation commissions, for instance, have typically focused on violence by the police, military and paramilitary that violates civil and political rights rather than non-violent economic crimes.[19]

Although international criminal courts and tribunals have not yet fully grappled with the factual and legal links between economic crimes and armed conflict, the connections are discernible and have been the subject of reports and newspaper articles, if not judgments.[20] In Sierra Leone and Liberia, for instance, the former Liberian President Charles Taylor reportedly amassed a fortune through control over natural resources in the two states, including control over diamond areas, the iron ore industry, and timber as well as the Firestone rubber plantation in Liberia.[21] The revenue generated through this illicit exploitation of natural resources is widely understood to have allowed Taylor to fund armed factions that perpetrated atrocities in Sierra Leone and fuelled conflict in the region.[22] The SCSL trial judgment in the *Taylor* case is, however, primarily limited to findings about Taylor's receipt of rough diamonds from leaders of the Revolutionary United Front (RUF) in exchange for

[17] R. Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' 2 *International Journal of Transitional Justice* (2008) at 310, 316–17.

[18] ibid. at 319.

[19] Ibid.

[20] See e.g. P. R. Keefe, 'Buried Secrets: How an Israeli Billionaire Wrested Control of One of Africa's Biggest Prizes' *The New Yorker* (8 July 2013).

[21] International Coalition for Justice, *Following Taylor's Money: A Path of War and Destruction* (2005), at 16.

[22] See e.g. D. Carvajal, 'Hunting for Liberia's Missing Millions' *The New York Times*, (Monrovia, Liberia 30 May 2010).

arms, ammunition, and other supplies.[23] The Court also found that Taylor facilitated a relationship between a Belgian diamond dealer and a leader of the RUF, Issa Sesay, for the purpose of diamond transactions.[24] But the trial judgment makes no further findings about what Taylor did with the diamonds and the wealth they generated. The judgment makes no mention of the fact that Taylor apparently sent money abroad, to bank accounts in Switzerland, Burkina Faso, and elsewhere.[25] The judgment also makes no mention of Taylor's extensive use of false aliases or identities and shell companies, which seems to have been designed to enable him to launder the proceeds of crimes, namely revenue from the illicit extraction of natural resources.[26]

The charges in the *Taylor* indictment arguably generated little need for the trial chamber to go further in its findings about how Taylor funded the armed conflict. Nor would such findings have been feasible for the trial chamber on the basis of the evidence before them in this case, as the parties relied heavily on witness testimony rather than the type of documentary evidence that would be needed to demonstrate money laundering in the context of the diamond trade. But the problem of stolen assets did not escape the notice of the SCSL, as the Prosecutor did request 'all states concerned' to identify, locate, and freeze Taylor's assets in their territory.[27] In July 2003, the Prosecutor met with some success in this respect, as the Swiss government complied with a request from the Prosecutor to freeze approximately US$1.5 million in Swiss bank accounts held by two persons associated with Taylor.[28]

The Taylor case illustrates one of the advantages of conducting investigations into financial crimes alongside investigations of atrocities: the potential for asset recovery. While the investigations into Taylor's assets by the SCSL as well as the United Nations and the Liberian government have yet to meet with significant success or the repatriation of funds, such asset recovery efforts are typically very lengthy and could still yield a positive outcome for Liberia. In addition, money laundering investigations have the advantage of producing evidence about the commission of other crimes. Such investigations can play an important role in supporting investigations of other predicate crimes, the proceeds of which have

[23] Trial Judgment, *Prosecutor v Charles Ghankay Taylor (*SCSL-03–01-T), Trial Chamber II, 18 May 2012, §§ 5843–6149.
[24] Ibid. at § 6103.
[25] International Coalition for Justice supra note 21.
[26] Ibid. at 7.
[27] *Prosecutor v Charles Ghankay Taylor*, Warrant of Arrest and Order for Transfer and Detention, 7 March 2003, 3.
[28] SCSL Office of the Prosecutor Press Release, '2 Million of Taylor's Assets Frozen' 23 July 2003 (2 million in Swiss Francs).

been laundered.[29] Money laundering investigations can provide critical evidence regarding where money originated, when it was received or deposited, and who the beneficiaries are.[30] Though the Amended Protocol limits money laundering to the predicate offence of corruption, money laundering investigations at the African Court could still support charges of other crimes, even if money laundering itself could not necessarily be included in an indictment. Finally, investigations of money laundering by international prosecutors could potentially expose or bring attention to the roles played by foreign individuals, companies, and banks in armed conflicts and large-scale corruption in African states. Such exposure could even help to trigger or provide evidentiary support for domestic investigations in non-African states.[31]

3. JURISDICTIONAL QUESTIONS

Prosecutors at the African Court can expect to encounter a number of jurisdictional hurdles in attempting to try individuals or legal persons for the offence of money laundering under Article 28I*bis* of the Amended Protocol. In an initial prosecution for money laundering, defence counsel would be likely to challenge the provision's compliance with the principle of *nullum crimen sine lege*, or the principle of legality. Even if judges were to find that the principle of legality poses no problems for the offence of money laundering, prosecutors may still find that the provision's limited scope or subject matter jurisdiction prevents frequent reliance on it. In addition, the possible preconditions for the exercise of jurisdiction, as set out under Article 46E*bis* of the Amended Protocol, are also likely to be limited.

A. *The Principle of Nullum Crimen Sine Lege*

Given that the African Court would be the first international criminal court to exercise jurisdiction over money laundering, defence counsel can be expected to challenge the legality of the Court's jurisdiction on the basis of the principle of *nullum crimen sine lege*. Defence counsel might argue, for example, that the African Court lacks jurisdiction over money laundering because the offence has not been criminalized under international law, customary or conventional. A number of international treaties include provisions on money

[29] Financial Action Task Force, *Operational Issues: Financial Investigations Guidance*, June 2012, § 23.

[30] Ibid.

[31] S. Starr, 'Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations' 101 *Northwestern University Law Review* (2007) at 1257, 1287–8.

laundering (e.g. the 1988 Vienna Convention and UNTOC), but these treaties do not enjoy universal participation among African states and cannot be viewed as evidence of custom, for reasons explained below. Moreover, these treaties also do not, by themselves, create international criminal responsibility, as they only require states to criminalize money laundering under domestic, as opposed to international law.

But prosecutors should be able to overcome jurisdictional challenges based on the principle of legality by arguing that Article 28I*bis* not only sets out the Court's subject matter jurisdiction, but also provides the applicable law.[32] In other words, this provision is both jurisdictional and substantive. This would not be a novel legal argument. In fact, scholars have made the same arguments about Articles 6, 7, 8, and 8*bis* of the Rome Statute of the ICC, which respectively concern genocide, crimes against humanity, war crimes, and aggression.[33] These provisions do not entirely conform with customary international law. But because the articles themselves criminalize the crimes over which the Court enjoys jurisdiction and they only apply prospectively, the principle of *nullum crimen sine lege* does not pose problems. This approach to the Rome Statute is supported by Article 21 concerning applicable law. This provision requires the Court to apply the Statute 'in the first place', along with the Elements of Crimes and the Rules of Evidence, before applying 'in the second place' custom or treaty law. Unlike the Rome Statute, the Amended Protocol does not contain any provision on applicable law. But the absence of such a provision would not preclude arguments that the provisions on the international criminal jurisdiction of the African Court effectively conflate jurisdiction and applicable law.

Interpreting Article 28I*bis* of the Amended Protocol as a substantive provision is, in fact, the only workable approach to the offence of money laundering. If prosecuting money laundering at the African Court is to be viable in practice, then the provision itself must be understood as stating the applicable law because of the absence of any customary international law prohibiting money laundering. The existence of numerous treaty provisions that require the criminalization of money laundering does not evidence the existence of a parallel customary norm, despite the fact that some of these treaties enjoy high ratification levels. While state practice in criminalizing money laundering may be widespread, this practice appears to stem, at least in part, from states'

[32] R. O'Keefe, *International Criminal Law* (Oxford: Oxford University Press, 2015) at s14.59.
[33] Ibid.; M. Milanovic, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' 9 *Journal of International Criminal Justice* (2011) at 25; but see N. Boister, 'Treaty Crimes, International Criminal Court?' *New Criminal Law Review* (2009) at 341, 347–8.

treaty obligations, and not from a freestanding sense of legal obligation to do so, which would be required for the requisite *opinio juris*. In addition, the 40 Recommendations on money laundering and terrorist financing issued by the FATF also cannot be taken as evidence of a customary norm prohibiting money laundering. The FATF 40 Recommendations comprise a non-binding instrument. Compliance with the anti-money laundering norms set out in the Recommendations reveals nothing about whether states have a freestanding sense of legal obligation. Instead, FATF has brought about widespread implementation of anti-money laundering laws through political and economic pressure, and by encouraging states to comply with their existing treaty obligations under the 1988 Vienna Convention and UNTOC.

The absence of a customary prohibition on money laundering is, in essence, irrelevant for the jurisdiction of the African Court. When drafting the constituent instrument of a judicial institution such as the African Court, states may vest it with whatever jurisdiction they choose, and they can also authorize it to apply any law of their choosing (subject to the principle of legality).[34] The subject matter jurisdiction and applicable law of international courts and tribunals do not necessarily depend on existing customary or treaty law, but may be determined by the constituent instrument itself. Nor must the subject matter jurisdiction of international criminal courts be limited to serious or grave crimes – a category into which offences like corruption and money laundering may or may not fall, depending partly on how we understand terms like serious and grave.[35] While the ICC is indeed limited to 'the most serious crimes of international concern,' this may be understood as a policy decision made by the drafters of the Rome Statute, and not as the consequence of any legal requirement.[36]

As a result of the fact that the Amended Protocol not only establishes jurisdiction over money laundering but also sets forth the applicable law, it may be understood as a treaty that creates international legal obligations for individuals. While treaties that directly impose obligations on individuals or legal persons are relatively rare in the international legal system, they are not unheard of (see e.g. the 1949 Geneva Conventions).[37] But in order to avoid binding individuals or legal persons in states that did not consent to the Amended Protocol, the jurisdictional scope of the money laundering

[34] O'Keefe supra note 32, at s2.15.

[35] But see A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) 24 *European Journal of International Law* (2013) 339–940, at 933.

[36] Rome Statute art. 1.

[37] Milanovic supra note 33, 46–7.

provision would have to be limited in practice to offences that occurred on the territory of states parties, or offences committed by the nationals of states parties.[38] The exercise of jurisdiction over offences committed by non-nationals outside of the territory of states parties to the Amended Protocol would therefore run afoul of the principle of legality.[39]

This approach to the Amended Protocol, as a substantive as well as jurisdictional provision, is workable due to the fact that Article 28I*bis* is relatively detailed. This provision closely resembles the money laundering provision in the 1988 Vienna Convention, which has formed the basis for all subsequent treaty provisions on money laundering. These treaty provisions are not necessarily less detailed than domestic statutory provisions on money laundering, and they could form a sufficient basis for giving individuals and legal entities notice of the *actus reus*, or the conduct that constitutes a criminal offence. This approach to Article 28I*bis* is also viable because the temporal jurisdiction of the African Court is not retroactive.[40] If the applicable law set out in Article 28I*bis* could apply retroactively, then this would indeed pose a problem with respect to the principle of legality.

Finally, Article 28I*bis* does, however, fail to stipulate a *mens rea* requirement in its chapeau, unlike the 1988 Vienna Convention, UNTOC, and UNCAC, which all require states parties to criminalize conduct that was 'committed intentionally'. The omission of a *mens rea* requirement could prove problematic from the perspective of the principle of legality, unless prosecutors and judges at the African Court engage in some creative treaty interpretation. The use of the word 'knowing' in Article 28I*bis*(i) and the phrase 'with the knowledge' in Article 28I*bis*(ii) could, for instance, be taken as indications that the conduct set out in this provision must be committed intentionally. But if such arguments fail to persuade the judges, then this apparent drafting error – which also plagues the other transnational criminal law provisions – could indeed prevent the prosecution of money laundering, along with many other offences set out in the Amended Protocol.

B. *The Scope of the Court's Jurisdiction over the Offence of Money Laundering*

Assuming that the principle of legality would not pose an insurmountable problem for prosecutors at the African Court with respect to the offence of

[38] Amended Protocol art. 46E bis(2)(a), (b).
[39] Ibid., art. 46E bis(2)(c), (d).
[40] Ibid., art. 46E(1).

money laundering, the scope of the offence set out in the Amended Protocol would nevertheless limit the provision's practical application. The offence of money laundering, as it appears in the Amended Protocol, is more limited than the offence as it appears in the more recent universal treaties, UNTOC and UNCAC, because it designates only 'corruption or related offences' as predicate offences. The term predicate offence refers to an offence that generates proceeds that may become the subject of a money laundering offence.[41] Both UNTOC and UNCAC contain money laundering provisions that refer broadly to 'the proceeds of crime', without imposing limits on the type of crime.[42] The Amended Protocol, by contrast, adopts the approach of the AU Convention, which limits the predicate offence to 'corruption or related offences'.[43] By confining the predicate offences to corruption or related offences, as opposed to criminal offences generally, the Amended Protocol greatly restricts the applicable scope of Article 28I*bis*. In addition, the meaning of 'related offences' is uncertain in the context of both the Amended Protocol and the AU Convention, although it may be understood, at least in part, as a reference to crimes such as the use or concealment of proceeds derived from acts of corruption.[44]

In restricting the predicate offences for money laundering in this manner, the Amended Protocol not only departs from UNTOC and UNCAC, but it also runs contrary to the FATF 40 Recommendations. FATF Recommendation 3 indicates that states 'should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences'. An interpretive note further explains that states may describe predicate offences as 'all offences', or by reference to a list of predicate offences or a particular threshold, such as serious offences or offences that attract a certain penalty.[45] Without a drafting history for the Amended Protocol, it is difficult to appreciate what might have inspired this decision to limit money laundering to proceeds derived from corruption or related offences. From a policy perspective, it is also difficult to justify the limited scope of Art 28I*bis* in light of the well-known links between money laundering and the other international and transnational crimes set out in the Amended Protocol, such as war crimes and crimes against humanity, piracy, terrorism, drug trafficking, human trafficking, and the illicit exploitation of natural resources. As noted in

[41] UNTOC art.. 2(h).
[42] Ibid., art. 6; UNCAC art. 23.
[43] Amended Protocol art. 28I*bis*(1)(i).
[44] Ibid., art. 28I(1)(h); AU Convention, art. 4(h).
[45] FATF, *The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, February 2012, at 34.

Section 2 of this chapter, for example, money laundering has been linked to the illicit exploitation of natural resources in both Sierra Leone and the DRC. Yet laundering the proceeds of such illicit exploitation would fall outside of the scope of Article 28I*bis*.

It is also difficult to appreciate why the drafters decided to conclude Article 28I*bis* with a safeguard clause which provides that '[n]othing in this article shall be interpreted as prejudicing the power of the Court to make a determination as to the seriousness of any act or offence'.[46] This provision would be logical if this Article described predicate offences by reference to a threshold of seriousness. Given that sub-paragraph 1 defines predicate offences not as serious offences, but as corruption or related offences, it is unclear why the African Court would have an interest in safeguarding its authority to determine the 'seriousness of any act or offence'. Because the Amended Protocol limits predicate offences to 'corruption or related offences', this clause appears to be overbroad in preserving the Court's power to make threshold determinations as to the seriousness of 'any act or offence'.

Sub-paragraph 2 of Article 28I*bis* would have been easier to explain if it had preserved the African Court's authority to determine what qualifies as a serious corruption offence. Article 28I, which concerns corruption, limits the scope of corruption offences to acts 'of a serious nature affecting the stability of a state, region or the Union'.[47] This clause has no origins in other international or regional anti-corruption treaties. Nor does similar qualifying language appear in any of the other transnational criminal law provisions in the Amended Protocol, except for the offence of illicit exploitation of natural resources, set out in Article 28L*bis*.[48] The terms 'serious', 'stability' and 'region' are undefined and open to debate, and therefore likely to result in preliminary challenges by those accused of corruption.[49] For unknown reasons, the drafters of the Amended Protocol apparently considered it necessary to limit the scope of only the corruption offences and the offence of illicit exploitation of natural resources. None of the other transnational criminal law offences, which could also result in prosecutions of relatively minor infractions as well as more major violations, have a seriousness threshold. Perhaps, in the eyes of

[46] Art. 28I*bis*(2).

[47] Amended Protocol art. 28I(1). See also J. Hatchard's discussion of this phrase in 'Combating Corruption Effectively? The Role of the African Court of Justice and Human Rights' in the same volume, Section 3A.

[48] For a discussion of this phrase in the context of the offence of illicit exploitation of natural resources see D. Dam and J. G. Stewart, 'Illicit Exploitation of Natural Resources' in the same volume, Section 1.

[49] Ibid.

the drafters, any violations, however minor, of the other transnational criminal law offences would potentially be suitable for prosecution by the African Court, while this would not be the case for instances of petty corruption, for example. Alternatively, the drafters may have had concerns about giving the Prosecution unfettered discretion to bring corruption charges in particular. But without *travaux préparatoires* for the Amended Protocol, these possible explanations remain speculative.

The inclusion of a seriousness threshold for corruption and illicit exploitation of natural resources, but not for any of the other transnational crimes, is questionable. In light of the sheer frequency with which crimes like drug trafficking and trafficking in persons are committed in Africa, the other provisions covering transnational crimes arguably could have also benefited from a threshold of some sort. During the drafting of the Rome Statute, by contrast, concerns about flooding the ICC with the prosecution of offences like drug trafficking led, in part, to exclusion of transnational crimes from the Rome Statute.[50] In addition, the prosecution of the remaining four offences – war crimes, crimes against humanity, genocide, and aggression – is limited to 'the most serious crimes of concern to the international community as a whole'. Regardless of the reasons why the drafters limited the African Court's jurisdiction over corruption, the effect is to limit the Court's jurisdiction over money laundering as well as corruption, as the scope of the money laundering provision depends in part on the scope of its predicate offence, corruption.

C. *Application of Jurisdictional Preconditions to the Offence of Money Laundering*

The African Court's exercise of jurisdiction over the offence of money laundering would also be limited by the fact that only two out of the four general preconditions for the Court's exercise of jurisdiction, set out in Article 46E*bis*, would apply to this offence. Article 46E*bis*(2), which suffers from its own drafting problems, appears to provide for the exercise of jurisdiction by the African Court on the basis of (a) territoriality, (b) active personality, (c) passive personality, and (d) the protective principle, which covers extraterritorial acts that threaten a vital interest of a state party.[51] Though Article 46E*bis*(2)

[50] Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee during the Period 25 March–12 April 1996, § 72.

[51] For a discussion of the drafting problems see V. Nerlich, 'Preconditions to the Exercise of Jurisdiction (Article 46E*bis*), Exercise of Jurisdiction (Article 46F) and the Prosecutor (Article 46G)' in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (Asser Press, 2016).

curiously omits any reference to states parties, it appears that this provision is meant to provide for the Court's exercise of jurisdiction over crimes committed on the territory of a state party and by a national of a state party, in addition to crimes that victimize the nationals of a state party or threaten the vital interests of a state party.[52] In the case of money laundering, however, only the territoriality and active personality principles are applicable.

The protective principle is inapplicable in the money laundering context on account of the principle of legality. As mentioned above, the principle of *nullum crimen sine lege* would be violated by the application of Article 28I*bis* to nationals of non-states parties for acts committed outside of the territory of a state party to the Amended Protocol. Because the Amended Protocol sets out the substantive law on money laundering (in the absence of customary law), the Court's exercise of jurisdiction is limited to conduct that takes place on the territory of a state party, and/or by one of its nationals. As a consequence, extraterritorial acts of money laundering by non-nationals fall outside of the jurisdiction of the Court, even where they threaten a vital interest of a state party.[53]

In addition, the jurisdictional precondition based on the protective principle, or the nationality of the victim of the crime, would also be of little relevance in the case of money laundering. Article 46E*bis*(2)(c) provides that the Court may exercise jurisdiction 'when the victim of the crime is a national' of a state party. The commission of many of the offences set out in the Amended Protocol would produce identifiable victims, such as trafficked persons, the crew or passengers detained by pirates, and persons killed or injured by acts of terrorism. In the case of money laundering, however, identifying victims would be a difficult, if not impossible task in many instances. This is not to argue that money laundering is a 'victimless crime'. Rather, the identification of victims or persons affected by the offence of money laundering is not a straightforward or even feasible task, as it might be in the case of crimes involving death or injury, for example.

In seeking to identify the victims of an act of money laundering, the African Court would have to identify the victims of the predicate offence of corruption or related offences. While disposing of the proceeds of crime may not, in itself, produce victims, the predicate crime of corruption may indeed cause harm to persons or legal entities. But acts of corruption 'of a serious nature affecting the stability of a state, region or the Union' are likely to generate an exceptionally wide range of potential victims. Acts of corruption that would actually have such an impact on stability (whether political, economic, legal, etc.) are

[52] Ibid.

[53] Amended Protocol art. 46E*bis*(2)(d).

likely to have innumerable victims among the population of a state, region, or the African continent. Corrupt conduct that entails such consequences is inherently unlikely to have affected a discrete number of persons who may be identified by the African Court for jurisdictional purposes. Even if this were the case, difficult questions might arise as to who or what ought to qualify as a victim in the first place (a term that the Amended Protocol does not define). In light of these conceptual challenges, the jurisdictional precondition based on the nationality of the victim is likely to be unworkable in the context of the money laundering offence, limited as it is to predicate crimes involving corrupt acts (or related offences) of a serious nature.

The jurisdictional preconditions for money laundering would therefore be limited to acts on the territory of a state party, and acts by a national of a state party.[54] The full scope of the African Court's territorial jurisdiction may, however, still be an open question in the context of money laundering. Would acts of money laundering that are begun in a state party and completed in a non-state party such as Switzerland, fall under the scope of its territorial jurisdiction? Such an interpretation would give the African Court a significantly greater capacity to prosecute money laundering, which is likely to involve cross border transactions in which money flows from Africa to international banking centres outside of Africa.

4. EVIDENTIARY CHALLENGES

If prosecutors were to surmount the potential jurisdictional hurdles described in Section 3, then another set of evidentiary challenges might await. This Section focuses on two challenges in particular: the complexities of financial investigations from an evidentiary perspective, and the African Court's likely dependence on cooperation from non-state parties as well as private sector entities.

A. *Complex Financial Investigations*

Financial investigations, of the sort that would be necessary to bring charges of corruption and money laundering, would be quite distinct from the types of investigations that are typically required for cases involving crimes against humanity, etc. At the modern international criminal courts and tribunals, post Nuremberg, witness testimony has been dominant, in good part because

[54] Amended Protocol, art. 46Ebis(2)(a), (b).

documentary evidence of atrocities has often not been readily available.[55] The accused who appeared before the International Criminal Tribunals for the former Yugoslavia and Rwanda, for example, did not keep the sort of meticulous documentary records that the Nazis did during the Holocaust. But investigations of acts of corruption and money laundering would require prosecutors at the African Court to focus on documentary evidence to a much greater extent than has been the case at modern international criminal courts and tribunals to date. While witness testimony could feature in trials for corruption and money laundering at the African Court, such testimony is likely to play a lesser, secondary role as compared with trials at the ad hoc tribunals, for instance.

Furthermore, financial investigations involving transactional forensics are likely to be exceptionally data intensive.[56] In order to identify and document the movement of money, future prosecutors and investigators at the African Court should expect to draw on bank account statements, wire transfer records, financial statements, tax records, customs records, etc.[57] Complex financial investigations require lawyers to work together with professionals from other fields, including financial investigators, forensic accountants, and forensic computer specialists.[58] A multidisciplinary investigation team would likely be necessary, and it would undoubtedly be expensive. Many commentators have already noted that the range of transnational crimes included within the jurisdiction of the African Court will increase its operating costs.[59] This is likely to be especially true for the types of financial investigations needed to support prosecutions for money laundering. Such investigations are likely to be highly resource intensive in terms of both required personnel and funding. Should the Court struggle financially, as have its predecessor institutions, complex financial investigations would likely be quite burdensome for this institution.

B. *Cooperation with States and Private Actors*

Even if prosecutors and investigators at the African Court possessed the necessary budget and staff for conducting financial investigations, the type of

[55] N. Combs, *Fact-Finding without the Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010) at 12.

[56] Financial Action Task Force, *Operational Issues: Financial Investigations Guidance*, June 2012, § 23.

[57] Ibid. at §§ 27–8.

[58] Ibid.

[59] M. Du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes', *Institute for Security Studies* No. 234, June 2012, 9–10.

evidence needed for prosecuting money laundering still might not be forthcoming. As with financial investigations at the domestic level, investigators at the African Court would need to be able to compel the production of evidence.[60] But in contrast with courts and prosecutors in domestic legal systems, the African Court lacks the capacity to directly compel banks or other private institutions to produce documentary evidence. Like all international courts and tribunals, the African Court would be dependent on cooperation from states and also international organizations like the United Nations. But state cooperation would be particularly important for financial investigations because the African Court would depend on states not only to produce government documents such as tax or customs records, but also to act as intermediaries between the Court and private actors. The African Court would depend on states to order private entities to produce evidence such as bank account statements and wire transfers.[61]

The Amended Protocol accordingly provides for cooperation by states with the African Court, but these provisions are likely to leave the Court heavily dependent on the good will of non-African states that would not (and could not) be parties to the Amended Protocol. The Amended Protocol would, for example, require states parties to cooperate with the African Court with respect to requests for assistance and orders for the production of evidence and also the freezing of assets for the purpose of eventual forfeiture.[62] But the African Court could not compel non-states parties to cooperate with it. Instead, the Court would only be entitled to seek, rather than compel, cooperation by non-state parties as well as regional or international courts and partners of the African Union.[63] Given that states must consent to the jurisdiction of international courts and tribunals, it could not, of course, be otherwise. The Court could nevertheless seek to build a system for cooperation with non-state parties by concluding separate cooperation agreements

[60] FATF supra note 56, § 75.

[61] This predicament arose, for example, in *The Prosecutor v Uhuru Muigai Kenyatta*, where the Prosecution requested three years of the accused's bank records. See Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute (ICC-01/09/02/11), 3 December 2014, § 33. The Kenyan government did not take steps to compel the production of bank records or facilitate a meeting between the Prosecution and relevant bank officials. Ibid. § 66. The Trial Chamber considered that the Kenyan Government's failure to provide all of the requested bank records, 'or to take steps to do so, fell below the standard of good faith cooperation required from States Parties'. Ibid. § 67. The Prosecution dropped the charges in this case on 5 December 2014 due to lack of evidence and the Trial Chamber terminated the proceedings on 13 March 2015.

[62] Amended Protocol, art. 46L(2)(b), (f).

[63] Ibid. at art. 46L(3).

with them, to the extent possible.[64] Unlike the ICC, however, the African Court would lack the ability to seek assistance from the UN Security Council, which has the capacity to impose cooperation obligations on UN members that are non-state parties to the Rome Statute.[65] The Amended Protocol makes no mention of cooperation directly with non-state actors such as banks, as all such cooperation would be ordered by states themselves.

Due to the structure of the international banking system, financial investigations in money laundering cases would likely strain the African Court's cooperation regime, as the Court would probably find itself most in need of cooperation by non-states parties. Much money laundering in Africa is undoubtedly confined to the continent, and thus to potential states parties to the Amended Protocol. But the type of corruption and money laundering cases that would fall within the African Court's jurisdiction would likely involve banks in major western financial centres in non-states parties, especially in non-states parties with bank secrecy laws that are favourable to money launderers. In confining the Court's jurisdiction over corruption and money laundering cases to serious corruption that affects the stability of a state, region or the African Union, the Amended Protocol brings to mind instances of heads of state and other high-level officials who have laundered embezzled state funds through Swiss bank accounts and through the purchase of luxury real estate in Paris, Miami or New York.[66] In other words, corruption and money laundering of the requisite severity is very likely to have a significant extraterritorial component that would necessitate cooperation with non-state parties.

The African Court's success in securing the cooperation of non-state parties, whether on an ad hoc basis or through permanent cooperation agreements, could depend in part on the extent to which those non-states parties were pursuing their own investigations of the same or related conduct. While parallel domestic investigations could, in theory, facilitate cooperation between states and the African Court, in practice, states might instead view international investigations as potential disruptions to domestic law enforcement efforts. It may be expected that some non-state parties could prove unwilling or highly reluctant to cooperate with investigations by the African Court that could interfere with long-standing, carefully designed domestic investigations. The same concerns actually formed the basis for some of the

[64] Ibid. at art. 46L(3).
[65] O'Keefe, supra note 32, at s14.86.
[66] See e.g. L. Story and S. Saul, 'Stream of Foreign Wealth Flows to Elite New York Real Estate' *The New York Times* (7 February 2015).

objections that were raised by states regarding the inclusion of transnational crimes like drug trafficking and terrorism in the Rome Statute.

The United States, for example, expressed concerns about how the prosecution of drug traffickers and terrorists by the ICC would interfere with and undermine investigations undertaken by the United States, often in cooperation with other states.[67] The United States described its own investigations as highly sophisticated, costly, wide ranging, and long-term (often spanning many years). These investigations are geared towards prevention as well as prosecution, and tend to involve sensitive and confidential information. The United States considered that the integrity of such domestic investigations could be undermined by ICC investigations and prosecutions, which are typically more limited and not concerned with prevention. The United States feared that ICC investigators might make different decisions about who and when to apprehend, and could also compromise sources of intelligence.

The same types of concerns could also be expected in the context of investigations and prosecutions at the African Court with respect to economic crimes such as corruption and money laundering. FATF has specifically noted that in domestic settings, investigators should make timely use of search warrants in order to seize documentary evidence or electronic data so as to minimize opportunities for suspects to destroy information.[68] Poor coordination of corruption and money laundering investigations by the African Court and by domestic jurisdictions could conceivably result in suspects purging records or destroying evidence. In such circumstances, non-states parties would likely decline to cooperate altogether, or would cooperate only after carrying out domestic investigations. The timing of investigations and prosecutions by the African Court for corruption and money laundering may therefore be heavily dependent on the timing of domestic investigations. The two could potentially be complementary if domestic law enforcement efforts were to result in the freezing and seizure of assets while a parallel case at the African Court were to result in individual criminal liability. The African Court could potentially stand to benefit from domestic enforcement actions in non-state Parties, as long as it is willing to wait for the initiation or even completion of domestic proceedings which unearth evidence and identify assets. The African Court could, however, find itself somewhat dependent on domestic investigators pursuing timely enforcement actions in the first place, while the relevant evidence still exists.

[67] *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 of the Establishment of an International Criminal Court*, UN Doc. A/AC.244/1/Add.2, 31 March 1995.
[68] FATF supra note 56, § 78.

It is also conceivable, however, that such timing problems might never arise on account of the provision for immunity in Article 46A*bis*. The Amended Protocol's controversial immunity provision precludes the prosecution of heads of state or government ('or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions') during their tenure of office.[69] This provision is quite likely to result in the delay of prosecutions of money laundering because the predicate crime of corruption or related offences is limited to acts 'of a serious nature affecting the stability of a state, region or the Union'. Corruption of this magnitude necessarily tends to involve high-level government officials who would fall within the scope of Article 46A*bis*, and would thus be protected from prosecution for the duration of their time in office. In practice, whether this immunity provision would merely delay prosecutions of government officials, or effectively render them impossible, remains to be seen. In the meantime, private individuals could, of course, still be prosecuted for the laundering of funds derived from private sector corruption – assuming that such conduct would reach the seriousness threshold of the corruption provision.[70]

5. ASSET RECOVERY AND REPARATIONS

From the perspective of reparations for victims and the repatriation of stolen assets, the inclusion of the offence of money laundering in the jurisdiction of the African Court is innovative and could, at least in theory, facilitate the Court's ability to carry out this aspect of its mandate. Article 45 of the Amended Protocol provides that the Court 'may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'.[71] This provision depends on the Court's ability to seize or bring about the transfer of assets of convicted persons. Article 43 of the Amended Protocol accordingly provides that 'the Court may order the forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State'.[72] In reality, these provisions may not function as intended, and the Court may instead need to rely on

[69] See D. Tladi, 'Immunities', in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (The Hague: Asser Press, 2016); Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (2016), 26–7.

[70] See Hatchard, supra note 47.

[71] Amended Protocol art. 45(2).

[72] Ibid. at 43A(5).

money laundering investigations in order to locate assets and request domestic jurisdictions to order freezing, seizure, and confiscation.

As trials at other international criminal courts and tribunals have shown, accused may not cooperate with orders by the African Court for the forfeiture of property, proceeds or assets acquired by criminal conduct. In fact, accused persons may claim indigence while having actually hidden vast wealth abroad, in overseas bank accounts under other names, for example. The prosecution of Charles Taylor by the SCSL raised just this problem, as Taylor received legal aid from the SCSL, while the SCSL attempted to trace his assets. Thus, forfeiture orders by the African Court under Article 43 may be wholly ineffective, and it may instead be necessary to rely on cooperating states to freeze the bank accounts of accused persons while the prosecution is ongoing. Following a conviction, the African Court could potentially reach agreements for the provision of reparations or the repatriation of funds to an African Union member state, but this would have to be arranged on a case-by-case basis between the African Court, the cooperating state, and potentially also the member state (if the state itself were the recipient of the repatriated funds).

Financial investigations that focus on money laundering could, in fact, play a significant role in helping the African Court to identify assets of accused persons that may be used for reparations should they be convicted. Money laundering investigations could potentially play a supporting role in cases involving a range of offences, from war crimes and crimes against humanity, to drug trafficking and terrorism. The narrow subject matter of the offence of money laundering, as set out in the Amended Protocol, may preclude convictions linked to predicate crimes beyond acts of corruption, but money laundering investigations by the African Court need not lead to criminal charges. The Court could perhaps conduct investigations of money laundering linked to other predicate offences, with a view to identifying assets rather than supporting a prosecution for money laundering. The ICC, for example, has conducted financial investigations in a number of its cases despite lacking the capacity to bring criminal charges for such conduct. Money laundering investigations thus have the potential to play an important role in facilitating reparations for victims, beyond cases involving corruption.

6. CONCLUSION

Almost all of the potential obstacles to prosecuting money laundering at the African Court could ultimately be resolvable, apart from the inherently limited scope of the offence as stipulated in the Amended Protocol. Arguments about the principle of *nullum crimen sine lege* could be defeated on the

basis that the Amended Protocol itself provides the applicable law, and does so only on a prospective basis. The text of Article 28I*bis* of the Amended Protocol thus alleviates the need to prove the existence of a separate customary prohibition on money laundering, which would not be a fruitful exercise. In addition, the jurisdictional preconditions that would be available to the African Court in situations involving money laundering would be limited, but still workable. The African Court's capacity to exercise personal jurisdiction over extraterritorial acts by non-nationals which threaten the vital interests of the state would run contrary to the principle of *nullum crimen sine lege*, and must be discarded as a possibility. Likewise, the African Court's ability to exercise jurisdiction over victims with the nationality of a state party is hard to reconcile with the realities of money laundering and serious acts of corruption, which typically lack clearly identifiable victims. But the African Court could still exercise jurisdiction over nationals of a state party, as well as crimes committed on the territory of a state party. The options available to the African Court are thus limited to those of the ICC – a workable outcome.[73]

The African Court could also face a number of evidentiary challenges, but these too are surmountable, at least in theory if not in practice. With enough funding and appropriate expertise, investigators at the African Court would be capable of carrying out the types of complex financial investigations needed to obtain evidence of money laundering as well as corruption. But the potential evidentiary obstacles go beyond the availability of financial and human resources, as the African Court also does not have the legal authority to impose cooperation obligations on non-states parties. Yet, the cooperation of non-states parties may be especially important for prosecutions of money laundering because most major financial centres lie outside of Africa. While non-states parties may be hesitant, and cooperation will most likely not be forthcoming in some instances, it is conceivable that given the right timing and political circumstances, the African Court could secure the cooperation of non-state parties.

By contrast, the last remaining obstacle may be inescapable, that is, the Amended Protocol's restrictive definition of the predicate crimes for money laundering. Instead of including all serious crimes within the scope of the predicate offences for money laundering, or all crimes included in the Amended Protocol, Article 28I*bis* inexplicably limits the predicate offences to the proceeds of serious acts of corruption. Without a drafting history, it is impossible to know why the Amended Protocol departs from the money

[73] Rome Statute, art. 12(2).

laundering provisions of the 1988 Vienna Convention, UNTOC, and UNCAC. The narrowness of the money laundering provision included in the Amended Protocol will form an obstacle to frequent reliance on this provision by prosecutors. In fact, money laundering charges may be rare given the further narrowness of its predicate crime, corruption. This obstacle will not prevent prosecutions for money laundering, but it will make them very unlikely. The drafters thereby relegated money laundering to a peripheral role in prosecutions at the African Court, which is unfortunate given that economic crimes can be among the structural causes of armed conflict, as prosecutors at the ICC have already discovered.

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Human Trafficking in Africa

Opportunities and Challenges for the African Court of Justice and Human Rights

TOM OBOKATA

1. INTRODUCTION

Human trafficking is a serious problem in Africa. It is a major region of origin for victims, who are trafficked into other parts of the world such as Western Europe and the Middle East.[1] Domestic or intra-regional trafficking are also common in certain areas, particularly in Sub-Saharan Africa.[2] A large number of those victimized in Sub-Saharan Africa are women and children[3] who are subsequently exploited in a variety of sectors such as agricultural and domestic work, prostitution and even military (e.g. child soldiers).[4] It has been estimated that 3.7 million people in Africa are in slavery and forced labour at any given time, and the annual profits generated from these amount to $13.1 billion in this region alone.[5] Many traffickers are known to the victims and include close family members, relatives and friends.[6] Interestingly, 50% of these traffickers in Africa are female,[7] dispelling a myth that it is a male-dominated crime. The involvement of sophisticated organized criminal groups has also been

[1] See, for instance, Country Narratives on Human Trafficking in U.S. Department of States, *Trafficking in Persons Report 2016*.
[2] United Nations Office of Drugs and Crime (UNODC), *Global Report on Trafficking in Persons* (2014), at 83.
[3] Ibid., at 82.
[4] International Organization for Migration (IOM), *Human Trafficking in Eastern Africa* (2008), at 12.
[5] International Labor Organization, *Profits and Poverty: The Economics of Forced Labor* (2014), at 7 and 13.
[6] Ibid., at 27.
[7] UNODC, note 2, at 81.

recognized,[8] and this makes the trafficking operation more sophisticated and dangerous. What is evident from this brief synopsis is that human trafficking is widespread and endemic in Africa.

The complex and transnational nature of human trafficking in this continent requires an integrated response, and the role of regional organizations becomes very important as they can contribute to the strengthening of both individual as well as collective actions against this crime. The purpose of this chapter is to explore some opportunities and challenges facing one of the key regional organizations, the African Court of Justice and Human Rights (African Court), in combating human trafficking. It is placed in a unique position as it can address not only State responsibility, mainly through the relevant human rights instruments, but also individual criminal responsibility when the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014 (Amendments Protocol) comes into force in the future, as it has included an offence of human trafficking over which criminal jurisdiction can be exercised. The potential of the African Court in facilitating a more effective action against this crime in Africa therefore merits a closer analysis.

The chapter begins by exploring the historical development of international law on human trafficking, starting from the early instruments on white slave traffic, to the most important treaty in the contemporary world, the Protocol to Prevent, Suppress and Punish Trafficking in Persons 2000[9] (Trafficking Protocol), attached to the UN Convention against Transnational Organized Crime[10] (UNTOC). It then identifies key elements of the offence of human trafficking by analyzing the definitions of this crime stipulated under the Trafficking Protocol as well as the Amendments Protocol. The chapter continues with an examination of State responsibility, with particular reference to the core obligations of prohibition/prosecution, protection, and prevention. Finally, it analyses the potential of the African Court in prosecuting and punishing human trafficking through its exercise of criminal jurisdiction. The main conclusion is that there will be ample opportunities for the African Court to enhance individual and collective responses to human trafficking through articulation of State responsibility. However, a number of challenges exists particularly in relation to the exercise of criminal

[8] United Nations Educational, Scientific and Cultural Organization, *Human Trafficking in South Africa: Root Causes and Recommendations* (2007), at 27–8; and U.S. Department of State, *Trafficking in Persons Report 2015*, at 265.

[9] 2237 UNTS 319.

[10] 2225 UNTS 209.

jurisdiction, and these are likely to limit the ability of the African Court as a criminal justice institution.

2. HISTORICAL DEVELOPMENT

International regulation of human trafficking has gradually developed since the early Twentieth century. One of the early legal instruments was the International Agreement for the Suppression of the White Slave Traffic 1904.[11] This instrument was adopted as a response to the growing sale of white women into prostitution in Europe, which was partially facilitated by the stagnant economic climate at that time.[12] There are some important aspects to be mentioned in relation to this Agreement. First, it applied only to 'white women.' This meant that women of other ethnic backgrounds, as well as men, were excluded. Second, the instrument was designed to regulate procurement of women or girls for immoral purposes abroad. Therefore, its emphasis was upon sexual exploitation of white women and girls and their trafficking outside of their States of origin. Finally, this Agreement lacked strong crime prevention provisions as it did not oblige States to prosecute and punish the white slave traffic at the national level and facilitate mutual legal assistance in criminal matters. Consequently, this legal instrument was not really effective in suppressing this practice.[13]

The next treaty was the International Convention for the Suppression of the White Slave Traffic 1910.[14] While an emphasis was still placed upon trafficking of white women and girls for sexual exploitation abroad, a degree of improvement could be seen in this instrument as Articles 1 and 3 clearly obliged State Parties to prohibit the practice at the national level. It is also worth noting that, unlike the 1904 Agreement, the 1911 Convention facilitated international cooperation. For instance, it obliged States to communicate with each other about national legislation and the records of conviction, and to make traffic an extraditable offence.[15] The scope of application, however, was limited for the same reason as the 1904 Agreement (non-applicability to women of other ethnicities and men/boys). It was also not designed to address the end purpose of trafficking, prostitution, as this was regarded as a matter of

[11] 1 LNTS 83.
[12] N. Demleitner, 'Forced Prostitution: Naming an International Offence,' 18 *Fordham International Law Journal* (2000), 163–96, at 167.
[13] Ibid., at 168.
[14] 8 LNTS 278.
[15] Arts 4–6.

domestic jurisdiction.[16] For this reason, this instrument was also criticized as being ineffective.[17]

After the World War I, the League of Nations, which recognized the seriousness of trafficking, adopted two more treaties. The first was the International Convention for the Suppression of the Traffic in Women and Children 1921.[18] This instrument incorporated the description of trafficking under the 1910 Convention,[19] once again emphasizing prostitution and sexual exploitation. The main difference, however, was that it applied to women of all ethnicities as well as both male and female children. In addition, criminal justice measures were enhanced. For instance, it provided for prohibition of so-called inchoate offences in addition to the act of trafficking itself.[20] Article 4 also made it clear that States were to extradite those who commit the offence specified in the Convention. The second treaty was the International Convention for the Suppression of the Traffic in Women of Full Age 1933.[21] This treaty was quite similar to its predecessors in terms of its nature and scope of application, except that it applied to adult women. Once again, the major issue with these two instruments was that they did not address the end purpose of trafficking, prostitution.

The United Nations was established after the World War II, and another treaty, the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others 1949,[22] was adopted. It is the consolidated version of the earlier treaties, but some discrepancies can be recognized. For instance, it specifically refers to exploitation of prostitution. Having said this, the 1949 Convention is gender-neutral, thereby recognizing that men and boys can be victimized. However, this treaty was criticized, among other things, for not obliging States to criminalize prostitution itself while criminalizing acts associated with prostitution such as running or keeping brothels.[23] One reason for this was that the drafters of the Convention feared that 'prohibition would drive prostitution underground, and that laws designed to punish both clients and prostitutes, in practice, would be selectively enforced

[16] T. Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Leiden: Martinus Nijhoff Publishers, 2006), at 15.
[17] J. Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts,' 11 *Harvard Human Rights Journal* (1998) 65–198, at 74–5.
[18] 9 LNTS 415.
[19] Art. 1.
[20] Art. 3.
[21] 150 LNTS 431.
[22] 96 UNTS 271.
[23] Art. 2.

only against prostitutes.'[24] Further, it did not take other forms of sexual exploitation, such as sex tourism, into consideration.[25] Finally, the 1949 Convention did not expand upon the provisions for mutual assistance in legal matters. Because of these and other reasons, the effectiveness of the 1949 Convention was also called into question.

While the international legal development relating to action against human trafficking has gone into hiatus after the 1949 Convention, this changed at the turn of the twenty-first century with the adoption of the UNTOC, and more importantly, the Trafficking Protocol. The key aims of this Protocol are to (1) prevent and combat trafficking, (2) protect the victims and (3) facilitate international cooperation. In order to achieve these objectives, this instrument as well as the UNTOC impose a variety of obligations designed to enhance national and international actions against human trafficking. One striking feature of the Trafficking Protocol is that it not only applies to prostitution and sexual exploitation, but also to other forms of exploitation, thereby expanding its scope of application.[26] This is important as the international community has recognized that victims are trafficked and exploited in non-sex sectors.

Aside from the aforementioned instruments, international human rights law has made important contributions to addressing this crime. This makes us realize that human trafficking is not only a crime, but also a violation of victims' human rights. The terms 'traffic' or 'trafficking' are specifically mentioned in some international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW),[27] the Convention on the Rights of the Child 1989 (CRC),[28] and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000.[29] Regionally, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2000,[30] the African Charter on the Rights and Welfare of the Child 1990,[31] the Council of Europe

[24] Demleitner, note 12, at 177.
[25] Report of the Special Rapporteur on Violence against Women (Trafficking in Women, Women's Migration and Violence against Women), E/CN.4/2000/68 (February 2000), at 22 and 23.
[26] See below of the international definitions of human trafficking and exploitation.
[27] Art. 6; 1249 UNTS 13.
[28] Art. 35, 1577 UNTS 3.
[29] 2171 UNTS 227.
[30] Art. 4, CAB/LEG/66.6 (2000).
[31] Art. 29, CAB/LEG/24.9/49 (1990).

Convention on Action against Trafficking in Persons 2005,[32] and the Inter-American Convention on Traffic in Minors 1994[33] are pertinent. The key benefit of international human rights law is that it encourages States to adopt a human rights approach thereby putting the welfare of the victims at the forefront of an overall action against this crime. As will be shown below, certain guidance on State responsibility are gradually emerging under this branch of international law.

In relation to other treaties, human trafficking can also be dealt with through the instruments relating to slavery and forced labour. One example is the Slavery Convention 1926.[34] This treaty was later strengthened by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956,[35] which has expanded the coverage of exploitation to include practices such as debt bondage and serfdom. In relation to forced labour, the ILO Forced Labour Convention 1930 (No. 29)[36] is important. These instruments have further been supplemented by international and regional human rights treaties. Article 8 of the International Covenant on Civil and Political Rights 1966[37] (ICCPR) provides for the prohibition of slavery, servitude as well as forced labour, and similar provisions can be seen in the European Convention on Human Rights 1950,[38] the American Convention on Human Rights 1969[39] and the African Charter of Human and Peoples' Rights 1980.[40] While human trafficking and slavery or exploitation are not necessarily synonymous as will be discussed below, it has been recognized that it can be dealt with under these provisions relating to slavery/forced labour[41] under certain circumstance, and therefore various obligations established by these human rights treaties will be relevant to this crime. In summary, international law on human trafficking has evolved to a great extent by shifting its traditional focus on prostitution of white women, to all people who experience a wide variety of exploitation.

[32] ETS No. 197.
[33] 33 ILM 721 (1994).
[34] 60 LNTS 254.
[35] 226 UNTS 3.
[36] 39 UNTS 55.
[37] 999 UNTS 171.
[38] ETS No. 5.
[39] 1144 UNTS 123.
[40] 1520 UNTS 217.
[41] *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (2010), para 281.

3. KEY ELEMENTS OF THE CRIME OF HUMAN TRAFFICKING

One of the important contributions made by the Trafficking Protocol is the adoption of the international definition of human trafficking. According to Article 3(a):

> Trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

There are three key elements in this definition: (1) act, (2) means and (3) purpose. The first element refers to the main conduct of trafficking, that is, recruitment, transportation, transfer, harboring or receipt of trafficked people. The second element explains how these victims are transported. Traffickers use coercion and/or deception to traffic people from one place to another. This suggests that there is no genuine consent on the part of victims. The second element is closely interlinked with the first as they both constitute the actus reus of trafficking. Finally, the third 'purpose' element refers to the reasons as to why people are trafficked. Traffickers transport victims for them to be exploited in sex and non-sex industries. Article 3(a) continues in this regard that '(e)xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.' Once again, the shift from the earlier instruments on trafficking is apparent.

It is important to stress here that it is not necessary that victims actually are exploited for an act to be classified as trafficking. This is so because the purpose element relates to the mens rea, ulterior intention in particular, rather than the actus reus.[42] A good analogy can be made in relation to the offences of housebreaking and burglary in Africa. Under Section 308 of the Kenyan Penal Code, for instance, anyone who breaks and enters any building with intent to commit a felony is guilty of housebreaking (burglary when committed at night). The wording of this provision suggests that this offence is complete as soon as one enters a building even when a felony is not actually committed. These are generally known as ulterior intent offences and are also

[42] This is of course in addition to direct intention to traffic people.

recognized in other jurisdictions in Africa.[43] By analogy, the above definition of trafficking suggests that the offence is established when a trafficker moves people from one place to another with intention to exploit them later or with full knowledge that they will be exploited by others at their destinations. When trafficked victims are actually exploited, that would technically be regarded as a separate offence of slavery or forced labour, or alternatively as an aggravating factor which would increase the level of punishment for human trafficking.

This point also becomes clear in looking at the definitions of slavery and forced labour. According to the Slavery Convention 1926 mentioned above, slavery is defined as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'[44] The key factors in determining its existence include, but are not limited to, the control of one's movement and physical environment, the use or threat of force, subjection to cruel treatment, and forced labour.[45] The reduction of the status of a person to a mere object was also regarded as an important characteristic.[46] However, a mere ability to buy, sell, trade or inherit a person or his/her labour is not in itself an example of slavery,[47] suggesting that human trafficking and slavery are not necessarily synonymous, and that something more than transportation may be needed for an act to amount to slavery. It would perhaps be easy to treat trafficking as slavery simultaneously when people are exploited afterwards by the same traffickers who transported them, as this ensures the continuous exercise of ownership.[48] However, where victims are exploited by those other than traffickers after reaching their destinations, then ownership is transferred to them, and such an instance might be regarded as a separate offence of slavery. In this regard, it has been emphasized that 'the duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved.'[49]

In relation to forced labour, Article 2(1) of the Forced Labour Convention define this as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself

[43] See, for instance, criminal trespass under s. 304 of the Eritrean Penal Code; unlawful entry under s. 152 of the Ghana Criminal Code; housebreaking/burglary under s. 309 of the Malawi Penal Code; and housebreaking/burglary under s. 294 of the Tanzanian Penal Code.

[44] Art. 1(1).

[45] *Prosecutor v. Kunarac et al.*, IT-96–23-T & IT-96–23/1-T (February 2001), para 543.

[46] *Siliadin v. France*, Application No. 73316/01 (2006), para 122.

[47] *Prosecutor v. Kunarac et al.*, note 45, para 543.

[48] Obokata, note 16, at 20.

[49] *Prosecutor v. Kunarac et al.*, note 45, para 542.

voluntarily.' The term 'forced' connotes physical or mental constraints.'[50] While the examples of exploitation listed under the Trafficking Protocol certainly fit under this definition, it is clear simultaneously that it does not contain the act element of human trafficking (i.e. recruitment, transfer, harboring or receipt of people). In view of these, it seems reasonable to conclude that subsequent exploitation is a sufficient, but not necessary, element of human trafficking.

It is useful at this stage to explore the definition of human trafficking as contained in the Amendments Protocol. According to Article 28J,

1. "Trafficking in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2. Exploitation shall include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.

It becomes immediately clear that the definition is identical to the one provided by the Trafficking Protocol. This demonstrates the willingness of a regional organization to abide by the international standards. Consequently, the key elements of this offence should be understood similarly in Africa in order for the African Court to be able to facilitate a more integrated or unified approach to this crime regionally as well as internationally.

The State practice at the national level, however, reveals that human trafficking has been defined differently in reality. Although a number of States[51] have already adopted the definition of human trafficking in line with the Trafficking Protocol and the Amendments Protocol, a degree of variation

[50] *Van der Mussele v. Belgium*, Application No. 8919/80 (1983), para 34.

[51] These States include, but are not limited to, Botswana under the Anti-Human Trafficking Act 2014; Burkina Faso under the Law No. 029–2008/AN on the Fight against Trafficking in Persons and Similar Practices; Djibouti under the Law No. 210/AN/07/5 Law on the Fight Against Trafficking in Human Being 2007; Egypt under the Law No. (64) of 2010 regarding Combating Human Trafficking; Equatorial Guinea under the Law No. 1/2004 on the Smuggling of Migrants and Trafficking in Persons; Gambia under the Trafficking in Persons Act 2007; Ghana under the Human Trafficking Act 2005; Kenya under the Counter-Trafficking in Persons Act 2010; Lesotho under the Anti-Trafficking in Persons Act 2011; Liberia under the Act to Ban Trafficking in Persons 2005; Malawi under the Trafficking in Persons Act 2015; Mauritania under the Law on Suppression of Trafficking in Persons (No. 25) 2003; Mauritius under the Combating of Trafficking in Persons Act 2009; Namibia under the Prevention of

is recognized in others.[52] Another interesting aspect is that the notion of exploitation also varies among African States. In some States such as Angola,[53] Comoros[54] and the Democratic Republic of Congo,[55] human trafficking is associated with prostitution and/or sexual exploitation only, while others cover a variety of exploitation such as forced marriage,[56] harmful sports,[57] and involvement in armed conflicts.[58] The perceptions of crimes, including human trafficking, are inevitably influenced by social, cultural, political and legal traditions of each States, and therefore the existence of discrepancies is inevitable. The practical implication, however, is that these variations can lead to fragmented approaches in combating human trafficking in Africa and make regional law enforcement cooperation more difficult. Further, States without sufficient legislative frameworks will become more vulnerable to human trafficking as criminals will naturally concentrate their activities in jurisdictions where law enforcement is weak. In order to facilitate more effective national and regional actions, therefore, the African Court will have an important task of promoting a uniform understanding by encouraging those States which have yet to do so to amend their national legislation and adopt the definition of human trafficking in line with the Trafficking Protocol as well as the Amendments Protocol.

Further, human trafficking is not to be confused with 'migrant smuggling.' In accordance with the Protocol against the Smuggling of Migrants by Land,

Organized Crime Act 2004; Nigeria under the Trafficking in Persons (Prohibition), Enforcement and Administration Act 2015; Senegal under the Act No. 2005–06 on the Fight against Human Trafficking and Similar Practices and the Protection of Victims; Seychelles under the Prohibition of Trafficking in Persons Act 2014; Sierra Leone under the Anti-Human Trafficking Act 2005; South Africa under the Prevention and Combating of Trafficking in Human Beings Act 2013; Uganda under the Prevention of Trafficking in Persons Act 2009; Zambia under the Anti-Human Trafficking Act 2008; and Zimbabwe under the Trafficking in Persons Act 2014.

[52] Burundi under the Criminal Code, arts 242 and 243; Cameroon under the LAW No 2011/024 Relating to the Fight against Human Trafficking in Persons and Slavery, s. 2; Eritrea, note 43, arts 297, 315 and 316; Ethiopia under the Penal Code, art. 597; Gabon under Law 09/04 Concerning the Prevention and the Fight Against the Trafficking of Children in the Gabonese Republic; Mozambique under Law No. 6/2008 on Preventing and Combating the Trafficking of People; Rwanda under the Penal Code, art. 50; Somalia under the Penal Code, arts 456–7; South Sudan under the Penal Code, arts 278–9, and 282; and Tanzania under the Anti-Trafficking in Persons Act 2008.

[53] Penal Code, arts 177 and 183.

[54] Penal Code, arts 310, 311, and 323.

[55] Law 06/018 on Sexual Violence.

[56] Equatorial Guinea and Kenya, note 51.

[57] Rwanda, Rwanda, note 52.

[58] Sierra Leone and Uganda, note 51.

Sea and Air 2000,[59] another instrument attached to the UNTOC, smuggling is defined as:

> (t)he procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident[60]

It is evident that these two acts differ in some important respects. For instance, there is no 'means' element for smuggling. This suggests that those smuggled willingly take part in this process. It is also the case that the smuggling definition does not entail the 'purpose element,' meaning that smuggling ends as soon as migrants reach their destinations, and that smugglers do not have intention to exploit them or have no knowledge that they will be exploited by others. The lack of these two elements in the smuggling definition is likely to encourage African States to treat it as a simple immigration offence of facilitating illegal entry as opposed to a gross violation of human rights. This in turn may justify tougher enforcement actions such as detention and deportation for smuggled migrants, while protection will be high on the agenda for trafficked victims.

It is important to remember, however, that a clear distinction between trafficking and smuggling cannot be drawn in many cases. The latter can be the beginning of the former, and many migrants experience a wide variety of abuses during their journey. Physical and/or sexual violence as well as loss of life (e.g. drowning at sea) are some of the clear examples of this. Therefore, smuggling can equally raise a number of human rights issues in practice. It is unfortunate that the Amendments Protocol does not include the offence of smuggling, and this suggests that the African Union and its Member States did not think it to be as important as human trafficking. That being said, this can in turn provide an opportunity for the African Court to demonstrate creativity in interpreting the trafficking definition or relevant provisions of the African Charter of Human and Peoples' Rights and other instruments in order to ensure that those who have suffered during the smuggling process are equally protected.

4. STATE RESPONSIBILITY OVER HUMAN TRAFFICKING

As the main subjects of international law, States have the primary obligation to combat human trafficking. An important task of the African Court then will be

[59] 2241 UNTS 507.
[60] Art. 3(a).

to elaborate upon the nature and the extent of relevant obligations for them to follow. As the exercise of criminal jurisdiction under the Amendments Protocol is concerned with criminal responsibility of those who commit human trafficking, a starting point is to treat this crime as a violation of human rights. An increasing number of opinions in relation to human trafficking have been expressed by international human rights bodies, and these can be used by the African Court as a basis for further elaboration, particularly in interpreting the relevant provisions such as Article 5 (prohibition of slavery and the slave trade) of the African Charter on Human and Peoples Rights 1981, Article 4(g) (trafficking in women) of the Protocol on the Rights of Women in Africa 2000 and Article 29 (sale, trafficking and abduction) of the African Charter on the Rights and Welfare of the Child 1990.

There are mainly three key obligations imposed upon a State. The first obligation is to prohibit and prosecute human trafficking. To begin with, this means that States must have a sufficient legislative framework.[61] The desirability of enacting a specific law on human trafficking, which include a comprehensive definition in line with the Trafficking Protocol, has been repeatedly expressed by human rights bodies.[62] It should be highlighted in this regard that many African States, particularly those which are partially or wholly based on the common law tradition, have done so.[63] For others which are influenced by the civil law tradition and/or rely on general Penal Codes, certain aspects of trafficking such as enslavement, prostitution, sale/purchase of slaves are covered.[64] However, these are not always in line with the international standards as mentioned above, and this will provide an opportunity for the African Court to encourage them to make necessary amendments and facilitate a more integrated response across the region.

The existence of legislative frameworks relating to human trafficking on its own is not sufficient unless they are properly enforced by the relevant law

[61] *Rantsev v. Cyprus and Russia*, note 41, para 284.

[62] Concluding Observations of the Human Rights Committee for Namibia, CCPR/C/NAM/CO/2 (April 2016), para 26 and Burundi CCPR/C/BDI/CO/2 (November 2014), para 16; Concluding Observation of the Committee on the Elimination of Discrimination against Women for Eritrea, CEDAW/C/ERI/CO/5 (March 2015), para 23; and Concluding Observation of the Committee on Migrant Workers for Morocco, CMW/C/MAR/CO/1 (October 2013), para 48.

[63] These include Botswana, Cameroon, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, South Africa, Sudan, Tanzania, Uganda, Zambia and Zimbabwe, notes 51 and 52.

[64] See for instance, Angola, note 54, arts. 178 and 183; Burundi, note 52, arts 242 and 243; Cape Verde under the Penal Code, art. 271; Comoros, note 54, arts 310 and 311; Eritrea, note 43, s. 297; and Somalia note 52, arts 456 and 457.

enforcement authorities. Another important obligation, then, is provision of sufficient resources and training to frontline officers so that they are able investigate, prosecute and punish human trafficking.[65] In addition, in order to deter traffickers from committing this crime in the future, the punishment regime should be sufficiently stringent to serve as effective deterrence. Once again, the State practice varies in this regard in Africa. Human trafficking attracts between five to ten years' imprisonment in Burkina Faso,[66] the Central African Republic[67] and Equatorial Guinea,[68] whereas the punishment is much higher in Gabon,[69] Kenya[70] and South Africa.[71] Although these variations are understandable, a major problem from the point of view of law enforcement is that these discrepancies can lead to concentration of human trafficking in States where punishments are weak, as stressed above.

A related point is the role of organized criminal groups in human trafficking. While trafficking is facilitated by those known to the victims such as immediate family members, relatives or friends in Africa,[72] the involvement of African and international criminal groups has also been recognized.[73] Their participation makes trafficking operations more successful due to their sophisticated *modus operandi*. They also employ risk-averting tactics such as bribery, intimidation and violence in order to avoid law enforcement. Therefore, it is essential that African States designate their involvement as an aggravating factor which would automatically increase the level of punishment. It is encouraging to see that some States, such as Kenya,[74] Liberia,[75] Malawi,[76]

[65] Concluding Observation of the Committee on the Rights of the Child for Tanzania, CRC/C/TZA/CO/3–5 (March 2015), para 77; Concluding Observation of the Committee on the Elimination of Discrimination against Women for Gambia, CEDAW/C/GMB/CO/4–5 (July 2015), para 25; and Concluding Observation of the Committee on Migrant Workers for Ghana, CMW/C/GHA/CO/1 (September 2014), para 45.

[66] Note 51, art. 4.

[67] The Penal Code, art. 151.

[68] Note 51, art. 3.

[69] 40 years' imprisonment, note 52.

[70] 30 years to life imprisonment, note 51.

[71] Life Imprisonment, ibid.

[72] Note 4, at 55.

[73] U.S. Department of State, note 1, at 160 (Egypt), 163 (Equatorial Guinea), 165 (Eritrea), 401 (Zambia), and 405 (Somalia); K Fitzgibbon, 'Modern-Day Slavery?' 12 *African Security Review* (2003) 81–9, at 88; T Raviv, 'Migrant Smuggling and Human Trafficking,' In D Picarelli (ed.), *International Organized Crime: An African Experience* (Milan: ISPAC, 2011), 100–1; and HM Government, *Serious and Organized Crime Strategy 2013*, at 39.

[74] Note 51, s. 10 (life imprisonment).

[75] Ibid., s. 6 (20 years' imprisonment).

[76] Ibid., s. 6 (21 years' imprisonment).

Seychelles,[77] and Zambia,[78] have recognized the need to combat organized criminal groups and increased the penalties for their involvement in human trafficking. However, many others have not done so as yet, and the African Court will be in a position to address this in the future.

The second key obligation is protection of the victims of human trafficking.[79] This is particularly important from a human rights perspective. The Trafficking Protocol provides certain guidance as to what this should entail. For instance, Article 6 touches upon protection of their privacy, assistance during criminal proceedings, and protection of their physical and mental well-being through, among others, provision of accommodation, medical/psychological assistance, and compensation. Article 7 further provides for the possibility of issuing temporary or permanent residence arrangements. These are necessary so that victims can recover from their ordeals and decide whether or not to co-operate with the law enforcement authorities to prosecute and punish traffickers. It is therefore clear that the obligation to protect victims is closely interlinked to the first obligation to prohibit trafficking.

Under international human right law, the obligation to protect the victims of human trafficking derives from a general duty to secure, ensure or restore rights as well as to provide remedies. The ICCPR in this regard imposes a duty on States to 'ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.'[80] The UN Human Rights Council explicitly acknowledged that this provision applies to the victims of trafficking,[81] and the Special Rapporteur on Trafficking in Persons also emphasized that the right to an effective remedy is a fundamental human right of all persons, including the victims of trafficking.[82] Although a similar wording cannot be found in the African Charter on Human and Peoples' Rights 1981, Article 1 obliges States to give effect to the enshrined rights, and this can be interpreted as placing an obligation to protect the victims of trafficking.

[77] Ibid., s. 5 (25 years' imprisonment).
[78] Ibid., s. 3 (25–35 years' imprisonment).
[79] *Rantsev v. Cyprus and Russia*, note 41, para 285.
[80] Art. 2.
[81] Resolution 20/1, Trafficking in Persons, Especially Women and Children: Access to Effective Remedies for Trafficked Persons and Their Right to an Effective Remedy for Human Rights Violations, A/HRC/20/L1 (June 2012).
[82] Trafficking in Persons, Especially Women and Children: A Note by the Secretary General, A/66/238 (August 2011), at 12.

In terms of protection measures, although international and regional human right instruments do not provide for a specific list, certain guidance is being developed by human rights bodies as part of the prohibition of slavery or other relevant provisions, and the African Court can follow suit in the future. First and foremost, provision of protection and assistance is conditional upon proper identification of victims. States therefore should put in place an effective mechanism for this purpose.[83] Public and law enforcement officials must also be trained sufficiently in order for identification to be effective. Once victims are identified, measures such as shelter, medical/psychological assistance and other tailored support, including rehabilitation/reintegration and compensation, should be provided.[84] In order to enhance transparency and accountability, it is desirable that protection measures are established through legislation.[85] Although some States, such as Botswana,[86] Ghana,[87] Lesotho,[88] Mauritius,[89] Mozambique,[90] South Africa,[91] Tanzania[92] and Uganda[93] have statutory provisions on protection, many others do not. This leaves large protection gaps in this region, and the African Court could, and should, take a proactive role in addressing these.

Another important aspect of protection is the observance of *non-refoulement*. In the context of trafficking, States cannot return victims to their States of origin if there is a risk of them or their close family experiencing torture,

[83] Concluding Observation of the Committee on the Rights of the Child for Burkina Faso, CRC/C/OPSC/BFA/CO/1 (July 2013), para 35; Concluding Observation of the Committee on the Elimination of Discrimination against Women for Tanzania, CEDAW/C/TZA/CO/7–8 (March 2016), para 25; and, Report of the Special Rapporteur on Trafficking in Persons: Visit to Seychelles, A/HRC/26/37/Add.7 (June 2014), para 69; and Report of the Special Rapporteur on Trafficking in Persons: Visit to Morocco, A/HRC/26/37/Add.3 (April 2014), para 83.

[84] Concluding Observation of the Human Rights Committee for Sierra Leone, CCPR/C/SLE/CO/1 (April 2014), para 24; Concluding Observation of the Committee on the Rights of the Child for Tanzania, supra note 65; Concluding Observation of the Committee on the Rights of the Child for Guinea-Bissau, CRC/C/GNB/CO/2–4 (July 2013), para 67; and Concluding Observation of the Committee on the Elimination of Discrimination against Women for Liberia, CEDAW/C/LBR/CO/7–8 (November 2015), para 27.

[85] Concluding Observation of the Committee on Migrant Workers for Algeria, CMW/C/DZA/CO/1 (May 2010), para 39.

[86] Note 51, pts IV and V.

[87] Ibid., ss. 14–19.

[88] Ibid., pt. IV.

[89] Ibid., ss. 4, 6, 7, 8, and 9.

[90] Note 52, ch III.

[91] Note 51, chs 4–6.

[92] Note 52, pt IV.

[93] Note 51, pt III.

inhuman or degrading treatment,[94] re-trafficking[95] or enslavement,[96] even when these are committed by non-State actors[97] such as traffickers when States concerned are unwilling or unable to provide sufficient protection.[98] *Non-refoulement* also applies extraterritorially, in that removing victims outside a State's own territory may be regarded as breaching this principle.[99] This is particularly relevant when victims are trafficked by sea where States may not have exclusive criminal jurisdiction. In this regard, the Inter-American Commission on Human Rights held that the practice of the United States to interdict and return Haitian refugees on the high seas constituted a breach of their human rights.[100] More recently, the European Court of Human Rights reached a similar conclusion in *Hirsi and Others v. Italy*.[101] In any event, unless victims have given an explicit and informed consent to return to their States of origin voluntarily, they should be allowed to remain and States should make appropriate arrangements, including issuing temporary or even permanent residence permits depending on the individual circumstances. It is should be highlighted here that the relevant national legislation of Lesotho,[102] Mauritius,[103] Mozambique,[104] Seychelles,[105] South Africa,[106] and Zambia[107] provides for temporary and/or permanent residence permits, and these are examples of good practice which should be followed by other African States.

The third obligation is prevention of human trafficking.[108] The nature and extent of this obligation depends on whether a State is the origin or

[94] See *Soering v. United Kingdom*, Application No. 114038/88 (1989), on the general principle.
[95] General Comment No. 6 of the Committee on the Rights of the Child on Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6 (September 2005), para 53.
[96] *Barar v. Sweden*, Application No. 42367/98 (1999).
[97] *Dawood Khan v. Canada*, Communication No. 1302/2004, CCPR/C/87/D/1302/2004 (August 2006), para 5.6; and *H.L.R. v. France*, Application No. 11/1996/630/813 (1997), para 40.
[98] *Omo-Amenaghawon et al. v. Denmark*, CCPR/C/114/D/2288/2013 (September 2015), which concerned Nigerian victims of human trafficking who faced deportation in Denmark.
[99] G.S. Goodwin-Gill and J. McAdam, *The Refugees in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007), at 385.
[100] *Haitian Center for Human Rights v. United States*, Case 10.675, Report No. 51/96, Inter-Am. C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev, paras 156–8, and 171.
[101] Application No. 27765/09 (2012).
[102] Note 51, ss. 30 and 31.
[103] Ibid., s. 7.
[104] Note 52, art. 24.
[105] Note 51, s. 16.
[106] Ibid., ss. 15 and 17.
[107] Ibid., ss. 34 and 35.
[108] The African Charter on Children, art. 29; and Protocol on Women in Africa, art. 4(g).

destination. In relation to States of origin like the most of the African States, the core obligation is to prevent their people from being trafficked in the first instance. In other words, they have to address 'push factors' of this crime such as poverty, gender/racial discrimination and humanitarian crises which compel them to move. In the context of Africa, it has also been pointed out that the traditional cultural and/or religious practices such as juju, voodoo, and child marriage serve as catalysts for this crime.[109] As to States of destination, predominantly wealthy Western States but also include some African ones such as Kenya and South Africa, they have to deal with so-called 'pull factors,' things which attract trafficked victims, such as the demand for trafficked people in sex and a variety of labour sectors.

These obligations are stipulated in the Trafficking Protocol, but can also be articulated through a human rights framework. For instance, the role of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)[110] in poverty eradication has clearly been recognized as it imposes an obligation to ensure the minimum levels of each of the rights set out in this instrument, such as rights to food, healthcare, basic shelter or housing to name a few.[111] States should also guarantee access to employment and technical/vocational training to everyone, but particularly to marginalized and vulnerable groups,[112] who are more vulnerable to human trafficking. These obligations are complemented by other relevant instruments designed to eliminate discrimination such as the CEDAW, the CRC, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990,[113] as well as the African instruments mentioned above. In terms of other obligations relating to prevention of human trafficking, international human rights bodies have stressed the importance of

[109] M. Ikeloa, 'The Role of African Traditional Religion and 'Juju' in Human Trafficking: Implications for Anti-Trafficking,' 17 *Journal of International Women's Studies* (2016) 1–18; C.S. Baarda, 'Human Trafficking for Sexual Exploitation from Nigeria to Western Europe: The Role of Voodoo Rituals in the Functioning of a Criminal Network,' 13 *European Journal of Criminology* (2016) 257–73; E. Warner, 'Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls,' 12 *Journal of Gender, Social Policy & the Law* (2011) 233–71; and International Centre for Missing and Exploited Children, *Child Marriage in the Middle East and North Africa* (2013).

[110] 993 UNTS 3.

[111] General Comment No. 3: The Nature of State Parties' Obligations, E/1991/23 (December 1990), para 10; and Poverty and the International Covenant on Economic, Social and Cultural Rights, E/CN.12/2001/10 (May 2001).

[112] General Comment No. 18: The Right to Work, E/C.12/GC/18 (February 2006), paras 31 and 44.

[113] 2220 UNTS 3.

implementing measures which include, but are not limited to, awareness-raising,[114] comprehensive research/data collection,[115] demand reduction,[116] and elimination of discriminatory practices experienced by certain populations such as women.[117] A complex issue in the context of Africa perhaps is the traditional cultural or religious practices which encourage human trafficking as mentioned earlier. Addressing these may not always easy due to the possible resistance by local communities of African States under the veil of cultural relativism. This, however, can be regarded as an opportunity for the African Court, as its judges are familiar with the cultural specificity of Africa, and States are more likely to pay attention to the decisions made by them, compared to those delivered by remote international human rights bodies and mandates located elsewhere.

Finally, international cooperation to tackle human trafficking is an overarching obligation applicable to all three mentioned above. The Trafficking Protocol clearly states in this regard that promotion of international cooperation is one of the key aims of this instrument.[118] International human rights law also supplements this obligation to co-operate. In relation to the causes of human trafficking such as poverty, the ICESCR emphasizes international assistance and cooperation for progressive realizations of rights enshrined within.[119] This means that wealthy Western States should assist African States to be able to address these causes. International law enforcement cooperation is another important aspect, which is recognized by the UNTOC,[120] the

[114] Concluding Observation of the Human Rights Committee for Benin, CCPR/C/BEN/CO/ 2 (November 2015), para 15, and for Mozambique, CCPR/C/MOZ/CO/ 1 (November 2013), para 17; Concluding Observation of the Committee on the Rights of the Child for Mauritius, CRC/C/MUS/CO/3– 5 (February 2015), para 66; and Concluding Observation of the Committee on the Elimination of Discrimination against Women for Cape Verde, CEDAW/C/CPV/CO/7–8 (July 2013), para 21.

[115] Concluding Observation of the Committee on the Elimination of Discrimination against Women for Swaziland, CEDAW/C/SWZ/CO/1–2 (July 2014), para 25, and for Central African Republic, CEDAW/C/CAF/CO/1–5 (July 2014), para 30; and Concluding Observation of the Committee on the Rights of the Child for Burkina Faso, note 83.

[116] Concluding Observation of the Committee on the Elimination of Discrimination against Women for Cameroon, CEDAW/C/CMR/CO/4–5 (February 2014), para 21; and Concluding Observation of the Committee on the Rights of the Child for Gabon, CRC/C/OPSC/GAB/CO/1 (June 2016), para 21.

[117] Concluding Observation of the Committee on the Elimination of Discrimination against Women for Malawi, CEDAW/C/MWI/CO/7 (November 2015), para 25.

[118] Art. 2(c).

[119] Art. 2(1).

[120] See for instance, Arts 16 (extradition) and 18 (mutual legal assistance).

Trafficking Protocol,[121] as well as the Amendments Protocol.[122] In addition to these, a pertinent legal instrument in Africa is the African Union Convention on Cross-Border Cooperation 2014, which stipulates the areas of cooperation which include, but are not limited to security, crime prevention, and socio-economic development.[123] The African Court will have jurisdiction over cases relating to this instrument and be in a position to facilitate meaningful and proactive regional cooperation against human trafficking. In summary, the nature and the extent of obligations in relation to human trafficking are still being clarified, and the African Court will be able to make an important contribution by elaborating on them, and more importantly, developing relevant regional standards which amply reflect African culture, morality and sensitivity.

5. INDIVIDUAL RESPONSIBILITY OVER HUMAN TRAFFICKING

The crime of human trafficking has been included in the Amendments Protocol as noted earlier, and there are some good reasons for allowing the African Court to exercise criminal jurisdiction over it. For instance, it can step in when African States are unwilling or unable to investigate, prosecute and punish human trafficking effectively at the national level.[124] This will send a strong message that the African Union takes human trafficking seriously and ensure that traffickers are punished one way or another. States may also be able to avoid retaliation and obstruction of justice in the forms of bribery and intimidation carried out by traffickers. National governments are more susceptible to these practices as it might be easier for traffickers, particularly organized criminal groups, to exert strong influence over them. Being an independent court with judges consisting of different nationalities and having no personal interests or opportunities for illicit gain, the African Court may be able to combat trafficking more effectively. In addition, the possibility of intervention by the African Court can put an additional pressure on States in the region to fulfil key obligations explored earlier and enhance their capacity to tackle this crime at the national level as they may not want to be seen as incapable by the rest of the world.

Aside from these general issues, another important aspect of the exercise of criminal jurisdiction by the African Court is corporate liability. In addition to

[121] Art. 2(c).
[122] Art. 46L.
[123] Art. 3.
[124] Arts 46(3) and (4).

individual and organized criminal groups, corporate entities such as employment agencies as well as local, national and international businesses may be involved in the trafficking process one way or another by exploiting victims. If the crime is committed intentionally, then it is right that these corporate entities are punished. Article 46L in this regard establishes corporate criminal liability, which is in line with Article 10 (liability of legal persons) of the UNTOC. As it is not possible to imprison a legal person, the punishment will be restricted to fines or forfeiture of criminal proceeds. While the deterrence effect may not be as strong as imprisonment, these measures will have symbolic significance at least for legitimate corporations or businesses, particularly multinational ones, who want to be seen as doing ethical business with the local communities.

Despite these positive aspects in exercising criminal jurisdiction over human trafficking, there are a number of issues and practical difficulties which will affect the ability of the African Court to successfully prosecute and punish this crime. For instance, a very large number of traffickers, including organized criminal groups, commit this crime in Africa, and it is doubtful whether the African Court will have sufficient financial, human and other resources to conduct effective investigations and prosecutions, bearing in mind other crimes it will have to deal with. The Court will be required to prioritize, and the extent to which human trafficking will come before others is not clear. It may well decide to address it through State responsibility instead, as that will encourage Member States to respond more proactively at the national level. The same reasoning is applicable to the number of victims. If they are to take part in criminal proceedings against traffickers, the African Court must be able to provide sufficient support such as witness protection, legal assistance, translation and/or interpretation and any other assistance which may be required by them. As the victims of a heinous crime, they should also be entitled to compensation. In the end, it may not be an effective use of its limited resources for the African Court to exercise criminal jurisdiction over human trafficking.

One way to address this resource issue is to make use of criminal proceeds. A large amount of profits is generated from human trafficking as noted, and the African Court can use these to support its criminal investigations and to protect victims and witnesses. This will also send a message to traffickers that they are not able to benefit from this crime. It should be mentioned in this regard that Article 43A(5) of the Amendments Protocol allows the Court to order forfeiture of any property, proceeds, or any asset acquired unlawfully. Under Article 45(2), the Court can also order a convicted trafficker to pay reparations to victims, including restitution, compensation and rehabilitation.

In addition, Article 46M envisages an establishment of a Trust Fund to be utilized for legal aid, assistance and for the benefit victims and their families, and the African Court can additionally order confiscated proceeds to be transferred into this pot. These are undoubtedly innovative aspects of the exercise of criminal jurisdiction.

However, several points should be highlighted in relation to confiscation of criminal proceeds. For instance, the timing of issuing a forfeiture order is not clear. Normally confiscation of criminal proceeds is ordered after one is convicted of a criminal offence.[125] In this sense, confiscation may be regarded as an additional form of punishment. Nevertheless, criminal proceeds may have already been laundered by the time a criminal conviction is handed down by the African Court, and this may necessitate it to take action sooner rather than later. In order for the entire process to be as transparent and accountable a possible, detailed rules or guidance must be developed by the Court in due course. Also, successful confiscation largely depends on cooperation from Member States.[126] A problem can arise when they do not have sufficient legislative frameworks and capability to confiscate criminal proceeds effectively. Consequently, the ability of the African Court can once again be restricted. In addition, while there might not be an issue in confiscating proceeds from organized criminal groups, human trafficking is also committed by individuals such as family members who are driven by poverty, inequality, and other factors with no other alternatives to sustain themselves economically. There is therefore a risk of further marginalization of these individuals if confiscation is to be strictly enforced, and the African Court must carefully balance the competing interests of all those involved.

Further, the usefulness of corporate criminal liability can be called into question. In the context of human trafficking, corporations or legal persons can be held liable only if they take part in recruiting, transporting, transferring, harboring or receiving trafficking victims. While this can certainly apply to recruitment agencies, trafficking and exploitation are not necessarily synonymous as explained earlier. Therefore, while many local or national employers may exploit victims in sex, labour and other sectors, they may not always take part in trafficking itself. It is unfortunate that the Amendments Protocol did not include stand-alone offences of slavery and forced labour, which could have been used against these employers. It is true that enslavement is included

[125] See for instance, Botswana under the Proceeds of Serious Crime Act 1990; Kenya under the Proceeds of Crime and Anti-Money Laundering Act 2009; South Africa under the Proceeds of Crime Act 1996; and Tanzania under the Proceeds of Crime Act 1991.

[126] The Amendment Protocol, art. 46Jbis.

as part of a crime against humanity under Article 28C(1)(c). However, there is a high threshold attached to this crime as will be shown blow, and therefore its applicability will be limited.

In view of these and other issues which may arise in the future, the most viable option would be for the African Court to try a limited number of cases on human trafficking, the most serious ones in particular. These instances could include trafficking carried out by organized criminal groups or terrorists, as their involvement will make the trafficking operations more dangerous, sophisticated, and successful. Large-scale operations involving particularly vulnerable victims (e.g. children or disabled people) or heinous instances (e.g. systematic sexual or physical abuses and causing deaths) could also justify the intervention of the African Court. Certain guidance can be obtained from the State practice whereby aggravating factors have been incorporated into respective domestic legislation. Trafficking of children,[127] human organ trafficking,[128] involvement of organized criminal group[129] and public/law enforcement officials,[130] HIV/AIDS infection,[131] as well as harmful rituals and human sacrifices[132] have been identified as such, and the African Court should closely examine these and others which it deems appropriate, in order to determine whether it should intervene.

In addition to addressing human trafficking under Article 28J of the Amendments Protocol, this offence may be elevated to the status of international crime, strengthening the justification for involvement by the African Court. It has, for instance, been argued that human trafficking can amount to a crime against humanity, enslavement in particular.[133] The International Criminal Tribunal for the Former Yugoslavia has hinted at this possibility,[134] and Article 28C(2)(c) of the Amendments Protocol specifically mentions human trafficking.[135] Other conducts included under the crimes against humanity, such as forced pregnancy or sexual slavery, as well as enforced disappearance could also resonate well with human trafficking. However, in order for trafficking to

[127] B. Faso, note 51, art. 5; Cameroon, note 52, s. 5; Egypt, note 51, art. 6; Eritrea, note 52, art. 316;
[128] Malawi, note 51, s. 16; Senegal, ibid., art. 1; and Zambia ibid., s. 3.
[129] Djibouti, ibid., art. 8; South Africa, ibid., s. 23;
[130] E. Guinea, ibid., art. 10; Seychelles, ibid., s. 5;
[131] Lesotho ibid., s. 7; Mozambique, note 52, art. 5; and Zimbabwe note 51, s. 3.
[132] Uganda, ibid., s. 4.
[133] T. Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System,' 54 *International and Comparative Law Quarterly* (2005) 445–58.
[134] *Prosecutor v. Kunarac et al.*, note 45, para 542.
[135] See also art. 7 of the Rome Statute of the International Criminal Court 1998, 2187 UNTS 3.

be regarded as any of these crimes, the relevant criteria (e.g. widespread or systematic nature, knowledge of the attack, and being part of an organizational policy) must be proven,[136] and this will inevitably limit the scope of its application in practice.

Another possibility is conscripting/enlisting child soldiers under the age of 15 as a war crime. This is specifically prohibited under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court 1998, as well as Articles 28D(b)(xxvii) and 28D(e)(vii) of the Amendments Protocol. Conscription includes 'any acts of coercion such abduction or forced recruitment,'[137] and is in line with the actus reus of human trafficking explored earlier. Indeed, the Special Rapporteur on Trafficking in Persons recently expressed a view that forced recruitment of child soldiers falls under the international definition of human trafficking.[138] While the term 'enlistment' connotes a degree of voluntariness,[139] the trafficking definitions make it clear that consent is irrelevant in relation to child trafficking[140] and therefore enlistment can still be regarded as part of the trafficking process. However, it should be highlighted that the relevant provisions do not apply to children between 16 and 18, as well as adults, thereby leaving clear protection and accountability gaps, and this will require the African Court to interpret other provisions creatively. In summary, while the exercise of criminal jurisdiction can be useful when States are unable or unwilling to prosecute and punish human trafficking at the national level, the African Court is likely to limit itself to a fewer cases bearing in mind various practical problems it could encounter in practice.

6. CONCLUSION

This chapter has explored the opportunities as well as challenges for the African Court of Justice and Human Rights to combat human trafficking. It is not only a criminal offence, but also a violation of human rights. Under

[136] Obokata, note 133, at 451–3; and H. Van Der Wilt, 'Trafficking in Human Beings, Enslavement, Crime against Humanity: Unravelling the Concepts,' 13 *Chinese Journal of International Law* (2014) 297–334, at 306.

[137] *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04/06 (March 2012), para 608; and *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03–01-T (May 2012), para 441

[138] Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children, A/HRC/32/41 (May 2016), para 47.

[139] *Lubanga* Case, para 607; and *Charles Taylor* Case, para 442, note 137.

[140] Art. 3(c) of the Trafficking Protocol and art. 28J (4) of the Amendments Protocol.

international law, this results in the establishment both States responsibility and individual criminal responsibility. The uniqueness of the African Court is that it will be able to address both of these. In relation to State responsibility, jurisprudence and guidance on the nature and extent of obligations are still emerging particularly in the field of international human rights law, and the African Court can make an important contribution to their development together with other international and regional human rights bodies. An additional benefit of the African Court is the exercise of criminal jurisdiction over individual criminals and legal persons who commit human trafficking, a function which does not exist for other regional and international organizations. While there are certain advantages in using the Court to prosecute and punish human trafficking directly, it has been demonstrated that a number of problems exist, and these are likely to encourage it to take on a limited number of cases.

A preliminary conclusion to be drawn from the present analysis, then, is that it might be a better use of its limited resources to focus on state responsibility for the time being. The African Court should become instrumental in setting regional standards on enhancing individual action against human trafficking to begin with, as the African States have the primary obligation to combat this crime. It has been shown that there is much cope for improvement at the national level, and the African Court can encourage them to develop and implement a more effective strategy. It should also play a leading role in facilitating regional cooperation. The transnational nature of human trafficking means that domestic responses alone are not sufficient. African States should show solidarity through joint regional efforts, and the African Court can certainly assist them in achieving an integrated approach to combat this crime. Finally, it is clear that human trafficking is multi-faceted, and a simple criminal justice response is not sufficient. Therefore, African States, the African Union and the Court should work together to devise a holistic approach capable of tackling wider issues such as the causes and consequences of human trafficking. Unless these are taken seriously and put into action, human trafficking unfortunately will continue to exist in Africa.

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Prosecuting Dirty Dumping in Africa

MATIANGAI V.S. SIRLEAF

1. INTRODUCTION

We talk of globalization, of the global village, but here in Africa we are under the impression of being that village's septic tank.

– Haïdar el Ali, Senegalese former Minister of Ecology

The African Union (AU)[1] adopted the Protocol on Amendments on the Protocol on the Statute of African Court of Justice and Human Rights[2] (hereinafter Malabo Protocol) to create the first ever regional criminal tribunal in June of 2014.[3] The regional criminal tribunal criminalizes trafficking in

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[1] Constitutive Act of the African Union, Lomé, 11 July 2000, in force 26 May 2001, 2158 U.N.T.S. I-37733 [hereinafter AU Constitutive Act]. For more on the transition from the Organization of African Unity (OAU) to the AU see generally, Abou Jeng *Peacebuilding in the African Union: Law, Philosophy and Practice* (Cambridge: Cambridge University Press, 2012) p. 111.

[2] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Malabo, 27 June 2014, available at http://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights.

[3] See id., art. 16. The Assembly of the AU adopted the Malabo Protocol on 27 June 2014 at its Twenty-Third Ordinary Session. *See* A.U. Doc. No. Assembly/AU/Dec.529 (XXIII). The regional Court's criminal law section will be composed of a Pre-Trial Chamber, a Trial Chamber, and an Appellate Chamber. Malabo Protocol, supra note 3, art. 16(2). See also Dinah L. Shelton & Paolo G. Carroza, *Regional Protection of Human Rights*, Second Edition (New York: Oxford University Press, 2013) 1019. In the book, this is characterized as 'revolutionary'.

hazardous waste,[4] and presents an opportunity for African states to alter the status quo in environmental protection. Trafficking in hazardous waste is something that none of the existing international criminal tribunals have jurisdiction over.[5] African states may be particularly sensitive to concerns about toxic waste, given a history of negative external interventions.[6] This chapter argues that regional cooperation through the criminal tribunal might assist with more effective prosecution of toxic dumping incidents. This is especially so because the Malabo Protocol provides for corporate criminal liability,[7] which presents a significant innovation for the field of international criminal justice.[8]

This chapter examines how the AU's adoption of the Malabo Protocol seeks to improve upon the limitations of the international legal framework for regulating hazardous waste. Little to no scholarship exists on the Malabo Protocol's provision criminalizing trafficking in hazardous waste. This chapter illuminates an under-researched area and provides a robust analysis of the criminalization of trafficking in hazardous waste in Africa. This chapter situates the Malabo Protocol's provision criminalizing the trafficking in

4 Malabo Protocol, supra note 3, art. 28L.

5 See generally Rome Statute of the International Criminal Court, July 1998, in force on 1 July 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Statute International Criminal Tribunal for the former Yugoslavia, 25 May 1993, UN Doc. S/Res/827 , available at www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute]; Statute International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc. S/Res/955, available at www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf [hereinafter ICTR Statute]; Statute of the Special Court for Sierra Leone, 16 January 2002), available at www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176 [hereinafter SCSL Statute]; see also generally S.C. Res. 1315, U.N. SCOR, 55th Sess., U.N. Doc S/RES/1315 (14 August 2000) on the establishment of the SCSL.

6 For further discussion, see Henry J. Richardson, 'African Grievances and the International Criminal Court: Issues of African Equity under International Criminal Law' (2013), *Africa and the Future of International Criminal Justice* 81 (V.O. Nmehielle ed., Eleven 2012); Temple University Legal Study Research Paper No. 2013–24 available at SSRN: https://ssrn.com/abstract=2285474. Justice, 91 (Vincent Nmehielle ed., 2012) (discussing the continent's history with slavery, colonialism, and neo-colonialism).

7 Malabo Protocol, supra note 3, art. 46C. This chapter relies on the broad definition of 'hazardous waste' in the Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Bamako, 30 January 1991, in force 22 April 1998 available at 30 I.L.M. 773, including wastes from particular streams in manufacturing processes, or hazardous constituent materials, wastes considered hazardous under the domestic laws of the country of export, import, or transit, as well as wastes outlawed in the exporting country due to human health or environmental reasons, and radioactive wastes. See id. art. 2, Annex I and Annex II of the Bamako Convention.

8 None of the existing international criminal tribunals provide for corporate criminal liability. Compare, Rome Statute, ICTY Statute, ICTR Statute and SCSL Statute supra note 6.

hazardous waste as part of the larger environmental justice movement and the struggle against corporate, government, and individual polluters. Environmental justice is a contested term that has variously been defined by scholars as – signifying inequitable distribution, a lack of recognition, limited participation, a critical lack of capabilities, inequitable application of environmental regulations, and systematic exclusion from environmental policies and decisions amongst others.[9] In the environmental justice literature, Robert Nixon has coined the term "slow violence" to describe a violence of delayed destruction that is "dispersed throughout time and space" to disposable bodies.[10] His work draws attention to categories of violence that unfold over years and decades that is often exponential and operates as a major threat multiplier, in the same way that toxic dumping can.[11] Such work complicates our understanding of violence because it does not conceive of violence as spectacular, or immediately sensational, or hyper-visible.[12] The concept of slow violence allows us to consider more forcefully the violence caused by environmental harms like toxic dumping.

The dumping of toxic waste in the Global South, and particularly in African countries is by no means an exceptional, or recent phenomenon.[13] This chapter will demonstrate the problematic trend of 'toxic colonialism,' in which African states are used as 'disposal sites for waste rejected' by more developed states.[14] The term 'colonialism' is used to signify the relationship between countries in the Global North that export the risks of toxic waste to countries in the Global South, who do not 'share in the benefits of the production process that generate those wastes'.[15] This pattern resembles some of the characteristics of historical colonialism in that toxic colonialism is similarly driven by economic dependence, exploitation, and inequality.[16]

[9] See Workineh Kelbessa, 'Environmental Injustice in Africa,' (2012) 9 *Contemporary Pragmatism*, 99–132.

[10] Rob Nixon, *Slow Violence and the Environmentalism of the Poor* 2 (Boston: Harvard University Press, 2011) (discussing the analogous concept of slow violence).

[11] Id. at 3.

[12] Id. At 3.

[13] See Rob White, 'Toxic Cities: Globalizing the Problem of Waste' (2008), 35 *Social Justice* 107.

[14] Laura A. Pratt, 'Decreasing Dirty Dumping? A Reevaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste' (2011), 41 *Texas Environmental Law Journal*, 147, 151. The chapter discusses how the term 'toxic colonialism' was coined by Greenpeace to describe the dumping of 'industrial wastes of the West on territories of the Third World.'

[15] See e.g. Samuel Atteh, 'Political Economy of Environmental Degradation: The Dumping of Toxic Waste in Africa' (1993), 30 *International Studies*, 277, 278 discussing the unfairness of this relationship.

[16] See Pratt, 'Decreasing Dirty Dumping?' p. 152.

As I noted elsewhere, regime complexes consist of 'several legal agreements that are created and maintained in distinct fora with participation of different sets of actors.'[17] They allow for greater creativity and flexibility. This adaptability is evident in the types of crimes covered by the regional criminal court, especially the attempt to regulate the trafficking in hazardous waste.

This chapter is organized as follows: Section 2 provides a brief background on how the history of toxic colonialism in Africa helped to inform the attempt to criminalize the trafficking of hazardous waste in the Malabo Protocol. Section 3 explores instead how the inadequate international legal framework for regulating hazardous waste, led to the criminalization of trafficking in hazardous waste in the Malabo Protocol. Section 4 analyzes how the regional prosecution of trafficking in hazardous waste contributes towards some of the newer theories of punishment, as well as some of the more traditional goals of punishment. This section also discusses how any potential challenges might be resolved through creative interpretation of the Protocol. Lastly, this chapter concludes that the regional criminal court's prosecution of trafficking in hazardous waste presents another option for African states whose domestic judiciaries and related institutions may not be able to prosecute trafficking in hazardous waste, and the international system, which has failed to prosecute trafficking in hazardous waste or corporations involved in toxic dumping.

2. OVERVIEW OF TOXIC COLONIALISM IN AFRICA

All of the toxic dumping incidents discussed in this section share the disturbing pattern of toxic colonialism, marked by economic dependence, exploitation, and inequality.

A. *The Global Increase and Causes of Trafficking in Hazardous Waste*

In 2000, the worldwide generation of hazardous waste was four hundred million metric tonnes, with almost all of this amount originating from developed nations.[18] It is estimated that by 2020, the total production of hazardous waste in the Global North will have increased by 60% annually.[19] Most of the estimates of the transboundary movement of hazardous waste from the Global

[17] Kal Raustiala & David Victor, 'The Regime Complex for Plant Genetic Resources' (2004). 58 *International Organizations* 277, 279.

[18] See David Hunter, James Salzmann and Durwood Zaelke, '*International Environmental Law and Policy*' Third Edition (New York: Foundation Press 2007).

[19] See David Naguib Pellow, '*Resisting Global Toxics: Transnational Movements for Environmental Justice*' (Massachusetts: The MIT Press 2007).

North to the Global South are quite small.[20] However, all of the estimates are based on the legal transfer of hazardous waste, as the quantification of 'illegal transboundary exchanges of hazardous waste is much more difficult.'[21]

Irrespective of the exact amount of hazardous waste; toxic dumping in Africa is a significant problem for a number of reasons. People that are exposed to toxic waste can experience dire health consequences ranging from respiratory problems, birth defects, burns, miscarriages, nausea, severe headaches, paralysis, frequent illness, irritation of the eyes and skin, various types of cancer, brain damage, intestinal disease, stunted growth, harm to the immune system, pathological conditions, and death.[22] If not properly treated, toxic waste can not only threaten human life, but also lead 'to ecological, geological, and environmental disasters' as contaminated 'soil, groundwater, and streams can endanger public health and the environment.'[23] A significant percentage of Africans live in rural areas that are dependent on groundwater and streams for domestic and agricultural uses.[24] In addition, the disposal of hazardous waste in landfills can easily result in water and food contamination.[25] The lack of the necessary infrastructure including facilities, environmental technology, and economic resources means that toxic dumping on the Continent has much more devastating consequences, than it does elsewhere.[26]

Given all of these negative consequences, why does toxic colonialism persist? The key driver is profit.[27] Toxic colonialism is also furthered by certain structural changes of and in the global system, including the restructuring of the nation-state and the growth of interdependence'.[28] The age of globalization[29] is marked by the increased mobility of capital and competition amongst states to attract foreign direct investment. For example, the amount of money offered for permission to import hazardous waste into

[20] See e.g. Hunter et al. 'International Environmental Law and Policy', p. 947 estimating that only 4% of the generated hazardous waste actually travels across borders.
[21] Pratt 'Decreasing Dirty Dumping?' p. 153.
[22] Id. see also Kelbessa, 'Environmental Injustice in Africa,' p. 109.
[23] Atteh, 'Political Economy of Environmental Degradation' p. 279.
[24] Id.
[25] Id.
[26] Id.
[27] *See* Pratt 'Decreasing Dirty Dumping?' p. 154.
[28] Anél Ferreira –Snyman, 'Regionalism and the Restructuring of the United Nations with Specific Reference to the African Union' (2011), 44 *Comparative and International Law Journal of Southern Africa*, 360, 362.
[29] See Adam Lupel, 'Regionalism and Globalization: Post-Nation or Extended Nation?' (2004), 36 *Polity* 153, 159. Globalization is a term that 'summarizes a variety of processes that together increase the scale, speed, and effectiveness of social interactions across political, economic, cultural, and geographical borders.'

African countries is reportedly sometimes more than the individual country's gross national product, or its total foreign debt.[30] Accordingly, individual developing countries are dissuaded from taking measures that would place additional regulations on multinational corporations (MNCs)[31] such as compliance with environmental and human rights obligations.[32] For instance, in some African countries, there are 'no real treatment process [es] and no proper storage'[33] options for hazardous waste. Indeed, the United Nations Environment Program (UNEP) noted that 'it costs as little as $2.50 per ton to dump hazardous waste [legally] in Africa as opposed to $250 per ton in Europe.'[34] Consequently, since the late 1970s and early 1980s, toxic waste has been exported increasingly to Africa.[35]

B. *Historical Development of Toxic Colonialism in Africa*

Toxic colonialism is manifested in many different ways: from Western MNCs rarely having track records of safe waste disposal, to the receiving countries not being accurately informed about the dangers of the hazardous waste,[36] to the lack of capacity of countries in the Global South to deal with the aftermath. In the mid-1980s a number African countries had private local companies, individuals, and governments 'openly or secretly' sign waste

[30] See D.M. Dzidzornu, 'Marine Pollution Control in the West and Central African Region' (1995), 20 *Queens Law Journal* 439.

[31] Multinational corporations (MNCs) or transnational corporations (TNCs) are economic entities operating in more than one country or a cluster of economic entities operating in two or more countries. *See* Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[32] See A. Lupel, 'Regionalism and Globalization: Post Nation or Extended Nation?' p. 157, discussing how globalization challenges states in their: administrative effectiveness, territorial sovereignty, collective identity, and democratic legitimacy, available online at www.ipinst.org/images/pdfs/lupel_polity_jan2004.pdf.

[33] F. Bridgland, 'Europe's New Dumping Ground: How the West's Toxic Waste is Poisoning Africa', The Herald, 1 October 2006 available online at http://archive.ban.org/ban_news/2006/061001_dumping_ground.html quoting the French environmental group 'Robin Hood of the Forest'.

[34] United Nations Environmental Program, National Rapid Environmental Desk Assessment-Somalia, 2005, p. 135 [hereinafter UNEP Report] available online at www.unep.org/tsunami/reports/TSUNAMI_SOMALIA_LAYOUT.pdf.

[35] See Atteh, 'Political Economy of Environmental Degradation' p. 281 discussing French and the U.S. exporting 'enormous amounts of hazardous waste to Africa'.

[36] See James Brooke, 'Waste Dumpers Turning to West Africa', New York Times, 17 July 1988, available at www.nytimes.com/1988/07/17/world/waste-dumpers-turning-to-west-africa.html?pagewanted=all.

disposal contracts with waste brokers.[37] These contracts authorized waste brokers 'to use certain designated areas' for dumping hazardous waste.[38] For example, the governments of Benin and Guinea-Bissau signed lucrative contracts with companies in the Global North to dump hazardous waste in their territories for a specified period of time.[39] In Benin, the company falsely described the hazardous waste material in the ten-year contract as 'complex organic matter' and 'ordinary industrial wastes'.[40]In Guinea, a Norwegian shipping company brokered a deal in 1988, to dump on Kassa, a resort island not too far from the capital.[41] The company unloaded 15,000 tonnes of a substance listed as 'raw material for bricks' in an abandoned quarry.[42] Subsequently, visitors from the mainland noticed that the island's vegetation began to shrivel.[43] A government investigation later discovered that in fact the material was incinerator ash from Philadelphia.[44] The contract originally provided for the disposal of 85,000 tonnes of hazardous waste in Guinea.[45] Following the incident, the government of Guinea arrested at least thirteen people,[46] including the Norwegian Consul-General who was accused of forging an import licence to enable the company to import the hazardous waste.[47] International furor ensued, and a Norwegian freighter completed removal of the hazardous waste in July of 1988.[48]

This pattern of toxic colonialism is replicated in Somalia's experience with hazardous waste dumping. In 1992, Italian and Swiss MNCs purportedly negotiated an $80 million, twenty-year contract with the 'Minister of Health' to dump toxic waste.[49] This is despite the reality that Somalia was embroiled in a devastating civil war with none of the warring factions able to claim any

[37] See Kelbessa, 'Environmental Injustice in Africa,' p. 109.
[38] Atteh, 'Political Economy of Environmental Degradation' p. 281.
[39] For further discussion see id. pp. 285–6.
[40] Brooke, 'Waste Dumpers Turning to West Africa', p A1.
[41] See id.
[42] See id.
[43] See id.
[44] See id. See also Mark Jaffe, 'Tracking the Khian Sea: Port to Port, Deal to Deal', The Philadelphia Inquirer, 15 July 1988 p. B1 available at http://articles.philly.com/1988–07–15/news/26236354_1_khian-sea-coastal-carriers-incinerator-ash discussing how efforts to dispose of the Philadelphian ash failed in Chile, Honduras, Haiti, the Bahamas, the Dominican Republic, Costa Rica, before it reached the West Coast of Africa.
[45] See Brooke, 'Waste Dumpers Turning to West Africa'.
[46] See Barbara Hunton, 'Emerging Controls on Transfers of Hazardous Waste to Developing Countries' (1989), 21 *Law and Policy International Business* p. 247.
[47] See Atteh, 'Political Economy of Environmental Degradation' p. 283.
[48] See Brooke, 'Waste Dumpers Turning to West Africa'.
[49] Hao-Nhien Q. Vu, 'The Law of Treaties and the Export of Hazardous Waste' (1994), 12 *University of California, Los Angeles Journal of Environmental Law and Policy* 389, 390.

sense of legitimacy or hold on power. The dumping began in the early 1980s and continued during the civil war.[50] The financial arrangements undoubtedly helped to fuel the conflict and provided powerful incentives to the various warlords to ignore environmental and public health repercussions.[51] The dumping of toxic waste in Somalia gained renewed international attention following the 2004 tsunami.[52] The waves from the tsunami exposed containers, which held 'radioactive waste, lead, cadmium, mercury, flame retardants, hospital waste, and cocktails of other deadly residues' on Somalia's shores. 'Subsequent cancer clusters have also been linked to Europe's special gift to the country, delivered by that tsunami.'[53] A report by UNEP said the release of the deadly substances, has caused:

> health and environmental problems to the surrounding local fishing communities including contamination of groundwater. Many people in these towns have complained of unusual health problems as a result of the tsunami winds blowing towards inland villages. The health problems include acute respiratory infections, dry heavy coughing and mouth bleeding, abdominal hemorrhages, unusual skin chemical reactions, and sudden death after inhaling toxic materials.[54]

Italian authorities initiated an investigation into the company's hazardous waste trade in 1997.[55] Due to the continued violence and political instability in Somalia the prospects for a successful clean-up are limited.

The problematic pattern of countries in the Global North exporting the risks of toxic waste to countries in the Global South, who do not share in the benefits of the production process of the waste is also exhibited in Nigeria's experience.[56] In Nigeria, a businessman permitted two Italian MNCs to use his residential property to store 18,000 drums of hazardous waste in 1987.[57] It was located in Koko, Nigeria a small rural community located on the river Niger.[58] The Line ship (registered in Germany) was refused entry in Europe

[50] See UNEP Report p. 134.
[51] See Bridgland 'Europe's New Dumping Ground'.
[52] See Kelbessa, 'Environmental Injustice in Africa,' p. 109.
[53] Bridgland, 'Europe's New Dumping Ground'.
[54] UNEP Report p. 134.
[55] See Kelbessa, 'Environmental Injustice in Africa,' p. 110.
[56] For further discussion see e.g. Sylvia F. Liu, 'The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste', (1992–1994) 8 *Journal of Natural Resources and Environmental Law*. 121; Obinna Anyadike, 'Toxic Terrorism' (1988), 3696 *West Africa* p. 1108; 'Nigeria: Koko's Radioactive Waste' (1988), *West Africa*, p. 1388.
[57] See Kelbessa, 'Environmental Injustice in Africa,' p. 109.
[58] See Atteh, 'Political Economy of Environmental Degradation' p. 283.

because the ship had been found to be carrying 'highly poisonous chemical waste' before it made its way to Nigeria.[59] The businessman charged $100 a month for the storage of the toxic waste.[60] The ship delivered four shipments of the waste before media exposure of the crime alerted the Nigerian authorities.[61] A Nigerian construction company falsified documents to the government, which allowed the company to import the toxic waste under the pretence that it was importing 'building materials.'[62] In the aftermath, nineteen individuals in the area died, including the businessman who stored the waste in his backyard.[63] Other adverse effects included chemical burns, paralysis of a member of the crew who reloaded the waste, and the dockworkers that repackaged the waste on board the ship reportedly vomited blood.[64] Nigeria's government responded forcefully – it recalled its ambassador to Italy, demanded that Italy remove the waste at once, and seized an Italian ship docked in its harbour to send the waste back to Italy.[65] The government also enacted a decree making the trafficking in hazardous waste a capital crime, but later reduced the punishment to life imprisonment.[66] It also passed a decree in 1988, which barred citizens from negotiating toxic waste contracts with foreign companies.[67]

The patterns of economic dependence, exploitation, and inequality also characterize the toxic dumping incident in Côte d'Ivoire, which occurred more than twenty years after the Nigerian and Somalian incidents. Outrage about toxic dumping in Nigeria in 1988, led Côte d'Ivoire to adopt a law that provides for prison terms of up to 20 years and fines of up to $1.6 million for individuals who import hazardous waste.[68] In August of 2006, a ship named the Probo Koala charted by the Dutch-based oil and service shipping company Trafigura Beheer BV, offloaded toxic waste. The Probo Koala left the waste at the port of Abidjan, the capital city of Côte d'Ivoire.[69] A local

[59] Id.
[60] See Kelbessa, 'Environmental Injustice in Africa,' p. 109.
[61] See Atteh, 'Political Economy of Environmental Degradation'.
[62] Id. p. 284.
[63] See id. p. 284.
[64] Id. See also Kelbessa, 'Environmental Injustice in Africa,' p. 109.
[65] See Atteh, 'Political Economy of Environmental Degradation'.
[66] See Joel Millman, 'Exporting Hazardous Waste: From Developed to Third World Nations' (1989), *Tech Rev* p. 1. See also Kingsley Moghalu, 'Nigeria Gets Tough on Toxic Dumping, (1989)' *Christian Science Monitor*, p. 6.
[67] See Atteh, 'Political Economy of Environmental Degradation' p. 283.
[68] See Brooke, 'Waste Dumpers Turning to West Africa'.
[69] See Amnesty International and Greenpeace, 'The Toxic Truth', 9, 25 September 2012, [hereinafter *The Toxic Truth*] available at www.greenpeace.org/international/Global/international/publications/toxics/ProboKoala/The-Toxic-Truth.pdf.

contractor of Trafigua disposed of the waste at approximately eighteen open-air sites in and around the city of Abidjan.[70] Similar to the hazardous dumping incident in Nigeria, the ship attempted to discharge its waste in Europe, but was unable to, due to the toxicity of the waste.[71] Following the toxic dumping in Abidjan, people living near the discharge sites began to suffer from a range of illnesses including: nausea, diarrhoea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs.[72] The exposure to this waste caused the death of sixteen people, and more than 100,000 people sought medical attention.[73] Trafigura denied any wrongdoing.[74] In early 2007, the company paid approximately $195 million for cleanup to the Ivorian government.[75] The government waived its right to prosecute the company.[76] Today, more than ten years after the dumping of large quantities of toxic waste in Côte d'Ivoire, despite the huge numbers of people affected, international coverage of the issue, and several legal proceedings, there remains no effective national, regional, or international mechanism to prevent and address a similar disaster.[77]

According to a three-year investigative report by Amnesty International and Greenpeace, 'too little has been done to strengthen national and international regulations, even after the scale of the toxic dumping became clear.'[78] Greenpeace International Executive Director Kumi Naidoo stated that,

> [Trafigura is] a story of corporate crime, human rights abuse and governments' failure to protect people and the environment. It is a story that exposes how systems for enforcing international law have failed to keep up with companies that operate transnationally, and how one company has been

[70] See Environmental Justice Atlas, available online at http://ejatlas.org/conflict/toxic-waste-dumping-in-abidjan-ivory-coast (last visited 3 March 2015).

[71] See Business and Human Rights Resource Centre, 'Trafigura Lawsuits' (re: Côte d'Ivoire), http://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire (last visited 3 March 2015); see Amnesty International and Greenpeace International Press Release 25 September 2012, www.greenpeace.org/africa/en/Press-Centre-Hub/Press-releases/AMNESTY-INTERNATIONAL–GREENPEACE-INTERNATIONAL-PRESS-RELEASE-/ (last visited 3 March 2015).

[72] See The Toxic Truth supra p. 57.

[73] See id. p. 10.

[74] See id. p. 9; see also Bianca Lazzari, 'The International Movement of Hazardous Waste: The Ivory Coast' 28 May 2014, https://prezi.com/nd1b96exyf1j/the-international-movement-of-hazardous-waste-the-ivory-coa/ (last visited March 2015).

[75] See The Toxic Truth supra p. 9.

[76] See id.

[77] For further discussion see Section 3.

[78] See Fiona Harvey, 'Trafigura Lessons Have not Been Learned, Report Warns', The Guardian 25 September 2012, www.theguardian.com/environment/2012/sep/25/trafigura-lessons-toxic-waste-dumping.

able to take full advantage of legal uncertainties and jurisdictional loopholes, with devastating consequences.[79]

The victims of Trafigura's toxic dumping in Côte d'Ivoire were not able to seek redress in their domestic judiciary. They had to seek justice in Europe, which ultimately proved unsatisfactory.[80]

The incidents of toxic colonialism discussed above indicate that several countries attempted to take steps to limit toxic dumping in their territories by resorting to criminal sanctions.[81] These countries also utilized tort law, but both areas of their domestic law proved to be inadequate deterrents. The spate of toxic dumping that took place in the 1980s led the Organization of African Unity (OAU),[82] to pass a resolution urging all member states to ban all imports of waste chemicals, metals, and radioactive materials, calling the trafficking in hazardous waste a 'crime against Africa and the African people.'[83] The OAU passed the resolution in 1988, shortly after the toxic dumping scandal in Nigeria had come to light. The Resolution condemned the dumping of hazardous waste by MNCS,[84] and urged its members to stop arranging for waste dumping.[85] It also sought to require that dumpers 'clean up the areas that have already been contaminated by them.'[86] Although a non-binding political statement, this Resolution would lay the foundation for the position that African states would adopt regarding the importing of hazardous waste from outside Africa. African countries' individual experiences with toxic colonialism are emblematic of why greater cooperation in regulating hazardous waste was needed. This section has also illustrated how the experience

[79] Amnesty International, 'Report Slams Failure to Prevent Toxic Waste Dumpling in West Africa' 25 September 2012, available at www.amnesty.org/en/articles/news/2012/09/report-slams-failure-prevent-toxic-waste-dumping-west-africa/.

[80] For further discussion of the case against Trafigura see e.g., Cyril Gwam, 'Symposium Powering the Future: A 21st Century Guide for Energy Practitioners: Human Rights Implications of Illicit Toxic Waste Dumping from Developing Countries Including the U.S.A., Especially Texas to Africa, in particular Nigeria' (2013), 38 *Thurgood Marshall Law Review* 241, 259–66; Holy Hall, 'Super-Injunction, What's Your Function' (2013), 18 *Commercial Law and Policy* 309, 320–2.

[81] See Chris Okeke, 'Africa and the Environment' (1996), 3 *Annual Survey of International & Comparative Law* 37, 62.

[82] The OAU 'steered Africa's political and ideological matters since its inception' in Abou Jeng, 'Peacebuilding in the African Union' p. 136.

[83] Article 1 of the Organization of African Unity: Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa, 23 May 1988, reprinted in 28 I.L.M. 568 (1989) [hereinafter OAU Resolution].

[84] Id. art. 2.

[85] Id. art. 3.

[86] Id. art. 2.

with toxic colonialism on the Continent would later influence the decision to attempt to regionally criminalize the trafficking of hazardous waste in the Malabo Protocol.

3. INTERNATIONAL LEGAL FRAMEWORK FOR REGULATING HAZARDOUS WASTE AND AFRICAN REGIONAL INNOVATION

This section will explore how the inadequate international legal framework for regulating hazardous waste, led to the attempt to criminalize the trafficking in hazardous waste regionally in Africa. The intention here is not to provide a comprehensive analysis of the main shortcomings of this area of international law.[87] Instead, this section briefly highlights the existing state of international law governing the import of hazardous waste and the control of transboundary movements of such wastes and analyzes African attempts to innovate regionally. This section demonstrates how African states have been at the forefront of efforts to penalize trafficking in hazardous waste – leading the way through a ban in a regional treaty, which would subsequently be reflected more generally in international law. African states once again are at the forefront of shaping international law in this area by moving to prosecute trafficking in hazardous waste through the Malabo Protocol.

A. *The Inadequate Legal Framework for Regulating Hazardous Waste*

This section provides much needed context on the international regulation of hazardous waste. The treaty governing this area, the Basel Convention of 1989, did not provide for a complete prohibition on the trafficking of hazardous waste. Consequently, African states insisted on such a ban in a regional treaty – the Bamako Convention of 1991. To date, the international regime governing this area of law has not adopted the abolitionist position seen in the Bamako Convention. Efforts to change the international regime through an amendment to the Basel Convention (Basel Ban Amendment), which would adopt the African prohibition on hazardous waste rule globally have stalled due to the resistance of countries in the Global North. This stalemate at the international level regarding the prohibition on hazardous waste helps to explain in part why African States through the Malabo Protocol, are attempting to create

[87] For more on the limitations of the current legal framework see generally Robert Percival, 'Global Law and the Environment,' (2011) 86 *Washington Law Review*, 579; Frederic Megret, 'The Problem of an International Criminal Law of the Environment,' (2011) 36 *Columbia Journal of Environmental Law* 195 (2011); Pratt 'Decreasing Dirty Dumping?'.

a regional forum for prosecuting the crime of trafficking in hazardous waste. Article 28L in the Malabo Protocol can only be understood against this background as it incorporates provisions articulated in the regional Bamako Convention of 1991.

1. International Regulation through the Basel Convention of 1989

The Basel Convention of 1989, which entered into force in 1992 is the primary international agreement for the regulation of hazardous waste.[88] Prior to this treaty, the international regulation in this area consisted of non-binding soft-law. For example, in 1987 UNEP gathered a group of experts to develop an agreement for the 'environmentally sound management of hazardous waste,' which came to be known as the Cairo Guidelines.[89] Global concerns regarding hazardous waste 'sparked a desire to create a more binding agreement' and led to the Basel Convention.[90]

The Basel Convention imposes certain general obligations on States Parties. These general obligations include ensuring that the generation of hazardous wastes within the State is 'reduced to a minimum, taking into account social, technological, and economic aspects.'[91] As of October 2018, 186 states are party to the Basel Convention.[92] The Basel Convention works more like a trade regime – in that it seeks to control the movement of hazardous waste 'through a system of prior informed consent, strict notification, and tracking requirements.'[93] Under this system, the movement of hazardous waste is only permitted where the exporting country does not have the capacity to dispose of the material 'in an environmentally sound and efficient manner,' or the waste is required in the importing country as a raw material for recycling or recovery.[94] The Basel Convention also requires certain notification between State Parties when hazardous wastes will be moved between or among them. To start, the State of export must notify the

[88] Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 I.L.M. 649 also available at www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf. [hereinafter Basel Convention].

[89] UNEP, Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Waste, 14/30 December, 17 June 1987 available at www.unep.org/Documents.multilingual/Default.asp?DocumentID=100&ArticleID=1663&l=en.

[90] Pratt 'Decreasing Dirty Dumping?' p. 158.

[91] Art. 4(2) of the Basel Convention.

[92] See Parties to the Basel Convention *available at* www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx (last visited 23 October 2018).

[93] Id. at 160. See also Art. 6 of the Basel Convention.

[94] Art. 4(9) of the Basel Convention. See also Pratt 'Decreasing Dirty Dumping?' p. 160.

State of import of any proposed transport of hazardous wastes.[95] The State of import must then respond in writing, expressing its consent to the movement, denying permission for the movement, or requesting additional information.[96] The Convention also prohibits the transboundary movement of hazardous waste exported to a non-Party or imported from a non-Party.[97]

Article 9 provides that any transboundary movement of hazardous wastes or other wastes is considered 'illegal', if the movement occurs:

(a) without notification pursuant to the provisions of this Convention to all states concerned; or
(b) without the consent pursuant to the provisions of this Convention of a State concerned; or
(c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or
(d) [in a manner] that does not conform in a material way with the documents; or
(e) [in a manner] that results in deliberate disposal (e.g.) dumping of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law.[98]

In the event of illegal trafficking in hazardous waste the Basel Convention provides depending on fault that the exporter or generating state take back the waste if practicable or otherwise dispose of it.[99] Where the importer or the disposing state is found to be at fault, then that state is responsible for disposal in an environmentally safe manner; and where it is unclear who is at fault amongst the parties, then the Convention provides that the parties are to cooperate to make sure that the waste is disposed of in an environmentally sound manner.[100] Rather than seeking enforcement through an international or regional court, the Basel Convention provides that each party shall introduce appropriate national/domestic legislation to prevent and punish illegal trafficking.[101] The parties to the Basel Convention envisioned that enforcement would take place through a tort-law regime.[102] They subsequently enacted a Protocol setting out appropriate rules and procedures for liability and compensation for damage resulting from the transboundary movement

[95] See Art. 6(1) of the Basel Convention.
[96] Id. art. 6(2).
[97] Id. art. 4(5).
[98] Id. art. 9(1).
[99] Id. art 9(2).
[100] Id. art 9(2).
[101] Id. art. 9(5).
[102] Id. art. 12.

and disposal of hazardous wastes and other wastes.[103] The Basel Convention does not provide for prosecutions of traffickers of hazardous waste through an international or transnational court like that Malabo Protocol envisions.

1. Other Attempts at International Regulation of Hazardous Waste

The Basel Convention has been followed by other subsequent agreements and amendments, which continue to shape the international regulation of hazardous waste. For example, African, Caribbean (ACP) states signed the Lomé IV Convention in 1990 with the European Economic Community.[104] The Lomé IV Convention prohibited the export of hazardous waste from the European Community to ACP States, and in return the ACP states agreed not to accept waste from any country outside of the European Community.[105] The agreement between the ACP states noted that in interpreting the provisions of the ban it would be guided by the principles and provisions in an 1988 OAU Resolution,[106] which amongst others considered the trafficking in hazardous waste to be a 'crime against Africa and the African people.'[107] The Lomé IV Convention expired in 2000.[108]

Overlapping regimes can result in a "race to the bottom"[109] with countries seeking lower barriers to entry. That is instead of states deciding to bind themselves to higher obligations, states can seek to lower their obligations. The Cotonou Agreement, which replaced the Lomé IV Convention between the European Community and ACP states in 2000 illustrates this point.[110] The Cotonou Agreement backtracks from the hazardous waste ban contained in

[103] See Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and their Disposal, 10 December 1999, in force 27 May 2014 available at www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf. [hereinafter Basel Protocol].

[104] See The Fourth African, Caribbean, and Pacific States – European Economic Community Convention of Lomé, Lome, 22 March 1990, 29 I.L.M. 783 available at http://aei.pitt.edu/4220/1/4220.pdf [hereinafter Lomé IV Convention].

[105] Art. 39 of the Lomé IV Convention.

[106] Annex VIII of the Lomé IV Convention, Joint Declaration on Article 39 on Movements of Hazardous Waste or Radioactive Waste.

[107] OAU Resolution.

[108] See Pratt 'Decreasing Dirty Dumping?' p. 166.

[109] Kenneth W. Abbott, *The Transnational Regime Complex for Climate Change*, 30 Environment and Planning C: Government & Policy 584 (2012) (discussing how this can lead to "pathological effects of unnecessary fragmentation").

[110] See generally Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, 2000 O.J. (L 317) 3 (entered into force 4 January 2003) [hereinafter Cotonou Agreement] *available at* https://ec.europa.eu/europeaid/sites/devco/files/cotonou-agreement-2000_en.pdf.

the Lomé IV Agreement. Instead, the Agreement takes "into account issues relating to the transport and disposal of hazardous wastes."[111] Without the total ban, the Cotonou Agreement is significantly weakened.[112] African states have attempted to improve upon these attempts at regulating hazardous waste.

2. Regional Innovation and Regulation of Hazardous Waste through Bamako Convention of 1991

Significantly, the OAU expanded on its 1988 Resolution and adopted the Bamako Convention in 1991, which created a regional ban on the importation of all hazardous waste into Africa and limits the transfer of hazardous waste within Africa.[113] The Bamako Convention entered into force in 1998 and imposes a duty on states to take legal, administrative, and other measures to prohibit the import of any hazardous wastes into their territories.[114] Moreover, the Convention stipulates that any importation of hazardous waste into Africa, 'shall be deemed illegal and a criminal act.'[115] This was a pointed development from the Basel Convention, which considered trafficking 'illegal,' but not criminal.[116] The Bamako Convention also imposes, 'strict, unlimited liability as well as joint and several liability on hazardous waste generators.'[117] This was another important improvement over the Basel Convention, which did not stipulate the rules for liability within the Convention.[118] With respect to hazardous waste generated within Africa, the Convention mimics the Basel Convention provisions.[119] As of October 2018, the Bamako Convention had twenty-nine signatories, and twenty-five parties.[120]

[111] Id. art. 32(1)(d).
[112] See Pratt 'Decreasing Dirty Dumping?' p. 166.
[113] See generally Bamako Convention.
[114] Art. 4 of the Bamako Convention.
[115] Id.
[116] See Art. 9 of the Basel Convention.
[117] Art. 4(3)(b) of the Bamako Convention; Art. 1(20) of the Bamako Convention defining a waste generator as 'any person whose activity produces hazardous wastes, or, if that person is not known, the person who is in possession and/or control of those wastes'.
[118] See Art. 12 of the Basel Convention.
[119] See Art. 11 of the Bamako Convention (For intra-African waste trade, parties must minimize the transboundary movement of wastes and only conduct it with consent of the importing and transit states among other controls. Parties are to minimize the production of hazardous wastes and cooperate to ensure that wastes are treated and disposed of in an environmentally sound manner.
[120] See Parties to the Bamako Convention www.unenvironment.org/events/conference/second-conference-parties-bamako-convention (last visited 11 March 2018).

The Bamako Convention parallels the Basel Convention, with some important distinctions. The Bamako Convention, like the Basel Convention, imposes certain general obligations on States Parties,[121] but as indicated above, the Bamako Convention imposes significantly more aggressive obligations. OAU member states were dissatisfied with the Basel Convention, which does not explicitly ban the export of hazardous waste.[122] Accordingly, almost all OAU countries except for Nigeria, refused to ratify the initial Basel Convention.[123] Recall that the Basel Convention has a limited ban on exports and imports of hazardous waste to and from non-parties to the Convention.[124] Thus, one of the key motivations for the creation of the African regional convention was the failure of the Basel Convention to ban imports of hazardous waste from more developed countries into less developed ones. Consequently, the first general obligation imposed by the Bamako Convention is a hazardous waste import ban, which states in part, '[a]ll Parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties. . .'[125]

The Basel and Bamako Conventions in many ways reflect the split between the Global North and South in the regulation of hazardous waste – with the Global North favouring a free-trade model for hazardous waste, and the Global South demanding a total ban on toxic waste.[126] Both views emanate from concerns over enforcement – with the Global North viewing a total ban as impossible to enforce, and the Global South viewing the free-trade model as impossible to monitor or control effectively due to disparities in technological and environmental infrastructure.[127] The Global South's view was reinforced by the series of toxic dumping scandals that took place in Africa even after the Basel Convention came into force.[128] This may also help to explain why the scope of what constitutes hazardous waste in the Bamako Convention is much wider, than what the Basel Convention covers.[129]

[121] Art. 4 of the Bamako Convention.
[122] See Jennifer R. Kitt, 'Note, Waste Exports to the Developing World: A Global Response' (1995), 7 *Georgetown Environmental Law Review* 485, 500–1.
[123] See Vu, 'The Law of Treaties and the Export of Hazardous Waste' p. 410.
[124] See Art. 4(5) of the Basel Convention.
[125] Art. 4(1) of the Bamako Convention.
[126] See Atteh, 'Political Economy of Environmental Degradation' p. 283.
[127] See id.
[128] See Section 2B of this Chapter.
[129] Compare art. 1, Annex I and Annex II of the Basel Convention, with art. 7, annex I and annex II of the Bamako Convention. The Bamako Convention not only includes radioactive wastes, but also considers any waste with a listed hazardous characteristic or a listed constituent as a

Crucially, the Bamako Convention also provides that the import of hazardous waste, 'shall be deemed illegal and a criminal act."[130] Like the Basel Convention, the Bamako Convention also contains a section on the illegality of trafficking in hazardous waste.[131] While the Bamako Convention reiterates the five conditions of illegality, quoted above in the Basel Convention the Bamako Convention goes much further. It stipulates that, '[e]ach Party shall introduce appropriate national legislation for imposing criminal penalties on all persons who have planned, committed, or assisted in such illegal imports. Such penalties shall be sufficiently high to both punish and deter such conduct."[132] As such, the Bamako Convention envisions that trafficking in hazardous waste will be regulated not simply through a tort-law regime like the Basel Convention, but crucially through each state's domestic penal law. Thus, the Bamako Convention provides a clear rationale to understand the later move to create a regional forum to prosecute the trafficking of hazardous waste in the Malabo Protocol. It is likely that parties found that only relying on domestic enforcement to prosecute trafficking in hazardous waste was leading to insufficient punishment and deterrence and likely anticipated that the creation of a regional court through the Malabo Protocol would lead to better results.

3. From Regional Innovation through Bamako to Attempts to Strengthen the International Regulatory Framework through Basel

Moreover, the overlapping Bamako and Basel regimes for regulating trafficking in hazardous waste led to generative outcomes for the progressive development of international law. Some scholars have postulated that competing regimes can 'generate positive feedback: providing incentives for a 'race to the top."[133] This occurs where countries take stronger action on a given issue in one regime, which generates imitation by others.[134] An excellent example of this is how the Bamako Convention's imposition of strict liability on 'hazardous waste generators"[135] influenced the Basel

hazardous waste. The Convention also covers national definitions of hazardous waste. Finally, products that are banned, severely restricted, or have been the subject of prohibitions, are also covered under the Convention as wastes.

[130] Art. 4(1) of the Bamako Convention.

[131] Compare Art. 9 of the Basel Convention with Article 9 of the Bamako Convention.

[132] Art. 9(2) of the Bamako Convention.

[133] Robert O. Keohane and David G. Victor, 'The Regime Complex for Climate Change' (2011), 9 '*Perspective on Politics*' 19.

[134] See id.

[135] Art. 4(3)(b) and art. 1(20) of the Bamako Convention.

Convention's Protocol on Liability and Compensation.[136] Recall, the Bamako Convention entered into force in 1998,[137] while the Basel Convention required parties to create and adopt a protocol on liability in 1989.[138] The Basel Protocol was only adopted after heated negotiations in December of 1999.[139] The Basel Protocol provides for strict liability for damages where parties to the Convention maintain control of the hazardous waste, but any person can also be subject to fault-based liability under the general principles of tort law.[140] The Protocol needs twenty ratifications to enter into force, and as of October 2018, only had eleven ratifications.[141] The stalled efforts at ratification reflects the continued split between the Global North and South on the regulation of hazardous waste.

Another instance of how the Bamako Convention is influencing international law regulating hazardous waste is the Basel Ban Amendment.[142] In 1995, state parties to the Basel Convention decided by consensus that a total ban of hazardous waste should be developed.[143] The Ban Amendment would go further than the Bamako Convention by prohibiting all exports of hazardous wastes between developed and developing countries, not just exports and imports within Africa like the Bamako Convention.[144] The Ban Amendment technically needs sixty-two ratifications to come into effect.[145] And as of October 2018, ninety-five parties have ratified the Ban, yet the amendment has still not entered into force.[146] Countries have failed to reach agreement on how the provisions relating to amendment of the Basel Convention should be

[136] See generally Basel Protocol.
[137] See Bamako Convention.
[138] See art. 12 of the Basel Convention.
[139] See Pratt pp. 163–4.
[140] See arts. 4 and 5 of the Basel Convention.
[141] See List of Parties and Signatories to Basel Protocol available at www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/Default.aspx.
[142] See Decision III/1 Amendment to the Basel Convention, Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Shipments of Hazardous Waste and Their Disposal, September 18–22, 1995, UN Doc. UNEP/CHW.3/35.
[143] The eighty-two parties present at the Third Meeting of the Conference of the Parties of the Basel Convention adopted the decision by consensus on 22 September, 1995. Id. See also art. 4A and Annex VII of the Basel Convention [hereinafter Ban Amendment].
[144] Id. Compare with Bamako Convention.
[145] See art. 17(5) of the Basel Convention which provides that amendments enter into force between the parties when 'at least three-fourths of the Parties who accepted them ratify the amendment. See also Pratt, 'Decreasing Dirty Dumping?' p. 163 noting that sixty-two ratifications represent three-fourths of the parties present at the Third Meeting of the Conference of the Parties.
[146] See Parties to the Ban Amendment, available at www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx (last visited 23 October 2018).

interpreted.[147] In 2011, state parties agreed that the Ban Amendment will enter into force when three-fourths of those parties that were parties at the time of the adoption of the amendment ratify it.[148] Countries in the Global South and Global North have continued to be split on the need and utility of a total ban on hazardous waste. Because the Basel Convention is a compromise document, the basic obligations under the treaty regime had to be lower in order to get more state parties to join the regime.[149] The delayed efforts at getting a harder enforcement regime in place under the Basel Convention, provides additional normative justification for the Malabo Protocol's move to create a regional court to prosecute traffickers of hazardous waste.

Currently, the only international agreement, which bans the import of hazardous waste is the Bamako Convention. The rest of the international agreements in this area seek to put varying levels of control on the transboundary movements of such wastes. In sum, since tougher international action on trafficking in hazardous waste has been lacking, the need for African states to act regionally to create a venue for penalizing and punishing bad actors under the Malabo Protocol has only been reinforced. The African innovation in the field of environmental and criminal law is like how regional systems have demonstrated creativity and flexibility elsewhere. For example, regional systems have demonstrated creativity and flexibility in other areas of law by adopting regional human rights treaties to fill the gaps in international law.[150] Regional systems also innovated to cover rights and duties not recognized in the main international human rights treaties.[151] The regional human rights system has functioned to strengthen the enforcement of human rights across the globe and fill in gaps that the international system alone cannot

[147] For further discussion *see* Overview Basel Convention Ban Amendment available at www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx (last visited 23 October 2018).

[148] See id.

[149] See Pratt 'Decreasing Dirty Dumping?' p. 163 discussing how the option of a total ban was tabled until future conferences of the parties.

[150] See e.g. Chaloki Beyani, 'Reconstituting the Universal: Human Rights as a Regional Idea' (2012), *Cambridge Companion to Human Rights Law*, 176.

[151] Compare the concept of peoples' rights in the African Charter on Human and Peoples' Rights, 27 June 1981, in force 21 October 1986 1520 U.N.T.S. 217 and concept of duties in the American Declaration of the Rights and Duties of Man, 2 May 1948, OEA/Ser.L./V.II.23, doc. 21, rev. 6 reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 1 with the omission of these concepts from the Universal Declaration of Human Rights, 10 December 1948 G.A. Res. 217 (III) A, UN Doc. A/RES/217 (III), International Covenant on Civil and Political Rights, 16 December 1966, S. Exec. Rep. 102–23, 999 U.N.T.S. 171 and the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, S. Treaty Doc. No. 95–19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

accommodate.[152] Given the experience of regionalization in the international human rights regime, a similar outcome may pertain in the fields of international environmental and criminal law.

The regional criminalization of hazardous waste in the Bamako Convention allows for more regulation than was possible at the global level. The international regime created by the Basel Convention does not provide for any enforcement mechanisms for illegal trafficking. Instead, it provides that parties should adopt domestic legislation for the prevention and punishment of trafficking in hazardous waste.[153] Since the OAU resolution in 1988, African states have considered the trafficking in hazardous waste to be a 'criminal act'.[154] This view was encapsulated in the Bamako Convention provision that states should adopt national laws to impose criminal penalties 'on all persons who have planned, committed, or assisted' in the illegal trafficking in hazardous waste.[155] These penalties were to be 'sufficiently high to both punish and deter such conduct."[156] The analysis above has shown that despite the strong provisions of the Bamako Convention,[157] the state parties to Bamako simply lacked the capacity to effectively enforce the provisions domestically and prevent toxic colonialism within their borders.[158] Indeed, none of the international legal agreements discussed above have contained the illegal trade in hazardous waste, which is often transported under false pretences.[159] Certainly, no state has the ability to check and inspect each shipment that enters its port to see, if it contains hazardous waste.[160] Notwithstanding the widespread capacity limitations on an individual state level, the Malabo Protocol provides a potentially more robust venue for the regional prosecutions of trafficking in hazardous waste.

Article 28L of the Malabo Protocol is derived from longstanding efforts by African states to criminalize and punish trafficking in hazardous waste. Certainly, the Bamako Convention envisioned future regional agreements regarding the transboundary movement and management of hazardous wastes

[152] *See* Beyani 'Reconstituting the Universal: Human Rights as a Regional Idea' p. 190; George William Mugwanya, 'Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (1999), 10 *Indiana International & Comparative Law Review* 35, 40.
[153] See art. 4(5) of the Basel Convention.
[154] See the OAU Resolution.
[155] See art 9(2) of the Bamako Convention.
[156] Id.
[157] See art 4 of the Bamako Convention.
[158] See Section 2B of this chapter.
[159] See Pratt 'Decreasing Dirty Dumping?' p. 167.
[160] Id. pp. 167 and 173.

generated in Africa and allowed for such arrangements so long as they 'do not derogate from the environmentally sound management of hazardous wastes as required' by Bamako and are 'no less environmentally sound than those provided for' under the Bamako Convention.[161] Article 28L of the Malabo Protocol is consistent with the Bamako Convention and promotes 'South-South co-operation in the implementation of the Convention'[162] through the creation of a regional forum for prosecutions of traffickers of hazardous waste amongst others.

B. *African Regional Innovation and Enforcement through Malabo*

This section discusses some of the legal and practical challenges that might arise with the enforcement of article 28L. Under the Bamako Convention, state parties were urged to cooperate and consider other 'enforcement mechanisms' to ensure that no imports of hazardous waste enter Africa.[163] The Malabo Protocol is potentially such an enforcement mechanism – it creates a regional venue for prosecuting trafficking in hazardous waste, amongst other crimes. The Protocol improves upon the international framework for regulating the trafficking of hazardous waste. Article 28L of the Malabo Protocol provides that 'any import, or failure to re-import transboundary movement or export hazardous waste proscribed by the Bamako Convention … shall constitute the offence of trafficking in hazardous waste' and fall under the criminal jurisdiction of the regional court.[164] Yet, there are several uncertainties as to how Article 28L should be interpreted. Moreover, there are a host of political, financial, and other obstacles that may impede the regional criminal court's ability to offer a robust prosecution mechanism for the trafficking in hazardous waste. The sub-sections below discuss both issues in turn.

1. Interpretative Challenges

Article 28L potentially invites confusion as it requires reference to a separate legal text to determine the relevant criminal prohibitions. When one turns to the Bamako Convention, article 1(22) informs the reader that illegal trafficking 'means any transboundary movement of hazardous wastes as specified in article 9 of this Convention."[165] Article 9(2) provides for the criminal penalties

[161] Art. 11(1) of the Bamako Convention.
[162] Id. art. 11(4).
[163] See Art. 4(1)(b) of the Bamako Convention.
[164] Art. 28L of the Malabo Protocol.
[165] Art. 1(22) of the Bamako Convention.

to be imposed on 'all persons who have planned, committed, or assisted' in illegal trafficking in hazardous waste.[166] This occurs according to article 9(1), when transboundary movement of waste occurs without notification or without consent of the relevant state, when consent is obtained through falsification, misrepresentation, or fraud, and when the waste does not conform materially with the documents.[167] While it might have been possible to interpret article 28L of Malabo such that it could cover only those offences that the Bamako Convention itself says are criminal acts under article 9, this interpretative methodology is unavailable because of the broad scope of the language in the last provision. Article 9(1)(e) stipulates criminal penalties 'when hazardous waste is deliberately disposed of in contravention of the Convention and of the general principles of international law.'[168]

Article 9(1)(e) of the Bamako Convention is the most ambiguous in terms of figuring out the scope of criminal liability under article 28L of the Malabo Protocol. For one, it is not exactly clear what general principles article 9(1)(e) refers to. And, as discussed above, the general international law framework for regulating hazardous waste does not attach criminal penalties to trafficking in hazardous waste. Moreover, there are numerous ways to dispose of hazardous waste in 'contravention' of Bamako. While article 4(1) of the Bamako Convention clearly makes importing hazardous waste into Africa an illegal and criminal act, it is not evident that all of the obligations that states undertook in Bamako were to also have that effect.[169] For example, article 4(2) of the Bamako Convention, which bans the dumping of hazardous waste at sea and in internal waters, specifies that all such actions shall be illegal, but does not contain the same 'and a criminal act' of article 4(1)'s prohibition.[170] Thus, it is unclear whether the Malabo Protocol wishes to expand Bamako to criminalize trafficking in hazardous waste at sea and in internal waters.

In addition, the Bamako Convention contains a host of very detailed obligations that state parties undertook for the transportation of hazardous waste within Africa.[171] With some of these provisions – such as Bamako's expansive definition of what constitutes 'hazardous waste' – it is apparent that the Malabo Protocol sought to include them within the criminal

[166] Id. art. 9(2).
[167] Id. art. 9(1)(a)–(d).
[168] Id. art. 9(1)(e).
[169] Id. arts. 4(1) and 4(2).
[170] Id.
[171] Id. art. 4(3)(i)–(u).

jurisdiction of the court.[172] However, for other obligations, like parties agreeing 'not to allow the export of hazardous wastes for disposal within the area South of 60 degrees South Latitude,'[173] it is not as straightforward. Additionally, the Bamako Convention contains detailed rules about the specific form and timing of notifications to be exchanged prior to the transportation of hazardous wastes across borders.[174] It would seem nonsensical to impose criminal liability for transportation of wastes that do not conform to every single provision in the Convention. Moreover, this is likely not what the drafters of Malabo intended. Yet it is certainly possible to interpret article 28L quite broadly – to criminalize any violation of any rule or regulation contained in the Bamako Convention governing the transportation of hazardous waste across state boundaries. Accordingly, it would be helpful if state parties further clarified what exactly was being criminalized – so that actors can be aware of the permissible and impermissible bounds of conduct. Moreover, this would help ensure that the court's resources are used judiciously, and that valuable time is not spent prosecuting minor violations of the Bamako Convention that the Malabo Protocol drafters did not intend to criminalize nor dedicate resources towards the regional prosecution of these offences.

The analysis above indicates that the Protocol needs to be much clearer about what specifically is being made illegal and criminalized. The Bamako Convention sets out many detailed rules relating to the transport of waste. It seems unreasonable to impose criminal liability for transport of wastes that do not conform with every single provision in the Convention. Accordingly, much more clarification is needed. This is important because it potentially violates one of the bedrock principles of criminal justice – legality. Individuals need to be given fair warning and notice about the criminal laws such that they can conform their conduct with the dictates of the law. In short, the Protocol would benefit from a clear statement of which 'proscribed' practices it is making illegal.

[172] *Compare* Art. 28L(2) of the Malabo Protocol *with* Arts. 2 and 4(3)(i) of the Bamako Convention. Bamako not only includes radioactive wastes, but also considers any waste with a listed hazardous characteristic or a listed constituent as a hazardous waste. The Convention also covers national definitions of hazardous waste. Finally, products that are banned, severely restricted, or have been the subject of prohibitions, are also covered under the Convention as wastes to be criminally prohibited from importation into Africa. Id.

[173] Art. 4(3)(1) of the Bamako Convention.

[174] Id. art. 6.

2. Practical Challenges

The regional court's expansive jurisdiction might assist with more effective prosecutions of toxic dumping incidents. When the Protocol enters into force, the Court can exercise jurisdiction over trafficking in hazardous waste and other crimes committed after that date.[175] The Assembly of the Heads of State and Government, and the Peace and Security Council[176] of the AU, as well as State parties, and the independent prosecutor[177] will be able to submit cases to the Court.[178] The Court can only exercise its jurisdiction where a State accepts its jurisdiction, where the crime was committed on the territory of the State, where the accused or victim is a national of the state, and when the vital interests of a state are threatened by the extraterritorial acts of non-nationals.[179] The Court does not have jurisdiction over persons under the age of eighteen during the alleged commission of the crime.[180] The Court's provision for corporate criminal liability[181] will be important in prosecutions of traffickers. Controversially, the Court does not have jurisdiction over any 'serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.'[182] This immunities provision is in stark contrast with the statutes of other international criminal tribunals.[183] It has caused significant backlash towards the court from scholars and practitioners.[184] This chapter discusses some of the challenges raised by the

[175] See art. 46E of the Malabo Protocol.
[176] See art. 2 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Durban, 9 July 2002), www.au.int/en/sites/default/files/Protocol_peace_and_security.pdf) [hereinafter PSC Protocol] establishing the PSC as the permanent mechanism for conflict prevention and resolution on the Continent.
[177] See art. 46G of the Malabo Protocol.
[178] See art. 15 of the Malabo Protocol.
[179] See art. 46E of the Malabo Protocol.
[180] See art. 46D of the Malabo Protocol.
[181] See. art. 46C of the Malabo Protocol.
[182] Art. 46A *bis* of the Malabo Protocol.
[183] See art. 27 Rome Statute supra note 5, detailing the irrelevance of official capacity for exempting someone from criminal responsibility; Art. 6 of the ICTR Statute; Art. 7 of the ICTY Statute ; Art. 6 of the SCSL Statute.
[184] See e.g., Mark Kersten, 'What Gives? African Union Head of State Immunity', 'Justice in Conflict' 7 July 2014), available at http://justiceinconflict.org/2014/07/07/what-gives-african-union-head-of-state-immunity/; MireilleAffa'a-Mindzie, 'Leaders Agree on Immunity for themselves during Expansion of African Court', IPI Global Observatory, 23 July 2014, available at http://theglobalobservatory.org/2014/07/leaders-agree-immunity-expansion-african-court/.

corporate criminal liability and immunity provisions for prosecuting traffickers of hazardous waste below.[185]

Further, there are myriad financial, political and other obstacles that will likely hinder the Court's ability to function effectively and mount prosecutions against traffickers in hazardous waste, if they are not addressed. First, once established, it is likely that the Court will face challenges regarding political will to enforce decisions. It is also likely, that the regional criminal Court will face credibility issues because of the issue of official immunity. Moreover, the Court will likely have difficulty guarding against bias accusations, particularly when the individuals or entities are from outside of the African region. Additionally, the Court will probably encounter challenges ensuring adequate funding, meeting international fair trial standards and conducting its proceedings with sufficient transparency. Furthermore, the Court may suffer from less judicial and lawyering experience than exists at the international level. Notwithstanding these logistical and conceptual concerns, the Malabo Protocol's criminalization and provision of a common forum for prosecutions for the trafficking of hazardous waste,[186] pushes the boundaries of international environmental and criminal law in a much-needed direction. In essence, the failure of both domestic and international institutions to effectively deal with trafficking in hazardous waste, has created a space for African states to innovate and attempt to change the status quo by utilizing a regional institution to criminalize and prosecute trafficking in hazardous waste.

4. IMPLICATIONS OF CRIMINALIZING AND PROSECUTING HAZARDOUS WASTE REGIONALLY

Recollecting that the Bamako Convention called for the imposition of criminal penalties domestically, and that said penalties 'shall be sufficiently high to both punish and deter' trafficking in hazardous waste.[187] Further, the Bamako Convention requires that Parties to the Convention 'co-operate with one another and with relevant African organisations, to improve and achieve the environmentally sound management of hazardous wastes.'[188] Because the Bamako Convention laid the groundwork for Article 28L, this section analyzes whether Article 28L furthers the criminal prosecution objectives of the Bamako

[185] See Section 4. For further discussion see Sirleaf, 'Regionalism, Regime Complexes and International Criminal Justice in Africa'.
[186] See art. 28L of the Malabo Protocol.
[187] Art. 9(2) of the Bamako Convention.
[188] Id. art. 10(1).

Convention. It does this by analyzing the potential implications of criminalizing and prosecuting trafficking in hazardous waste regionally through the Malabo Protocol. This section also considers whether the regional prosecution of trafficking in hazardous waste contributes towards some of the newer theories of punishment like restorative justice and expressive condemnation, as well as some of the more traditional goals of punishment like retribution and deterrence. Lastly, this section examines how some of the more pressing challenges might be resolved through creative interpretation of the Protocol to assist with furthering the sound regulation of hazardous wastes.

A. *Regional Criminalization of Trafficking in Hazardous Waste and Retributive Justice*

How should the traditional notions of criminal law, based as they are on the idea of a natural person capable of criminal and actions, be applied to corporations deemed responsible for illegal dumping? Further, how can we think of the regional prosecution of trafficking in hazardous waste in relation to its ability to further retribution? Retributive justice theories of punishment emanated from the desire for vengeance and 'just deserts' for offenders.[189] Most modern retributivists, however, reject the notion of an 'eye for [an] eye,' and instead seek to determine the degree of punishment in relation to the magnitude of the alleged crimes.[190] The Malabo Protocol allows for the imposition of prison sentences, pecuniary fines, and forfeiture of property acquired unlawfully.[191] The Protocol also stipulates that the regional Court should be guided by the 'gravity of the offence and the individual circumstances of the convicted person.'[192] The analysis above indicates that states have provided for criminal sentences ranging from twenty years to life imprisonment and fines of up to $1.6 million for trafficking in hazardous waste.[193] It is not clear how 'grave' the Court will determine the crime of trafficking in hazardous waste is, and whether this will comport with the sentences or fines

[189] See e.g. Immanuel Kant's Perpetual, Peace: '*A Philosophical Proposal*', (London: Sweet & Maxwell, Ltd, 1927); Susan Jacoby '*Wild Justice; The Evolution of Revenge*', (New York: Harper & Row, 1983).

[190] Paul H. Robinson, 'Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical' (2008), 67 *Cambridge Law Journal* 145, 147; see also Allison Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001), 87 *Virginia Law Review*, 415, 444; Andrew Von Hirsch & Nils Jareborg, Gauging Criminal Harm: A Living-Standard Analysis' (1991), 11 *Oxford Journal of Legal Studies* 1, 2–3.

[191] Art. 43A of the Malabo Protocol.

[192] Art 43A(4) of the Malabo Protocol.

[193] See Section 2B.

available domestically. If the regional Court's sentencing or penalties for those found guilty of trafficking in hazardous waste is significantly at variance with domestic norms, this could frustrate the ability of the regional court to further retributive justice goals. The Court might need to develop something akin to the 'margin of appreciation' doctrine used by the European Court of Human Rights,[194] for sentencing and to make sure its judgments comport with the majority of state's practice in the region.

Furthermore, because the Malabo Protocol bars the prosecution of not only Heads of States, but also of 'senior state officials' based on their functions,[195] leaders who are accused of trafficking in hazardous waste could not be investigated and prosecuted before the regional Court. This is a serious challenge to the Court's ability to fulfil retributive justice goals given the role that some African leaders have played in facilitating dumping of hazardous waste in their territories.[196] Failure to prosecute all equally culpable individuals violates the retributive principles of just deserts, as well as the principle of proportionality that all like crimes should be treated the same.

The ability of the Court to contribute towards retributive justice goals may also be limited because it is dependent on member states for the enforcement of its sentences and fines.[197] Complications could arise where an individual is sentenced or an entity is fined by the regional court for trafficking in hazardous waste, but no state indicates their willingness to accept and imprison the sentenced person, or give effect to the fine ordered by the Court. Moreover, the Malabo Protocol also provides for the pardon or commutation of sentences, where a person convicted by the regional Court, would be eligible for a pardon or commutation in the jurisdiction where the convicted person is imprisoned.[198] In these circumstances, the regional court can issue a pardon or commutation of a sentence based on the 'interests of justice and the general principles of law.'[199] Depending on how the Court interprets these provisions, this could potentially allow for states to work around the attempt to criminalize and punish the trafficking in hazardous waste regionally. However, because the Malabo Protocol situates the regional criminal court within a

[194] See e.g., Paul L. McKaskle, 'The European Court of Human Rights: What It Is, How it Works, and Its Future' (2005), 40 *University of San Francisco Law Review* 1, 49 explaining that the concept of margin appreciation allows for 'countries to differ in what is acceptable under the terms of the Convention based on cultural differences.'

[195] Art. 46A*bis* of the Malabo Protocol.

[196] See Section 2B of the chapter for further discussion.

[197] See, arts. 46J and 46J*bis* of the Malabo Protocol.

[198] Art 46K of the Malabo Protocol.

[199] Id.

larger judicial architecture in the AU this can potentially be counteracted. Other relevant regional bodies that may assist with issues of compliance include the Panel of the Wise, the Peace and Security Council, and the African Standby Force.[200] Of course, the existence of a connection with regional institutions does not completely deal with issues of non-compliance.[201] For all of the reasons above, the regional prosecution of trafficking in hazardous waste may have limited ability to further retribution, which is a traditional goal of punishment and one of the Bamako Convention's objectives of punishing trafficking in hazardous waste.

Another concern is the court's ability to effectively exercise its control over offenders, especially offenders outside of the territory of any state party. Generally, hazardous waste moves from the Global North to South. Thus, although this will not necessarily always be the case, there is a high likelihood that violators importing waste will be coming from states that are not parties to the Protocol. The court may, thus, have a challenging time bringing offenders from the Global North before the Court for trial. For this reason, the Protocol's effectiveness and legitimacy could be enhanced by expanding the scope of its cooperation regime.

B. *Regional Criminalization of Trafficking in Hazardous Waste and Restorative Justice and Expressive Condemnation*

1. Restorative Justice

The prosecution of trafficking in hazardous waste through the regional court may help to further restorative justice goals. Restorative justice can be conceptualized as 'a process in which offenders, victims, their representatives and representatives of the community come together to agree on a response to a crime.'[202] The overwhelming focus is to assist with 're-establishing social

[200] See arts. 7, 11, and 13(1) of the PSC Protocol providing the authority for the Peace and Security Council, establishing the Panel of the Wise, and providing for the African Standby Force; Arts. 3–4 of the AU Constitutive Act.

[201] George William Mugwanya, 'International Criminal Tribunals in Africa', in Mainsuli Ssenyonjo (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (Leiden: Martinus Nijhoff Publishers, 2011) pp. 307–10. discussing the difficulties securing state cooperation with the criminal tribunals in Rwanda and Sierra Leone; see also Beyani, 'Reconstituting the Universal: Human Rights as a Regional Idea' p. 87.

[202] Linda Gröning & Jørn Jacobsen, 'Introduction: Restorative Justice and the Criminal Justice System', *in* Linda Gröning & Jørn Jacobsen (eds.), '*Restorative Justice and Criminal Justice: Exploring the Relationship*' (Sweden: Santerus Academic Press, 2012) pp. 9, 12. For further

equilibrium'[203] and facilitating 'corrective changes in the record, in relationships, and in future behavior.'[204] The regional court is empowered to provide compensation and reparation to victims.[205] The Malabo Protocol also provides for the establishment of a trust fund for victims to provide legal aid and assistance.[206] The ability of the Court to contribute towards restorative justice goals may be limited, if the Court interprets these provisions narrowly. The Court's ability may also be limited, if the fund for victims is under-funded, or if reparations are administered in a problematic way. However, if the Court follows the lead of the Inter-American Court for Human Rights in fashioning remedies, it might order communal reparations,[207] or formulate broad reparative and restorative measures[208], which require the state to end the consequences of a violation through formulating specific policies and programmes.[209] There may also be insufficient compliance with restorative justice orders because of the Court's dependence on member states for enforcement.[210]

discussion, see generally John Braithwaite, 'Narrative and "Compulsory Compassion"', (2006), 31 *Law & Social Inquiry: Journal of the American Bar Foundation* 425 Elizabeth Kiss, 'Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice', in Robert I. Rotberg & Dennis F. Thompson (eds.), *'Truth v. Justice: The Morality of the Truth Commissions'* (New Jersey: Princeton University Press, 2000) pp. 68, 79–83.

[203] Jennie E. Burnet, '(In)Justice: Truth, Reconciliation, and Revenge in Rwanda's Gacaca', in Alexander L. Hinton (ed.), *Transitional Justice Global Mechanisms and Local Realities after Genocide and Mass Violence*, (New Jersey: Rutgers University Press, 2011), pp. 95, 100.

[204] Martha Minow, *'Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence'* (Boston: Beacon Press, 1999).

[205] See art. 20 of the Malabo Protocol.

[206] See art. 46M of the Malabo Protocol.

[207] See, e.g., *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 146 (29 March 2006) The Court fashioned an order, which provided that the state was to allocate $1 million to a community development fund for educational, housing agricultural, and health projects. In addition, the state was to provide compensation of $20,000 each to the 17 members of the community who died because of events.

[208] For further discussion, see Thomas M. Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011), 47 *Stanford Journal of International Law* 279.

[209] See e.g. *Miguel Castro Prison v. Peru Merits, Reparations and Costs Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 160 (25 November 2006) The Court's order provided amongst others that the state needed to carry out a public act of acknowledgement of its international responsibility in relation to the violations declared and for satisfaction of the next of kin. The state also had to conduct a public ceremony covered by the media, carry out human rights education and programs for the security sector, as well as create a monument for those who died as a form of reparations.

[210] See Section 4B for further discussion.

The Court could potentially be a vehicle for regional innovation in providing fuller redress to victims. The Court might even require a convicted defendant to participate in local reconciliatory procedures as a means of securing reparations to victims. It is premature to determine how broadly the Court will construe these provisions. But, this would be an improvement on the 'imagined victims' of international justice advocates. These 'imagined victims' always demand retributive justice, when in reality, victims have diverse desires for redress, which also emphasize reparative and restorative justice.[211] Restorative justice approaches may be especially important for the crime of trafficking in hazardous waste, given the dire consequences that toxic dumping has on public health and the environment.[212] The detrimental impact of trafficking in hazardous waste for individuals and communities, may mean that imprisonment of traffickers or other retributive measures have less import in achieving justice as conceived by the affected community. This is particularly important in some communities within African countries where justice is conceptualized in 'reference to communal restoration, inter-personal forgiveness, and reconciliation, and redistributive, rather than retributive process.'[213] Consequently, the regional prosecution of trafficking in hazardous waste under Malabo may further restorative justice goals. Thus, Art. 28L would assist with furthering the Bamako Convention's objectives of punishment for traffickers of hazardous waste.

2. Expressive Condemnation

The prosecution of trafficking in hazardous waste through the Court may also help to further expressive condemnation goals. Some theorists emphasize the expressive value of punishment,[214] which is required to reverse the false

[211] See Laurel E. Fletcher, 'Refracted Justice: The Imagined Victim and the International Criminal Court', in Christian De Vos, Sara Kendall, Carsten Stahn, (eds.), '*Contested Justice: The Politics and Practice of the International Criminal Court Interventions*', (Cambridge: Cambridge University Press, 2015) pp. 2, 15 (available at www.law.berkeley.edu/php-programs/faculty/facultyPubsPDF.php?facID=517&pubID=41.

[212] See Section 2A for further discussion.

[213] Sergey Vasiliev, 'Between International Criminal Justice and Injustice: On the Methodology of Legitimacy', draft paper on file with author, p 29.

[214] See, e.g., Emile Durkheim, *'The Division of Labour in Society'*, (New York: : Simon and Schuster, 1997); David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in Samantha Besson & John Tasioulaseds, *'The Philosophy of International Law'* (New York: : Oxford University Press, 2010) pp. 569, 575; Robert D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007), 43 *Stanford Journal of International Law* 39, 42–5; Dan M. Kahan, 'What Do Alternative Sanctions Mean?' (1996), 63 *University of Chicago Law Review* 597.

message sent by the offender's actions about the value of the victim relative to the criminal.[215] These theorists view punishment as a form of moral communication used to express condemnation, revalidate a victim's worth, and strengthen social solidarity. Yet, the ability of the Court to further expressive condemnation goals of punishment may be limited for several reasons. First, regional powers may tend to distort or even abuse regional processes[216] by using the Court to further political aims or protecting allies from the court's reach. In the same way that powerful actors may shield their allies from potential prosecutions at the domestic or international level, the Court may exhibit the same tendencies. For example, the AU has been notoriously silent on human rights violations taking place in Zimbabwe and other countries with influential or revered leaders.[217] The Court could then be subject to the criticism that it lacks sufficient political independence, which may limit the ability of the Court to be a robust mechanism for expressing condemnation of trafficking in hazardous waste. Yet, because there are multiple regional hegemons on the Continent, this may counteract the ability of one state to exercise undue influence over the regional criminal chamber. Additionally, there is no reason to think of African states as a monolith -regional hegemons may have drastically different views on expressing condemnation on the trafficking of hazardous waste.

The criminalization of trafficking in hazardous waste may assist in rendering international criminal trials more credible in expressing condemnation. International criminal trials generally focus on individual cases, and not the complex relationships that exist between individuals, groups, institutions, and other entities that make massive violations possible.[218] And in the effort to move away from collectivizing guilt (which may lead to further violence or recriminations) and instead attempt to individualize guilt, trials often tend to absolve other states, corporations, groups, institutions,

[215] See, e.g., Dan M. Kahan, 'The Anatomy of Disgust in Criminal Law' (1998), 96 *Michigan Law Review* 1621, 1641; R.A. Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996), 20 *Crime and Justice* 1, 8; Jean Hampton, 'An Expressive Theory of Retribution', in Wesley Cragg (ed), *Retributivism and Its Critics* (Berlin: Franz Steiner Verlag, 1992) pp. 1, 32–3.

[216] See Christoph Schreuer, 'Regionalism v. Universalism' (1995), 6 *European Journal of International Law*, 477.

[217] See generally Laurence Helfer & Karen J. Alter, 'Legitimacy & Lawmaking: A Tale of Three International Courts' (2013), 14 *Theoretical Inquiry in Law* 479, 502.

[218] See M. V.S. Sirleaf, 'Beyond Truth & Punishment in Transitional Justice' (2014), 54 *Virginia Journal of International Law* [hereinafter Sirleaf, Beyond Truth & Punishment] (internal citations omitted).

bystanders, and the rest of society of any responsibility as if individuals committed massive violations in a vacuum.[219] The focus on establishing individual accountability for a small number of crimes may present the opportunity for many criminal participants including corporations 'to rationalize or deny their own responsibility for crimes,'[220] which limits the ability of such trials to express social solidarity and condemnation. The Court's ability to prosecute trafficking in hazardous waste and the provision for corporate criminal liability may advance the already limited ability of such trials to express social solidarity and condemnation, and thereby increase the credibility of such trials, even if minimally. This improvement while not eliminating some of the problematic tendencies of such trials, would be a welcome development. The regional criminal court in Africa could develop a regional jurisprudence[221] on trafficking in hazardous waste given the prevalence of these issues in Africa,[222] which may influence other jurisdictions to express condemnation of this crime. In sum, the regional prosecution of trafficking in hazardous waste may further expressive condemnation goals. Accordingly, Art. 28L of the Malabo Protocol would assist with advancing the Bamako Convention's objectives of punishment for traffickers of hazardous waste through expressive condemnation.

C. *Regional Criminalization of Trafficking in Hazardous Waste and Deterrence*

The prosecution of trafficking in hazardous waste through the Court could also help to further deterrence. Utilitarian theories focus on punishment as a means to achieve some desired end, usually the prevention of future crimes.[223] Deterrence theories of punishment are based on the rationale that potential perpetrators are dissuaded from committing atrocities due to the risk and fear

[219] See id.

[220] Laurel E. Fletcher & Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002), 24 *Human Rights Quarterly* 573, 601.

[221] For example, the Inter-American Court of Human Rights has developed a rich jurisprudence on the 'right to truth' and forced disappearances due to the prevalence of authoritarian regimes in the region. See the Preamble of the Inter-American Convention on Forced Disappearances of Persons, Inter-American Commission on Human Rights, Belem do Para, 8 June 1994, in force 28 March 1996 available at www.oas.org/en/iachr/mandate/Basics/disappearance.asp

[222] See Section 2B.

[223] See generally J. Bentham, '*An Introduction to the Principles of Morals and Legislation*', (Buffalo: Prometheus Books, 1988); H.L.A. Hart, '*Punishment and Responsibility: Essays in the Philosophy of Law*', (Oxford: Oxford University Press, 2008).

of punishment.[224] Individual or specific deterrence seeks to prevent future crime by setting sentences that are strict enough to ensure that a particular offender will not reoffend. While general deterrence attempts to prevent crime by inducing others who might be tempted to commit crime, to desist out of fear of the penalty.

The ability of the Court to contribute towards deterrence goals may similarly be limited because it is dependent on member states for cooperation.[225] In order for deterrence theory to work as applied to the crime of trafficking in hazardous waste – the risk of getting caught and being punished cannot be so low as to be discounted. Yet, the regional Court is dependent on state parties to effectively carry out any investigation and prosecution of trafficking in hazardous waste for everything from the identification and location of persons, to the arrest, detention, and transfer of persons to the Court, as well as the freezing and seizure of assets for forfeiture.[226] The Court may face significant challenges with trying to increase the likelihood of getting caught for trafficking in hazardous waste. As noted above the illegal trafficking in hazardous waste depends on an underground economy,[227] which may be exceedingly difficult to investigate, and prosecute. The regional criminal court's inability to prosecute the trafficking in hazardous waste effectively could be even more pronounced because many of the individuals or entities sought will likely be located outside of the Continent, and those located within Africa may not be parties to the Malabo regime. The problem of under-detection was illustrated in the toxic waste scandal in Nigeria. It highlights how detection of the crime of trafficking in hazardous waste is likely to prove difficult. As a result, there is a significant risk that hazardous, even radioactive materials, could be transported and left in Africa undetected until residents begin to suffer severe negative health consequences. Moreover, the domestic prosecution of the U.S. 'war on drugs' demonstrates that unless changes are made on the demand side, cracking down on the suppliers will only lead to more individuals and entities stepping in to fill the roles of those imprisoned. Furthermore, at the international level where crimes of mass atrocity are committed more openly, prosecutions have been anything, but swift or certain, and this is with more

[224] See, e.g., Deirdre Golash, 'The Justification of Punishment in the International Context', in Larry May & Zachary Hoskins (eds.), '*International Criminal Law and Philosophy*' (Cambridge: Cambridge University Press, 2010) pp. 201, 211 (Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002), 13 *European Journal of International Law* 561.

[225] See art. 46L of the Malabo Protocol.

[226] See id.

[227] See Section 2 for further discussion.

states participating in the Rome Statute regime.[228] Accordingly, it may be worthwhile to consider supplementary monitoring mechanisms that will help ensure that, if proscribed conduct is violated, the Prosecutor for the regional court will come to learn of these violations.

On the other hand, the Court might be able to contribute to deterrence in other ways. For example, the penalties would have to be adequately publicized regionally to further deterrence. The Malabo Protocol provides that 'penalties shall be pronounced in public.'[229] The Court should make every effort to publicize its sanctions not just before the accused or by word of mouth, but in print, online, and on social media. Moreover, the Court may further deterrence due to the severity of its penalties and sentences for trafficking in hazardous waste. It remains to be seen how the Court will determine its sentences or penalties for those found guilty of trafficking in hazardous waste and whether it will have any impact on marginal deterrence. Because the Court has a lot of latitude under the Protocol to impose penalties and sentences (short of the death penalty),[230] significant penalties and sentences should be imposed in order to further the goals of specific and general deterrence.

Additionally, some commentators have found that deterrence due to the fear of trials may be more influential for higher-level perpetrators, while deterrence due to the fear of penalties might be more impactful for lower-level perpetrators.[231] It is not evident whether the unlikely, but more severe punishment of imprisonment or the more likely, but less severe sanction of a fine will deter would-be traffickers in hazardous waste. The Malabo Protocol gives the Court the flexibility of taking individual circumstances into account when imposing sentences or penalties.[232] This adaptability will be incredibly important for dealing with hazardous waste brokers, as the penalties or sentences imposed on these intermediaries may need to differ from those imposed on those lower or higher-up the 'food-chain.' Unlike retributive justice, deterrence theory does not require the punishment of all equally culpable individuals. Accordingly, the Court's inability to prosecute political

[228] There are 123 countries that are State parties to the Rome Statute; African States form the biggest regional block, with thirty-four state parties. See International Criminal Court, The State Parties to the Rome Statute www.icccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last checked on Oct. 24, 2017).

[229] See art. 43A(3) of the Malabo Protocol.

[230] See *arts.* 43A(1) and (2) of the Malabo Protocol.

[231] See Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002), 15 *Harvard Human Rights Journal* 39, 70.

[232] See art. 43A(4) Malabo Protocol.

leaders that are alleged to have engaged in trafficking of hazardous waste due to the immunity provision, is not fatal from a deterrence perspective. This is because, if exemplary punishments adequately deter future crime that is sufficient. As such, the selective prosecution of 'intermediaries' or lower-level perpetrators may suffice to further general deterrence goals. The regional Court could focus its prosecutions on private local companies, individuals, lower-level government officials, as well as waste brokers. This prosecution strategy may be useful because it will be difficult for the Court to obtain jurisdiction over higher-level perpetrators, or individuals and entities outside the Continent. Yet, as the Court grows and begins to increase its credibility, prosecutions of those higher up the food chain could be done more fruitfully.

The Court may also further deterrence because this theory of punishment depends on the perpetrator being a 'rational actor'. The individual(s) contemplating engaging in trafficking must be deterrable and trafficking in hazardous waste is a crime that requires careful planning as opposed to being a crime of hate or passion. Consequently, deterrence theory is expected to work as applied to trafficking in hazardous waste because actors engaging in it are more likely to do a cost-benefit analysis. Indeed, the combination of cheap land and labour for landfill operations, concomitant with looser regulations and enforcement mechanisms in developing countries, means that exporting hazardous waste is a cost-effective option for producers in the Global North, and offers short-term benefits to importers in the Global South.[233] The Malabo Protocol seeks to disrupt this calculus from the reported '$2.50 per ton to dump hazardous waste in Africa as opposed to $250 per ton in Europe.'[234]

In addition, actors may not engage in toxic dumping for extra-legal reasons. For example, lower-level perpetrators might simply believe that trafficking in hazardous waste is wrong, or higher-level perpetrators may be more concerned about political isolation regionally or internationally for engaging in trafficking in hazardous waste. For these individuals, the Court's intervention would be expected to have no impact on deterrence. Yet, the net result of these extra-legal deterrents would be to reduce the amount of trafficking in hazardous waste. Even if it does so minimally, the Court will further deterrence goals by raising the cost of trafficking in hazardous waste in Africa – by increasing the regulation and prosecution of this crime, or at least increasing the stigma associated with the crime. In sum, Article 28L of the Malabo Protocol will

[233] See Pratt 'Decreasing Dirty Dumping?' p. 154.
[234] UNEP Report.

assist with fulfilling the Bamako Convention's requirement that criminal penalties 'be sufficiently high to both punish and deter' trafficking in hazardous waste.[235]

5. CONCLUSION

Given the analysis above, there are many reasons to be cautiously optimistic about Article 28L's criminalization of trafficking in hazardous waste and the provision of a regional forum for investigation and prosecution for this crime and others under the Malabo Protocol. While it is unlikely that the regional criminalization of trafficking in hazardous waste will contribute to retribution, there are many theories of punishment that support the Protocol's innovation in this area, including restorative justice, expressive condemnation, and deterrence. It is also important to bear in mind that the proposed Court would be one tool amongst many for combating the trafficking in hazardous waste. While by no means perfect, the Malabo Protocol presents another option for African states whose domestic judiciaries and related institutions may not be able to prosecute trafficking in hazardous waste at all. Additionally, Article 28L of the Protocol certainly helps to fulfil many criminal justice goals of the Bamako Convention when compared to the international system, which has failed to prosecute trafficking in hazardous waste or corporations involved in dirty dumping.

[235] Art. 9(2) of the Bamako Convention.

21

Illicit Exploitation of Natural Resources

DANIËLLA DAM DE JONG AND JAMES G. STEWART

1. INTRODUCTION

Article 28A(1)(13) of the Protocol to the Statute of the African Court of Justice and Human Rights ('The Protocol') lists 'Illicit exploitation of natural resources' as a criminal offence within the Court's jurisdiction (hereafter 'Illicit Exploitation'). The Protocol goes on to define Illicit Exploitation as including seven different sub-offences – sometimes vague, often groundbreaking – that might attract criminal responsibility under the aegis of this new crime.[1] The sole limiting criterion is whether acts of illicit exploitation of natural resources are 'of a serious nature affecting the stability of a state, region or the Union'. In conjunction with the new mandate of the African Court, which includes the exercise of jurisdiction over corporations for the first time

I wish to thank my colleagues Dr. Mamadou Hébié and Dr. Sergey Vasiliev for their valuable comments during the drafting of this chapter. Any remaining mistakes of course are my own.

[1] Art. 28L Bis of the Protocol, entitled "Illicit Exploitation of Natural Resources", reads:

> For the purpose of this Statute, 'Illicit exploitation of natural resources' means any of the following acts if they are of a serious nature affecting the stability of a state, region or the Union:
>
> (a) Concluding an agreement to exploit resources, in violation of the principle of peoples' sovereignty over their natural resources;
> (b) Concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned;
> (c) Concluding an agreement to exploit natural resources through corrupt practices;
> (d) Concluding an agreement to exploit natural resources that is clearly one-sided;
> (e) Exploiting natural resources without any agreement with the State concerned;
> (f) Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and
> (g) Violating the norms and standards established by the relevant natural resource certification mechanism.

in an international treaty, the prohibition of 'illicit exploitation of natural resources' creates an offence with especially sharp teeth, for businesspeople, their corporations, military actors and politicians. The crime constitutes an important innovation in international law, since it offers a distinct legal basis for prosecution of a wider array of acts covered by the war crime of pillage.[2] Nonetheless, it also comes with a set of major limitations, not the least of which is its great vagueness.

This chapter offers a critical doctrinal overview of the seven sub-offences that fall within the wider banner of this new crime of Illicit Exploitation, simultaneously pointing to a range of interpretative possibilities that might accord with recent thinking about the relationship between law and resource predation. We include a set of recurring shortcomings with the provision as drafted in The Protocol even though we agree that accountability for resource predation in Africa is long overdue. Our overall impression is that the provision is overly broad and insufficiently precise in many manifestations of its form, but we hope that what follows functions as an introduction of sorts, which other scholars will use as a point of departure for far more detailed scholarly treatment. Accordingly, we divide this chapter into three parts. In section one, we situate the novel crime within pre-existing avenues for regulating illegal exploitation of natural resources in international law. In section two, we go on to examine the scope of the provision, focusing on its chapeau and the seven different sub-offences it covers. The chapter concludes in section three with a brief overview of the crime's strengths and weaknesses.

2. SITUATING THE NOVEL CRIME

Symbolically, the criminalization of illicit exploitation of natural resources is both significant and timely. With the formulation of a novel international crime of illicit exploitation of natural resources, the African community has taken an important step in addressing one of its major concerns in recent decades. The illicit exploitation of natural resources is associated with the financing of armed conflicts, which unsurprisingly, has very negative effects on local populations' enjoyment of basic human rights, physical security and economic wellbeing. Over the past decades, natural resources have become

[2] Pillage was also the legal basis for the International Court of Justice to hold the Ugandan State responsible for the looting by Ugandan soldiers of the natural resources of the DR Congo. See International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, *I.C.J. Reports* 2005, para. 245.

one of the principal sources of revenue for armed groups, replacing Cold War superpower sponsorship.[3] In armed conflicts in Angola, Sierra Leone, Côte d'Ivoire, the DR Congo and the Central African Republic, natural resources did not necessarily provide the sole means or motivations for armed violence, but they were at least one of several important causal factors that helped sustain bloodshed. Thus, this new offence of illicit exploitation of natural resources represents an important symbolic response to much publicized issues in a variety of African war zones.

The problems that flow from the illegal exploitation of natural resources are by no means limited to the funding of armed conflicts, however. An investigation led by various international organizations in the Democratic Republic of Congo (DRC), for instance, concluded that around 98 per cent of net profits from illegal natural resource exploitation in the DRC – particularly gold, charcoal and timber – goes to transnational organized criminal networks, while armed groups retain only 2 per cent of these profits.[4] This blurring is typical of present day warfare, which is characterized by an important interaction between the local and the global, and which resembles private enterprise more than traditional ideologically motivated battles between military groups.[5] Aside from organized crime, illicit exploitation is also a key component in kleptocratic governance, a frequent part of endemic corruption and illegal tax evasion,[6] and a central driver of the famed resource curse, whereby the richest countries in terms of natural resource endowment are, very counterintuitively, the poorest in terms of standards of living.[7] Thus,

[3] See K. Ballentine & J. Sherman (ed.), *The Political Economy of Armed Conflict: Beyond Greed and Grievance*, International Peace Academy (Boulder/London: Lynne Rienner Publishers 2003), at 1–3.

[4] UNEP-MONUSCO-OSESG, 'Experts' background report on illegal exploitation and trade in natural resources benefitting organized criminal groups and recommendations on MONUSCO's role in fostering stability and peace in eastern DR Congo', Final report, 15 April 2015, available at www.unep.org (last visited 1 February 2016).

[5] See on this e.g. M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Palo Alto, CA: Stanford University Press, Second Edition 2006); and W. Reno, 'CSR and Corporate Engagement with Parties to Armed Conflict', in C. Walker-Said and J.D. Kelly, *Corporate Social Responsibility?: Human Rights in the New Global Economy* (Chicago: The University of Chicago Press Books 2015), at 259–77.

[6] According to the Africa Progress Panel, Africa lost US$63.4 billion from illicit financial outflows between 2008 and 2010, of which US$38.4 billion was related to mispricing by multinational companies operating in Africa. Africa Progress Panel, *Equity in Extractives: Stewarding Africa's Natural Resources for All*, Africa Progress Report 2013, Figure 22, at 66.

[7] See R. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Abingdon-on-Thames, UK: Routledge, 1993); M.L. Ross, 'The Political Economy of the Resource Curse', 51(2) *World Politics* (1999) 297–322; and J.D. Sachs and A.M. Warner, 'The Curse of Natural Resources', *European Economic Review* 45 (2001), at 827–38.

the illegal exploitation of natural resources is clearly a problem with long historical antecedents and multiple negative impacts in contemporary Africa, thus explaining the desire to criminalize the practice.

A range of complementary initiatives have demonstrated the same desire in recent years, such that this new crime overlaps with a number of related areas of law. If these complementary initiatives underscore the priority the international community attaches to the problem, especially in Africa, they create an interesting and complex overlap with this new offence of 'illicit exploitation of natural resources.' In what follows, we flesh out several of these points of overlap in order to isolate the added normative reach the new offence of Illicit Exploitation offers and to point out opportunities for synergy with pre-existing regulatory initiatives. As we will see, the points of overlap include a range of other criminal offences that might attach to different aspects of resource predation as well as a set of non-criminal schemes that attempt to regulate the same sorts of behaviours.

With respect to overlapping criminal offences, Illicit Exploitation partially overlaps with the war crime of pillage.[8] In the aftermath of the Second World War, a number of businesspeople were prosecuted for pillaging natural resources during the war, principally because their exploitation was 'illegal' insofar as the true owners of manganese, coal, iron and oil never consented to their appropriation. This exploitation was achieved through a range of different strategies and techniques, but courts invariably concluded that these practices constituted pillage in war.[9] Pillage appears to be gaining traction as a legal response to the illegal exploitation of natural resources in modern resource wars too. Swiss authorities conducted a formal investigation into one of the largest gold refineries in the world for complicity in pillage a few years ago,[10]

[8] For a more extensive analysis of this crime and its relevance for illegal natural resources exploitation, see J.G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (New York: Open Society Justice Initiative Publication 2011); and L.J. van den Herik and D.A. Dam-de Jong, 'Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict', Vol. 22(3) *Criminal Law Forum* (2011) 237–73.

[9] See e.g. Trials of War Criminals before the Nuremberg Tribunals under Control Council Law No. 10, Vol. IX, the *Krupp* case (Washington: Government Printing Office 1950), at 1344–5; Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XIV, *France v. Roechling* (Washington: Government Printing Office 1949), at 1113 and 1124.

[10] The investigation was closed in 2015, because the Swiss prosecutor was unable to proof that the company was aware of the criminal origin of the gold it refined, showing the difficulties in prosecuting companies further up the supply chain. See J.G. Stewart, 'The Argos Heraeus Decision on Corporate Pillage of Gold', 19 October 2015, available through http://jamesgstewart.com/the-argor-heraeus-decision-on-corporate-pillage-of-gold/ (visited 27 September 2016) for a legal analysis of this decision and links to the prosecutor's decision.

and a Belgian businessman was arrested by the Belgian authorities in 2015 for allegedly collaborating with former Liberian President Charles Taylor and a rebel group in pillaging diamonds from Sierra Leone.[11] Moreover, in September 2016, the Prosecutor of the International Criminal Court formally published a new prosecutorial strategy, which included a commitment to 'give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in... the illegal exploitation of natural resources.'[12]

States have also developed comparable criminal offences through regional agreements to tackle the illicit exploitation of natural resources, notably within the framework of the International Conference on the Great Lakes Region (ICGLR).[13] Most importantly, a specialized Protocol Against the Illegal Exploitation of Natural Resources was adopted in 2006 as part of the Pact on Security, Stability and Development, which forms the basis for cooperation between the ICGLR Member States. This Protocol aims to promote the development of effective mechanisms to address illegal exploitation of natural resources, to enhance cooperation amongst the ICGLR Member States in this field and to promote harmonization of their national legislations, policies and procedures.[14] One of the most important tools developed by the ICGLR for this purpose is a regional certification mechanism.[15] From the perspective of criminal law, however, the most notable aspect of this parallel treaty regime is contained in in Art 12 of the Protocol Against the Illegal Exploitation of Natural Resources, which also contemplates a novel set of domestic offences governing what it calls 'the illegal exploitation of natural resources'.[16]

[11] See https://trialinternational.org/latest-post/michel-desaedeleer/ (visited 8 December 2016). The suspect died in custody on 28 September 2016.

[12] Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, para. 41. www.icc-cpi.int/Pages/item.aspx?name=policy-paper-on-case-selection-and-prioritisation (visited 4 October 2016).

[13] The ICGLR is an inter-governmental organization established by the States located in the African Great Lakes region to enhance regional cooperation in the fields of Peace and Security; Democracy and Good Governance; Economic Development and Regional Integration; and Humanitarian and Social Issues. See www.icglr.org for more information.

[14] ICGLR Protocol Against the Illegal Exploitation of Natural Resources, 30 November 2006, Art. 2.

[15] See Art. 11 of the Protocol, which was adopted in September 2014. See also www.icglr.org for the certification manual (visited 29 March 2016).

[16] Art 12 of the Protocol Against the Illegal Exploitation of Natural Resources reads as follows:

> 'Each Member State shall ensure that all acts of illegal exploitation of natural resources are offenses under its criminal law. Such acts shall include:
>
> (a) Concluding an agreement to exploit resources, in violation of the principle of peoples' sovereignty over their natural resources;

Of course, forms of 'illegality' that might inform our understanding of 'illicit' exploitation of natural resources for the purposes of this new crime need not be limited to criminal law. It is perfectly plausible that the new crime of Illicit Exploitation represents the criminalization of a range of regulatory schemes that were never meant to be punished through criminal law beforehand, and on its face, The Protocol purports to do just this. At the global level, for instance, sanctions regimes imposed by the UN Security Council seek to break the link between illegal trade in natural resources on one hand and conflict financing on the other. The Security Council has imposed sanctions in a number of instances, including diamond sanctions against Angola, Sierra Leone and Liberia as well as travel and financial sanctions against individuals and entities involved in illicit natural resources trade in the Central African Republic and the DR Congo.[17] In order to enhance the effectiveness of its sanctions, the Council has actively relied on several global and regional mechanisms that have been created to address the problem of natural resources financing armed conflicts.[18]

Amongst these are informal mechanisms such as the 2002 certification scheme for rough diamonds developed by the Kimberley Process (KPCS) to tackle the trade in 'conflict diamonds'[19] and the 2010 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected

(b) Concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned;
(c) Concluding an agreement to exploit natural resources through corrupt practices;
(d) Concluding an agreement to exploit natural resources that is clearly one-sided;
(e) Exploiting natural resources without any agreement with the State concerned;
(f) Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and
(g) Violating the norms and standards established by the relevant natural resource certification mechanism.'

[17] For a more detailed discussion of these sanctions regimes, see D.A. Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2015); and Security Council Report, 'UN Sanctions: Natural Resources', Research Report (2015) No. 4, www.securitycouncilreport.org (last visited 1 February 2016).

[18] See D.A. Dam-de Jong, 'UN natural resources sanctions regimes: Incorporating market-based responses to address market-driven problems', in L.J. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (Cheltenham Glos, UK: Edward Elgar, 2017).

[19] For the purposes of the KPCS, conflict diamonds have been defined as 'rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognized in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future'. See KPCS Core Document, available at www.kimberleyprocess.com/en/kpcs-core-document (visited 17 March 2016).

and High-Risk Areas (OECD Guidance) which assists companies in assessing the risks of their mineral purchases to contribute to the commission of international crimes and gross human rights abuses.[20] In addition, the 2009 Extractive Industries Transparency Initiative (EITI) was created to increase transparency and accountability in the extractive sector by publishing company payments to governments. These are just some of the overlapping non-criminal initiatives that might help in plotting the new crime's significance across a wider set of regulatory initiatives, but at the same time, these initiatives might be relevant in construing the term 'illicit' within this novel offence itself. The relationship between these overlapping criminal offences, complementary regulatory initiatives and the new crime announced within the Protocol is therefore a question that is complex, intriguing and unexplored.

At the same time, this novel crime also raises a number of fundamental concerns, most importantly relating to its scope and specificity. While the provision itself enumerates a limitative list of seven acts that would fall under the crime, the definition of these acts is broad and open to multiple interpretations. At times, there is uncertainty about which overlapping field the reference to 'illicit' exploitation appeals to, but other times interpretative difficulties stem from a failure to set out the scope of the seven sub-offences in terms that will come close to satisfying the demands of a defensible criminal prohibition. In particular, these difficulties pose an inherent danger of overreach and uncertainty that frequently risks compromising the foundational principle of *nullum crimen sine lege*. In addition, the list omits particular acts that would logically fall under the definition of illicit exploitation of natural resources, most particularly the exploitation of natural resources in contravention of resolutions adopted by the UN Security Council. In what follows, we

[20] The OECD Guidance was last revised in April 2016. Strictly speaking, the OECD Guidance is not a global instrument, since it only applies to companies which are based in an OECD member State. Nevertheless, the OECD Guidance has also been incorporated in the regional system of the International Conference for the African Great Lakes Region (ICGLR), it has been endorsed by the UN Security Council and it has resulted in the creation of similar guidelines in non-OECD member States, most importantly the guidelines developed by the Chinese Chamber of Commerce. See www.oecd.org/corporate/mne/mining.htm (visited 30 May 2016); the Lusaka Declaration of the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources in the Great Lakes Region (2010), para. 12; UN Security Council Resolutions 1952 (2010), para. 8 and 2198, para. 22 on the DR Congo and Resolution 2153 (2014) on Côte d'Ivoire, para. 31; and China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters, Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains (2015), available at www.cccmc.org.cn/docs/2015-10/20151029133501092584.pdf (visited 17 March 2016).

attempt to plot these and other related concerns while elucidating the scope of the novel offence – as incorporated in Article 28L *Bis*.

3. THE SCOPE OF THE PROVISION

Illicit Exploitation is potentially a very broad term. A wide variety of laws – both national and international – govern different aspects of the resource extraction process. Given the absence of official *travaux préparatoires* for The Protocol, our attempt to identify which norms the offence contemplates is necessarily based on an interpretation of the provision itself within the context of international law generally. In this light, one of the major strengths of Article 28L *Bis* is that it includes a limitative list of acts that constitute 'illicit exploitation' for the purposes of the provision. The definition is thus a welcome attempt to resolve some of the contests about the meaning of the term 'illegal' exploitation in other contexts,[21] although as we suggest earlier, it still leaves a series of very important questions unanswered. Before we address these intricacies, we pause to consider the overarching chapeau elements that must be satisfied for each of the underlying sub-offences. Structurally speaking, the new crime is vaguely reminiscent of crimes against humanity: it contains an overarching chapeau that operates as a kind of threshold triggering the application of the list of seven sub-offences that are enumerated beneath this threshold. The analysis that follows mimics this structure, commencing

[21] Two of these attempts merit closer attention. Firstly, the UN Panel of Experts on the DR Congo, which had been established by the Security Council to collect information on the illegal exploitation of natural resources in the DR Congo and to analyze the links between natural resources and the continuation of the conflict, opted for a very broad definition of illegal exploitation in its 2001 report. Its definition of 'illegality' hinged on the following four factors related to the rule of law: a violation of sovereignty, specified as all activities that are conducted 'without the consent of the legitimate government'; conducting activities in violation of the existing regulatory framework of the country of operation; activities that are contrary to widely accepted business practices; and activities carried out in violation of international law, including soft law. The term 'exploitation' was similarly defined broadly so as to include 'all activities that enable actors and stakeholders to engage in business in first, secondary and tertiary sectors in relation to the natural resources and other forms of wealth of the Democratic Republic of the Congo'. See Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 12 April 2001, *UN Doc. S/2001/357*, p. 5. The second attempt has been made by the ICGLR for the purposes of its Protocol on Illegal Exploitation of Natural Resources. Art. 1 of the Protocol defines illegal exploitation as 'any exploration, development, acquisition, and disposition of natural resources that is contrary to law, custom, practice, or principle of permanent sovereignty over natural resources, as well as the provisions of this Protocol'. Illegal exploitation as defined by the Panel of Experts and the ICGLR Protocol therefore includes a wide range of aspects of the extraction process, while illegal also refers to a broad range of legal bases.

with an analysis of the chapeau, then continuing to consider the various sub-offences one by one.

By way of preliminary observation, it is important to note that the provision does not formulate distinct objective or subjective requirements for the chapeau itself or for the various sub-offences.[22] One would normally refer to general provisions concerning the mental elements of crimes for the purposes of The Protocol or detailed definitions of the criminal offences themselves, but alas these are defined nowhere in the instrument. While the Protocol contains an explicit provision on corporate criminal liability, which defines knowledge and intent in the corporate context,[23] a similar provision for individuals is lacking in the current draft of The Protocol.[24] Similarly, there is nothing in the Protocol that replicates the clarity and detail of the ICC Elements of Crimes, which seek to provide greater legal clarity to crimes that are broadly defined in the abstract within the ICC Statute itself. To a large extent, the absence of these details undermines The Protocol's creative attempt to criminalize Illicit Exploitation and makes what follows speculative on our part, but we hope that our preliminary analysis provides guidance that may be useful for scholarly debate, judicial interpretation or legislative reform.

A. *The Chapeau Requirement of Seriousness*

To recall, the chapeau for the new crime stipulates that 'illicit exploitation of natural resources' means 'any of the following acts *if they are of a serious nature affecting the stability of a state, region or the Union*.'[25] The chapeau requirement acts as a qualification for all of the seven underlying crimes that make up the umbrella crime of Illicit Exploitation. In other words, the chapeau is an attempt at limiting these offences somehow, given the veritable sea of transactions (minor and grave) it would capture without an initial threshold of this sort. Troublingly, though, the meaning of the terms 'serious nature' and 'affecting the stability' remain entirely without further definition, requiring that courts develop their own understandings in much the same ways as modern

[22] See supra note 1, for the text of the provision.

[23] See Art. 46C of The Protocol, which stipulates that '[c]orporate intention to commit an offense may be established by proof that it was the policy of the corporation to do the act which constituted the offense', where a 'policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.' Corporate knowledge on the other hand 'may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation [. . .] even though the relevant information is divided between corporate personnel.'

[24] Art. 46B on individual criminal responsibility does not set out clear *mens rea* requirements.

[25] Emphasis added.

understandings of crimes against humanity have emerged over the past decades. In what follows, we make a first attempt at plotting several ways of interpreting the chapeau requirement in ways that balance the desire for this offence to address the heart of the problem of Illicit Exploitation without casting such a broad net that the offence is unacceptably over-inclusive.

We take the terms 'affecting the stability of a state, region or the Union' and 'serious nature' as implying separate tests, so deal with each in turn. With respect to the former, it strikes us that a variety of different illicit resource transactions might 'affect the stability of a state, region or the Union' in different ways. Clearly, transactions that have an important impact on the advent or maintenance of warfare affect stability in clear terms. The illicit harvesting of timber in Liberia's civil war as well as the exploitation of Congolese coltan at different points in 'Africa's First World War' had this effect, and to employ an example from outside Africa, the illegal exploitation of Kuwaiti oil by Iraq in 1991 was clearly a factor that affected the stability of the state and region. In each of these scenarios, the transactions had negative impacts on stability in that they produced or sustained war. We see no particular reason, however, to view stability as coterminous with warfare. The term 'stability' might possibility extend to other scenarios, where illicit resource transactions produce political or health crises, major displacement, severe environmental damage or otherwise have serious impacts on the safety of the general population. The difficulty is that without defining the term 'stability,' it is hard to discern whether any of these factors short of warfare will satisfy the chapeau for the crime. We would therefore recommend to reflect upon the scope of the term stability in light of the purpose of the provision. A broad understanding of this term may enhance the possibilities for the Court to play a meaningful role in addressing acts of natural resources exploitation that have serious repercussions for human beings or the environment outside situations of armed conflict or generalized violence.

Unfortunately, the requirement that the illicit transaction be of a 'serious nature' is not markedly clearer either. The illicit trade in diamonds incontestability affected the stability of Angola and the Great Lakes Region over several decades up until the early 1990s, so individuals who were engaged in illicit transactions of a 'serious nature' within the Angolan diamond trade might conceivably be captured by the language in the chapeau.[26] But which transactions are of a serious nature? Here we see three options:

[26] Although the parallel is not entirely direct, this interpretation of "a serious nature affecting the stability of a state, region or the Union" operates in a manner similar to "a widespread or systematic attack on a civilian population" in the chapeau of Crimes Against Humanity.

First, one might define 'seriousness' is causal terms, eliminating actors who were making overdetermined causes to the state of instability.[27] If the defendant was one of very many low-level purchasers of illicit conflict diamonds in Angola, their contribution is less 'serious' than that of actors whose actions were causally necessary for the state of affairs. On this interpretation of seriousness, this offence would be limited to politicians, military leaders, businesspeople and companies that made an important difference to illicit resource markets that destabilized the political system. On this reading, even those who exploited a great deal of illicit resources would not be captured by the offence if they were fungible for a set of other actors who would have done similarly if they had not, emulating the focus on 'those most responsible' in other contexts.

Second, seriousness in this context could mean scale: an individual or corporation involved in the extensive acquisition of illicit Angolan diamonds might undertake acts 'of a serious nature affecting the stability of a state, region or the Union.' This interpretation would exclude single, minor and isolated acts of illicit exploitation, even if they did make some contribution to the terrible state of instability in the region at the time, since these acts would in themselves not be sufficiently serious. Of course, scale itself requires a threshold determination which is sometimes difficult to plot. Does one tally up the entire quantum of diamonds exploited in Angola during the period, ascertain the defendant's relative contribution, and assert jurisdiction if that amount is more than five, ten or twenty-five percent of the whole?

Third, one could interpret 'serious nature' in symbolic terms. If a bank was directly involved in the illicit exploitation of Angolan diamonds, and the role of banks in sustaining illicit resource transactions had never been exposed in Angola or elsewhere, one might consider the responsibility of bankers and their corporations as serious for symbolic reasons. This interpretation is broadest because it would hold regardless of the quantity of the resources illegally acquired or the causal significance of the bank's contribution to the overall state of political stability the trade in diamonds produced for Angola in our hypothetical. Therefore, this option provides prosecutors then courts with considerable discretion.

We express no definitive preference for any one of these interpretative options, although allowing the court an ability to pursue important symbolic

A defendant him or herself need not personally play an important role in the attack; his or her individual crimes must only be adequately connected to it. See ICTY, *Prosecutor v. Tadić*, No. IT-94–1-T, Trial Chamber Judgment of 7 May 1997, para. 649, referred to in C.K. Hall and K. Ambos, 'Article 7', in O. Triffterer and K. Ambos, The Rome Statute of the International Criminal Court: A Commentary (Hart, Third edition 2016), at 165–6.

[27] James G. Stewart, *Overdetermined Atrocities*, 10 *Journal of International Criminal Justice* 1189–218 (2012).

cases might allow for a nuanced approach to addressing the illegal exploitation of natural resources provided some of the shortcomings with this provision can be addressed.

B. *Acts that Constitute the International Crime*

This section analyses the seven sub-offences included in Article 28L *Bis*, which are enumerated beneath the chapeau requirement we have just addressed. Structurally, what counts as 'Illicit' for the purposes of Article 28L *Bis* results either from the conclusion of an agreement (sub-offences a-d) or from the actual exploitation itself (sub-offences e-g). Interestingly however, the provision does not define 'natural resources' or 'exploitation', two concepts that are crucial to defining the scope of the provision. For the purposes of this analysis, we propose to follow the definitions included in the 2006 Protocol Against the Illegal Exploitation of Natural Resources, adopted by the International Conference on the Great Lakes Region. Arguably, these definitions are authoritative, since the text of Article 28L *Bis* has been taken directly from Article 12 of this Protocol. The 2006 Protocol defines 'natural resources' as 'substances provided by nature that are useful to human beings and have an economic value [. . .]. The major types of natural resources include minerals, flora and fauna, fishery products and water'.[28] Even though a focus on the economic value and utility of natural resources would be restrictive in other contexts, this definition is appropriate for the purposes of Article 28L *Bis*, which is exclusively concerned with acts of natural resources exploitation that have an economic dimension. 'Exploitation' for its part is defined as 'any exploration, development, acquisition, and disposition of natural resources', thereby encompassing the whole array of activities from mining to marketing.[29] The extent to which this definition also encompasses acquisition of natural resources further up the supply chain is not entirely clear, yet it is sufficiently open to accommodate forms of indirect appropriation. We will now proceed to addressing each sub-offence in turn.

1. Concluding an Agreement to Exploit Resources, in Violation of the Principle of Peoples' Sovereignty over Their Natural Resources

The first sub-offence of illicit natural resources exploitation as included in Article 28L *Bis* refers to the conclusion of an agreement to exploit natural

[28] ICGLR Protocol Against the Illegal Exploitation of Natural Resources, 30 November 2006, Art. 1.
[29] Ibid.

resources 'in violation of the principle of peoples' sovereignty over their natural resources'. There are two issues that are important to note from the outset. First, the scope of this provision, which is limited to concluding agreements, implies that the relevant indices for the crime can be found in the terms of the agreement or the circumstances surrounding its conclusion. Thus, the provision would not cover the exploitation of natural resources in contravention of the principle of sovereignty over natural resources without an agreement, which would be covered by other aspects of the offence.[30] Second, the interpretation of the term 'peoples' is of crucial importance for the scope and addressees of the sub-offence. After all, the term 'peoples' can refer either to the population of a State, to specific groups in a State or to the State itself.[31] This section addresses both these issues.

The principle of peoples' sovereignty over natural resources can be traced back to the General Assembly resolutions adopted in the 1950s and 1960s formulating a principle of permanent sovereignty over natural resources (PSNR) as well as to Article 1(2) of the 1966 Human Rights Covenants.[32] However, the principal point of reference for the interpretation of peoples' sovereignty in Article 28L *Bis* of The Protocol would logically be Article 21 of the African Charter on Human and Peoples' Rights, which is subject to the jurisdiction of the African Court. This provision determines that 'All peoples shall freely dispose of their wealth and natural resources. This right shall be

[30] These instances are covered by Art. 28L *Bis*(e), which criminalizes the exploitation of natural resources without any agreement with the State concerned.

[31] J. Crawford, 'The Right of Self-Determination in International Law', in Alston, P. (ed.), *Peoples' Rights*, Academy of European Law (Oxford University Press 2001), at 7–67; and R.N. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights', *American Journal of International Law*, Vol. 82, No. 1 (1988), at 80–101.

[32] See UN General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, 14 December 1962; 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, Annex to UNGA Resolution 2200 (XXI) of 16 December 1966, 993 *UNTS* 3; 1966 International Covenant on Civil and Political Rights (ICCPR), New York, Annex 2 to UNGA Resolution 2200 (XXI) of 16 December 1966, 999 *UNTS* 171. The principle of permanent sovereignty over natural resources has acquired a firm status in international law. It has been recognized by the International Court of Justice as having customary international law status. See e.g. International Court of Justice, Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Judgment of 19 December 2005, *I.C.J. Reports 2005*, para. 244. It has also been inserted in several treaties, especially in the field of international environmental law. For a detailed examination of the principle of permanent sovereignty over natural resources, see N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997); D. Rosenberg, *Le Principe de Souveraineté des Etats sur Leurs Ressources Naturelles* (Paris, France: Librairie Générale de Droit et de Jurisprudence, 1983); G. Elian, *The Principle of Sovereignty over Natural Resources* (The Netherlands: Sijthoff & Noordhoff, 1979).

exercised in the exclusive interest of the people. In no case shall a people be deprived of it'. Article 21 of the African Charter has proven to be very valuable for the protection of minority rights,[33] but has also been invoked by States in their relationship with other States.[34] Therefore, the right of peoples to freely dispose of their natural resources accrues both to States themselves and to groups within a State. The ICGLR Protocol on Illegal Exploitation of Natural Resources defines this relationship more clearly. Article 3 determines that 'Member States shall freely dispose of their natural resources. This right shall be exercised in the exclusive interest of the people. In no case, the populations of a State shall be deprived of it'.[35] We here discuss some of the principal scenarios that come within the reach of the sub-offence when it is construed in this manner.

First, the sub-offence would potentially cover agreements concluded between armed groups and (foreign) companies that violate the State's right to freely dispose of its natural resources. There are numerous examples in the recent history of Africa concerning armed groups granting concessions to companies to operate mines in territories under their control. For example, the Panel of Experts on Angola revealed in a key report that before the imposition of the diamond sanctions on Angola in 1998, the opposition group UNITA had auctioned off mining permits to foreign companies for the exploitation of mines within UNITA-controlled territory. In addition, the Panel found that UNITA had granted various diamond buyers a licence to operate within the areas under its control in exchange for a commission.[36] If one considers the principle of sovereignty over natural resources as an attribute of State sovereignty, granting an exclusive authority to the government to exploit natural resources on behalf of the population, these activities would comfortably fit within the current sub-offence. If, on the other hand, one

[33] See references to relevant case law below. For a thorough examination of the notion of 'peoples' rights within the African Charter regime, see also R.N. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights', Vol. 82, No. 1 *American Journal of International Law* (1988) 80–101.

[34] In the Congo-Uganda case, the ICJ based its decision on reparations on Art. 21(2) of the African Charter, which determines that '[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation'. International Court of Justice, Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Judgment of 19 December 2005, *I.C.J. Reports 2005*, para. 245.

[35] International Conference on the Great Lakes Region, Protocol Against the Illegal Exploitation of Natural Resources, 30 November 2006, Art. 3.

[36] See the Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA, *UN Doc. S/2000/203*, 10 March 2000, paras. 78 and 79.

adopts a more human rights oriented approach, the ultimate question would be whether the armed group concerned, in this case UNITA, would be considered a representative of the people.

Second, this sub-offence might also cover resource agreements concluded by foreign States or their nationals over resource endowments. In the *Armed Activities* case before the International Court of Justice, for instance, the DRC contended that Uganda had violated the DRC's sovereignty over its natural resources through illegal exploitation of these resources, including by allowing Congolese rebel groups to trade with Ugandan businesses.[37] Although the Court concluded that permanent sovereignty over natural resources 'is a principle of customary international law', it also found that there was nothing suggesting that this principle is 'applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State.'[38] Nonetheless, as Judge Koroma cogently argued in a separate opinion in that case, 'these rights and interests [permanent sovereignty over natural resources] remain in effect at all times, including during armed conflict and occupation.'[39] Thus, the factual allegations the ICJ addressed in the *DRC v. Uganda* case might also satisfy this limb of the offence of Illicit Exploitation.

Third, agreements by state officials to the detriment of the State's population might also fall within the purview of the sub-offence. Africa has suffered several kleptocratic rulers who divert natural resources revenues from the national budget for their own personal gain through strong man politics and patronage networks.[40] Relevant examples include Sese Seko Mobutu, the former president of Zaïre, currently the DR Congo, and Charles Taylor, the former president of Liberia, who were both accused of using the country's natural resources for their own personal enrichment.[41] These activities – at least in as far as they concern the underlying agreements concluded with companies allowing for the diversion of revenues – would likely be captured

[37] See International Court of Justice, Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Judgment of 19 December 2005, *I.C.J. Reports 2005*, para. 226–9.

[38] Ibid., para. 244.

[39] Ibid., Declaration of Judge Koroma, para. 11.

[40] W. Reno, *Warfare in Independent Africa* (Cambridge, UK: Cambridge University Press 2011).

[41] See e.g. for the DR Congo, Office of the High Commissioner for Human Rights, Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003 (2010), p. 351; and for Liberia, Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia, *UN Doc. S/2001/1015*, paras. 309–50.

by the novel crime of illicit exploitation of natural resources as formulated in Article 28L *Bis*(a) of The Protocol,[42] since the 'peoples' sovereignty over natural resources was violated by their political leaders. In this sense, the offence is possibly a backdoor solution for the failure to criminalize kleptocracy itself.[43]

Fourth, the sub-offence might also be relevant to concession agreements that violate the rights of indigenous peoples over land. Even though there is still considerable controversy about the precise scope of the rights of indigenous peoples over their lands and the natural resources found therein,[44] there is growing recognition that these peoples' special relationship with their lands requires some form of protection, which would impact on States' right to regulate natural resources exploitation. The Ogoni case brought before the African Commission provides a relevant example. The Commission considered in this case that the failure of the Nigerian government to regulate and monitor the activities of private actors benefitting from concessions on the land inhabited by the Ogoni people constituted a violation of the State's obligation to act in the interest of the people when exercising its right to freely dispose of its natural resources, notably because of the detrimental effects of the corporate activities on the livelihood of the people of Ogoniland.[45] There is also a growing body of case law by other human rights bodies dealing with

[42] Concluding agreements for personal enrichment would also be partly captured by Art. 28L *Bis* (c), dealing with corrupt practices. However, this provision is limited to using corruption as a means to conclude contracts, which, potentially, leaves out advantages that are derived from the contract itself. This issue is examined under (c).

[43] S. B. Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, SSRN Scholarly Paper ID 934470 (Social Science Research Network). However, note that Art. 46A *Bis* of The Protocol determines that 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'.

[44] See A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, (Cambridge University Press 2007); and N.J. Schrijver, 'Unravelling State Sovereignty? The Controversy on the Right of Indigenous Peoples to Permanent Sovereignty over their Natural Wealth and Resources', in Boerefijn, I. & Goldschmidt, J. (ed.), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Cambridge, UK: Intersentia 2008), at 85–98. See also the final report of the Special Rapporteur of the Commission on Human Rights, Mrs. Erica Daes, on Indigenous peoples' permanent sovereignty over natural resources, *UN Doc. E/CN.4/Sub.2/2004/30* of 13 July 2004 and its addendum, *UN Doc. E/CN.4/Sub.2/2004/30/Add.1* of 12 July 2004.

[45] Decision of the African Commission on Human & Peoples' Rights Regarding Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, *ACHPR/COMM/A044/1*, paras. 55–8. The relevant provision is Art. 21 of the African Charter on Human and Peoples' Rights.

the rights of indigenous peoples over land in relation to concessions concluded by governments, indicating that there is an obligation for States to consult indigenous peoples on natural resources projects.[46]

Notwithstanding these developments, the question can be raised whether the actual conclusion of a concession agreement between the State and a (foreign) company violates the sovereignty of indigenous peoples over their natural resources. Most of the relevant cases deal with States' obligations in relation to secondary rights, for example to obtain prior and informed consent by indigenous peoples or, as in the Ogoni case, to regulate the environmental and social aspects of natural resources exploitation. In addition, whether violations of the rights of indigenous peoples would reach the threshold established in the chapeau is debatable. Arguably, instances in which agreements affecting the rights of indigenous peoples would have an actual or potential impact on the stability of the State itself would be exceptional. For these reasons, it is uncertain if and to what extent the sub-offence would cover agreements concluded by the State to the detriment of indigenous peoples.

2. Concluding with State Authorities an Agreement to Exploit Natural Resources, in Violation of the Legal and Regulatory Procedures of the State Concerned

The second sub-offence of 'illicit exploitation of natural resources' aims to criminalize the conclusion of contracts with state officials in violation of procedures set out in relevant national legislation. Some may argue that this provision is unduly onerous. Whether one should hold an investor criminally responsible for concluding an agreement contrary to domestic law, when this agreement is concluded with state authorities as the guardians of their own laws and regulations is disputable. This concern is all the more valid if one considers that the provision is formulated broadly. It refers generally to domestic 'legal and regulatory procedures'. Does this mean that any violation of these procedures would be criminal for the purposes of this provision? Or would the provision only apply to laws and regulations that aim to protect important values of the host State? In addition, should the African Court be allowed to scrutinize the policies of sovereign States, which may have good reasons to exempt a project from its regulatory procedures? Notwithstanding

[46] See e.g. the Inter-American Court of Human Rights, *Case of the Saramaka People v. Surinam*, Judgment of 28 November 2007; Inter-American Court of Human Rights, *The Kichwa people of Sarayaku v. Ecuador*, Judgment of 26 July 2012; Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, 15 November 2000.

the fact that the chapeau can play an important role in limiting the instances to which the sub-offence applies, there is a need to define the elements of the current sub-offence more clearly. Current case law by international investment tribunals regarding the legality of investments may be a helpful reference in this regard,[47] but mostly the issue is one that warrants far greater thought. The principal question would be what type of acts the provision aims to target: would it be confined to situations where investors collude with State authorities acting *ultra vires* or would it also encompass other situations? In the following, two examples will be provided to demonstrate the types of situations that are potentially covered by the sub-offence.

A Nigerian case provides a first relevant example. This case involved a contract concluded by Shell and Eni with the Nigerian government to exploit a major oil field off the coast of Nigeria. The Nigerian government allegedly acted as a middle-man for the Nigerian company Malabu, said to be owned by the former oil minister Dan Etete.[48] After the conclusion of the deal, the money was allegedly transferred to Malabu and diverted to Etete's personal bank account.[49] In 2014, the Nigerian House of Representatives called on the Nigerian government to cancel the deal, describing it as 'contrary to the laws of Nigeria'.[50] If Shell and Eni knew that the Nigerian government acted only as a middle-man,[51] this incident could arguably come within the purview of the current sub-offence, although we reiterate the complexities of discerning whether particular transactions meet the chapeau threshold and again highlight the absence of any indications about the requisite mental elements for these crimes.

Liberia offers a slight variation of the same offence. A 2013 audit report commissioned by the staff of the Liberian Extractive Industries Transparency

[47] See R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, Second edition, 2012), at 92–7 for examples of cases where arbitral tribunals denied jurisdiction on these grounds.

[48] See Global Witness, Shell and Eni's Misadventures in Nigeria: Shell and Eni at risk of losing enormous oil block acquired in corrupt deal, November 2015, available online at www.globalwitness.org/en/campaigns/oil-gas-and-mining/shell-and-enis-misadventures-nigeria/ (visited 12 May 2016).

[49] See Global Witness, Shell and Eni's Misadventures in Nigeria: Shell and Eni at risk of losing enormous oil block acquired in corrupt deal, November 2015, available online at www.globalwitness.org/en/campaigns/oil-gas-and-mining/shell-and-enis-misadventures-nigeria/ (visited 12 May 2016).

[50] Ibid., p. 3.

[51] This is currently being investigated in Nigeria and Italy, with the cooperation of the Dutch authorities. See E. Sylvers and S. Kent, 'Shell Under Investigation in Italy over Nigerian Oil Deal: Anglo-Dutch Oil Giant Drawn into Corruption Probe that has Dogged Italy's Eni', *The Wall Street Journal* 30 March 2016.

Initiative (LEITI) to investigate 68 contracts concluded by the Liberian authorities between 2009 and 2011 determined that 90 per cent of these contracts violated the provisions of relevant mining and forestry laws.[52] Although it is not entirely clear whether the Liberian cases would in themselves meet the threshold set by the chapeau of Art. 28L*Bis*, it is important to consider these in light of Liberia's recent history. It was only a decade ago that major scandals in the Liberian mining sector were considered to constitute such a threat to the Liberian peace process that international donors initiated an intrusive yet fairly successful programme, the Governance and Economic Management Assistance Programme (GEMAP), to improve public administration, focusing *inter alia* on concession procedures.[53] With the caveats we mention throughout, these too might violate this limb of the new offence enshrined within The Protocol.

3. Concluding an Agreement to Exploit Natural Resources through Corrupt Practices

This sub-offence seeks to criminalize a widespread phenomenon, which severely diminishes the chances that African peoples will benefit from their natural resource endowments. Corruption can take several forms in relation to natural resources. In addition to the diversion of revenues obtained from exploration and exploitation contracts, another commonly used method is the undervaluation of public natural resources deposits. The 2013 Africa Progress Report concluded, for example, that assets in the mining industry in the DR Congo were sold on average at one-sixth of their estimated value.[54] Even though the Panel focused on the undervaluation itself and did not investigate allegations of corruption, it did signal that corruption would be one of the factors explaining the undervaluation.[55] Significantly, this sub-offence would

[52] Final Report for the Liberia Extractive Transparency Initiative (LEITI) Post Award Process Audit, conducted by Moore Stephens LLP, May 2013, available online at www.leiti.org.lr/uploads/2/1/5/6/21569928/leiti_post_award_process_audit_final_report.pdf (visited on 24 May 2016).

[53] See e.g. R. Dwan and L. Bailey, *Liberia's Governance and Economic Management Assistance Programme (GEMAP)*, A joint review by the Department of Peacekeeping Operations' Peacekeeping Best Practices Section and the World Bank's Fragile States Group, May 2006.

[54] Africa Progress Panel, *Equity in Extractives: Stewarding Africa's Natural Resources for All*, Africa Progress Report 2013, at 56. The Panel based its findings on five deals concluded between 2010 and 2012.

[55] Ibid. See also Global Witness, *Digging in Corruption: Fraud, Abuse and Exploitation in Katanga's Copper and Cobalt Mines*, July 2006, at 35–8 for earlier examples.

criminalize corruption in these circumstances, again under the umbrella of Illicit Exploitation.

For definitional purposes, the current sub-offence should be read in conjunction with Article 28I of The Protocol, which criminalizes acts of corruption 'if they are of a serious nature affecting the stability of a state, region or the Union'. The term 'corruption' in Article 28I is defined so as to include *inter alia* the offering or acceptance of financial benefits or other advantages, by or to public officials, persons directing or working for private entities or other persons in a position to exert improper influence on the decision-making process, whether for their own advantage or for the advantage of third persons. The provision covers acts of bribery, embezzlement, illicit enrichment and concealment. It thereby largely follows the principal categories of corruption established in the 2004 UN Convention Against Corruption and complements its provisions on domestic criminalization.[56] Borrowing this provision from elsewhere in The Protocol is therefore very appropriate in interpreting this limb of Illicit Expropriation.

If this reading is accurate, however, this third limb of the definition of illicit exploitation of natural resources is somewhat duplicative of acts criminalized elsewhere in The Protocol. In other words, what would be the added value of including a separate sub-offence under the heading 'illicit exploitation of natural resources' allowing for the prosecution of corrupt practices as a means to conclude an agreement to exploit natural resources if these corrupt practices can also be prosecuted as acts of corruption in their own right? From this perspective, the inclusion of the current sub-offence in The Protocol predominantly has symbolic value, in the sense that it emphasizes that all forms of financial or other incentives used to persuade a person in a position of power to conclude a contract are criminal.

4. Concluding an Agreement to Exploit Natural Resources That Is Clearly One-Sided

This sub-offence is worded very vaguely and can only be properly understood with reference to the French authentic version of the text, which criminalizes

[56] It should however be noted that in some respects The Protocol adopts a narrower definition of corruption than the UN Convention. The Protocol, for example, restricts embezzlement to the redirecting of State funds by public officials, thereby using a narrower construction than Art. 17 of the UN Convention, which applies to both public and private funds entrusted to public officials. Also, The Protocol does not contain an equivalent to Art. 22 of the UN Convention, regarding embezzlement by persons directing or working for private companies of funds or any other thing of value entrusted to them.

'la conclusion par fraude ou par tromperie d'un contrat d'exploitation des ressources naturelles'.[57] According to the French text, the sub-offence would apply to the conclusion of contracts by means of fraud or deception. We recommend following this definition, since it is much more precise than the reference to agreements that are 'clearly one-sided' in the English text. Upon this reading of the text, the current sub-offence would apply to cases of intention to deceive (state) authorities or business partners when negotiating contracts. This can relate, for example, to misrepresentation by the investor of its financial capabilities or concealment of the company's true ownership (shell companies), provided of course that these forms of misrepresentation are of such a serious nature as to actually or potentially affect national stability. State officials may also be liable for the offence if they undertake similar practices.

Other examples would relate to tax avoidance schemes that would deprive the host state of substantial tax revenues.[58] One way is the deliberate mispricing of assets in cross-border intra-company transactions.[59] This practice can be avoided through the inclusion of express provisions in investment contracts concluded between the host State and the investor stipulating that transfer pricing should be based on the arm's length principle, i.e. that it should reflect actual market value.[60] Arguably, the prosecution of these practices would send a strong signal to companies that they should refrain from creating loopholes in the system that produce grossly inequitable agreements in developing countries. Nevertheless, whether this issue fits squarely within the ambit of this particular offence is a question that courts and scholars will have to address in greater depth in the future.

5. Exploiting Natural Resources without Any Agreement with the State Concerned

Read in conjunction with the chapeau, this limb is by far the most appropriate aspect of Illicit Exploitation for addressing the trade in 'conflict resources.'

[57] See Protocole Portant Amendements au Protocole Portant Statut de la Cour Africaine de Justice et des Droits de l'Homme, *African Journal of International Criminal Justice* (1) 1 (2014), at 185.

[58] See for examples Environmental Law Alliance Worldwide, *Natural Resource Contracts: A Practical Guide*, November 2013, available online at www.elaw.org/system/files/Natural_Resource_Contracts_Guide.pdf (visited on 26 May 2016), at 29–33.

[59] Africa Progress Panel, *Equity in Extractives: Stewarding Africa's Natural Resources for All*, Africa Progress Report 2013, at 65. See also the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010 (OECD Publishing 2010), DOI: http://dx.doi.org/10.1787/tpg-2010-en.

[60] See Ibid.

The practice is often dependent on military and political elites who arrange the exploitation and benefit from its proceeds. In addition, businesspeople and corporations often play an important role in perpetuating these practices, either by procuring natural resources from armed groups or by exploiting natural resources under the control of armed groups.[61] Article 28L *Bis*(e) could therefore provide a legal basis for prosecuting those involved in the exploitation of conflict resources, whether this concerns senior members of armed groups, corporations or their representatives.

However, there are important reasons to reconsider the formulation of this limb, since it seems to portray the State as the only authority entitled to alienate natural resources. We recommend interpreting the reference to 'agreement with the State' as requiring permission from an entity which has the authority to dispose of the natural resources concerned. There are two important reasons for opting for this interpretation. First, an exclusive focus on the State as the only authority entitled to conclude agreements over the exploitation of natural resources would have the effect of criminalizing companies for doing business with private concessionaires or mine owners possessing a valid legal title. Title in natural resources is regulated differently from one jurisdiction to the next.[62] Even in instances where States are the owners of natural resources within their territory, they are perfectly capable of passing this title on to private owners. Clearly, the drafters of this provision never meant to criminalize cases where a businessperson, for instance, purchases natural resources from a company that enjoyed title in those resources, even though this is what the language of the provision suggests.

In addition, especially in the midst of a full-blown internal armed conflict, it is not always clear which entity is entitled to formally represent the State and therefore has the right to dispose of its natural resources. Even though there is

[61] For examples of corporate involvement in the exploitation of conflict resources, see e.g. the Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA, *UN Doc. S/2000/203*, 10 March 2000, paras. 78, 79, 87–93; the Final Report of the Monitoring Group on Angola, *UN Doc. S/2000/1225*, in particular, paras. 154–61; and the Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone, *UN Doc. S/2000/1195*, December 2000.

[62] Of the roughly three models governing natural resources ownership across national jurisdictions, only one (the concession system) vests ownership of natural resources in the state. In this system, it is the State that has the exclusive authority to grant rights to search for, extract, process, and sell these resources. Alternative systems are the claims system, which confers ownership of minerals on anyone who discovers the deposit, subject only to certain formalities; and the accession system, which vests ownership in natural resources to the owner of the land where the resources are found. See J.G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (New York: Open Society Justice Initiative Publication 2011), at 40.

a presumption in international law in favour of the incumbent government,[63] there may be circumstances in which other entities have competing or even better claims. Arguably, a right to exploit natural resources can accrue to armed groups who are in effective control of parts of the State territory, as long as the revenues obtained from the exploitation of natural resources are used for the benefit of the local population.[64] By contrast, there may be circumstances in which the incumbent government can no longer be deemed to be entitled to dispose of the State's natural resources. To illustrate, the UN Security Council imposed an asset freeze on the Libyan authorities in 2011, including on Libya's national oil company as a 'potential source of funding for [Gaddafi's] regime'.[65] In light of these shortcomings, we recommend amending the provision by replacing 'States' with 'owners' or for courts to interpret the provision in this fashion.

6. Exploiting Natural Resources without Complying with Norms Relating to the Protection of the Environment and the Security of the People and the Staff

This sixth sub-offence is a significant departure from the preceding sub-offences, in the sense that it is directly concerned with the protection of values other than those related to ownership. Whereas earlier aspects of Illicit Exploitation approximated to theft, this sub-offence instead focuses on the effects of resource exploitation on the environment and human beings. A strict reading of the provision would confine the sub-offence to instances that satisfy

[63] See H. Lauterpacht, Recognition in International Law, (first published in 1947; 2013 paperback edition, Cambridge University Press), at 94 in relation to the recognition of governments more generally; and D.A. Dam-de Jong, 'Armed Opposition Groups and the Right to Exercise Control over Public Natural Resources: A Legal Analysis of the Cases of Libya and Syria', *Netherlands International Law Review* 62(1), at 3–24 in relation to natural resources exploitation.

[64] See W. Reno, 'CSR and Corporate Engagement with Parties to Armed Conflict', in C. Walker-Said and J.D. Kelly, *Corporate Social Responsibility?: Human Rights in the New Global Economy* (Chicago, US: The University of Chicago Press Books 2015), at 259–77; J.G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (Open Society Justice Initiative Publication 2011), at 58–62; and D.A. Dam-de Jong, 'Armed Opposition Groups and the Right to Exercise Control over Public Natural Resources: A Legal Analysis of the Cases of Libya and Syria', *Netherlands International Law Review* 62(1), at 3–24.

[65] See UN Security Council Resolution 1973 (2011), 17 March 2011, para. 19 and Annex II. On 24 June 2011, the Sanctions Committee extended the assets freeze to a subsidiary of the Libyan National Oil Corporation. See in this regard the following press release: 'Security Council Committee Concerning Libya Adds Names of Individuals and Entities to Its Travel Ban and Assets Freeze List', *UN Doc. SC/10302*, 28 June 2011.

both elements: the release of toxic substances, for example, will harm the environment and will also affect the security of the people and the staff. There are, however, also instances where either the environment is harmed or the security of the people and/or the staff are endangered. We presume that these instances are also covered by the sub-offence, notwithstanding the use of the word 'and' in The Protocol.

The first issue that this limb may address is large-scale environmental pollution caused by the mining industry, provided this would affect the stability of the State. In this sense, it also aligns with current discussions regarding the introduction of environmental crimes in international criminal law.[66] Environmental pollution would particularly affect the stability of the State if it would harm vulnerable communities, who are dependent on the environment for their livelihood, or when the pollution would cause serious diseases amongst the population, as these effects would enhance grievances amongst the population and thereby affect stability negatively. One of the most well-known examples reaching this threshold is the environmental pollution caused by oil spills in the Nigerian Niger delta, which have seriously contaminated the fragile wetlands and their rich biodiversity, depriving the local population of its basic means of subsistence and exposing them to major health risks.[67] Importantly, this pollution also had serious repercussions for the security in the Niger delta.[68]

The provision may also address concerns arising from security measures to protect the operations of extractive companies, especially when these operations are carried out in conflict-prone or conflict-torn regions. Mining companies often use security forces to protect their interests, including State forces and private security firms. Sometimes clashes occur between those security

[66] S. Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court* (Intersentia 2015); and S. Jodoin and M. Cordonier Segger, *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge, UK: Cambridge University Press 2013).

[67] See UNEP, *Environmental Assessment of Ogoniland* (2011), available online at http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf (visited 1 June 2016).

[68] The environmental pollution caused by the oil spills has been the subject of several legal procedures, including before the African Commission against the Nigerian government and before Dutch courts against Shell. See the Decision of the African Commission on Human & Peoples' Rights Regarding Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, *ACHPR/COMM/A044/1*; District Court The Hague, Oguru-Efanga/Shell, Judgment of 30 January 2013, ECLI:NL:RBSGR:2013:BY9850; District Court The Hague, Dooh/Shell, Judgment of 30 January 2013, ECLI:NL:RBSGR:2013:BY9854; and District Court, Akpan/Shell, Judgment of The Hague 30 January 2013, ECLI:NL:RBSGR:2013:BY9854. The case is currently in appeal. In addition, Shell settled a case out of court that was filed before the English court.

firms and the local population, especially in reaction to popular protests against the company's operations. By way of example, clashes allegedly occurred in Tanzania in 2011, when local villagers tried to enter a gold mine operated by a British company in protest to their operations. The security forces were accused of having used excessive violence against the population, including killings, severe beatings and rape. The subsequent lawsuit filed by the villagers in the UK court was settled out of court in early 2015.[69] In addition to incidents involving local communities, companies have also been accused of using excessive force against their own staff, sometimes in cooperation with local or State authorities. A well-known example is the incident at the Marikana platinum mine in South Africa in August 2002, when 34 workers who were striking to improve their working conditions were allegedly killed by the police.[70] This incident led to a series of strikes throughout the country, potentially bringing the 'Marikana massacre' within the ambit of the chapeau. These are just some examples of violence used by companies or State authorities against local communities and staff, which could be addressed by the current provision, provided one adheres to a broader reading of the sub-offence.

Lastly, the sub-offence could cover serious violations of fundamental safety and health norms, such as exposing employees to dangerous substances or exploiting natural resources without taking any precautions to prevent serious accidents, such as explosions. Here again, it is unclear what violations of these norms would reach the threshold set by the chapeau. Would the explosion of a single mine affect the stability of a State, if it is symptomatic of a broader pattern of violation of safety standards? To draw on a famous example from outside both the resource sector and Africa, in 1997, the accounting firm Ernst & Young completed an audit of a shoe manufacturing plant in Vietnam for Nike. The report indicated that 'there is no adequate water reserved for comfort use of workers', dust and toxic fumes in parts of the plant 'exceeded the standard from 6 to 177 times', and 'there are 128 employees (77.57%) getting respiratory disease and 7 employees (4.24%) getting heart disease.'[71] With the caveats about the chapeau requirement and the need to prove mental elements that are not defined in The Protocol, a repetition of similar

[69] Business & Human Rights Resource Centre, African Barrick Gold lawsuit (re. Tanzania), available online at http://business-humanrights.org/en/african-barrick-gold-lawsuit-re-tanzania (visited on 2 June 2016).

[70] See S. Adelman, 'The Marikana Massacre, the Rule of Law and South Africa's Violent Democracy', (2) *Hague Journal on the Rule of Law* 7 (2015) 243–62.

[71] Ernst & Young Environmental and Labor Practice Audit of the Tae Kwang Vina Industrial Ltd. Co., Vietnam, 13 January 1997. Available online at www.corpwatch.org/article.php?id=2488&printsafe=1. Last visited 7 December 2016.

practices in the resource sector in Africa might violate this limb of The Protocol's definition of Illicit Exploitation.

A final issue that needs to be clarified relates to the term 'norms'. The reference to 'norms' in the provision is open-ended and begs the question of what types of norms would be covered. Would these include soft law norms, such as ILO standards, ISO standards for environmental protection, the OECD Guidelines for Multinational Companies or the Voluntary Principles on Security and Human Rights? Since the provision addresses the responsibility of private companies in addition to state actors, it may be assumed that norms and standards developed by non-binding instruments and national law would be the principal benchmarks against which to assess the legality of their behaviour. This does not have to be problematic from the perspective of legal certainty, as long as these instruments provide sufficiently detailed guidance to companies against which to assess their behaviour. However, on a more fundamental level, one may wonder if it is appropriate to elevate so-called 'voluntary' instruments to the level of binding norms by criminalizing the breach of their provisions.

7. Violating the Norms and Standards Established by the Relevant Natural Resource Certification Mechanism

This limb of the Illicit Exploitation offence criminalizes the violation of norms and standards set by natural resources certification mechanisms. Currently, there are two important resource certification mechanisms in place in Africa. These are the Kimberley Process Scheme for the Certification of Rough Diamonds (KPCS) and the ICGLR Regional Certification Mechanism for tin, tantalum, tungsten and gold (3TG). We briefly consider both of these certification schemes, highlighting the very significant implications that arise from the quick criminalization of regulatory regimes that were sometimes created for states, frequently intended as soft law, and seldom given the sort of precision that might ground criminal liability.

The KPCS requires States to adopt a system of internal controls designed to eliminate conflict diamonds from shipments of rough diamonds imported into or exported from their territory.[72] For this purpose, participants must designate Importing and Exporting Authorities, ensure that rough diamonds are imported and exported in tamper-proof containers, adopt appropriate legislation to implement and enforce the Certification Scheme, and collect, maintain and

[72] Kimberley Process Certification Scheme, available online at www.kimberleyprocess.com/en/kpcs-core-document (visited 10 May 2016), Sect. IV(a).

exchange official production, import and export data with other participants.[73] The KPCS constitutes soft law, formulating non-binding 'minimum requirements' for States to implement in their domestic systems. The sudden criminalization of violations of this scheme raises a series of important questions: (a) which aspects of the KPCS fall within the scope of the crime; (b) can non-state actors also violate the 'norms and standards' of the KPCS for the purpose of Article 28L *Bis*(g) of The Protocol even though the scheme addresses States exclusively;[74] and (c) have states fully understood that the ways in which violations of the KPCS were just transformed into supranational crimes?

The certification mechanism developed by the ICGLR is the second important regulatory scheme. This mechanism introduces a system of controls aimed at guaranteeing that minerals exported from the ICGLR are conflict-free.[75] The system encompasses certification for mines to attest that they are conflict-free and meet certain minimum social standards.[76] In addition, it introduces a chain of custody tracking system for minerals to prevent any sort of support to armed groups throughout the supply chain to the point of export and, lastly, it comprises the certification of mineral exports. This process is monitored by government officials and third party audits, while regional databases for the designated minerals seek to bring greater transparency in the mineral flows.[77] Contrary to the KPCS, the ICGRL certification mechanism does contain direct obligations for private actors, such as processors,

[73] Kimberley Process Certification Scheme, Sects. IV(b)–(f).

[74] If so, this sub-offense could cover some of the major issues which have hampered the implementation of the KPCS since its very establishment, notably the issuing of fraudulent certificates by state authorities allowing blood diamonds to enter the legal market See www.kimberleyprocess.com/en/enforcement (visited on 14 October 2016).

[75] 'Conflict-free' is defined as 'free from support for non-state armed groups or public or private security forces who: (a) "illegally control mine sites or otherwise control transportation routes, points where minerals are traded and upstream actors in the supply chain"; (b) "illegally tax or extort money or minerals at points of access to mine sites, along transportation routes or at points where minerals are traded"; and/or (c) "illegally tax or extort intermediaries, export companies or international traders'. See the ICGLR Regional Certification Mechanism (RCM) – Certification Manual, available online at www.oecd.org/investment/mne/49111368.pdf (visited 10 May 2016), at 4.

[76] These minimum standards seek to eliminate '"any forms of torture, cruel, inhuman and degrading treatment"; (ii) "any forms of forced or compulsory labour, which means work or service which is exacted from any person under the menace of penalty and for which said person has not offered himself voluntarily"; (iii) "the worst forms of child labour"; (iv) "other gross human rights violations and abuses such as widespread sexual violence"; and, (v) "war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide".' See the ICGLR Regional Certification Mechanism (RCM) – Certification Manual, at 4.

[77] See Ibid.

comptoirs, smelters and other exporting entities, the latter defined as a 'company, cooperative, individual or other entity that exports Designated Minerals from a Member State'.[78] Relevant obligations include an obligation to refrain from purchasing minerals from uncertified mines and an obligation to ensure that other actors upstream in the supply chain, i.e. those actors from which the minerals are purchased, act in compliance with the relevant standards set by the mechanism.[79] Since these obligations are numerous, sometimes procedural and not explicitly specified, we believe that this sub-offence is overly broad and requires clarification.

More generally, it is questionable whether the violation of 'norms and standards' that are part of soft law should be recognized as an international crime at all. Even as far as these norms and standards have been included in domestic legislation, the transformation of these non-criminal 'norms and standards' into a supranational criminal offence may strike some as controversial if not harsh. The problem with the norms and standards included in certification mechanisms is that, apart from having been drafted as best practices in the industry rather than criminal offences, they are continually subject to change. Both shortcomings are problematic from the perspective of providing the legal certainty required for a serious criminal offence. Thus, reformulating this sub-offence as a separate crime, moving away from 'norms and standards', and focusing on the issue of due diligence obligations for companies may better delimit this offence. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas can be a useful tool in this respect, since it provides a clear five-step framework for companies to exercise due diligence. Even here, though, it would be highly advisable to translate these broad policies into terms typical for criminal offences, including by stipulating the crime's objective and subjective elements explicitly.

4. CONCLUSION

The crime of illicit exploitation of natural resources, as included in The Protocol, is highly innovative. It provides new opportunities to address grave

[78] ICGLR Regional Certification Mechanism (RCM) – Certification Manual, at 6.

[79] Ibid., at 30. The latter obligation amounts to a due diligence obligation as set out under the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. See OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (Paris, France: OECD Publishing, Third Edition, 2016), available online at http://dx.doi.org/10.1787/9789264252479-en (visited on 10 May 2016).

injustices related to the exploitation of natural resources as well as to bolster the abilities of African States to use their natural resource wealth for the benefit of their respective peoples. At the same time, the provision as currently formulated is unsatisfactory in several dimensions. In some regards, the crime overcriminalizes a whole raft of regulatory regimes no one previously thought gave rise to criminal responsibility. In other instances, a strict reading of the Protocol would result in the criminalization of perfectly legal acts. Elsewhere, there is the problem of overlap, both within the provision and in relation to other provisions included in The Protocol. Overall, the absence of any mention of objective or subjective elements capable of proving the offence transgress basic principles in the criminal law. The shortcomings that we have identified in this chapter point to a need to further refine both the scope of the provision as well as its intention. We recommend the drafting of elements of crimes as a way to resolve some of the difficulties we point to. The reality of resource predation, especially in Africa, is a subject of major concern that has justifiably attracted considerable attention. The criminal law should certainly play a role in responding to this morose reality; indeed, much of our work stems from the view that accountability in this realm is long overdue, and that in some instances, it is difficult to imagine long term stability in regions without a robust concept of title in natural resources and powerful regulatory regimes to enforce violations of this title. Nevertheless, the foregoing suggests that the criminal law should serve a very principled role in addressing the problem that conforms with a very orthodox understanding of fair punishment.

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Unconstitutional Change of Government

A New Crime within the Jurisdiction of the African Criminal Court

HARMEN VAN DER WILT

1. INTRODUCTION

One of the most interesting and controversial crimes that belong to the subject matter jurisdiction of the newly to be established African Criminal Chamber is undoubtedly the crime of unconstitutional change of government. Article 28E of the Malabo Protocol which is intended to serve as the legal basis of this future African Criminal Court[1] defines this offence as the commission or ordering to be committed of a number of specified acts with the aim of illegally accessing or maintaining power. These acts include:

(a) A putsch or coup d'état against a democratically elected government;
(b) An intervention by mercenaries to replace a democratically elected government;
(c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
(d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
(e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution; and

The author feels obliged towards his Master-students, Naida Hadžiomerović, for her research assistance, and Alisdair Shaw, for his inspired and inspiring thesis on the right to revolt under international law.

[1] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, STC/Legal/ Min7(1) Rev. I, African Union; First Meeting of the Specialized Technical Committee on Justice and Legal Affairs, 15–16 May 2014, Addis Ababa, Ethiopia (hereafter: Malabo Protocol). This essay has previously been published in Leiden Journal of International Law, Volume 30, Issue 4 (2017), pp. 967–986 and has been reproduced with the kind permission of the publisher (CUP).

(f) Any substantial modification to the electoral laws in the last six months before the elections without the consent of the majority of the political actors.

This definition derives from Article 23 of the African Charter on Democracy, Elections and Governance with the exception of the final item – substantial modification of electoral laws – which is missing in the Charter and has been added in the Malabo Protocol.[2] The inclusion of the crime of unconstitutional change of government has been a true bone of contention. It prompted the AU Assembly of Member States in 2012 to postpone the adoption of the Draft Protocol (the predecessor to the Malabo Protocol) and send the drafters back to the drawing table, summoning them to come up with a more precise definition of the crime. However, an expert meeting decided that an amendment of the existing definition was not necessary.

In this article, I will reflect on the nature of this crime in general and I will in particular discuss the question whether it would qualify as a supra-national crime. My interest in the topic is primarily inspired by the consideration that the crime of unconstitutional change of government is atypical for the genus of core crimes. Any criminalization of the conduct at a regional level and the concomitant inclusion of the offence in the jurisdiction of regional courts raises questions about the right of foreign intervention in internal political affairs of the relevant state and the curtailment of the right to rebel (if such a right can be established in the first place).[3] On the other hand, one has to admit that unconstitutional changes of government are related to core crimes, in the sense that they can easily generate widespread oppression and violence.[4] The analogy with the crime of aggression and its relationship with war crimes and crimes against humanity readily comes to mind.

[2] African Charter on Democracy, Elections and Governance, Addis Ababa, 30 January 2007, available at: www.achpr.org/files/instruments/charter-democracy/aumicom_instr_charter_democracy_2007_eng.pdf (last visited: 27 January 2017). For a brief historical survey of the development of the norms on unconstitutional changes of government in the African context, see Gerhard Kemp and Selemani Kinyunyu, 'The Crime of Unconstitutional Change of Government (Article 28E)', in: G. Werle and M. Vormbaum (eds.), *The African Criminal Court; A Commentary on the Malabo Protocol*, International Criminal Justice Series, Volume 10, The Hague 2017, at 61–4.

[3] See on this issue the fascinating article by T. Honoré, 'The Right to Rebel', 8 *Oxford Journal of Legal Studies* (1988), at 34.

[4] The Preamble of the African Charter on Democracy, Elections and Governance expresses the concern of the Member States of the African Union that 'unconstitutional changes of governments are one of the essential causes of insecurity, instability and violent conflict in Africa.' For a comprehensive overview of recent political turmoil in African countries and the dire consequences in their aftermath, see J. Shola Omotola, *Unconstitutional Changes of Government in Africa; What Implications for Democratic Consolidation?*, Discussion paper 70 Nordiska Afrikainstitute, Uppsala (2011).

It is my intention to balance the pros and cons of the criminalization of unconstitutional change of government in order to ascertain whether the inclusion of this crime in the subject matter jurisdiction of the African Criminal Court is justified and recommendable.[5] In that context, I wish to shed some light on the issues just raised and in particular ponder on the question *why* this offence is upgraded to the regional level of criminal law enforcement. To that purpose, I will first briefly sketch the political developments that spurred the initiative to establish the African Criminal Court and include a survey of its main jurisdictional features and competences. Next, I will discuss and analyze the main elements of the crime of unconstitutional change of government against the backdrop of the essence of international crimes. Then, I will search for indications of an acknowledged relationship between political violence and core crimes in the recent case law of the International Criminal Court on the situations in Kenya, Libya and Ivory Coast. I will explore whether a right to rebellion, if we assume that it exists, would impede regional or international organizations from qualifying unconstitutional changes of governments as a crime. Then, I will explore a brief discussion of the principle of non-intervention in internal affairs under international law and proceeds with inquiring what reasons and interests (African) states would have to interfere with civil strife in other states. I end with some final reflections.

2. AN EXPERIMENT IN REGIONAL CRIMINAL JUSTICE: THE EMERGENCE OF THE AFRICAN CRIMINAL COURT

The African Criminal Court is actually intended to be a special Chamber under the 'roof' of the African Court of Justice and Human Rights. This court has been the outcome of a merger of the African Court of Human and People's Rights and the African Court of Justice which materialized by a Protocol on 1 July 2008.[6] However, that protocol never received sufficient ratifications and is now superseded by the Malabo Protocol that has reinstated the old name (African Court of Human *and People's* Rights) and provides that three types of jurisdiction (human rights, general affairs, and international crimes) will be exercised by its separate chambers.[7]

[5] The article chooses primarily a normative perspective. For a legal assessment of the provision in the Malabo Protocol on Unconstitutional Change of Government, see Kemp and Kinyunyu, supra note 2, at 64–8.

[6] Assembly/AU/Dec.83(V) (2005).

[7] For a condense survey of the drafting history (until 2013), see A. Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects', 60 *Netherlands International Law Review* (2013), at 28–31.

It is fairly generally acknowledged that the initiative to establish a special criminal chamber within the architecture of the African Court was spurred by the discontent at the exercise of universal jurisdiction over African people, including high state officials, by western states and the selective policy of the International Criminal Court, which is often perceived to be exclusively interested in targeting African countries.[8] The concrete event that prompted mounting tensions between the African Union and the International Criminal Court was the latter's decision to issue arrest warrants for Sudan's incumbent president Al-Bashir. The general opinion was that the initiative was ill-timed and thwarted attempts to achieve peace and reconciliation by political means, thereby displaying callous disregard for African solutions.[9] In a resolution issued in July 2009, the African Union referred to the 'unfortunate consequences that the indictment has had on the delicate peace processes underway in Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.' The resolution enjoined African Union members not to cooperate with the Court when asked to surrender Al-Bashir and requested the Security Council to defer the situation in Darfur in conformity with Article 16 of the Rome Statute, a request that was largely ignored.[10]

In connection with what was perceived as the excessive exercise of universal jurisdiction against African high officials by European criminal courts, the African Union acknowledged that 'universal jurisdiction is a principle of International Law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so without impunity and are brought to justice', but it pointed to an 'abuse of the principle of universal jurisdiction by judges from some non-African States

[8] See for instance M. Du Plessis, 'Implications of the AU decision to give the African Court jurisdiction over international crimes', Paper 235 Institute for Security Studies (June 2012), at 1: 'The process (of creating a criminal chamber within the African Court) occurs against the backdrop of the African Union's open hostility to the International Criminal Court's focus on African situation.' See, extensively, C. Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal Justice* (2011), at 1068–79. The text of this paragraph is partially taken from an earlier publication: Harmen van der Wilt, 'The African Court of Justice and Human and Peoples' Rights and Complementarity', in: G. Werle & M. Vormbaum, The African Criminal Court – A Commentary on the Malabo Protocol, Asser: The Hague 2016, Chapter 11.

[9] Murungu, supra note 8, at 1078. See also L. Nadya Sadat, 'On the Shores of Lake Victoria: Africa and the Review Conference for the International Criminal Court', Washington University in St. Louis/ School of Law, Paper No. 10–06-04 *Legal Studies Research Paper Series* (16 June 2010), at 5–6.

[10] Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court(ICC) Doc. Assembly/AU/13(XIII), 3 July 2009.

against African leaders.'[11] More specific allegations were levied against European States, revealing old grievances: 'Indictments issued by European states against officials of African states have the effect of subjecting the latter to the jurisdiction of European states, contrary to the sovereign equality and independence of states. For African states, this evokes memories of colonialism.'[12]

The African Union's decision to vest the African Court of Justice and Human Peoples' Rights with criminal jurisdiction cannot be viewed in isolation from such deep-rooted misgivings.[13] It is plainly an attempt to pre-empt both the universal jurisdiction of European States and the International Criminal Court. It is telling in this regard that the Preamble of the Malabo Protocol explicitly refers to the African Union Assembly's Decision on the Abuse of the Principle of Universal Jurisdiction.[14] In short, the African Criminal Court is intended to hold the ICC and Western states aloof and to render 'African justice for the Africans'. Meanwhile, the situation has reached a stalemate. While the Gambia and South Africa have recently recanted their decision to dissociate themselves from the ICC, the African Union has backed the call of some of the African leaders to leave the Court *en masse*.[15] For all that, the African Criminal Court is still not operational. This final fact should, however, not discourage us to give it due attention.

The subject matter jurisdiction of the African Court is extremely broad, covering both the traditional 'core crimes' and a number of so-called 'transnational crimes'.[16] The elements of crimes are meticulously elaborated in subsequent provisions (Articles 28B–28M). The definitions of the core

[11] Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/14 (XI), Assembly/AU/Dec. 199(XI), Eleventh Ordinary Session 30 June–1 July 2008, Sharm El Sheikh, Egypt, §§ 3–5.

[12] Assembly/AU/Dec. 199(XI), supra note 11, § 5(iv). For a seminal analysis of the question whether the allegations of neo-colonialism are borne out by the facts, see Res Jorge Schuerch, *The International Criminal Court at the Mercy of Powerful States; How the Rome Statute Promotes Legal Neo-Colonialism*, PhD thesis, University of Amsterdam, 2016.

[13] In a similar vein: M. Ssenyonyo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders', 13 *International Criminal Law Review* (2013), at 415–16. He identifies the objections against universal jurisdiction and the displeasure with the International Criminal Court's strategy as two of the four factors giving impetus to the African Union's decision.

[14] Preamble of the Malabo Protocol, § 13.

[15] 'African leaders plan mass withdrawal from international criminal court', The Guardian, available online at: www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court (last visited: 11 April 2017).

[16] Article 28A mentions: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.

crimes are copied almost *verbatim* from the Rome Statute, whereas the other crimes are derived from legal and political instruments of the African Union and reflect the African realities. According to Article 46H, the African Court is intended to be complementary to domestic jurisdictions. The provision is largely modelled after the parallel article in the Rome Statute (Article 17) although there is one subtle, but possibly far-reaching, difference: in the Malabo text the qualifier 'genuinely' is missing. Moreover, the Malabo Protocol is completely silent about the relationship between the African Court and the ICC.[17] Another conspicuous feature of the Malabo Protocol is the introduction of corporate criminal liability (Article 46C). As indicated in the introduction, the proposal to add the crime of 'unconstitutional change of government' was contentious and caused a delay of the enactment of the Malabo Protocol. It is to this interesting and controversial crime that I will now turn.

3. THE CONSTITUENT ELEMENTS OF UNCONSTITUTIONAL CHANGE OF GOVERNMENT

According to Article 28E of the Malabo Protocol, several different acts can constitute the crime of 'unconstitutional change of government'. What they all have in common is that they threaten democratically elected governments and procedures. In other words, the entire provision serves to protect institutions and (democratic) processes of political decision-making. In this respect, the offence is not dissimilar from existing international crimes. It is a truism that international criminal justice is primarily concerned with the dismal fate of individual human beings that have suffered – and continue to do so - under flagrant human rights violations amounting to the most heinous international crimes.[18] This does not exclude, however, that communities, (political) institutions or even procedures can be the victims of international crimes. The most conspicuous example is obviously the crime of aggression. Article 8*bis* of the Rome Statute defines the crime of aggression as an 'act of aggression' – invasion or attack by armed forces, bombardment, blockade of the ports or coasts etc. – of one state against another state. In other words, the provision aims at the preservation of the integrity of a state.[19] In a similar vein,

[17] On these issues, see van der Wilt, supra note 8.

[18] Compare the second item of the Preamble to the Rome Statute that reads 'Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of mankind'.

[19] For legal analyses of aggression as an international crime, see (amongst many others): R. S. Clark, 'The crime of aggression', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of*

terrorism as an international crime is not only characterized by the special intent to intimidate the population, but can also have the purpose to force a government to do something or abstain from doing something or can be directed at the demise of economic, social or political institutions.[20]

If we try to dissect the several manifestations of the composite crime of unconstitutional change of government, we can point out at least three conspicuous features. First of all, it might be observed that the term 'unconstitutional *change*' is in a sense a misnomer, because it does not only encompass dynamic attempts to topple and replace sitting governments, but also the (illicit) perpetuation of power. After all, Art. 28E refers to the 'refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections.' The provision is thus a compound of a dynamic and a static aspect and by no means aims to preserve the political *status quo*. Both the dynamic and static versions give rise to separate questions. Article 28E suggests that *coup d' états* can be accomplished by making use of mercenaries or rebellious armed groups. Probably, these eventualities are included as separate offences, in order to prevent that the true political beneficiaries might disguise their involvement and get off scot-free by hiding behind the back of their associates.[21] In respect of the static form of unconstitutional 'change' of government, a pertinent question is whether the 'refusal of incumbent government to relinquish power' also includes tenure prolongations and third term agendas. Shola Omotola convincingly denounces such techniques as clever tricks to circumvent criminal responsibility.[22] Secondly, Article 28E of the Malabo Protocol refers to legislative initiatives that would enable the execution of unconstitutional changes of government. Obviously, such measures would

the International Criminal Court, (Leiden/ Boston 2009), at 709–23; M. de Hoon, *The Law and Politics of the Crime of Aggression*, PhD Thesis, Free University of Amsterdam (2015); G. Kemp, *Individual Criminal Liability for the International Crime of Aggression*, (Antwerp – Cambridge – Portland 2016).

[20] The Special Tribunal for Lebanon defined the *mens rea* required for terrorism as the intent to spread fear among the population *or* directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-1–01/I/AC/R176*bis*), Appeals Chamber, 16 February 2011, §§ 83, 85. The definition in the EU Council Framework Decision 2002/475/JHA on Combating Terrorism, *Official Journal of the European Communities*, No. L 164, 22 June 2002, at 3, adds as a possible aim of terrorists 'seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation' (Article 1, s. 1).

[21] It might be observed that 'mercenarism' – a familiar scourge in African countries – is a separate crime (Article 28H) under the Malabo Protocol.

[22] Omotola, supra note 4, at 25–7.

serve to render these practices a semblance of legality. And finally, the provision repeatedly emphasizes that the victims or targets of this crime are *democratically* elected governments and candidates that have surfaced victorious after *free, fair, and regular* elections. It connotes the idea that these political factions bear no guilt in any attempt to depose them and that the provision precisely serves to protect democratic processes and fair elections. Moreover, it would appear that the provision does not apply in case of rebellion or insurrection of the population against an incumbent tyrant. I will address this issue in more detail below. While the drafters may be quite sincere when they contemplated the provision, it begs the question who will decide on the legitimacy of a popular uprising against an (oppressive) regime.[23]

4. ON THE RELATIONSHIP BETWEEN UNCONSTITUTIONAL CHANGE OF GOVERNMENT AND CORE CRIMES

As mentioned earlier, the decision to include 'unconstitutional change of government' as a crime under the jurisdiction of the future African Criminal Court has been inspired by the specific African situation where internecine struggles for political power have preceded and triggered mass human rights violations. As the ICC has almost exclusively focused on African situations, one might expect that the connection between unconstitutional change of government and international crimes would have surfaced in the case law of (Pre-)Trial Chambers. To a certain extent, this has been the case, although indirectly and rather sparingly. Causal connections between unconstitutional change of government and subsequent core crimes have emerged in the context of inquiries by the ICC Pre-Trial Chambers into the admissibility of cases before the ICC. The assessment of admissibility requires an investigation into domestic criminal proceedings – if any – in which sedition, the crushing of insurgency, and international crimes are often conflated. Such inquiries would shed light on possible inextricable connections between these crimes, potentially impeding further prosecution by the ICC. As is well known, the admissibility assessment involves a two-pronged test.[24] First of all, it must be explored whether the state has developed any activity in the realm of criminal

[23] For similar apprehensions, see A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', Vol. 24 No. 3 *European Journal of International Law* (2013), at 941.

[24] Appeals Chamber, *Prosecutor v. Katanga and Ngudjolo Chui*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04–01/07–1497, 25 September 2009, §§ 75–9.

enforcement at all, with the ICC being able to proceed if the outcome is negative. Next, Article 17(1)(a) of the Rome Statute stipulates that a case is inadmissible where it is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. In the *Lubanga* case, Pre-Trial Chamber I held that, for the purpose of the assessment of admissibility, the person subject to the domestic proceedings had to be the same person against whom the proceedings before the Court are being conducted and that the domestic proceedings had to cover substantially the same conduct that was under scrutiny before the Court.[25] This so-called 'same person, same conduct' test has become consistent case law of the Court. In investigating whether the national proceedings indeed related to the 'same (f)acts', the ICC had – at least theoretically – the opportunity to gain insight in the violence that was applied by accused to seize political power or repel contenders.

In the *Situation in Kenya*, the Kenyan government challenged the admissibility of the case against Kenyatta (and others), arguing that it 'currently investigated crimes arising out of the 2007–8 Post-Election Violence.'[26] The case was not conducive to a substantive discussion of domestic proceedings, as the government erroneously opined that it was not necessary to investigate the same persons, but that investigation of 'persons at the same level in the hierarchy' would suffice for the purpose of the assessment of (in)admissibility.[27] In view of the lack of information that pointed to *ongoing* investigations *against the three suspects* (Kenyatta *cum suis*), the Chamber concluded that a situation of inactivity remained which prompted it to determine that the case was admissible.[28] As the domestic criminal proceedings probably involved both charges of electoral fraud, (illegitimate) claims to political power and international crimes, the Chamber missed the opportunity to address the relationship between these crimes.

The *Situation in Libya*, encompassing the cases against Saif Gaddafi and Al-Senussi, offered more interesting material for exploring the connection

[25] Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo', 24 February 2006, ICC-01/04–01/06–8-Corr, § 31.

[26] Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute", 30 May 2011, ICC-01/09–02/11, § 46.

[27] *Prosecutor v. Kenyatta et al*. supra note 26, § 49.

[28] *Prosecutor v. Kenyatta et al*. supra note 26, § 66.

between political violence and core crimes. The Pre-Trial Chamber summarized the case before the Court as concerning

> the individual responsibility of Mr Al-Senussi for killings and acts of *persecution by reason of their (real or perceived) political opposition to the Gaddafi regime carried out on many civilian demonstrators and political dissidents*, allegedly committed directly or through the Security Forces *during the repression of the demonstrations taking place in Benghazi from 15 February 2011 until at least 20 February and as part of a policy designed at the highest level of the Libyan State machinery to deter and quell, by any means, the revolution against the Gaddafi regime occurring throughout Libya*.[29]

After having compared the case before the Court with the case subject to domestic proceedings, the Chamber was satisfied that 'the same conduct alleged against Mr Al-Senussi in the proceedings before the Court is subject to Libya's domestic proceedings.'[30] The Pre-Trial Chamber observed that, while the discriminatory intent to target victims on political grounds – which is required for the crime of 'persecution' – was not a factual aspect of the domestic proceedings, it nevertheless served as an 'aggravating factor which is taken into account in sentencing under articles 27 and 28 of the Libyan Criminal Code.'[31] The Chamber concluded that this demonstrated that Al-Senussi was prosecuted in Libya for the same facts that sustained his indictment before the Court. The Chamber acknowledged thus that in both the international and domestic proceedings the core crimes had been inspired by the political motive to repel popular insurrections in the quest to remain in power. The Pre-Trial Chamber did not pronounce any verdict (even not implicitly) on the question whether the rebels had a right to rise against the oppressive Gaddafi regime, nor – for that matter – whether Gaddafi was authorized (or not) to crush the insurgency, for the simple reason that those issues are beyond the jurisdictional competence of the ICC. But the recognition that political persecution emerged from the incumbent regime's attempt to suppress an insurrection is strong evidence of the Court's understanding of a close connection between political turmoil and international crimes.

The most conspicuous example of domestic criminal proceedings in respect of political crimes that *did not* coincide with core crimes (at least in which this connection was not demonstrated) – and therefore did not impede

[29] Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11–01/11, § 71 (italics added).

[30] *Prosecutor v. Gaddafi & Al-Senussi*, supra note 29, § 165.

[31] *Prosecutor v. Gaddafi & Al-Senussi*, supra note 29, § 166.

the admissibility of a case – was provided in the *Situation in the Republic of Côte d'Ivoire*, to wit the admissibility challenge relating to the case against Simone Gbagbo.[32] This case concerns

> the individual criminal responsibility of [Mrs.] Gbagbo for the commission, jointly with Laurent Gbagbo and his inner circle and through the Ivorian Defence and Security Forces (FDS), who were reinforced by youth militias and mercenaries, of the crimes of murder, rape and other forms of sexual violence, inhumane acts and persecution committed: (i) in the context of the march on the *Radiodiffusion Télévision Ivoirienne* (RTI) building on 16 December 2010; (ii) in the context of the Abobo market shelling on 17 March 2011; and (iii) in relation to the Yopougon massacre on 12 April 2011.[33]

The government of Côte d'Ivoire challenged the admissibility of the case, arguing that some economic crimes and crimes against the state that were prosecuted domestically were preparatory acts to the commission of the crimes with which Mrs. Gbagbo had been charged by the ICC Prosecutor.[34] Unfortunately, the criminal acts have been redacted in the ICC Pre-Trial Chamber's decision and the Appeals Chamber's judgment, so we are precluded from determining their relationship with the core crimes. In any event, the Appeals Chamber held that 'Côte d' Ivoire does not explain, how, in its view, the preparatory nature of the conduct underlying those crimes shows that it is substantially the same conduct as that alleged in the proceedings before the Court and, consequently, that the Pre-Trial Chamber erred by failing to consider those crimes' preparatory nature.'[35]

The wording of the judgment is quite interesting. The Appeals Chamber does not deny that a close connection might have existed between the crimes against the state and international crimes, but only contends that the state had failed to prove that such a relationship would actually conflate both crimes into one 'case' impeding the ICC from further investigation and prosecution. As in the case against Gaddafi and Al-Senussi, the ICC would not be authorized to adjudicate any state crimes allegedly committed by Mrs. Gbagbo.

[32] Pre-Trial Chamber I, *Prosecutor v. Simone Gbagbo*, 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', 11 December 2014, ICC-02/11–01/12–47-Red.

[33] *Prosecutor v. Simone Gbagbo*, supra note 32, §73.

[34] Document in Support of the Appeal, § 66: 'Plusieurs des infractions précitées doivent être analyses en des actes préparatoires ou en des actes fournissant les moyens nécessaires à la commission d'autres crimes.'

[35] *Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', ICC-02/11–01/12 OA, 27 May 2015, § 101.

Apart from the legal impediments, there may be political considerations why the ICC is rather reluctant to scrutinize the political context of core crimes and to that purpose engage in the assessment of (for example) unconstitutional changes of governments. After all, the ICC will eschew becoming embroiled in politics. In the context of the case against Laurent Gbagbo, the ICC Prosecutor, Ms. Fatou Bensouda stated that 'this trial is not about who won the 2010 elections. Nor is it about who should have won the elections... The purpose of this trial is to establish individual responsibility of the two accused [Mr Gbagbo and Mr Charles Blé Goudé] of the crimes committed.'[36] While these efforts to keep aloof from politics are commendable, the concern expressed by Ms Bensouda is perhaps a bit exaggerated. As indicated above, the jurisdictional limitations impede the ICC from judging crimes against the constitutional order. Its assessment of the political background of some core crimes is more subtle and indirect. It can either take any political events – like a rebellion or the crushing of an insurgency – into consideration, when the very nature of some core crimes (like persecution on political grounds) makes such assessment inevitable (as is the *Al-Senussi* and *Gaddafi* cases). Or the ICC can, in assessing the admissibility of a case, decide that charges on purely political crimes and international crimes in domestic proceedings are so inextricably linked that they impede the ICC from pursuing a case (a decision the ICC has not yet taken). In both cases, the ICC confirms the causal relationship between the political crimes (including possibly unconstitutional change of government) and core crimes, without expressing any judgment on the former itself.

5. THE RIGHT TO REBEL

There is a potential tension between criminalization of assaults on incumbent governments and the right of rebellion. In the opening sentences of his searching article, Tony Honoré captures succinctly the predicament: 'There is a dilemma concerning the relation between human rights and criminal responsibility. Unless in certain conditions we have the right to rebel, much talk of human rights can be dismissed as empty rhetoric. But if there is such a right, we are at times entitled to use violence against our fellow citizens as if we were at war with them. We may properly commit what are by ordinary

[36] D. Connett, 'Laurent Gbagbo trial: Ivory Coast's ex-President 'used rape and murder' against rivals, ICC told', The Independent, available online at: www.independent.co.uk/news/world/europe/laurent-gbagbo-trial-ivory-coast-s-ex-president-used-rape-and-murder-against-rivals-icc-told-a6840456.html; (last visited: 25 July 2016).

standards the gravest of crimes.'[37] For the purpose of this article, it is important to figure out whether the introduction of the crime of 'unconstitutional change of government' can be reconciled with the right to rebel. Such an inquiry into the normative compatibility of these notions requires a further investigation of the content of, and limitations on, the right to rebel as well as by whom it is recognized. I am therefore less interested in the question whether there exists a *remedy* to enforce the right to rebel, because the focus is on the crime of 'unconstitutional change of government' and whether the introduction of that crime can be trumped by the right to rebel, as a normative counterweight.[38] It is less important whether the right to rebel can actually be *enforced*.

Some light on both the essence of the right to rebel and its limitations is shed by a famous sentence in the Preamble of the Universal Declaration of Human Rights: '... whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.' The formulation is rather enigmatic and shrouded in ambiguity. Indeed, it could be interpreted as an exhortation to states to avoid rebellion.[39] Moreover, one should be cautious not to deduce too easily a right to rebellion from these lines, in view of the explicit resistance against recognition of such a right by country delegates during the drafting process of the Universal Declaration.[40] Nonetheless, the Preamble suggests that the international society of states allows people to rise against their oppressing rulers, as an ultimate measure. The situation must have become unbearable and there should be no other method available to escape the ordeal, as is clearly expressed in the words 'as a last resort'.

The notion of rebellion as 'ultimate remedy' resonates in the grand tradition of political philosophers. Calvin's acknowledgement of the right to resist the monarch had – unlike what one might have expected – clearly political, rather than religious, connotations. If the king renounced his primary duty, to wit the protection of the liberties of the people, selected persons entrusted with power and authority within the realm would be allowed to disobey and, if necessary, depose him in order to preserve order: 'Certain remedies against tyranny are allowable, for example, when magistrates and estates have been

[37] Honoré, supra note 3, at 34.

[38] Compare Honoré, supra note 3, at 35 who identifies *recognition* and *remedy* as necessary features of rights, distinguishing them from mere aspirations.

[39] Honoré, supra note 3, at 42.

[40] B. Dunér, 'Rebellion: The Ultimate Human Right?', Vol. 9, No. 2 *International Journal of Human Rights* (June 2005), at 253 points out that 'Several countries made it clear that they did not want to see rebellion as a right.'

constituted and given the care of the commonwealth: they shall have the power to keep the prince to his duty and even to coerce him if he attempts anything unlawful.'[41]

Calvin predicated this right – or even duty – to disobey the unfaithful king on the premise that the relation between the ruler and citizen 'was not a direct one, but occurred through the mediating agency of the law.'[42] Ultimately, the resistance therefore served to vindicate the primacy of the law.

For John Locke, the right to revolt was a logical sequel of his postulating the predominance of society over politics, in which we already discern the traces of Rousseau's political discourse. The monarch only rules by the grace of the will of the community and its role was that of 'image, phantom, or representative of the commonwealth, acted by the will of society, declared in its laws.'[43] If the king strayed from the right course, blatantly abused his powers and oppressed the people, the society had the right to depose him by forceful means, in order to restore the ideal state of nature. Locke suggested that the fierceness of the reaction that was visited upon him was proportionate and reciprocal to the initial violence: 'In all States and Condition the true remedy of Force without Authority, is to oppose Force to it. The use of force without Authority, always puts him that uses it into a state of War, as the Aggressor, and renders him liable to be treated accordingly.'[44] Nonetheless, Locke immediately qualified his position by pointing out that rebellion would only be appropriate when 'the inconvenience is so great that the majority feel it, and are weary of it, and find a necessity to have it amended.'[45]

It is not difficult to understand the relentless emphasis on 'last resort', because an unchecked right to revolt would be a 'perpetual foundation for disorder.'[46] Besides, for states the curtailment of the right to rebel is a question of sheer self-preservation. Domestic criminal codes contain criminal provisions, outlawing insurrection and overthrow of incumbent governments and such conduct is generally threatened with severe punishment. Article 94 of the Dutch Penal Code, for example, punishes the assault, undertaken with the intent to destroy or unlawfully change the constitutional government or the

[41] J. Calvin, *Calvani Opera*, (ed. G. Baum, E. Cunitz and E. Reuss), 50 volumes (Braunschweig 1863–1900, Volume 29: 557, 636–7); quoted by S. S. Wolin, *Politics and Vision*, (Expanded Edition, Princeton University Press 2004), at 169.

[42] Wolin, supra note 41, at 169.

[43] J. Locke, *Two Treatises of Government*, (ed. by Peter Laslett, New York 1965), Second Treatise, § 151.

[44] Locke, supra note 43, § 155.

[45] Locke, supra note 43, § 169.

[46] Locke, supra note 43, § 169.

order of succession of the throne with life imprisonment or a prison sentence of maximum of 30 years (or a fine of the 5th category).[47] Such regulations belong to the sovereign realm of states and international (human rights) law does not deny them the right of self-defence against the threat of annihilation. In this context, it is noteworthy that Article 4(1) of the International Covenant on Civil and Political Rights embodies the state's authority to derogate from certain human rights in emergency situations:

'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

Commenting on this provision, Bertil Dunér observes that 'it goes without saying that this possibility given to the state contradicts a right to rebellion: it is for the survival of the state that it was introduced.'[48] Even those states that recognize a right to resist official power make the necessary qualifications. Article 20(4) of the German Constitution (*Grundgesetz)* acknowledges such a *Widerstandsrecht*: 'All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.' The provision is essentially conservative, as it can only be invoked in order to preserve, not to change the constitutional order. Moreover, the notion that the right to resist is a measure of last resort is manifestly included in the addition that there should not be any other remedy available.

It is interesting to compare the rather modest recognition of the right of resistance, as acknowledged by political philosophers and embodied in the German Constitution and the Universal Declaration of Human Rights, with the proposed provision on unconstitutional change of government in the Malabo Protocol. In all serious pleas for a right to resist, including the German constitutional provision, the requirement that any resort to force should be an ultimate remedy is a steady concern. It seems to suggest that rebellion is only allowed if a tyranny or oppressive regime chokes all political opposition and makes life unbearable. The Malabo Protocol only prohibits assaults on *democratically elected* governments. The implication seems to be that in those situations a revolution would not be an appropriate *ultimum remedium*, because there would be other (democratic) means to oust the

[47] Translation by the author.
[48] Dunér, supra note 40, at 255.

incumbent powerholders. In this sense, the provision in the Malabo Protocol would not be in contravention of a restricted – and generally acknowledged – right to revolt, because the former clearly does not encompass resistance against tyranny. The acknowledgement of the citizens' right to resist attempts to abolish the constitutional order, as incorporated in the German Constitution, is especially interesting. It might arguably govern situations of powerholders clinging to their position and acting in clear violation of the constitution. This comports with the 'static' variety of unconstitutional change of government, as envisaged in Article 28E of the Malabo Protocol. By making such practices a crime, the Malabo Protocol rather seems to sustain (a limited use of) the right to rebel than to counter it. We might therefore come to the intermediate conclusion that the criminal provision on unconstitutional change of government does not infringe the right to rebel.

6. THE CRIME OF UNCONSTITUTIONAL CHANGE OF GOVERNMENT IN THE MALABO PROTOCOL AND THE PRINCIPLE OF NON-INTERVENTION

The essential question in this article is to explore whether there are good reasons for African states to elevate the repression of unconstitutional change of government to a supra-national (regional) level. In that context, it is necessary to inquire whether any criminalization of this conduct does not contravene essential rights and prerogatives – as has been done in the previous paragraph. However, that does not suffice. While the previous section has indeed demonstrated that the offence of unconstitutional change of government does not violate the right to rebel and that states are entitled to restrain and, if necessary, suppress insurrections, it is by no means clear why this offence should come under the jurisdiction of a regional court. The proper yardstick for assessing whether this crime qualifies for 'promotion' is, I submit, whether criminalization surpasses merely parochial interests of the state and epitomizes the idea that it has become the business of a wider community of states.[49]

In the realm of international criminal law, the universal interest in the repression of international crimes can be gleaned from the fact that they qualify as violations of customary international law.[50] Could the argument be made

[49] On the distinction between parochial and universal interests as the foundation of the difference between domestic and international (criminal) law, see G. P. Fletcher, 'Parochial versus Universal Criminal Law', 3 *Journal of International Criminal Justice* (2005), at 20–34.

[50] Compare, amongst others, *Cassese's International Criminal Law*, (3rd ed. Revised by A. Cassese, at Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, Oxford 2013), at 20.

that, by analogy, a regional organization like the African Union can legitimately claim jurisdiction over a crime the prohibition whereof has solidified in (regional) customary law? Such a line of reasoning is (implicitly) defended by Ademola Abass who, after expressing concerns that not 'all crimes (within the jurisdiction of the African Court) are, in fact, 'international' and 'serious' enough to warrant international prosecution', contends that the crime of unconstitutional change of government would certainly meet those criteria:

> The acts constituting unconstitutional change of government . . . have, for a long time, been practices which have been consistently rejected by the majority of African states, as evidenced by myriad treaties and declarations adopted over several decades to outlaw them. The African Charter on Democracy, Election and Government is therefore merely a codification of what had become a quintessential custom in Africa: the rejection of UCG (Unconstitutional Change of Government).[51]

The idea that regional customary law could serve as an appropriate legal basis for the selection of crimes that qualify for subject matter jurisdiction of a regional criminal court is interesting.[52] But a thorough research into whether unconstitutional change of government indeed meets this standard is beyond the scope of this article. Moreover, I would hold that the category of crimes under the jurisdiction of the African Criminal Court is not exhausted by those offences that demonstrably belong to the realm of regional customary law. All of the offences mentioned in Article 28A of the Malabo Protocol are subject of (regional) treaties in which states commit themselves to criminalize the conduct, render mutual assistance in criminal matters and pledge to either prosecute or extradite (*aut dedere, aut judicare*) those suspected of those offences that are found on their territory.[53] The very fact that African states conclude treaties with a view to the common criminal law enforcement in respect of certain offences is proof that they share an interest in their suppression. Any decision to outsource such law enforcement to a regional court is a logical next step that is facilitated by the prior enactment of such treaties. After all, States are not prohibited by international law to establish a regional criminal court and equip this court with jurisdiction over crimes of common

[51] Abass, supra note 7, at 34.

[52] See for a general analysis on regional customary law and its relationship with general customary law: A. D'Amato, 'The Concept of Special Custom in International Law', Paper 116 Faculty Working Papers (2010) available online at: http://schoalrlycommons.la.northwestern.edu/facultyworkingpaers/116 (last visited: 23 January 2017.)

[53] For an extensive analysis of these regional suppression treaties, see: H. van der Wilt, 'On Regional Criminal Courts as Representatives of Political Communities', in (Kevin Jon Heller and others), *The Oxford Handbook of International Criminal Law*, Oxford 2019 (forthcoming).

concern, provided that such offences are criminalized under their domestic law and the regional court does not apply the law retroactively.

Yet, intuitively, the crime of unconstitutional change of government seems to be of a different nature than the other crimes featuring in Article 28A of the Malabo Protocol. Civil unrest that can turn into rebellion or insurrection is a typical internal affair. Article 2, section 7 of the UN Charter precludes the United Nations from intervening in affairs that essentially belong to the domestic jurisdiction of a state and regional instruments confirm that states are under a duty to abstain from such interference.[54] The argument could be made that a transfer of criminal jurisdiction in respect of internal political crimes to a regional court would amount to such an intervention which is prohibited under international law. On closer scrutiny, however, this assumption is far-fetched and even incorrect. It is generally acknowledged in international law that states are allowed to seek the assistance of other states in order to suppress rebellion or insurrection. Conversely, states are not entitled to support insurgents.[55] It should be recalled in this context that in the famous *Nicaragua v. US* case the International Court of Justice found that the US assistance to the *contras*, such as financial support, training and supply of weapons constituted 'a clear breach of the principle of non-intervention.'[56] The construction obviously serves the preservation of world order and favours established governments, to the detriment of rebels.[57] The asymmetric interpretation of the principle of non-intervention raises the question whether this principle, rather than precluding criminalization of unconstitutional change of government, not actually supports such an initiative. After all, it could be argued that the assistance of states to the hard-pressed government might consist of bringing the rebels to criminal justice before a regional court.

[54] See also Article 15 of the Charter of American States, Bogotá 30 April 1948, T.I.A.S. 2361: 'No State or group of States has the right to intervene directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State.'

[55] Compare J. C. Novogrod, 'Internal Strife. Self-Determination and World Order', in M. Cherif Bassiouni (ed.) *International Terrorism and Political Crimes*, Springfield Illinois 1975, at 103: 'During rebellion there is no dispute that assistance may be given to the legitimate government upon request, but, contrarily, none may be given to the rebels'; later adding that 'it is not surprising that even when the revolt becomes somewhat more sustained in time and place and is organized under responsible leaders, the resulting insurgency still does affect the rule that the established government may be assisted but the insurgents may not.' See also M. N. Shaw, *International Law*, 6th ed., Cambridge 2008, at 1152: 'The reverse side of the proposition – that states are allowed to seek the assistance of other states in the suppression of rebellion – is that aid to rebels is contrary to international law.'

[56] ICJ, Case Concerning the Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits 27 June 1986, General List No. 70, § 242.

[57] Novogrod, supra note 55, at 103.

However, this position is also untenable for two reasons. For one thing, the free consent of the state is a prerequisite for the legitimacy of the foreign assistance.[58] Besides, absent a treaty, no state is under an obligation to render assistance to the established government during insurgency.[59] Secondly, as soon as the insurgency has 'matured' into belligerency, a foreign state is under an obligation to remain neutral and forfeits its right to support the incumbent government.[60] Obviously, states would be allowed to take sides and become a co-belligerent with one of the two factions. For the purpose of our research, this entails that foreign states would not be allowed to bring belligerents to criminal justice before a regional court on account of their revolt, as soon as they have succeeded in achieving that status.

It may be interesting to pay some attention to the relationship between the principle of non-intervention and the static form of unconstitutional change of government. Would states be allowed to intervene when defeated dictators cling to their position and refuse to abdicate in favour of democratically elected power contenders? The issue is topical in view of the recent intervention by troops from other West-African countries in the Gambia in order to remove outgoing president Yahya Jammeh who was adamant in his decision to stay in power.[61] In his discussion whether such an intervention for the restoration of democracy is permitted, Malcolm Shaw is quite determined where he holds that 'apart from the problems of defining democracy, such a proposition is not acceptable in international law in view of the clear provisions in the UN Charter.'[62] One might deduce from this, *per argumentum a contrario*, that less invasive measures which imply no use of (military) force,

[58] Novogrod, supra note 55, at 105–6: 'Implicit in the permissibility of assistance to the lawful government during rebellion and insurgency is the understanding that such aid is based on the express or tacit consent of the strife-torn state. Without the requisite consent of the incumbent government, any assistance thrust upon it would be unwarranted interference in its internal affairs.' See also Shaw, supra note 54, at 1151: 'It would appear that in general outside aid to the government authorities to repress a revolt is perfectly legitimate, provided, *of course*, it was requested by the government.' (Italics added.)

[59] Novogrod, supra note 55, at 107.

[60] Garner 'Questions of International Law in the Spanish Civil War', 31 *American Journal of International Law* (1937), at 66, 69: 'It – the foreign state – loses the right which it had during the period of insurgency to assist the legitimate government and henceforth must treat both belligerents alike.' See Shaw, supra note 55, at 1150, asserting that '[o]nce the rebels have been accepted by other states as belligerents . . . the rules governing the conduct of hostilities become applicable to both sides, so that, for example, the recognizing states must then adopt a position of neutrality.'

[61] See the headlights in 'Military intervention looms as Jammeh clings to power', Al Jazeera, (19 January 2017), available online at: www.aljazeera.com/news/2017/01/gambia-jammeh-military-intervention-170119035928489.html (last visited: 23 January 2017).

[62] Shaw, supra note 55, at 1158.

like regional criminal law enforcement, would be allowed. However, even if that position can be vindicated, other obstacles may abound.

At this point, it is necessary to briefly discuss the topic of immunities. Article 46A*bis* of the Malabo Protocol stipulates that '[n]o charges shall be commenced or continued before the (African) Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure or office'.

The provision exhibits an obvious retrogression from Article 27 of the Rome Statute that has abolished all immunities before the International Criminal Court. It is not entirely clear whether Article 46A*bis* only refers to personal immunities (*ratione personae*) or would also cover functional immunities (*ratione materiae*), but the explicit mention of 'serving Heads of State' and the addition 'during their office' suggest that the former option was intended.[63] The problem of immunities in the context of international criminal law has been widely debated, in particular in relation to the arrest warrants issued against President Al-Bashir.[64] Moreover, the immunity issue has a far wider purport and may affect prosecution and trial of all international and transnational crimes under the jurisdiction of the African Criminal Court. For these reasons, an extensive discussion of the topic is beyond the scope of this article. Nonetheless, it cannot be denied that immunities have special repercussions for the crime of unconstitutional change of government. For one thing, those who succeed in toppling a democratically elected government may invoke immunity as soon as they have come to power. Secondly, those who refuse to make way for victorious and freely elected contenders appear to be shielded against prosecution as long as they remain in office.

[63] Compare D. Tladi, 'Immunities (Article 46A*bis*)', in Werle and Vormbaum, supra note 2, at 207: 'Although Article 46A*bis* could be read as establishing two categories of immunities, namely immunity *ratione materiae* and immunity *ratione personae*, on balance it appears that this second alternative is likely what was meant by the African Union.'

[64] See on immunities and international criminal law in general: D. Akande, 'International Law Immunities and the International Criminal Court', 98 *American Journal of International Law* (2004), at 407–33; A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case'13 *European Journal of International Law* (2002), at 853–75. In relation to the Al Bashir-case: D. Akande, 'The Legal Nature of the Security Council Referrals to the ICC and Its Impact on Bashir's Immunities', 7 *Journal of International Criminal Justice* (2009), at 333–52; P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 7 *Journal of International Criminal Justice* (2009), at 315–32; D. Tladi, 'The ICC decisions in Chad and Malawi: On Cooperation, Immunities and Article 98', 11 *Journal of International Criminal Justice* (2013), at 199–221. On the contested provision in the Malabo Protocol: D. Tladi, 'The Immunity Provision in the AU Amendment Protocol: Separating the (doctrinal) Wheat from the (Normative) Chaff', 13 *Journal of International Criminal Justice* (2015), at 3–17.

Immunities serve as a double-edged sword that benefits vested interests and perpetuates unlawful exercise of power. To be sure, there are ways to circumvent such predicaments, by withholding recognition of governments that have seized power by illegitimate means or by stipulating that tenure ends whenever an incumbent head of state refuses to abdicate.[65] Still, it bears emphasis that immunities constitute an impressive bulwark that may impede a successful repression of unconstitutional change of government.

Returning to the principle of non-intervention, it appears that this principle neither prohibits, nor sustains the criminalization of unconstitutional change of government. The principle is entirely subservient to the sovereign will of states, which stands to logic as it serves to protect their interests. States are at liberty to seek assistance of other states against insurgents and such assistance may take the form of criminal law enforcement by an African Criminal Court, but they are not bound by such an arrangement if they are not party to the Malabo Protocol. The freedom that international law bestows on states to seek assistance is even wider than acknowledged under the Malabo Protocol because such prerogatives are not dependent on the democratic quality of the government in power. The only limitation that the principle of non-intervention entails is that belligerents are not to be held criminally accountable because that would imply a breach of neutrality. Furthermore, the interpretation of the principle is understandably skewed in favour of preservation of the *status quo*. However, any obstacles in the prosecution of incumbent powerholders will probably be caused by inconsistencies in the law on immunities, rather than by the principle of non-intervention itself. Nonetheless, both the principle of non-intervention itself and its exceptions and limitations are primarily inspired by the quest for stability in international relations. And this rationale is of primary importance for the understanding of the introduction of the crime of unconstitutional change of government and its elevation to a regional level in Africa.

In my view, the best and probably only reason why states have a common interest in the repression of unconstitutional change of government is that insurgency is contagious. While it seemingly is restricted to the territory of one state, it cannot easily be contained and has the nasty habit of spilling over to neighbouring countries. The analogy with the crime of aggression is highly appropriate here. There is no consensus among political philosophers and legal commentators that aggression is the most hideous of crimes. Larry May, for instance, contends that the crime of aggression is not clearly the worst of

[65] On these solutions, see Tladi, supra note 63, at 208 and Kemp & Kinyunyu, supra note 2, at 69, respectively.

crimes, because state aggression may in some cases be the lesser evil, especially when it creates on balance positive effects.[66] Those, however, who consider aggression the worst of crimes often refer to Von Clausewitz' famous discourse *On War* in which he argues that war is essentially boundless. According to Von Clausewitz, 'war is an act of force which theoretically can have no limits'.[67] And he goes on to explain the mechanics of escalation that are inherent to warfare. The logic of war is that 'each of the adversaries forces the hand of the other. War tends toward the utmost exertion of forces' which implies increased ruthlessness, since 'the ruthless user of force who shrinks from no amount of bloodshed must gain an advantage if his opponent does not do the same.'[68] Because the stakes of glory versus defeat are so high, the antagonists hold each other hostage and run into a downward whirl of death and destruction.[69] This vicious circle of ever mounting violence is not restricted to the initial parties. As the adversaries try everything possible to gain the upper hand, they seek the assistance of allies. And so, war expands in space and time, involving more and more participants. It is precisely due to this process of escalation that war does not stop at geographical boundaries. It has prompted states to outlaw war as a method of dispute settlement, because the experience had taught them that it can redound on themselves.[70]

In case of civil strife, one would expect that its violent effects would be less volatile, but the experience in Africa in particular has proved otherwise. Examples of insurrections, crossing border and affecting several countries abound. The carnage in the Congo at the turn of the century which has often been qualified as an 'African world war' originated from the civil wars in Rwanda and Burundi. Other players soon tuned in, always in pursuit of raw materials, sometimes in order to root out rebels who found refuge in the vast

[66] L. May, *Aggression and Crimes against Peace*, Cambridge 2008, at 223–5.

[67] K. Von Clausewitz, *On War*, (translation by M. Howard and P. Paret, Princeton 1976), at 76.

[68] Von Clausewitz, supra note 67, at 75/76.

[69] For a vivid discussion of von Clausewitz' arguments, see M. Walzer, *Just and Unjust Wars*, (3rd ed. New York 1977 (2000)), at 23. Walzer, however, does not agree with Von Clausewitz grim and fatalistic view. As war is a social construction, it is, in his opinion, possible to modify and temperate war fare (Just and Unjust Wars, at 25).

[70] G. Best, *War & Law since 1945*, (Oxford 1994), at 54. Best explains how the urge in the *interbellum* to get rid of war altogether was in effect conducive to a neglect of the improvement of the *jus in bello*: 'So profound and unsettling, however, was the impression made upon that generation of survivors by, as they called it, the Great War, that their consequent responses went far beyond such patching of the *jus in bello*. It was no doubt desirable that war should never again be fought in ways as beastly as those in which the Great War had specialized. But how much more desirable that great wars should never happen again and that the use of armed force among States, so far as it could not be absolutely prevented, should be controlled to serve the common good!'

jungle (Museveni's Uganda) and sometimes in retaliation for earlier support of insurgents by Congo (Angola).[71] The Lord's Resistance Army, after having partially been defeated by Ugandan forces in the north of the country, moved its camps to neighbouring Sudan and the Central African Republic, creating havoc in those states.[72] The string of events in the 'Arab Spring' exhibiting a domino effect in several countries was explicitly mentioned in the warrant of arrest issued against Al-Senussi.[73] And the infamous civil war, fuelled by the hunt for diamonds in Sierra Leone, was initially triggered by incessant tribal warfare in neighbouring Liberia that did not end with the demise of the dictatorship of Samuel Doe, but gave new opportunities to arch-schemer Charles Taylor.[74] Against this backdrop one can understand the urge of African states to join forces and engage in criminal repression of the unconstitutional change of government.

7. SOME FINAL REFLECTIONS

It has been my objective to investigate and understand why a typical domestic political event like unconstitutional change of government has been upgraded in the African context to a 'supranational crime' that is supposed to be countered by law enforcement at a regional level. I have argued that criminalization of the conduct as such does not infringe a supposed right of rebellion. Nor would the elevation of the offence to the regional level contradict the principle of non-intervention. However, while these principles do not defeat the prosecution and trial of unconstitutional change of government by the African Criminal Court, it is still not clear why states would be inclined to move criminal law enforcement in respect of this crime to a higher level. One reason that comes to mind is that serious political strife is connected to core

[71] For a chilling account, see M. Meredith, *The State of Africa; A History of Fifty Years of Independence*, (London 2006), at 524– 45. As Meredith observes (p. 535): 'One province after another joined the rebellion. Not only were Rwanda and Uganda involved in the campaign but Angola too, long resentful of Mobutu's support for the Angolan rebel leader Jonas Savimbi.'

[72] In a recent Resolution, the Security Council noted that the LRA 'is still engaged in or providing support for acts that undermine the peace, stability or security of the CAR.' UN SC Res. 2262(2016), § 12.

[73] *Prosecutor v. Al Gaddafi and Al Senussi*, supra note 29, § 70: 'Following the events in Tunisia and Egypt which led to the departure of their respective Presidents in the early months of 2011, a State policy was designed . . . aimed at deterring and quelling the demonstrations of civilians against the regime of Gaddafi'.

[74] Compare with Meredith, supra note 71, at 550: 'The dominant role played by the Krahn, particularly in suppressing dissent, provoked tribal animosities that had long lain dormant. The eventual consequence was civil war. It was a war that was not confined to Liberia but spread into neighbouring countries, engulfing the whole region in conflict.'

crimes in the sense that they generate those crimes. The analogy with the crime of aggression is apposite, in that aggression not only promotes war crimes but also constitutes the *sine qua non* for their occurrence. The Nuremberg Military Tribunal succinctly expressed this: 'To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'[75] Like inter-state war, insurgencies trigger violence and augment the risk of heinous crimes being committed. Nonetheless, the explanation is not entirely satisfactory, because penalization of unconstitutional change of government does not aim to counter political violence at all costs. Its objective is to suppress assaults on *democratic* institutions, suggesting that such illegitimate activities in particular are likely to affect peace and stability within a political community. A second – and arguably better – explanation is that insurgencies are not contained to single states but are inclined to spread to other countries. Again, the analogy with the crime of aggression is striking. The Nuremberg Tribunal noted that '[w]ar is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.'[76] These lines lay bare the infectious nature of war. With respect to internal rebellions, this is not essentially different. The African continent in particular has been plagued by internal strife that easily moves from state to state. States have a common interest in suppressing both the dynamic and static form of unconstitutional change of government because the ensuing unrest and violence is not likely to stop at their borders.

The inclusion of this crime in the Malabo Protocol suggests that states are confident that the African Criminal Court may be better equipped to take on the investigation and prosecution of perpetrators of the offence. After all, the relationship between this court and domestic jurisdictions is governed by the principle of complementarity which implies that the Court can intervene when the state, due to internal political tensions, is unable to pursue criminal proceedings. Of course, we have no guarantee that the incorporation of the crime within the jurisdiction of the African Court will reduce or prevent its occurrence. However, the same holds true for the crime of aggression in the Rome Statute. It may be considered, though, as a normative expression of a genuine common concern of African states.

[75] *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22nd August – 1st October 1946), at 421.
[76] Ibid.

B

Institutional and Procedural Issues

23

Complementarity at the African Court

MARGARET M. DEGUZMAN

INTRODUCTION

This chapter explores the likely relationships among the African Court (AC), the International Criminal Court (ICC), possible sub-regional courts, and national courts. It begins with an analysis of the complementarity provision of the AC Statute, which largely replicates that of the ICC. Based on this analysis, as well as the ICC's early complementarity jurisprudence, the chapter seeks to explicate the legal relationships among the various institutions. The chapter then turns to the normative question of how the proposed regional court should interact with national courts, the ICC, and other supra-national criminal courts such as the Extraordinary African Chambers in Senegal. While a great deal of theoretical work remains to be done in this area, the chapter suggests that as regional and sub-regional criminal courts such as the AC emerge, they should not be viewed as forming a jurisdictional hierarchy, with national courts at the top and the ICC at the bottom, but rather as providing a menu of adjudicative options. Adjudicative priority should be decided by balancing a range of factors from practical considerations, such as ease of obtaining evidence and custody, to defendants' rights. Particular attention should be paid to the interests of each institution's constitutive community in adjudicating a particular case. In this way, national, regional, and international criminal courts can truly complement each other.

1. LEGAL ANALYSIS OF THE PROTOCOL'S COMPLEMENTARITY PROVISIONS

This section of the chapter analyzes the Malabo Protocol's provisions on complementarity as well as the ICC jurisprudence concerning the virtually identical provisions in the Rome Statute. It then explains the likely contours of

complementarity at the AC and sets forth the biggest open questions concerning application of the principle.

A. *Complementarity in the Protocol*

The concept of complementarity is broadly conceived in the Protocol as encompassing a cooperative relationship with any institution concerned with human rights promotion and protection on the continent. The Protocol first mentions complementarity in the Preamble, which takes note of 'the complementary relationship between the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, as well as its successor, the African Court of Justice and Human and Peoples' Rights'.[1] The Protocol further asserts that African Union (AU) member states are '[c]onvinced that the present Protocol will complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples' rights … and ensuring accountability for them wherever they occur'.[2] Article 4 of the Protocol on the 'Relationship between the Court and the African Commission on Human and Peoples' Rights' notes that: 'The Court shall, in accordance with the Charter and this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights'.[3] This protective mandate is set forth in Article 45 of the African Charter on Human and Peoples' Rights, which provides that the Commission will promote human and peoples' rights inter alia by 'cooperat[ing] with other African and international institutions concerned with the promotion and protection of human and peoples' rights'.[4] The Protocol's drafters thus envisioned a system in which various institutions would work together to further human rights on the continent.

The details concerning the functioning of complementarity at the AC are set forth in Article 46(H) of the Protocol entitled 'Complementary Jurisdiction', which states:

> 1. The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.

[1] Preamble *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, EX.CL/846(XXV), 27 June 2014.

[2] Ibid.

[3] Ibid. at art. 4.

[4] Art. 45 *African Charter on Human and Peoples' Rights* ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981.

2. The Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint; (d) The case is not of sufficient gravity to justify further action by the Court.
3. In order to determine that a State is unwilling to investigate or prosecute in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
   (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
   (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
   (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
4. In order to determine that a State is unable to investigate or prosecute in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[5]

Most of this provision is identical to Article 17 of the Rome Statute of the ICC.[6] However, there are some notable differences. First, the AC is to be complementary not only to national courts, but also to the courts of regional economic communities (RECs).[7] Currently, no regional community court has jurisdiction over international crimes; but some state leaders have

[5] Art. 46(H) Draft Protocol ACtJHR.
[6] Art. 17 ICCSt.
[7] Art. 46(H) Draft Protocol ACtJHR.

indicated an interest in extending the jurisdictions of these institutions.[8] Should this occur, another layer of complexity will be added to the complementarity analysis, particularly in cases where states, RECs, and the AC have overlapping jurisdiction.

A drafting peculiarity is worth noting in regards to complementarity with the RECs. While paragraph 1 of Article 46(H) asserts that the AC 'shall be complementary' to both national courts and courts of the RECs, the remainder of the article mentions only the possibility of deferring to 'State' investigations and prosecutions.[9] For instance, the Court is instructed to 'determine that a case is inadmissible' when '[t]he case is being investigated or prosecuted by a State which has jurisdiction over it'.[10] Technically, therefore the AC judges could interpret paragraphs 2 and 3 of Article 46(H) to apply only to situations where States are investigating or prosecuting a case before the Court.[11] In that case, they would have to identify other rules applicable to complementarity with RECs should those institutions be granted jurisdiction over international crimes. More likely, however, the judges will read references to the RECs into paragraphs 2 and 3, which is probably what the drafters intended. The omission of the RECs from these paragraphs appears to be a casualty of the decision largely to copy this provision from the Rome Statute.

A potentially more important drafting difference between the two statutes is the omission of the word 'genuinely' from paragraphs 2 (a) and (b) of the Protocol. The Rome Statue provides that a case is inadmissible when it is being investigated or prosecuted by a state with jurisdiction 'unless the State is unwilling or unable *genuinely* to carry out the investigation or prosecution'.[12] Likewise, a case is inadmissible when a state has investigated and decided not to prosecute 'unless the decision resulted from the unwillingness or inability of the State *genuinely* to prosecute'.[13] The AC Statute uses identical language in these paragraphs except that it omits the word 'genuinely'. The most likely explanation for this omission is that state leaders were reluctant to grant

[8] See e.g., 'East African Court to Hear Crimes Against Humanity', Chimp Reports, 29 April 2013, available at, www.chimpreports.com/9681-east-african-court-to-hear-crimes-against-humanity/ (reporting that the East African Community is considering adding criminal jurisdiction, including over crimes against humanity, to the East African Court of Justice); see also Don Deya, 'Is the African Court Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crime', Open Society Initiative for Southern Africa, 6 March 2012, available at www.osisa.org/openspace/regional/african-court-worth-wait.

[9] Art. 46(H) Draft Protocol ACtJHR.

[10] Ibid. at art. 46(H)(2) and (3).

[11] Ibid.

[12] Art. 17(1)(a) ICCSt (emphasis added).

[13] Ibid. art. 17(1)(b) (emphasis added).

the AC the power to evaluate the genuineness of their state's criminal proceedings. The consequence, however, is that the provisions are rendered nonsensical.[14] As drafted, paragraph 2(a) asserts that a case is inadmissible when a state is investigating or prosecuting unless it is not investigating or prosecuting (due to unwillingness or inability).[15] Similarly, paragraph 2(b) states in part that a case is inadmissible when a state has investigated and decided not to prosecute unless the state is unwilling to prosecute – which is clearly the case since the state has decided not to do so.[16]

For the judges of the AC to conduct a complementarity analysis, they will have to find some basis on which to evaluate the adequacy of national, and perhaps regional, proceedings. They might do this by reading the word 'genuinely' back into the provision or by finding another principle on which to rest their decisions. For purposes of the remainder of this chapter, I will assume that something akin to genuineness will be required.

Another difference between the AC's complementarity provision and that in the Rome Statute is that the latter contains two additional articles entitled 'Preliminary Rulings Regarding Admissibility' (Article 18) and 'Challenges to the Jurisdiction of the Court or the Admissibility of a Case' (Article 19).[17] Article 18 requires the ICC prosecutor to notify relevant states before opening an investigation except in situations referred by the Security Council and to defer to the state's investigation unless the Pre-Trial Chamber authorizes an investigation.[18] The article provides for appeal of the Pre-Trial Chamber's decisions and requires states to inform the prosecutor of the progress of investigations when the prosecutor has deferred to them.[19] Article 19 sets forth procedures regarding challenges to the ICC's jurisdiction or the admissibility of a case including who may assert such challenges, the timing of the challenges, and which chamber will hear them.[20] It is unclear why these (or similar) provisions were omitted from the AC Statute. Part of the explanation may be that the Protocol generally does not include the same level of procedural detail as the Rome Statute. With regard to appeals, for instance, Article 18 of the Protocol simply states that '[a]n appeal may be made against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction'.[21] In contrast, the Rome

[14] I am grateful to my research assistant, Kelsey Lee, for this observation.
[15] Art. 46(H)(2) Draft Protocol ACtJHR.
[16] Ibid.
[17] Arts 18 and 19 ICCSt.
[18] Ibid. at art. 18(1) and (2).
[19] Ibid. at art. 18(4) and (5).
[20] Ibid. at art. 19.
[21] Art. 18(3) Draft Protocol ACtJHR.

Statute contains detailed provisions regarding the grounds and procedures for appeal.[22] The absence of detailed procedures from the Protocol will likely mean the judges will be tasked with elaborating the AC's procedures.

A final difference between the two statutes is that Article 17 of the Rome Statute is labelled 'Admissibility', while Article 46(H) of the Protocol is labelled 'Complementary Jurisdiction'.[23] The term 'complementarity' in the context of the Rome Statute is usually interpreted to refer only to the question of whether a case is admissible due to a state's failure adequately to investigate or prosecute. Considerations of *ne bis in idem* and gravity, also covered in Article 17, are separate aspects of admissibility. It is unclear why the Protocol's drafters deviated from the Rome Statute model in this regard and the difference may have little practical effect.[24] Nonetheless, since the judges of the AC will conduct the analyses concerning gravity and *non bis in idem* alongside that of whether another jurisdiction is adequately investigating and prosecuting, it is conceivable that those analyses will be linked to a greater degree than they are in the ICC's jurisprudence. In light of the inclusion of *non bis in idem* and gravity as part of complementarity in the Protocol, those provisions are analyzed below.

In both the Rome Statute and the Protocol, *non bis in idem*[25] is referenced twice: first in the provisions concerning complementarity (Protocol)[26] and admissibility (Rome Statute),[27] and then in a separate article that elaborates the *non bis in idem* principle.[28] Article 46(I) of the Protocol, which largely mirrors Article 20 of the Rome Statute, states:

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

[22] Arts 81–3 ICCSt.

[23] Art. 17 ICCSt; Art. 46(H) Draft Protocol ACtJHR.

[24] In the *Al-Senussi* case, the court referred to *ne bis in idem* as a 'corollary' to the principle of complementarity. Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute', *Saif Al Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–321-Red), Pre-Trial Chamber I, 2 May 2013, § 38; see also O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (München: CH Beck, 2008), at 7 (stating that Article 20(3) both helps to safeguard defendants' rights and to limit the ICC's reach by 'distributing and balancing the competences of the ICC and those of national courts according to the principle of complementarity').

[25] The Rome Statute uses the term '*ne bis in idem*'.

[26] Art. 46(H) Draft Protocol ACtJHR.

[27] Art. 17 ICCSt.

[28] Art. 46(I) Draft Protocol ACtJHR; Art. 20 ICCSt.

2. Except in exceptional circumstances, no person who has been tried by another court for conduct proscribed under Article 28A of this Statute shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court:
   (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
   (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Court shall take into account the extent to which any penalty imposed by another Court on the same person for the same act has already been served.[29]

There are several important differences between this provision and Article 20 of the Rome Statute. First, the Rome Statute contains an additional paragraph asserting: 'No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court'.[30] This seems to have been omitted from the Protocol to allow states flexibility in deciding whether to adhere to the principle of *non bis in idem* in regards to judgments of the AC. Second, unlike the Rome Statute, the Protocol qualifies the prohibition on retrial at the AC of a person who has been tried by another court with respect to the same conduct with the phrase 'except in exceptional circumstances'.[31] Again, the intent seems to be to afford the AC flexibility in respecting the principle of *non bis in idem*, although no guidance is given regarding what might constitute 'exceptional circumstances' beyond those already taken into account in paragraphs 2 (a) and (b).[32]

Finally, there is no equivalent in the Rome Statute of Article 46(I) of the Protocol, which instructs the Court in determining an appropriate penalty to take account of any time served by virtue of another conviction for the same act.[33] Article 78(2) of the Rome Statute concerning determination of sentence states that '[t]he Court may deduct any time otherwise spent in

[29] Art. 46(I) Draft Protocol ACtJHR.
[30] Art. 20(2) ICCSt.
[31] Art. 46(I)(2) Draft Protocol ACtJHR; Art. 20 ICCSt.
[32] Art. 46(I) Draft Protocol ACtJHR.
[33] Ibid. at art. 46(I)(3).

detention in connection with conduct underlying the crime'.[34] This statement is discretionary, however, whereas the AC is required to take time served into account.

Apart from the differences highlighted above, the complementarity provision of the AC Statute largely mirrors that of the Rome Statute. The next sections will explain how the ICC's judges and prosecutors have interpreted and applied complementarity, *ne bis in idem*, and gravity to set the stage for the final Part's discussion of how the AC ought to interpret the Protocol's similar provisions.

B. *Complementarity at the ICC*

At the ICC, complementarity has been treated as a 'principle' requiring the Court to complement the efforts of national courts. This principle has been implemented both by the Court's prosecutors, who have adopted a policy of 'positive complementarity',[35] and by the judges who have ruled on complementarity-based challenges to the admissibility of particular situations and cases. The Prosecutor's positive complementarity policy entails providing assistance to national systems in an effort to encourage and support them in conducting prosecutions of crimes within the ICC's jurisdiction.[36] Such assistance takes the form of trainings, evidence-sharing, and technical guidance, among other things.[37] In a recently issued draft policy paper, the Prosecutor states that if a state with jurisdiction is investigating or prosecuting a case, her office 'may consult with the authorities in question to share the information or evidence it has collected, pursuant to Article 93(10) of the Statute, or it may focus on other perpetrators that form part of the same or a different case theory, in line with a burden-sharing approach'.[38]

The ICC judges have ruled on complementarity-based challenges to admissibility on several occasions, thereby developing jurisprudence around the concept. The issue of complementarity sometimes arises at the investigation

[34] Art. 78(2) ICCSt.

[35] The Office of the Prosecutor, *Prosecutorial Strategy*, International Criminal Court, 1 February 2010, available at www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf.

[36] Ibid. at § 5.

[37] Ibid. at § 17.

[38] The Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, International Criminal Court, 15 September 2016, available online at www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf, at 31.

stage, in which case the question is whether the overall situation is admissible.[39] To determine the admissibility of a situation, the Court examines whether the cases most likely to come before the Court would be admissible.[40] Determining admissibility at the case stage is more straightforward because the identities of the defendants and the nature of the charges are already known.

To determine whether the requirements of complementarity are met, the Court first looks to whether a state with jurisdiction is actively investigating or prosecuting a relevant case.[41] The determination is made as of the time of the admissibility decision and is subject to revision if circumstances change.[42] The Court will not consider the willingness or ability of a state to investigate unless there is some relevant state-level activity.[43] The ICC Appeals Chamber has stated:

> in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.[44]

[39] Art. 53(1)(b) ICCSt.

[40] Ibid.

[41] Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Thomas Lubanga Dyilo* (ICC-01/04–01/06–8-US-Corr 09–03–2006 20/65 SL), Pre-Trial Chamber I, 24 February 2006, § 29.

[42] Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09–02/11–96 30–05–2011 1/27 RH PT), Pre-Trial Chamber II, 30 May 2011, §§ 56–66; The Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04–01/07–1497 25–09–2009 1/44 IO T OA8), Appeals Chamber, 25 September 2009, § 56.

[43] Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga and Chui* (ICC-01/04–01/07–1497 25–09–2009 1/44 IO T OA8), Appeals Chamber, 25 September 2009, § 78.

[44] Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–547-Red 21–05–2014 1/96 NM PT OA4), Appeals Chamber, 21 May 2014, § 213 (referring to Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga and Chui*, (ICC-01/04–01/07–1497 25–09–2009 1/44 IO T OA8), Appeals Chamber, 25 September 2009, § 78).

Thus, when all states with jurisdiction are inactive, a case is admissible.[45] This situation may arise when a state with territorial or nationality jurisdiction over a case requests the ICC's involvement. In the *Katanga* case, the Appeals Chamber rejected the argument that a state's decision to relinquish jurisdiction, despite its own ability to prosecute, renders the case inadmissible.[46] The Chamber found that such a decision complies with the state's obligation to exercise jurisdiction over international crimes, and that admitting such 'self-referred' cases promotes the ICC's goal of ending impunity for international crimes.[47]

When a state with jurisdiction is investigating or prosecuting, the question becomes whether the state activity pertains to the same 'case' that is before the ICC. The Court has interpreted this to mean that the state activity must concern the 'same individual and substantially the same conduct'.[48] Thus, in the *Lubanga* case, which involved charges of conscripting, enlisting, and using child soldiers, the Pre-trial Chamber determined the case to be admissible because the Democratic Republic of Congo (DRC) – the state where the crimes were committed – had charged Lubanga with different conduct.[49] The DRC was thus deemed 'inactive' for purposes of the complementarity analysis.[50] This was true even though some of the crimes charged in the national proceedings were arguably more serious: genocide and crimes against

[45] Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Lubanga* (ICC-01/04–01/06–8-US-Corr 09–03–2006 1/65 SL), Pre-Trial Chamber I, 24 February 2006, § 29.

[46] Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *Germain Katanga and Mathieu Ngudjolo Chui*, (ICC-01/04–01/07–1213-tENG 15–07–2009 1/38 IO T), Trial Chamber II, 16 June 2009, § 79.

[47] Ibid.

[48] Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *William Samoei Ruto et al* (ICC-01/09–01/11–307 30–08–2011 1/44 NM PT OA), Appeals Chamber, 30 August 2011, § 1 (hereinafter Ruto Admissibility Judgment); Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09–02/11–274 30–08–2011 1/43 NM PT OA), Appeals Chamber, 30 August 2011, § 1.

[49] Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Lubanga* (ICC-01/04–01/06–8-US-Corr 09–03–2006 1/65 SL), Pre-Trial Chamber I, 24 February 2006, §§ 36–40.

[50] Ibid. at § 39.

humanity.[51] What mattered was that Lubanga was not charged with crimes related to child soldiers, as he was before the ICC. The Court has rejected the argument that it suffices for a state to investigate persons at the same level in the hierarchy of an organization implicated in international crimes as those the ICC is pursuing.[52]

To determine whether state activity concerns 'substantially the same conduct', the Court compares the incidents the state is investigating with those that are the subject of the ICC proceedings to ascertain the degree of overlap.[53] To the extent the incidents differ, the Court considers the state's explanation for why it is not investigating the incidents the ICC is investigating.[54] The requirement that the conduct be 'substantially the same' does not mean that the state proceeding must concern identical charges, or even international crimes.[55]

A state challenging admissibility bears the burden of demonstrating that it is investigating or prosecuting the same person and substantially the same conduct that are the subject of ICC proceedings.[56] To show it is 'investigating', a state must provide evidence that it is taking 'concrete and progressive investigative steps' to determine the responsibility of a suspect under ICC investigation.[57] It is insufficient for the state to provide evidence of future intent to investigate; the investigation must be ongoing at the time of the admissibility

[51] Ibid. at § 33; *International Center for Transitional Justice, Situation Brief: The Trial of Thomas Lubanga*, International Center for Transitional Justice, January 2009, available at www.ictj.org/sites/default/files/ICTJ-DRC-Lubanga-Trial-2009-English.pdf (stating that the DRC arrested and charged Lubanga with genocide and crimes against humanity under DRC's military criminal code).

[52] Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09–02/11–96 30–05–2011 1/27 RH PT), Pre-Trial Chamber II, 30 May 2011, §§ 56–66.

[53] Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–547-Red 21–05–2014 34/96 NM PT OA4) Appeals Chamber, 21 May 2014, § 72.

[54] Ibid. at § 74.

[55] Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2003 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi', *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–565 24–07–2014 1/117 NM PT OA6), Appeals Chamber, 24 July 2014, § 119.

[56] Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–344-Red 31–05–2013 26/91 FB PT), Pre-Trial Chamber I, 31 May 2013, §§ 61, 135 (defining 'case' as same person same conduct and stating that evidence does not allow the Chamber to discern the contours of the national case).

[57] OTP says in Côte d'Ivoire statement that this standard is from *Gaddafi*; Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May

challenge.[58] The evidence must be 'of a sufficient degree of specificity and probative value' to establish the existence of an ongoing investigation.[59] Merely opening a file on a suspect has been deemed insufficient to constitute an ongoing investigation.[60] Examples of the kinds of evidence required include 'directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the domestic investigation of the case'.[61]

The evidence submitted must enable the ICC judges to discern the contours of the state investigation and to determine that they cover substantially the same conduct as the ICC investigation.[62] In the *Gaddafi* case, the Pre-Trial Chamber found that the evidence Libya presented was insufficient to demonstrate that Libya was investigating substantially the same conduct as the ICC.[63] The ICC case alleged that Gaddafi used his leadership position within

2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09–02/11–274 30–08–2011 1/43 NM PT OA), Appeals Chamber, 30 August 2011, §§ 1, 40, 80, 81 (stating that examples of investigative steps may include interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analysis); Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–344-Red 31–05–2013 2/91 FB PT), Pre-Trial Chamber I, 31 May 2013, § 73.

[58] Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09–02/11–96 30–05–2011 1/27 RH PT), Pre-Trial Chamber II, 30 May 2011, §§ 59–66.

[59] Decision on the admissibility of the case against Abdullah Al-Senussi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–466-Red 11–10–2013 1/152 NM PT), Pre-Trial Chamber I, 11 October 2013, § 66(vi); Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09–02/11–274 30–08–2011 1/43 NM PT OA), Appeals Chamber, 30 August 2011, § 61.

[60] Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09–02/11–274 30–08–2011 1/43 NM PT OA), Appeals Chamber, 30 August 2011, § 61 (holding that the submissions of Kenya regarding investigation of all allegations into the six suspects and consideration of all evidence that emerged was insufficient and the Chamber considers that there remains a situation of inactivity).

[61] Decision on the Admissibility of Case against Saif Al-Islam Gaddafi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–344-Red 31–05–2013 84/91 FB PT), Pre-Trial Chamber I, 31 May 2013, § 55.

[62] Ibid. at § 135.

[63] Ibid. at § 134.

the government to suppress civilian demonstrations, including through lethal force.[64] Although Libya's submissions in support of its admissibility challenge demonstrated that its investigations related to aspects of the ICC charges, they were deemed insufficient to cover substantially the same conduct.[65]

In sum, for the ICC to find a case inadmissible based on ongoing national proceedings, the party challenging admissibility must submit a significant amount of evidence demonstrating that the state is investigating or prosecuting a substantially similar set of incidents involving the same defendants as the ICC case.

When a state with jurisdiction is investigating or prosecuting the same person for substantially the same conduct, the case may nonetheless be admissible before the ICC if the state is found to be unwilling or unable *genuinely* to investigate or prosecute the case.[66] Here again, the party challenging admissibility bears the burden of demonstrating the conditions that render a case inadmissible;[67] that is, that the proceedings were not undertaken to shield the accused, there was no unjustified delay, and the proceedings were conducted independently, impartially, and consistently with the intent to bring the person concerned to justice.[68]

The Court has held that an evaluation of a state's willingness and ability genuinely to investigate or prosecute is only necessary when some doubt exists as to the genuineness of state proceedings.[69] When such an evaluation is necessary, it must be conducted in light of the applicable national laws and procedures.[70] The evidence submitted to demonstrate relevant state activity may also be used to determine the genuineness of that activity.[71]

The Court considered the questions of unwillingness and inability in the *Gaddafi* and *Al-Senussi* cases in the Libya situation. In *Gaddafi*, the Pre-Trial Chamber held that the national judicial system was unable genuinely to prosecute largely because the central government did not adequately control

[64] Ibid. at § 133.
[65] Ibid. at § 134.
[66] Art. 17(1)(a) ICCSt.
[67] Decision on the Admissibility of the case against Abdullah Al-Senussi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–466-Red 11–10–2013 1/152 NM PT), Pre-Trial Chamber I, 11 October 2013, § 208.
[68] Art. 17(2) ICCSt.
[69] Decision on the Admissibility of the case against Abdullah Al-Senussi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–466-Red 11–10–2013 1/152 NM PT), Pre-Trial Chamber I, 11 October 2013, § 208.
[70] Ibid. at § 203.
[71] Ibid. at § 210.

relevant areas of the country.[72] The Chamber noted that the government did not have custody of the accused and was unable to obtain necessary testimony, to ensure witness protection, or to control adequately detention centres.[73] Additionally, the government had not secured independent legal representation for Gaddafi.[74] The Appeals Chamber upheld the decision, although it did not reach the questions of unwillingness or inability.[75]

In contrast, in the *Al-Senussi* case, the Pre-Chamber declined to find Libya unable genuinely to proceed, noting that Libya had collected significant evidence against Al-Senussi – more than it had against Gaddafi – and that the security situation had not undermined the investigation.[76] Moreover, unlike Gaddafi, Al-Senussi was in the custody of the central government and efforts were being made to secure him representation.[77] The Appeals Chamber confirmed these rulings as well.[78]

In the *Al-Senussi* case, the Appeals Chamber further held that unwillingness is not demonstrated simply by failure to adhere to international fair trial standards.[79] Although the Chamber conceded that it might be possible to read the Rome Statute as implying such a requirement, it found this interpretation to be contrary to the purpose of the complementarity principle, which is to promote the exercise of national jurisdiction.[80] However, the Appeals Chamber noted that: 'instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice.

[72] Decision on the Admissibility of Case against Saif Al-Islam Gaddafi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–344-Red 31–05–2013 84/91 FB PT), Pre-Trial Chamber I, 31 May 2013, § 205.

[73] Ibid. at §§ 206–11.

[74] Ibid. at §§ 212–14.

[75] Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–547-Red 21–05–2014 1/96 NM PT OA4), Appeals Chamber, 21 May 2014, §§ 213–14. The appeals Chamber found that Libya had not satisfied the Pre-Trial Chamber that it was investigating the same case and therefore did not address the question of unwillingness and inability. Ibid.

[76] Decision on the admissibility of the case against Abdullah Al-Senussi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–466-Red 11–10–2013 1/152 NM PT), Pre-Trial Chamber I, 11 October 2013, §§ 297–9.

[77] Ibid. at § 308.

[78] Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi', *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–565 24–07–2014 1/117 NM PT OA6), Appeals Chamber, 24 July 2014, § 295.

[79] Ibid. at §§ 213–14.

[80] Ibid. at § 217.

In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all'.[81] It therefore remains to be seen where the ICC will draw the line between violations of defendants' rights that render a state unwilling genuinely to prosecute and those that do not meet the threshold.

The Pre-Trial Chamber also considered unwillingness in the *Al-Senussi* case. The Chamber rejected the argument that Libya is unwilling to conduct genuine proceedings, finding that there was no evidence of intent to shield the accused, unjustified delay, or a lack of intent to bring the accused to justice.[82] The evidence the Pre-Trial Chamber evaluated in reaching this conclusion included the quantity and quality of the evidence Libya collected as part of its investigation of Mr. Senussi, the scope of the investigation and resources employed, the transfer of the case to the Accusation Chamber, the conduct of proceedings against other Gaddafi-era officials, and the efforts to resolve issues in the national judicial system using international assistance.[83]

In sum, the jurisprudence to date on unwillingness and inability suggests that the ICC is reluctant to find states unwilling to investigate or prosecute and will give significant latitude to state procedures in determining inability.

C. *Ne Bis In Idem* and Gravity at the ICC

The ICC has yet to interpret either Article 17(1)(c) or Article 20(3), which contain several unresolved ambiguities regarding the application of *ne bis in idem*. Moreover, although the statutes of the *ad hoc* international criminal tribunals contain similar provisions, those also have not been the subjects of significant jurisprudence. Although the principle of *ne bis in idem* – that a court cannot try someone for a crime that has already been the object of criminal proceedings against them[84] – is present in many of the world's legal systems, significant differences exist in its application.[85] In particular, divergence exists as to whether the principle bars further prosecutions on the

[81] Ibid. at § 230.

[82] Decision on the admissibility of the case against Abdullah Al-Senussi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–466-Red 11–10–2013 143/152 NM PT), Pre-Trial Chamber I, 11 October 2013, §§ 290–2.

[83] Ibid. at § 289.

[84] A. Cassese, *Cassese's International Criminal Law*, (3rd edn., Oxford: Oxford University Press, 2013), at 314.

[85] G. Conway, 'Ne Bis in Idem in International Law', 3 *International Criminal Law Review* (2003) 351–83, at 355.

same facts – the 'in concreto' application of the principle – or only for the same offence – the 'in abstracto' version.[86] Civil law systems tend to adopt the former approach, while common law systems follow the latter.[87]

Both the Protocol and the Rome Statute contain the broader 'in concreto' version of the principle with regard to previous national trials. That is, apart from limited exceptions,[88] an individual convicted by a national court cannot be tried at either institution for the same conduct even if the offence of conviction was not the offence with which the supranational court would have charged the individual. This broad prohibition on retrial was controversial among the drafters of the Rome Statute, with some preferring to permit an ICC trial when the national court had charged only 'ordinary' crimes.[89] This restriction was rejected, however, with the majority finding it sufficient that a perpetrator was tried, convicted, and punished, even if the conduct was not categorized as an international crime.[90]

The gravity threshold in Article 17(d) of the Rome Statute has received more attention in the jurisprudence and scholarship. Like the equivalent language in the Protocol, Article 17(d) prohibits the ICC from admitting a case that 'is not of sufficient gravity to justify further action by the Court'. Unlike the Protocol, however, the Rome Statute clearly limits the ICC's jurisdiction to 'the most serious crimes of concern to the international community'.[91] Because the Rome Statute lists war crimes, crimes against humanity, genocide, and aggression as fulfilling this criterion, the ICC's judges have struggled to explain which such crimes fall below the gravity threshold.

The gravity determination must be made first in deciding whether it is appropriate to open an investigation, and second, to ascertain the admissibility of particular cases within a situation.[92] The ICC Prosecutor's policy is to consider the following four factors in determining whether a case or a

[86] Ibid. at 356–7.
[87] Ibid. at 357.
[88] As noted above, in addition to the exceptions detailed in the Rome Statute, the Protocol permits the AC judges to disregard this prohibition in unspecified 'exceptional circumstances'.
[89] J. T. Holmes, 'Principle of Complementarity', in R. S. Lee (ed.), *ICC: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999), at 57–8. The Rome Statute and Protocol differ in this regard from the *ad hoc* international criminal tribunals for Former Yugoslavia and Rwanda where retrial is permitted when the national convictions were for 'ordinary crimes'. Art. 10(2)(b) ICTYSt; Art. 9(2)(b) ICTRSt.
[90] Holmes, supra note 89 at 58.
[91] Art. 5 ICCSt; see also Preamble ICCSt.
[92] Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Lubanga* (ICC-01/04–01/06), Pre-Trial Chamber I, 24 February 2006, § 44.

situation meets the gravity threshold: (1) the scale of the crimes, (2) the nature of the crimes, (3) the impact of the crimes, and (4) the manner of commission of the crimes.[93]

The ICC's judges have adopted a similar approach, generally applying the same four factors to determine the admissibility of cases. In the *Abu Garda* case, the Pre-Trial Chamber asserted that gravity must be determined according to both quantitative and qualitative factors.[94] The quantitative aspect concerns the number of victims while the qualitative inquiry looks to the 'nature, manner and impact' of the crimes.[95] This requires the Court to consider 'the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime'.[96]

The judges have taken a flexible approach to the gravity evaluation, emphasizing different factors in different cases. In many cases they emphasize the quantitative aspect, noting the high numbers of people killed, raped, and subjected to other serious harms to find a case sufficiently grave. However, in cases involving fewer victims, the Court emphasizes other gravity factors. For instance, the *Abu Garda* case concerned an attack that killed only twelve people, and was thus low in terms of quantitative gravity. The Court nonetheless found the case admissible on the grounds that since those attacked were peacekeepers, the impact of the crimes included a reduction in peacekeeping forces that harmed the broader community.[97] The Court has also held that crimes involving omission and crimes committed through indirect means can be sufficiently grave to meet the threshold.[98]

[93] The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, International Criminal Court, November 2013, available at www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf, at 15 (discussing ICC Prosecutor's policy for assessing gravity as a Principle).

[94] Decision on the Confirmation of Charges, *Bahar Idriss Abu Garda* (ICC-02/05–02/09), Pre-Trial Chamber I, 8 February 2010, § 31.

[95] Ibid.

[96] Ibid. at § 32.

[97] Ibid. at §§ 33–4. The Pre-Trial Chamber ultimately declined to confirm the charges against Abu Garda on grounds of insufficient evidence. Ibid. §§ 215–16. In another case, the Pre-Trial Chamber adopted and applied the gravity threshold analysis in Abu Garda without further analysis or elaboration. Corrigendum of the 'Decision on the Confirmation of Charges', *Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (ICC-02/05–03/09), Pre-Trial I Chamber, 7 March 2011, §§ 27–8.

[98] Confidential Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC01/09–02/11–382), Pre-Trial II Chamber, 23 January 2012, §§ 46–7.

A Pre-Trial Chamber attempted to give additional content to the gravity threshold in the *Lubanga* and *Ntaganda* cases, although the effort was rejected on Appeal. The Pre-Trial Chamber had interpreted the gravity threshold to include three requirements: (1) that the conduct at issue was large-scale or systematic, with due consideration given to the 'social alarm' the conduct causes; (2) that the accused was among the most senior leaders of the situation; and (3) that the accused was among those most responsible for the crimes.[99] The Appeals Chamber rejected each of these requirements. It held that to require large-scale or systematic conduct would conflate war crimes and crimes against humanity, only the latter of which has such a requirement.[100] The Chamber found the concept of 'social alarm' too subjective to be used in the admissibility determination, and it concluded that limiting admissibility to the most responsible senior leaders would undermine the ICC's deterrence objective.[101] The Appeals Chamber did not provide an alternate framework for evaluating gravity although one judge writing separately opined that the threshold should be read narrowly to exclude only the most insignificant war crimes.[102]

To evaluate the gravity of a *situation*, the Court considers the gravity of the cases likely to arise in that situation.[103] In deciding to authorize the investigation in the Kenya situation, the Pre-Trial Chamber not only employed the quantitative and qualitative factors elaborated above in determining whether the crimes were sufficiently grave, but also inquired into whether the potential defendants were likely to include those who bear the greatest responsibility for the crimes.[104] The Pre-Trial Chamber thus seemed to revive one of the elements the Appeals Chamber rejected in the *Lubanga* and *Ntaganda* case, but this time in the context of evaluating the gravity of a situation rather than a case.

In sum, a body of jurisprudence concerning the nature of the gravity threshold is beginning to emerge that leaves the judges a high degree of flexibility in making gravity determinations.

[99] Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Lubanga Dyilo* (ICC-01/04–01/06), Pre-Trial I Chamber, 2 February 2006, §§ 46–50.

[100] Ibid. at §§ 70–1.

[101] Ibid. at §§ 72–79.

[102] Ibid. §§ 40–1 (Judge Pikis, Separate and Partly Dissenting Opinion).

[103] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Kenya, *Situation in the Republic of Kenya* (ICC-01/09), Pre-Trial II Chamber, 31 March 2010, § 58.

[104] Ibid. at § 62.

D. *Relevance of ICC Jurisprudence to AC*

The ICC's jurisprudence on complementarity, *ne bis in idem*, and gravity is likely to be an important source of insights for the judges of the AC given that the applicable provisions of the Protocol are taken largely verbatim from the Rome Statute. Nonetheless, there are important differences between the institutions that limit the relevance of ICC jurisprudence for the AC. First, when the ICC's complementarity provisions were drafted, the only alternative adjudicative fora were national courts. In contrast, although the Protocol nowhere mentions the ICC, the Protocol's drafters undoubtedly understood that the relationship between the AC and the ICC would be an important issue for the AC to resolve. Moreover, as noted above, if any of the RECs obtain jurisdiction over the crimes in the Protocol, an additional layer of complexity will be added to the complementarity analysis for the AC. As such, complementarity for the AC will have a significantly broader scope than it has thus far at the ICC.

That said, once the AC becomes operational, the ICC will likely have to address the appropriate relationship between the two institutions as well. Ideally, the prosecutors of each institution will exercise their discretion in ways that avoid unnecessary conflicts over priority in the exercise of jurisdiction. Nonetheless, it is likely that at some point each institution will seek to exercise jurisdiction over the same case and priorities will have to be determined. An important question that will arise in this regard is whether the Rome Statute permits the ICC to defer to a regional court given that its complementarity provision refers only to state courts. The ICC judges could conceivably interpret the words 'investigate or prosecuted by a State' to include situations in which a state has delegated its investigative or prosecutorial prerogatives to a regional body such as the AC. Such an interpretation would enable the ICC to defer to an AC investigation. However, it would also require the ICC to evaluate whether the AC is 'genuinely' investigating and prosecuting, which would certainly be a sensitive inquiry. Moreover, when the UN Security Council refers a situation to the ICC as a measure in furtherance of global peace and security, it is unclear whether the ICC could defer the matter to a regional court. The ICC's jurisprudence on these issues and the AC's reactions will be important determinants of the level of harmony between the institutions.

Another important difference between the institutions is that the Protocol, unlike the Rome Statute, does not limit the jurisdiction of the AC to the most serious crimes of concern to the world, or even to the most serious crimes of concern to the African continent. Indeed, the Protocol does not claim that the crimes listed are especially grave compared to national

crimes.[105] This difference is particularly relevant to the gravity analysis. Whereas the ICC's gravity threshold is understood to provide additional assurance, beyond the definitions of crimes, that the ICC will limit its reach to exceptionally serious crimes, it is less clear what role the gravity threshold in the AC Statute serves. For that reason, the ICC's gravity jurisprudence may be of limited relevance to the AC.

2. HOW SHOULD THE AC STRUCTURE ITS COMPLEMENTARITY ANALYSIS?

This section seeks to provide insight into how the AC ought to approach the complementarity analysis. It draws on theories of complementarity and gravity developed in the ICC context to argue that the AC should adopt a burden sharing rather than a hierarchical approach to complementarity and that it should interpret the gravity threshold as a minimal bar to the exercise of jurisdiction.

A. *Burden Sharing, Not Hierarchy*

The dominant narrative concerning complementarity at the ICC is that the ICC is a 'court of last resort'.[106] Indeed, when the ICC was established, many of the drafters used this or similar language in describing the intended role of the Court in the global legal order.[107] The chairman of the committee that drafted the complementarity provision of the Rome Statute, Canadian diplomat John Holmes, describes the complementarity system as creating a mechanism 'to fill the gap where States could not or failed to comply with' their obligations to prosecute crimes against humanity, genocide, and war crimes.[108] The standard view therefore considers national courts with jurisdiction, usually based on territoriality or nationality, to be superior fora for adjudicating international crimes compared to the ICC. National courts have greater capacity and are closer to the evidence, the victims, and the most

[105] Draft Protocol ACtJHR.

[106] See e.g. E. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Cheltenham: Edward Elgar Publishing 2010).

[107] P. Kirsch, 'The Role of the International Criminal Court in Enforcing International Criminal Law', 22 *American University International Law Review* (2007) 539–47, at 543 ('The ICC is a court of last resort'.); 'International Criminal Court Receives Mixed Performance Review, as General Assembly Concludes Discussion of Body's Annual Report', Meetings Coverage and Press Releases: United Nations, 31 October 2014, available online at www.un.org/press/en/2014/ga11577.doc.htm (last visited 21 January 2018).

[108] Holmes, supra note 89, at 74.

affected communities.[109] Moreover, under the Rome Statute,[110] the Responsibility to Protect Doctrine (R2P),[111] and perhaps customary international law,[112] states have a responsibility to prosecute international crimes committed on their territories.

The 'last resort' approach to complementarity is often presented in contradistinction to the 'primacy' enjoyed by the *ad hoc* international criminal tribunals for Former Yugoslavia and Rwanda. Those tribunals were created on the opposite premise; that is, that they would provide superior fora for adjudicating international crimes compared to the relevant national courts.[113] As such, the statutes of those tribunals provide that they have priority in adjudicating cases within their jurisdictions.[114] When the ICC, a permanent institution, was created, states were unsurprisingly reluctant to cede their sovereignty to a permanent international institution to such an extent. The idea of complementarity arose to reassure states that the ICC would only exercise its jurisdiction when states were unwilling or unable to do so. In a sense then, the 'court of last resort' approach to complementarity places the ICC in a hierarchical relationship below national courts, whereas primacy put the *ad hoc* tribunals above national courts.

An alternative way to conceptualize complementarity is as a 'burden-sharing' system.[115] This approach considers the ICC to be no less appropriate

[109] Office of the Prosecutor, *Paper on Some Policy Issues before the Office of the Prosecutor*, International Criminal Court, September 2003, available at www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf, at 2.

[110] Preamble ICCSt.

[111] GA Report of the Secretary-General, *Implementing the Responsibility to Protect*, UN Doc. A/63/677, 12 January 2009, §§ 17–19, at 11–12 (discussing the duty under the first pillar of R2P to prosecute international crimes).

[112] See generally *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31 (listing obligations of High contracting Parties regarding creation of penal statutes and the duty to search for and bring such persons before the court); Jan Wouters, 'The obligation to Prosecute International Law Crimes', in *The Need for Justice and Requirements for Peace and Security: Proceedings of the Bruges Colloquium, 9th–10th September* 2004 (32nd edn. Bruges: College of Europe, 2005), at 17–32 (discussing whether an obligation to Prosecute international law crimes exists in customary international law).

[113] See M. M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visting Rule 11 *BIS* of the Ad Hoc Tribunals', *International and Comparative Law Quarterly*, 57 (April 2008) 403–15, 403–4. (discussing primacy in the *ad hoc* tribunals.)

[114] Art. 9(2) ICTYSt.; Art. 8(2) ICTRSt.

[115] R. Rastan, 'Complementarity: Contest or Collaboration?', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 83–132, at 83.

a forum than national courts for adjudicating international crimes and perhaps even a superior one in some circumstances, such as when national courts might be viewed as less fair or impartial.[116] The burden-sharing approach to complementarity thus places the ICC in a horizontal relationship with national courts.[117] Where the hierarchical approach implies a presumption in favour of national court adjudication, the burden-sharing approach suggests a more nuanced inquiry into the appropriateness of each forum in a given situation.

While the rhetoric surrounding complementarity often invokes the hierarchical 'last resort' trope, the ICC's jurisprudence and prosecutorial policies tend to reflect the burden-sharing approach. For instance, the ICC's decision to find situations and cases to be admissible when national courts are inactive without inquiring into inability or unwillingness suggests a burden-sharing understanding of complementarity. As William Schabas has pointed out, there is no reason the ICC cannot adjudicate willingness and ability even in the absence of state action.[118] Indeed, at least some of the drafters of the Rome Statute envisioned that the Court would do just that.[119] If the judges truly considered the ICC to be a court of last resort, it would make sense for them to inquire into the likelihood of a state exercising its jurisdiction within a reasonable timeframe rather than proceeding whenever relevant states are inactive. In the Kenya situation, the government of Kenya asserted that it intended to investigate persons at a similar level in the organizational hierarchy as the ICC accused.[120] The government provided evidence that it had made efforts toward that end, including amending and adopting relevant national laws.[121] The ICC nonetheless proceeded with its cases on the grounds that Kenya was not currently investigating the same persons for the same conduct as the ICC.[122]

[116] See ibid. 84–90 (discussing the role of the complementarity analysis in deciding the appropriateness of investigation and prosecution).

[117] Ibid. at 84.

[118] W. Schabas, *An Introduction to the International Criminal Court* (3rd edn., Cambridge: Cambridge University Press, 2007), at 181 ('[I]t remains legitimate to consider whether the State is itself willing and able to prosecute'.).

[119] Ibid. at 16 ('The International Law Commission draft envisaged a court with "primacy" much like the ad hoc tribunals for the former Yugoslavia and Rwanda'.).

[120] Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09–02/11–96 30–05–2011 1/27 RH PT), Pre-Trial Chamber II, 30 May 2011, §§ 14–15.

[121] Ibid. at § 12.

[122] Ibid. at § 66.

Another example of burden sharing is the willingness of the Court to accept referrals from states parties regarding crimes committed on their own territories.[123] The ICC's judges have found this to be a legitimate way for states to fulfil their obligations under the Rome Statute to investigate and prosecute international crimes committed on their territories.[124] Again, if the judges considered the ICC a court of last resort, it would presumably to do more to encourage states to adjudicate international crimes committed on their territories rather than so readily accepting these 'self-referrals'.

Some of the ICC Prosecutor's policies also adopt a burden-sharing approach to complementarity. In a Draft Policy Paper on Case Selection and Prioritization issued in March 2016, the ICC Office of the Prosecutor asserts that if relevant national authorities are investigating the same person for substantially the same conduct, the ICC Prosecutor may turn her attention to 'other perpetrators that form part of the same or a different case theory, in line with a burden-sharing approach'.[125] A hierarchical approach to complementarity would instead suggest that the prosecutor should desist from investigating any perpetrators in a situation that states are actively and genuinely addressing.

Despite the 'last resort' rhetoric that dominates discussions of complementarity, it is not surprising that the ICC's judges and prosecutors have leaned toward a burden-sharing approach to operationalizing the concept of complementarity. First, institutional incentives favour an approach that treats the ICC as at least co-equal with national courts. Particularly in the early days of the Court's existence, it had incentives to assert its jurisdiction in order to demonstrate its value to the international community, in particular to states parties and states considering joining the regime. Second, as a practical matter, deciding complementarity based on evidence of current investigations of the

[123] P. McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism', 13 *Chinese Journal of International Law* (2014) 259–96, at 262 http://chinesejil.oxfordjournals.org/content/early/2014/05/22/chinesejil.jmu007.full.pdf+html.

[124] Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Lubanga (ICC-01/04-01/06-8-US-Corr 09-03-2006 1/65 SL), Pre-Trial Chamber I, 24 February 2006, § 35; Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *Katanga and Chui* (ICC-01/04–01/07–1213-tENG 15–07–2009 32/38 IO T), Trial Chamber II, 16 June 2009, §§ 79–80; Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga and Chui* (ICC-01/04–01/07–1497 25–09–2009 1/44 IO T OA8), The Appeals Chamber, 25 September 2009, § 85.

[125] The Office of the Prosecutor, *Draft Policy Paper on Case Selection and Prioritisation*, International Criminal Court, 29 February 2016, 11, available at www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf.

same people and conduct is much easier than requiring the judges to speculate about potential future state action.

A burden-sharing approach at the ICC also makes sense in terms of the institution's objectives. As the preamble to the Rome Statute asserts, the Court's overall objective is to 'put an end to impunity for the perpetrators of [serious international crimes]'.[126] This broad objective can be understood in retributive terms as an effort to inflict deserved punishment, or as a utilitarian mandate to prevent international crimes, or both. Regardless of the underlying justification, burden sharing is likely to be more productive in accomplishing the goal of ending impunity for several reasons. First, the availability of multiple adjudicative fora tends to increase the chances of punishment and thus prevention. While ICC involvement could theoretically decrease the likelihood of national prosecutions, there is little evidence to suggest this effect. Moreover, the ICC can mitigate any possible disincentive to national prosecutions by clearly expressing its intention to share the burden of prosecutions with national courts and by assisting national courts through positive complementarity.

Second, a burden-sharing approach to complementarity increases the likelihood that both global community and national community interests will be addressed. Sometimes such interests are aligned, but not always. For instance, the global community has an interest in promoting norms that are not yet well established around the world; but this interest may not fully align with national interests in prosecuting the most serious crimes committed in a given situation. For example, in the DRC situation, the ICC has focused in part on prosecuting the recruitment and use of child soldiers in order to express global reprobation of such crimes, while national courts enforce the arguably more serious, but also more established, prohibitions against large-scale murder, rape and so forth.

Finally, for some crimes, ICC adjudication is more likely to be viewed as impartial and therefore more legitimate than national prosecution. The crime of aggression, for instance, involves the leaders of a state acting against the sovereignty of another state. The political nature of the crime increases the likelihood that prosecution in a national court will be conducted in a partial manner and raises concerns about illegitimacy, or at least the perception of illegitimacy. Indeed, one scholar has argued that aggression should not be subject to the usual complementarity analysis, but rather the ICC should have *de facto* primacy in situations involving aggression.[127]

[126] Preamble ICCSt.

[127] See B. Van Schaack, '*Par in Parem Imperium Non Habet*: Complementarity and the Crime of Aggression', 10 *Journal International Criminal Justice* (2012) 133–64, at 163.

Similar practical and goal-based considerations also support a burden-sharing approach to complementarity between the AC on the one hand, and national courts, the RECs, and the ICC on the other.

1. Burden Sharing Between the AC and National Courts

First, like for the ICC, any hierarchical relationship would place the AC below national courts in priority rather than above. This is clear from the drafting history of the Protocol – there was no intention to create a supreme court for the African continent. Rather, the idea was to close whatever impunity gaps exist by virtue of the inability or unwillingness of national courts to act.[128] But the AC's judges and prosecutors are unlikely to view the AC as an inferior forum for adjudication compared to national courts; and, particularly early in the AC's existence, they will have incentives to exercise their jurisdiction over whatever cases are available. Moreover, the AC's judges, like those of the ICC, will likely resist developing an approach to complementarity that requires them to speculate about future state actions.

There are also goal-based justifications for a burden-sharing approach to complementarity between the AC and national courts. The purpose of the AC is similar to that of the ICC. The Protocol's preamble asserts that the institution will contribute to 'preventing serious and massive violations of human and peoples' rights … and ensuring accountability for them wherever they occur'. As such, the arguments made above in favour of burden sharing also apply to the AC. Moreover, the AC's expanded jurisdiction compared to the ICC makes burden sharing even more important. The AC has jurisdiction not only over the so-called 'core crimes' in the Rome Statute – war crimes, crimes against humanity, genocide, and aggression – but also over a long list of what are often called 'transnational crimes'.[129] For transnational crimes, supranational jurisdiction may be particularly important in some circumstances. Transnational crimes often, although not always, cross physical borders in that some of their elements take place in one state and other elements or effects take place in another.[130] The transnational crimes in the Protocol include

[128] *African efforts to close the impunity gap: Lessons for complementarity from national and regional actions*, Institute for Security Studies, November 2012, available at www.issafrica.org/uploads/Paper241.pdf.

[129] Art. 28A Draft Protocol ACtJHR.

[130] G. O.W. Mueller, 'Transnational Crime: Definitions and Concepts', in Dimitry Vlassis and Phil Williams (eds), *Combating Transnational Crime* (New York: Frank Cass Publishers, 2001) 13–21, at 13. ('The then United Nations (UN) Crime Prevention and Criminal Justice Branch

trafficking in drugs, persons, and hazardous waste; money laundering; and illicit exploitation of natural resources, among others.[131] Moreover, Article 28 (A) of the Protocol states that '[t]he Assembly may extend upon the consensus of States Parties the jurisdiction of the Court to incorporate additional crimes to reflect developments in international law'.[132] As such, additional transnational crimes may be added in the future.

When criminal activity crosses borders, adjudication by an institution outside of either state can be useful. This is particularly true when the states involved take different positions regarding the criminality of the acts or government actors are implicated in the crimes. Under such circumstances, a supranational court is likely to be more impartial, or at least to be viewed as such. Supranational adjudication may therefore decrease the likelihood of inter-state tension and increase the chance that outcomes will be perceived as legitimate.

The AC will also have jurisdiction over the crimes of 'unconstitutional change of government' and corruption.[133] For these crimes, the case for supranational adjudication is even stronger since the governments involved in these crimes are highly unlikely to investigate and prosecute them, at least in a manner that is perceived as legitimate. Moreover, even assuming the national courts of other states have jurisdiction over these crimes, their political nature will likely make the exercise of such jurisdiction undesirable in many cases. For these reasons, the AC may sometimes be a superior forum compared to national courts. Even when this is not the case, assuming the AC garners substantial legitimacy through its procedures and outcomes, it should at least not be considered an inferior forum to national courts.

Another argument against a hierarchical approach to complementarity with national courts at the AC is that the AC will inhabit a world of overlapping jurisdictions that is likely to continue to grow in complexity. The AC will have to navigate relationships not only with national courts, the ICC, and possibly REC courts, but also with other courts that will likely be added to the mix. The Extraordinary African Chambers within the Senegalese court system, created to try former Chadian dictator Hissène Habré, is the most recent example of a special court created to adjudicate international crimes on the African continent. Many other such courts have been created or proposed

coined the term [transnational] in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country'.)

[131] Art. 28A Draft Protocol ACtJHR.

[132] Ibid. at art. 28A(2).

[133] Ibid. at art. 28(A)(1).

around the world, indicating that the trend is likely to continue.[134] Determining a hierarchy of appropriate exercise of jurisdiction among this growing network of courts will present many challenges. This is particularly true since each institution will likely have incentives to promote its own jurisdiction.

A burden-sharing approach to complementarity at the AC is therefore preferable for both practical and principled reasons. Rather than any institution being considered superior as a general matter, the courts should develop balancing tests to determine the most appropriate forum for adjudication of particular cases, somewhat like forum non conveniens doctrines in some national courts.[135] The final section of this Chapter will provide some thoughts regarding the contours of the suggested balancing tests.

2. Burden Sharing Between the AC and RECs

The question of whether there should be a hierarchical or horizontal relationship between the AC and any REC courts that may be given criminal jurisdiction is somewhat more complicated. On the one hand, the RECs are closer geographically and culturally to the communities they serve than is the more geographically diverse AC. An argument could therefore be made that the REC courts should have priority over the AC in exercising any overlapping jurisdiction between them.[136] On the other hand, the institutional incentives discussed above may also make it difficult for the AC to defer to the REC courts. Moreover, it is unclear whether the REC courts or the AC will develop greater institutional legitimacy through the nature and quality of their work.[137] In the event the AC is widely seen as more legitimate or effective, requiring it to defer to the RECs when they have jurisdiction might be viewed as inappropriate. On balance, the complexity of the developing networks of jurisdiction

[134] B. Van Schaack, 'Building Blocks of Hybrid Justice', 44 *Denver Journal of International Law and Policy* (2016) 169–280, at 170.

[135] See generally P.K. Bookman, 'Litigation Isolationism', 67 *Stanford Law Review* (2015) 1081–144 (discussing the US strategy of avoiding transnational litigation through the doctrine of forum non conveniens).

[136] Interestingly, the creation of REC courts will also raise the question of how questions of overlapping jurisdiction among those courts should be decided.

[137] For discussions of institutional legitimacy from a sociological perspective see A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics and International Affairs* (2006) 405–37, at 405 ('An institution is legitimate in the sociological sense when it is widely *believed* to have the right to rule'.); R. H. Fallon Jr., 'Legitimacy and the Constitution', 118 *Harvard Law Review* (2005) 1787–853, at 1795 (addressing legitimacy as a sociological concept).

discussed above mitigates in favour of a horizontal approach to complementarity between the AC and the RECs.

3. Burden Sharing Between the AC and the ICC

The question of what relationship the AC should have with the ICC is perhaps the most complex of the complementarity issues. First, there is no provision in the statute of either court that addresses this question. When the ICC was created the drafters did not anticipate the possibility of other supranational courts with jurisdiction over international crimes. The omission of any mention of the ICC in the Protocol is glaring, however, particularly since substantial portions of the Protocol are copied from the Rome Statute. Yet the jurisdiction of the AC will almost certainly overlap with that of the ICC. Even if all African states withdraw from the ICC – a possibility that remains remote – the Security Council could still refer situations in Africa to the ICC. It is therefore crucial for these courts to develop some kind of *modus vivendi*.

As explained above, the ICC's complementarity provision requires it to defer to 'a State which has jurisdiction' under appropriate circumstances.[138] It is not clear that this provision permits the ICC to defer to another supranational institution such as the AC. However, the ICC's judges could interpret the Rome Statute to render cases inadmissible when a supranational court, to which a state has granted jurisdiction, is investigating or prosecuting in good faith. One difficulty with such an interpretation is that, just as the ICC can exercise jurisdiction over non-party states when the Security Council refers the situation, the AC can exercise jurisdiction over non-party states when a situation is referred to it by the Assembly of Heads of State and Government or the Peace and Security Council of the African Union.[139] In such situations, it is more difficult to argue that the 'state' is investigating or prosecuting through its delegation of jurisdiction to the AC. It may therefore be preferable to amend the Rome Statute to expand the complementarity provision to allow deferral to the AC, and possibly other supranational courts with jurisdiction.

Nonetheless, assuming the AC develops a significant degree of legitimacy by, for instance, operating independently and respecting the human rights of defendants, the ICC should defer to the AC in appropriate circumstances. As a regional body, the AC will be closer to the crimes and to the legal and cultural norms in the affected societies. The mantra 'African solutions to

[138] Art. 17 ICCSt.
[139] Art. 46F Draft Protocol ACtJHR.

African problems' that helped motivate the creation of the AC will likely also generate support for the AC being given priority some of the time.

However, the AC should also be willing to defer to the ICC in some cases. Like the ICC's complementarity provision, the Protocol could be interpreted to allow the AC to defer to a supranational court or the Protocol could be amended to explicitly allow such deferral. In some situations, the ICC may be a superior forum for adjudication of international crimes. The ICC's global reach and stature enables it to express global norms to a global audience.[140] For some crimes this may be particularly important. For instance, for relatively recently criminalized international crimes, such as the recruitment and use of child soldiers, there is value in having the norm recognized at the international level. In other cases, the AC and the ICC may be equally appropriate forums of adjudication. A burden-sharing approach to the exercise of jurisdiction would enable courts to make particularized determinations of appropriateness according to the facts and circumstances of each situation.

The following section discusses how a burden-sharing approach to complementarity could be implemented in the jurisprudence of the courts.

B. *Developing a Complementarity Test for the AC*

To implement a burden-sharing approach at the AC, complementarity should be conceived narrowly to render inadmissible only cases where another court is already active or has rendered a verdict. The gravity threshold should likewise be a minimal bar to admissibility. The real work of ensuring that the various courts share the burden of ending impunity for serious crimes should be done at the level of prosecutorial discretion and judicial oversight of that discretion.

1. Relevant Activity as a Threshold Inquiry

A burden-sharing approach to complementarity supports the approach the ICC has taken thus far of treating relevant activity as a threshold requirement for any inquiry into complementarity. When no other institution with jurisdiction is actively investigating or prosecuting in a given situation, the AC need not conduct a further complementarity analysis. Moreover, the ICC's test of relevant activity – 'the same person and same conduct' test – also makes

[140] For a discussion of this point see M. M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', 33 *Michigan Journal of International Law* (2012) 265–320.

sense for the AC. The test has been criticized on the grounds that it is not sufficiently deferential to state investigative procedures.[141] According to critics, the ICC should allow states more leeway in terms of the targets of their investigation, the nature of the charges, and the timing of bringing investigations.[142] Such critiques largely reflect a hierarchical 'last resort' view of the ICC's appropriate exercise of jurisdiction. If states are the more appropriate forum of adjudication, it stands to reason that the ICC, and likewise the AC, should show significant deference to them.

As explained above, however, practical and principled reasons counsel against this approach. It is impracticable for courts to base admissibility decisions, like decisions about jurisdiction which must be routed in clear and consistent criteria, on speculation about what other courts may do in the future. In addition, simultaneous investigations may best accomplish the goal of ending impunity for international crimes. The danger of duplicative efforts can be avoided if the prosecutors of the institutions work together as recommended below. In sum, the AC should adopt a narrow view of relevant activity similar to the one the ICC has taken. It should consider admissible any case where the same person is not being investigated or prosecuted for the same conduct, or at least similar conduct, that is at issue before the AC.

2. Unwillingness and Inability

Decisions about the unwillingness and inability of other courts to act in a situation before the AC will likely be among the most difficult and controversial decisions the Court makes. Here again, the approach of the ICC provides useful guidance. First, the AC must adopt some standard akin to the 'genuineness' standard in the Rome Statute. The difficulty of course is that the AC's drafters seem to have explicitly rejected inclusion of the word 'genuinely' given that they copied most of the complementarity provision from the Rome Statute and yet left out that word. But, as already noted, without some qualifying adjective, the complementarity provision simply

[141] See, e.g., K. Heller, 'Radical Complementarity', 14 *Journal International Criminal Justice* (2016) 1–38, at 3, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714503 (arguing 'that as long as a state is making a genuine effort to bring a suspect to justice, the ICC should find his or her case inadmissible regardless of the prosecutorial strategy the state pursues, regardless of the conduct the state investigates, and regardless of the crimes the state charges').

[142] For an example of the former, see the argument the government of Kenya made in contesting the admissibility of the Kenya situation. Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09–02/11–96 30–05–2011 1/27 RH PT), Pre-Trial Chamber II, 30 May 2011, §§ 4–7.

makes no sense – a state cannot be both investigating or prosecuting and not investigating or prosecuting at the same time.

Confusion can be avoided by reference to paragraph (3) of Article 46(H), which explains the circumstances in which a state should be considered unwilling to investigate or prosecute. These include when the proceedings are being undertaken to shield a person, when there is unjustified delay that is inconsistent with an intent to bring the person to justice, and when the proceedings are not conducted independently or impartially or are otherwise being conducted in a way that is inconsistent with an intent to bring the person to justice.[143] Each of these is an example of a situation where the investigation or prosecution is not 'genuine' – or is in some sense a sham. As such, despite the absence of the word 'genuinely' from Article 46(H), the AC should apply a similar requirement to determine unwillingness.

With regard to the first two types of unwillingness – the intent to shield and unjustified delay – there is as yet no ICC case enunciating a standard. In determining the existence of such circumstances, both the ICC and the AC should be quite deferential to the other courts with jurisdiction over the same crimes. They should bear in mind the reputational damage that can be inflicted by accusations of intentional injustice and only levy such charges when they are clearly warranted.

The question of independence and impartiality has arisen at the ICC in the cases in the Libya situation discussed above. Like the ICC in those cases, the AC should take a fairly broad view of what it means for a court to be independent and impartial. The AC should not seek to serve as an arbiter of strict compliance with human rights standards under the guise of admissibility determinations. Instead, the AC should address such concerns when properly raised under the human rights jurisdiction of the Court. Such restraint in adjudicating the legitimacy of proceedings in another forum is compatible with the burden-sharing approach to complementarity discussed above.

3. The Gravity Threshold

The AC should also follow the lead of the ICC judges in interpreting the gravity threshold as a minimal bar to admissibility. As the ICC Appeals Chamber explained in the *Lubanga* and *Ntaganda* decision discussed above, giving significant content to the requirement of gravity is tantamount to

[143] Art. 46(H)A-C Draft Protocol ACtJHR.

revising the subject matter or personal jurisdiction of the Court.[144] If the AC judges decided that the gravity threshold requires widespread harm, they would essentially be adding an element to war crimes as well as to most of the transnational crimes, which have no such requirement in their definitions. If the judges determined that the gravity threshold requires that prosecutions be limited to senior leaders or to those most responsible for criminal activity, they would be narrowing the personal jurisdiction of the Court. The inclusion of a broad range of crimes in the AC Statute is ample evidence that the drafters intended no such gravity-based limitations. As such, the gravity threshold should be treated as a low bar that excludes only the most insignificant cases from the AC's purview.

4. Prosecutorial Discretion and Positive Complementarity as Primary Vehicles for Burden Sharing

In light of the limited ability of the formal requirements of complementarity in the AC Statute, to ensure appropriate burden sharing among courts, the task of implementing the burden-sharing approach will fall largely to the prosecutor. The Protocol is not entirely clear about the degree of discretion the prosecutor will have to determine which cases reach the court. On the one hand, unlike the Rome Statute, which contains significant limits on the ICC Prosecutor's ability to initiate investigations,[145] the AC Statute simply states that: 'cases brought before the International Criminal Law Section shall be brought by or in the name of the Prosecutor'.[146] At the same time, however, the AC Statute provides that cases can be submitted to the Court by state parties, the AU Assembly, and the Peace and Security Council, as well as by the prosecutor acting *proprio motu*.[147] It is thus unclear how much discretion the prosecutor will have to decide not to investigate or prosecute cases submitted by other bodies.

The ICC Statute requires the Prosecutor to initiate investigations, or seek to do so in the case of *proprio motu* referrals, when: (1) there is a reasonable basis to believe crimes within the Court's jurisdiction have been committed, (2) the case is admissible, and (3) taking account of the gravity of the alleged crimes and interests of victims, the investigation is not contrary to the interests of

[144] For a more extensive discussion on this point see M. M. deGuzman, 'The International Criminal Court's Gravity Jurisprudence at Ten', 12 *Washington University Global Studies Law Review* (2013) 475–86.
[145] Art. 53 ICCSt.
[146] Art. 34A Draft Protocol ACtJHR.
[147] Ibid. at art. 46F.

justice.[148] While the ICC Prosecutor has yet to invoke the interests of justice, that provision at least arguably provides the ICC Prosecutor leeway in determining whether the ICC is an appropriate forum of adjudication compared to other available fora. When the ICC Prosecutor declines to investigate a situation based on the interests of justice, that determination is subject to review by the Pre-Trial Chamber.[149] As such, both the Prosecutor and the Pre-Trial Chamber are given important roles in determining the interests of justice.

To implement a burden-sharing approach, the AC's Prosecutor should also have discretion to determine whether adjudication at the AC best advances the interests of justice, or another forum would be more appropriate. Providing a role for the AC judges in reviewing such decisions would likely help to ensure the decisions are perceived as legitimate. In making decisions about the appropriateness of AC adjudication, the prosecutor and judges should balance the interests of the AU community in prosecuting particular cases with those of the national communities most directly impacted by the crimes. While space constraints preclude a detailed elaboration of the many factors that could be relevant to this balancing, they include, for instance, the extent to which the crimes have affected the entire AU community, whether the AU community norms implicated require regional reinforcement, whether the national communities most affected support AC adjudication, and whether AC adjudication is likely to promote or undermine other important goals such as peace and security in the relevant states.

In addition to balancing the interests of each of the relevant communities, the test to determine the most appropriate forum should take into consideration questions such as which forum has greatest access to relevant evidence, can devote appropriate resources to the case, and is best able to respect victims' and defendants' rights. Of course, such a balancing test raises many complex questions given the diversity of values around the world. In addressing these questions over time, international and regional courts can contribute to the development of a normative framework for determining the most appropriate forum for adjudicating international crimes.

Another important way for the AC to pursue burden sharing is for the AC Prosecutor to adopt a policy of 'positive complementarity' similar to that in place at the ICC.[150] According to the ICC's Office of the Prosecutor, the

[148] Art. 53(1) ICCSt.

[149] Ibid.

[150] See S. T. Ebobrah, 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations', 22 *European Journal of International Law* (2011) 663–88.

positive approach to complementarity means that the Office 'encourages national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation'.[151] This has taken different forms in different situations, demonstrating the Office's flexible approach.[152]

Positive complementarity has been controversial, with some critics asserting that the Court's founders did not intend for the Court to use its resources to encourage national prosecutions proactively.[153] Others, however, see positive complementarity as an important vehicle for the ICC to pursue the goal of ending impunity for serious international crimes.[154] There is evidence that the ICC's positive complementarity policy has contributed to accountability in some situations.[155]

Positive complementarity would support burden sharing at the AC by putting the AC in close communication with national and REC systems interested in investigating and prosecuting similar crimes. The Court could encourage those systems to proceed in situations where it deems national or REC prosecutions would be beneficial and to desist in others. This kind of interaction among the various systems should promote the overall goal of ending impunity for serious crimes. Indeed, positive complementarity might

[151] Office of the Prosecutor, *Report on Prosecutorial Strategy*, International Criminal Court, 14 September 2006, available online at www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf, at 5; International Criminal Court: Office of the Prosecutor, *Prosecutorial Strategy*, International Criminal Court, 1 February 2010, available online at www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf, at 5.

[152] See S. Krug (ed.), 'Testing the ICC: The Politics of Complementarity', Jurist, 1 June 2012 (discussing the principle of positive complementarity and its application in the situation in Libya), available at www.jurist.org/hotline/2012/06/eric-leonard-libya-ICC.php; see also H. Takemura, 'A Critical Analysis of Positive Complementarity', in S. Manacorda and A. Nieto, *Criminal Law between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions* (Cuenca: Ed. De la Universidad de Castilla-LaMancha, 2009) 601–21.

[153] 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/; L. Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Switzerland: Springer, 2015), at 32. ('The idea of actively encouraging domestic prosecutions was novel and not one which was contemplated as the ICC was being established'.).

[154] Nichols, supra note 153, at 31–2.

[155] G. Dancy and F. Montal, 'Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions', (2015) 1–58, available at http://tulane.edu/liberal-arts/political-science/upload/Dancy-Montal-IO-2014.pdf.

even be implemented between the AC and ICC so that over time a mutually beneficial *modus vivendi* could develop between the institutions.

3. CONCLUSION

When the AC comes into existence, the prosecutor and judges will face the important challenge of determining the most appropriate relationships between the AC on the one hand and national courts, sub-regional courts, and the ICC on the other. While the Protocol clearly provides for complementarity – at least with national and sub-regional courts – it leaves important questions about the nature of complementarity unanswered. This Chapter has sought to provide some insight into how the prosecutor and judges of the AC ought to interpret and implement the Protocol in this regard. In particular, it has argued that they should adopt a burden sharing rather than a hierarchical understanding of complementarity.

Burden sharing suggests that the AC should take a fairly narrow view of when cases are inadmissible either based on relevant activity in another jurisdiction or on gravity. Rather than finding entire categories of cases to be outside the AC's purview, the prosecutor and judges should engage in a more particularized inquiry to determine which forum is most appropriate for a given case. That inquiry should involve balancing a host of factors relevant to the respective interests of the communities each institution represents in adjudicating the case, as well as their practical ability to investigate and prosecute the case effectively.

Finding the right balance will not be easy, and the very idea of burden sharing will be resisted by those who view supra-national adjudication, particularly at the ICC, as a last resort. But as the number of supra-national courts increases, and the subject matter they address expands, a hierarchical approach to admissibility will become increasingly impracticable and unattractive. Supra-national courts are created because supra-national communities have interests, and those interests are not always compatible with the interests of national communities. The task of determining which community's interest should prevail when conflicts arise is one of the most pressing challenges facing international criminal law.

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Defence and Fair Trial Rights at the African Court of Justice and Human and Peoples' Rights

MELINDA TAYLOR

1. INTRODUCTION

The right to a fair trial is rooted in the African Charter of Human and Peoples' Rights,[1] and firmly entrenched in the legal frameworks and case law of the various international and hybrid criminal courts.[2] The inclusion of a separate provision on fair trial rights in the Malabo Protocol thus provides welcome clarity and detail on what is recognised to be an essential component of the criminal process.

At first glance, the provision (Article 46A – Rights of Accused) appears to be virtually identical to the equivalent fair trial provision at the International Criminal Court (Article 67(1) of the Rome Statute). There are, however, both key lacuna and important innovations, which differentiate the Malabo Protocol from the Rome Statute. Of particular relevance to the right to a fair trial, the Protocol envisages the establishment of a 'Defence Office', the head of which shall enjoy 'equal status' as concerns rights of audience and negotiation *inter partes*.[3] This recognition of the right to structural equality of arms between the Defence and the Prosecution builds on the positive developments at earlier hybrid tribunals, such as the Special Court for Sierra Leone, and the Special Tribunal for Lebanon, which also recognised the need for internal representation of the interests of the Defence through the establishment of independent 'defence offices'. In contrast, the ICC equivalent, which lacks institutional or legal parity with the Prosecution and falls administratively

[1] Article 7 of the African Charter on Human and Peoples' Rights

[2] See for example, Article 20 of the ICTY, Article 67(1) of the ICC Statute, Article 17 of the Statute for the SCSL

[3] Article 22(c)(7) of the Protocol.

under the authority of the Registrar, appears retrograde, and offers less structural protection for the rights of the Defence.[4]

Although the Malabo Protocol delineates the core rights of the accused in Article 46(a), the text of the Protocol is remarkably sparse as concerns key procedural rights pertaining to a range of important issues, such as disclosure, the framework for amending the charges, and legal representation. Whereas the ICC Statute includes much greater detail on such issues, this bare bones structure is more in line with the Statutes of the ICTY and ICTR, which eschewed specific procedural details, addressing such issues instead through rules adopted and promulgated by the judges.

Given that the African Court is, like the ICC, a treaty based judicial entity, it is arguable that States should have a clear idea of the procedural rights that might apply to their nationals, before they decide whether to accept the Court's criminal jurisdiction. It may be too cumbersome to amend the Malabo Protocol to include such detail, but an alternative approach might be to submit proposed Rules of Procedure and Evidence to the State Parties for ratification, which is the procedure employed at the ICC.[5] Although the ICTY and ICTR imbued the judges with the power to adopt and amend the rules, these Tribunals were established by the Security Counsel, and did not, therefore, depend on State consent. In contrast, if the Judges at the African Court were to engage in substantive law making to such an extent that the applicable law differs fundamentally from the terms of the Protocol, State Parties could argue that such a radical transformation of the Court constitutes a material breach of the founding treaty (i.e. the Malabo Protocol), which in turn, allows them to suspend their obligation to be bound by it, in whole or in part.[6]

The structure of the African Court of Justice itself and its close connection to its human rights counterpart also offers unique protections which have been absent so far, in other international criminal courts and tribunals. Although the Protocol does not spell out the nature of the intersection between the Court's human rights jurisdiction and its criminal jurisdiction in detail,[7] the approach adopted by the European Court of Human Rights (ECHR) offers a possible parallel. The ECHR has found that although the Convention permits member states to transfer powers to an international organisation, States must ensure

[4] X. Keïta, M. Taylor, 'The Office of Public Counsel for the Defence', Behind the Scenes, the Registry of the International Criminal Court 2010 (ICC Publication) pp. 69–71, at 71.

[5] Article 51(2), ICC Statute.

[6] Article 60(2) of the Vienna Convention on the Law of Treaties.

[7] Article 4 of the Protocol specifies that the mandate of the criminal division shall 'complement' the human rights Court.

that the organisation in question 'is considered to protect fundamental rights as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.'[8]

If the same, or a similar test were to be employed by the African Court of Human Rights, it follows that the Criminal jurisdiction of the Court would be obliged to offer 'equivalent' deference and respect for the provisions of the African Charter on Human and Peoples' Rights as would exist in State parties. It also follows that since a defendant can bring a complaint before the African Commission or even the same Court in connection with alleged violations of domestic criminal procedures, where in the latter case that State has entered the special declaration required to entertain individual complaints, an 'equivalent' remedy must also exist in relation to proceedings that are before the Court's criminal jurisdiction. A key question that arises in this regard would be whether a defendant, before the Court, could invoke fair trial concerns not just before the Criminal Law Section both also at the same time, or subsequently, before the Human Rights Section.

The intersection between the Court's human right and criminal divisions also has interesting implications for the relationship between State parties and the ICC. Since the ICC is a 'court of last resort', it only exercises competence over cases where national States are unwilling or unable to do so.[9] If it is assumed that a State party can delegate this power to the African Court, this will raise issues as to whether the ICC's determination that it possesses the ultimate competence to determine questions of admissibility (that is, whether the case should be tried before national courts or before the ICC) is tenable.[10] Although the Malabo Protocol does not regulate such matters,[11] if there is a dispute between the competence of the ICC and that of the African Court to prosecute an individual, the human rights division could find that the defendant cannot be transferred to the ICC, unless the ICC offers an equivalent level of protection as concerns the protection of the defendant's rights under the African Charter. This possibility might, in turn, incentivise the ICC to apply article 21(3) of its own Statute to fill in any gaps concerning effective fair trial

[8] *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi V. Ireland*, Application no. 45036/98, para. 155.

[9] Article 17, ICC Statute.

[10] *Prosecutor v. Kony et al.*, 'Decision on the admissibility of the case under article 19(1) of the Statute', ICC-02/04–01/05–377, 10 March 2009, para. 46.

[11] Article 30(3) of the Vienna Convention on the Law of Treaties suggests that if a State ratifies the Malabo Protocol after ratifying the ICC, it would be obliged to implement its obligations to the ICC in a manner which is consistent with its obligations under the Malabo Protocol.

protection at the ICC.[12] From this perspective, the Malabo Protocol should be viewed as an extremely positive development as concerns the effective implementation of fair trial safeguards within the sphere of international criminal law.

This chapter will analyse the individual rights set out in Article 46(A) of the Protocol, with reference to case law from other internationalised criminal courts and human rights court, which might shed light on the future case law and practice of the Court.

2. ANALYSIS OF INDIVIDUAL RIGHTS

A. *Article 46(A)(I) All Accused Shall be Equal before the Court*

At first glance, there appears to be an inherent tension between the supposed equality of accused, and the existence of immunity provisions in the Protocol, which afford specific protection from legal process to certain defendants, that is, sitting Heads of States, and not others, for example, their political opponents. It could, nonetheless, be argued that this notion of equality only governs the legal regime that applies to the investigation and prosecution of different defendants, and not, the preliminary question as to who should and should not be prosecuted.

The precise ambit of the right to equality under the law has arisen in connection with the application of amnesties for war crimes, which are considered to be legitimate, when issued as part of a negotiated peace settlement in internal conflicts.[13] Whereas the Ugandan Supreme Court found, in the Kwoyelo case, that the defendant could not invoke the right to equality, and the protection against discrimination in order to claim an entitlement to an amnesty that had been granted to defendants in similar circumstances,[14] the ACHPR reached the opposite conclusion. In so doing, the ACHPR distinguished between laws, which were discriminatory in their content, and laws, which were applied in a discriminatory manner.[15] Both types of discrimination could constitute a violation of the right to equality before the law, although the ACHR acknowledged that some types of positive discrimination are permissible if:

[12] Article 21(3) of the Statute specifies that the State must be applied in a manner which is consistent with internationally recognised principles of human rights law.

[13] Article 6(5) of Additional Protocol II

[14] *Uganda v. Kwoyelo*, Constitutional Appeal no. 1 of 2012, www.rightzinfo.org/resources/publications/uganda-v.-kwoyelo-judgment.

[15] Communication 431/12 – *Thomas Kwoyelo v. Uganda*.

- The discrimination is objectively justifiable/reasonable;
- It is a proportionate means for achieving the objective in question.[16]

In assessing the case before it, the ACHPR found that the right to equality before the law had been violated due to the fact that Uganda had failed to sufficiently justify its decision to withhold the right to an amnesty to Kwoyelo, whilst granting it to other individuals in similar circumstances. This case law suggests that if the immunities under the Malabo Protocol are challenged on the basis of discrimination, it will fall to the Court to demonstrate that the inclusion of a Head of State immunity serves an objectively justifiable need, that it is a proportionate means to achieve this need, and that it has been applied in a uniform manner as concerns individuals, who fulfil its criteria.

Issues of equality are also likely to arise in connection with State cooperation, and the impact that this will have on the ability of the Defence to investigate in an effective manner. Clearly, Defence Counsel tasked with representing politically unpopular defendants are likely to face significant issues as concerns their ability to access Government controlled documents or sources. Unless the Court determines that it possesses the power to subpoena witnesses or documents, the Defence will be seriously disadvantaged not just vis-à-vis the Prosecution, but also as concerns defendants who are aligned to the Government rather than the opposition.

In order to address comparable situations and ensure equality of arms between the parties,[17] the drafters of the ICC Statute vested the Prosecutor with the explicit duty to search for, collect, and disclose all information that might be relevant to the establishment of the truth, including both incriminating and exculpatory information.[18] The Malabo Protocol does not, however, include an equivalent duty on the part of the Prosecutor to search for both incriminating and exculpatory elements. Indeed, the Protocol is completely silent as concerns the nature and scope of the Prosecutor's disclosure duties.

This lacuna can be addressed through the promulgation of rules of procedure and evidence, which is the means by which disclosure obligations were

[16] Paras. 161–4.

[17] M. Bergsmo and P. Kruger, 'Article 54 Duties and powers of the Prosecutor with respect to investigations', in Commentary on the Rome Statute of the International Criminal Court, (O. Triffterer (ed.), 2nd ed., 2008) p. 1078. See also United Nations General Assembly, 'Draft Report of the Preparatory Committee', 23 August 1996, A/AC.249/L.15, p. 14, cited by the Appeals Chamber in its 'Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial"', ICC-01/04–01/07–2288, 16 July 2010, at footnote 125.

[18] Article 54(1)(a) of the ICC Statute, read in conjunction with the disclosure obligations set out in Article 67(2) of the Statute, and Rule 77 of the Rules of Procedure and Evidence.

regulated at the *ad hoc* Tribunals, or through judicial interpretation of the defendant's right to a fair and impartial trial. The Defence Office can also play an important role in eliminating or mitigating inequalities, by entering into generic cooperation agreements with various State parties in a proactive manner.[19] This possibility is supported by firstly, the Defence Office's right, as an independent organ of the Court, to enter into such arrangements, and secondly, the fact that Article 22(C)(2) of the Protocol specifically vests the Office with the power to collect evidence, and Article 22(C)(3) imposes a corresponding duty to provide necessary support and facilities to individual Defence teams. In contrast, if the Court waits for specific cooperation issues to arise in specific cases, it is more likely that political considerations will influence the outcome.

B. *Article 46(A)(2) The Accused Shall Be Entitled to a Fair and Public Hearing, Subject to Measures Ordered by the Court to Protect Victims and Witnesses*

This provision raises two separate elements: firstly, the relationship between the right to public hearings and protective measures, and secondly, the relationship between the right to a fair hearing and protective measures.

As concerns the first element, it is relatively uncontroversial that the right to a public hearing is subject to the Court's duty to impose protective measures. Nonetheless, even though it might seem, at first blush, less harmful to curtail the right to public hearings in order to ensure protection measures, overuse of such measures can render the Court vulnerable to claims that it lacks transparency. Closed hearings can impede the ability of external organisations to monitor the extent to which the Court implements fair trial rights.[20]

[19] The Defence Office at the Special Tribunal for Lebanon has played this role, and the International Bar Association (IBA) recommended that consideration should be given to the adoption of a similar system should be implemented at the ICC: 'Fairness at the International Criminal Court' IBA Report of August 2011, pp. 34–5.

[20] As underlined by the ECtHR, the public character of proceedings 'protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.' *Werner v. Austria*, Judgment of 24 November 1997, para. 45 The former Vice-President of the ICTY, Judge Florence Mumba, has also observed that public hearing 'serve an important educational purpose, by helping people understand how the law is applied to facts that constitute crimes, acting as a check on "framed" trials, and giving the public a chance to suggest changes to the law or justice system'. Florence Mumba, Ensuring a Fair Trial Whilst Protecting Victims and Witnesses – Balancing of Interests, in Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald (Richard May et al. eds., 2001), p. 365.

Over-extensive and vigorous protective measures vis-à-vis the public can also render it difficult for Defence teams to conduct specific inquiries that might be required to investigate the credibility of witnesses called by the Prosecution.[21] Finally, extensive reliance on closed sessions potentially dilutes the deterrent effect of the Court's proceedings. The above considerations dictate that the Court should only have recourse to confidential hearings when it is strictly necessary to do so.[22]

In terms of pragmatic solutions for achieving a fair balance between the competing aims of publicity and protection, the ICC Trial Chamber in the *Katanga* case attempted to provide, where possible, public summaries of any developments that occurred in closed session, and further issued a series of recommendations, designed to limit the need to have recourse to confidential sessions: this included framing questions in such a way as to avoid the need to mention confidential matters, and reviewing confidential transcripts in order to identify whether public redacted versions could be issued.[23] Chambers have also required the parties to review all past confidential filings, and either prepare a public redacted version, or explain why it is not possible to do so.[24]

Regarding the second element, that is, the relationship between fair trial rights and the duty to impose protective measures, Article 46(A)(2) is worded ambiguously; the placement of the comma leaves it open to judicial interpretation as to whether both the right to fair hearing and the right to a public hearing are subject to measures ordered by the Court to protect victims and witnesses, or whether it is only the right to a public hearing which must defer to victims' rights. As a result, the hierarchy between the right to a fair trial, and the duty of the Court to implement protective measures is uncertain.

In terms of the practice of the *ad hoc* Tribunals, this issue of hierarchy first arose in an ICTY decision, which considered the possibility of hearing 'anonymous' witnesses. In a dissenting Opinion, Judge Stephen noted that

[21] 'A disproportionate number of closed sessions can affect public perception of the accused's responsibility and may prevent potential witnesses from viewing the proceedings and coming forward with new and relevant information.' 'Witnesses before the International Criminal Court' IBA Report of July 2013, p. 32.

[22] This would be consistent with principle 3(f) of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, www.achpr.org/instruments/principles-guidelines-right-fair-trial/

[23] *Prosecutor v. Katanga & Ngudjolo*, Oral decision, Transcript of 7 September 2010, ICC-01/04–01/07-T-184-Red-ENG, pp. 72–5; Oral decision transcript of 20 September 2010, ICC-01/04–01/07-T-189-ENG, pp. 10–16.

[24] *Prosecutor v. Bemba et al.*, 'Decision Closing the Submission of Evidence and Further Directions', ICC-01/05–01/13–1859, 29 April 2016, para. 8.

the equivalent legal text of the ICTY, Article 20(1), stipulated that the Court shall ensure that 'proceedings are conducted. . .with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.[25] To Judge Stephen, this contrast between full respect and due regard underscored the drafters intention to create a legal scheme in which protective measures should not override the specific rights of the accused. This distinction between the obligation to respect the rights of the accused, and the duty to give due regard to witness protection was accepted, and applied in subsequent case law of the *ad hoc* Tribunals.[26] Nonetheless, in the recent ICTY *Haradinaj* judgment, the Appeals Chamber obliterated this distinction through its determination that effective witness protection was itself, a core requirement of fair and impartial proceeding. The Appeals Chamber further concluded that a failure to secure effective protection could undermine the Prosecution's right to a fair trial.[27]

In line with this evolution, the current approach at the ICC appears to favour a balancing test, which requires the Court to ensure that any protective measures do not compromise the overarching right to a fair and impartial trial.[28] It would seem that this approach is more in line with the wording of the Malabo Protocol, and it will ultimately fall to the Chamber to exercise effective oversight over protective measures in order to ensure that they promote, rather than undermine the right to fair and impartial proceedings.

The potential for conflict between the two competing duties is most likely to arise in relation to requests to withhold the identity of witnesses and victims from the Defence, and requests to redact or withhold the disclosure of information on the grounds of witness protection.

The Malabo Protocol neither permits nor prevents witness anonymity. Whilst underscoring the duty to ensure effective protective measures, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also emphasise that '[n]othing in these Guidelines shall permit the use of anonymous witnesses, where the judge and the defence is unaware of the witness' identity at trial'. This wording does not prohibit anonymous

[25] *Prosecutor v. Tadic*, 'Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses', 10 August 1995.

[26] See for example, *Prosecutor v. Brdjanin & Talic*, 'Decision on Motion by the Prosecution for Protective Measures', 3 July 2000, para. 31.

[27] *Prosecutor v. Haradinaj et al.*, Judgment on Appeal, 19 July 2010, paras. 35, 46.

[28] 'The right of endangered witnesses to protection and of the defendant to a fair trial are immutable, and neither can be diminished because of the need to cater for other interests', *Prosecutor v. Lubanga*,' Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters', 24 April 2008, ICC-01/04–01/06–1311-Anx2, para. 94.

witnesses, but the express inclusion of this caveat reflects awareness of the tension between witness anonymity and rights of the accused.

There is no uniform position amongst international and hybrid courts on the question of witness anonymity, although the overall trend appears to be opposed to its use. In the first ICTY case, although the Trial Chamber authorised a small handful of Prosecution witnesses to testify on an anonymous basis due to protection concerns, it was subsequently discovered by chance that one of the witnesses (witness 'L') had fabricated his testimony at the behest of a State security agency.[29] Consequently, neither the ICTY, ICTR or SCSL heard witnesses on an anonymous basis after this point. This incident coincided with the finalisation of the ICC Rules of Procedure and Evidence, and appears to have informed the decision to exclude the possibility of hearing anonymous witnesses at trial from the ICC legal framework.[30]

Conversely, the rules of the STL allow for witness anonymity,[31] although the rule has never been invoked in practice. In deciding which path to go down, it will be important for the Court to consider the normative impact of its decision on domestic case law in member States, and the potential, demonstrated by the *Tadic* case, that anonymity can be misused to prevent the Defence from challenging the accuracy or credibility of false allegations.

In terms of the use of redactions and delayed disclosure, this involves redacting certain information during the pre-trial stage, including identifying features such as the witness's name and address, which will then be disclosed at a pre-determined point prior to the witness's testimony. The logic underpinning this scheme is that the less time between disclosure and the date on which the witness testifies, the less risk that disclosure will result in possible witness interference or otherwise endanger the witness,[32] although no empirical research supports the assumption that this measure effectively curtails potential witness inference.

[29] *Prosecutor v. Tadic*, 'Trial Chamber's Decision on Prosecution Motion to Withdraw Protective Measures for Witness L', dated 5 December 1996, para. 4.

[30] C. Hall, 'The First Five Sessions of the Un Preparatory Commission for the International Criminal Court', 94 *Am. J. Int'l L.* 773 at 784; D. Lusty, 'Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials' 24 *Sydney L. Rev.* (2002) 361, at 421–3.

[31] Rule 93 of the STL Rules of Procedure and Evidence.

[32] The proposition was first adopted by the Trial Chamber in the *Prosecutor v. Brjanin and Talic*, on the basic of arguments from the Prosecution based on examples where witnesses had been intimidated after the Defence started its investigations; there was, however, evidence submitted in support of the proposition that delayed disclosure would eliminate this risk: 'Decision on Motion for Protective Measures', 3 July 2000.

Moreover, the converse to this logic is that the less time there is between disclosure and the testimony of the witness, the less time there is for the opposing party to investigate the credibility of the witness or verify the accuracy of the witness's proposed testimony. Delayed disclosure is also resource intensive, as it requires the parties to disclose and review the same materials on multiple occasions. The assumption that delayed disclosure is necessary to ensure witness protection is also undercut by the fact that many civil-law countries employ a dossier system, whereby the 'case file' is provided to the Defence during the preliminary phase, rather than being dolled at in a piecemeal fashion. Given that sufficiency of resources, and the length of proceedings are likely to be at the forefront of issues experienced by the ACJ, there might be good cause for the Court to consider afresh the utility and viability of adopting measures, such as delayed disclosure.

C. *Article 46(A)(3) The Accused Shall Be Presumed Innocent until Proven Guilty in Accordance with the Provisions of this Statute*

The presumption of innocence is considered to be of such paramount importance that the United Nations Human Rights Committee has found that States can never derogate from the duty to respect and apply this principle in criminal proceedings.[33] Even in times of warfare or states of emergency, it would be completely impermissible to prejudge the guilt of suspects, or otherwise assume guilt by association. This golden rule is, nonetheless, often honoured more in the breach, as reflected by the extent to which individuals, who have yet to stand trial, are described as warlords, or similar terms steeped in assumed guilt.

The Principles and Guidelines for the Right to a Fair Trial in Africa elaborate the following three key elements of the presumption:

1. The presumption of innocence places the burden of proof during trial in any criminal case on the prosecution.
2. Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.
3. Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence.

[33] UN Human Rights Committee, CCPR General Comment 32 (2007), paras. 6, 11, 16.

Regarding the first aspect, although the Protocol does not specify the standard of proof, the African Commission has elaborated that,[34]

'For purposes of criminal guilt, "proof beyond reasonable" means the totality of evidence must push the allegation past the point below which it would reasonably be doubted if the accused is indeed guilty. Once the evidence surpasses that point, guilt will have been established.'

In terms of the second aspect, the presumption of innocence acts as an important constraining factor as concerns information or comment provided by court officials pending the issuance of a judgment. In line with this requirement, ICC Chambers have publicly deprecated certain statements from the Prosecutor which implied that the accused was guilty or which improperly influenced public perceptions of the proceedings.[35] Human Rights courts have also emphasised that the public appearance of the defendant should not prejudge issues of guilt or innocence,[36] and for this reason, have condemned the placement of defendants in cages during public proceedings.[37]

The third point concerning presumptions of fact or law, although simple in its formulation, enters into complex territory in circumstances in which the court is addressing multiple cases arising from the same set of facts, as was the case at the ICTR and ICTY. Both Tribunals allow the judges to base the judgment on facts which are 'common knowledge',[38] and 'adjudicated facts'.[39] The former, are 'facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute'.[40] This definition has been construed broadly to include objective background facts, such as the status of ratification of treaties by the country in question, but also 'facts' that form part of the elements of the offence, such as the existence of a non-international armed conflict, or the existence of a widespread and systematic attack against a civilian population.[41]

[34] Communication 322/2006 – *Tsatsu Tsikata v. Republic of Ghana*, para. 124.
[35] *Prosecutor v. Lubanga*, Decision on the press interview with Ms Le Fraper du Hellen, ICC-01/04–01/06–2433, 12 May 2010, paras. 37–9,
[36] *Rushiti v. Austria*, App. No. 28389/95, para.31; *O. v. Norway*, App. No. 29327/95, para. 39; *Zollmann v. United Kingdom*, App. No. 62902/00.
[37] *Polay Campos v. Peru*, Communication No. 577/1994, para. 8.5.
[38] Rule 94(A) of the ICTR RPE; Rule 94(A) of the ICTY RPE.
[39] Rule 94(B) of the ICTR RPE; Rule 94(B) of the ICTR RPE.
[40] *Prosecutor v. Karemera*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, Case No. ICTR-98–44-AR73(C), 16 June 2006, para. 22.
[41] *Semanza v. Prosecutor*, Appeals Judgment, ICTR-97–20-A, 20 May 2005, para. 192.

In 2006, the notion reached its apogee when the ICTR Appeals Chamber determined that henceforth, the ICTR would consider that '[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group' as a fact of common knowledge.[42] The ICTR Appeals Chamber claimed that taking 'judicial notice' of such facts did not infringe the presumption of innocence or in any way shift the burden of proof, because firstly, the facts in question did not concern the individual role of the defendant, and secondly, the judges could not take 'judicial notice' of inferences based on such facts.[43] These caveats seem to rest on a distinction without a difference: in a simple murder case, if the judges assume that the person has been intentionally killed, this assumption will still shift the burden of proof as concerns the establishment of a fundamental component of the allegations, even if the assumption does not touch on the role of the defendant in the alleged murder. Similarly, if the judges can rely on these facts as part of the judgment, their inability to take judicial notice of 'inferences' based on these facts is of little import, and does not preclude them from drawing inferences or conclusions in the ordinary manner. Of further concern, the relevant wording of the ICTY and ICTR Rules 'commanded' the judges to take judicial notice of such facts; the judges had no discretion to put the issue to proof if the criteria for judicial notice was met.[44]

This mandatory assumption of facts cannot be reconciled with the 'Principles and Guidelines for the Right to a Fair Trial in Africa', which proscribes presumptions of fact, that are not rebuttable. It is notable in this regard that Article 46(c)(3) of the Protocol provides that a policy may be attributed to a corporation where it provides the most reasonable explanation of its conduct. If it is assumed that 'corporations' enjoy a right to a fair trial, then the wording of this provision is problematic. Specifically, it has been accepted at both the *ad hoc* Tribunals and the ICC that in order to satisfy the standard of beyond reasonable doubt, a particular finding concerning an element of the offence must be the 'only reasonable' conclusion,[45] whereas the phrase 'most reasonable' implies that other reasonable explanations exist. Although it might be

[42] *Prosecutor v. Karemera*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, *Case No. ICTR-98–44-AR73(C)*, 16 June 2006, paras. 35–6.

[43] *Semanza v. Prosecutor*, Appeals Judgment, ICTR-97–20-A, 20 May 2005, para. 192.

[44] *Prosecutor v. Milosevic*, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, Case No.: IT-02–54-AR73.5, 28 October 2003.

[45] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, 'Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"', ICC-02/05–01/09–73, 03 February 2010, paras. 32–3; *Prosecutor v. Stakić*, 'Judgment', 22 March 2006, IT-97–24-A, para. 219; *Prosecutor v. Bagosora and Nsengiyumva*, 'Judgment' (Appeals Chamber), 14 December 2011, ICTR-98–41-A, para. 515.

acceptable to imply a lower standard of proof to corporations, the use of this threshold might have troubling implications for individuals who might be prosecuted in tandem with corporations. The word 'may' makes clear that unlike the *ad hoc* Tribunals, the judges have the discretion not to employ this assumption, and findings concerning corporations should not, in any case, be incorporated in cases involving individual responsibility (that is, through the notion of 'adjudicated facts').

Adjudicated facts are those that have been determined by the Tribunal in a different case, and, either the parties did not appeal the finding or the 'fact' was affirmed at the appellate level. Unlike facts of common knowledge, the Chamber has the discretion to decide whether to accept the adjudicated facts in question,[46] and must, in any case, hear first from the parties. The ICTR Appeals Chamber explained that the rationale underpinning adjudicated facts was that they are 'a method of achieving judicial economy and harmonising judgments of the Tribunal while ensuring the right of the accused to a fair, public, and expeditious trial.'[47] The facts in question must be relevant to the criminal responsibility of the accused, but they cannot touch on the acts, conduct, and mental state of the accused.[48] Notwithstanding this narrow category of exceptions, it is difficult to accept that the admission of key facts, that have been litigated in an entirely different case, which may have been defended by lawyers who did not contest certain facts for strategic reasons, does not impact on the presumption of innocence and burden of proof. The ICTR Appeals Chamber's claim that the presumption of innocence remains intact because this approach only affects the burden of production of evidence, and not the burden of persuasion, appears entirely unconvincing, particularly if one steps back from the pressure faced by the ICTY and ICTR to clear their backlog of cases with minimal resources.

In any case, it is unlikely that the African Court will face the same situation of hearing multiple cases based on the same sub-set of facts. This minimises the need to 'harmonise judgments', and the expediency of doing so, at the expense of the rights of the accused. It is telling in this regard that whilst the ICC Rules of Procedure and Evidence permits the Court to take judicial notice of facts of common knowledge,[49] the Judges cannot take 'judicial

[46] *Prosecutor v. Milosevic*, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, Case No.: IT-02–54-AR73.5, 28 October 2003.

[47] *Setako v. Prosecutor*, Appeals Judgment, Case No. ICTR-04–81-A, 28 September 2011, para. 200.

[48] *Prosecutor v. Karemera*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, Case No. ICTR-98–44-AR73(C), 16 June 2006, para. 50.

[49] Article 69(6) of the ICC Statute.

notice' of facts that concern the criminal responsibility of the defendant or the elements of the offence, or consider facts that have been adjudicated in another case as being established for the purposes of the case at hand.

Apart from the issue of the burden of proof, the presumption of innocence also has important connotations for the expeditiousness of the proceedings, and the use of pre-trial detention. In particular, the presumption of innocence mandates a presumption of liberty.[50] Accordingly, although the Malabo Protocol does not regulate the issue of provisional release (and the related standards), it would be incompatible with the presumption of innocence to impose a system of mandatory pre-trial detention. Similarly, the UN Human Rights Commission has observed that lengthy pre-trial detention is incompatible with the presumption of innocence,[51] for example, if a detainee has already been detained for 8 years, this creates both a public perception that the defendant must be guilty, and an incentive to issue a conviction, and sentence which is equal to or greater than 8 years in order to avoid possible claims for compensation, or an appearance of injustice.

The experience of the ICTR and ICC has nonetheless demonstrated that the right to provisional release will be meaningless in practice if the Court does not possess the means to release the detainee. At least some defendants are likely to be political or military opponents, who will be unwilling or unable to return to their country of origin. This means that unless States are willing to allow such defendants to be released to their territory (either on a provisional basis or if the defendant is acquitted), then it is possible that the defendants will be forced to remain in detention, due to the lack of practical possibilities for ensuring their release. One solution would be to follow the ICC example of encouraging State parties to enter into proactive agreements with the Court concerning the potential release of detainees onto their territory, which can then be invoked in specific cases, if required.[52]

[50] Section M(1)(e), Principles on Fair Trial in Africa; Paragraphs 1(b), 7, 10–11, 31, 32(a) of Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa.

[51] 'The holding in detention of accused persons pending trial for a maximum duration of a third of the possible sentence facing them, irrespective of the risk that they may fail to appear for trial is incompatible with the presumption of innocence and the right to be tried within a reasonable time or to be released on bail.' Ecuador, ICCPR, A/53/40 vol. I (1998) 43 at para. 286. See also CCPR/C/GC/32, para. 30, citing concluding observations, Italy, CCPR/C/ITA/CO/5 (2006), para. 14 and Argentina, CCPR/CO/70/ARG (2000), para. 10

[52] The Court has entered into such agreements with Belgium and Argentina: 'Belgium and ICC sign agreement on interim release of detainees', 10 April 2014, ICC-CPI-20140410-PR993
'Argentina and ICC sign agreements on Interim Release and Release of Persons, reinforcing Argentina's commitment to accountability and fair trial', 28 February 208, ICC-CPI-20180228-PR1360

In line with this approach, the presumption of innocence further mandates that the Court should have legal framework in place to address the scenarios which might arise in the event that defendants are acquitted. This includes the need to negotiate agreements to accept acquitted persons, who are unable to return to their country of nationality, due to a well-founded fear of persecution or risk of death, torture or cruel treatment. The ICC has finalised one such agreement,[53] which could operate as model for the Court to adapt for its own proceedings.[54]

D. *Article 46(A)(4) The Minimum Guarantees*

1. The Right to Be Informed Promptly in Detail, and in a Language He Understands, of the Nature, Cause and Content of the Charges

There are three elements folded within this right:

First, the right to be informed promptly of the legal and factual nature of the accusations (the 'nature and cause');
Secondly, the right to receive the disclosure of evidence underpinning these accusations in a prompt manner ('the content element'); and
Thirdly, the right to have such information communicated in a language which the defendant understands ('the language element').

2. The Right to Be Informed Promptly of the Legal and Factual Nature of the Accusations

The first element derives from the right of '*habeaus corpus*', which provides that anyone deprived of his or her liberty has the right to be informed immediately of the factual and legal basis for such detention. This right, which is a bulwark against illegal and arbitrary detention, is 'non-derogable under both treaty law and customary international law'.[55] It is also a 'self-standing human right, the absence of which constitutes a human rights

[53] Ibid.

[54] The model text is set out, as annexes, in 'Cooperation Agreements' (an ICC Booklet, www.icc-cpi.int/news/seminarBooks/Cooperation_Agreements_Eng.pdf)

[55] UN Working Group on Arbitrary Detention, Compilation of Deliberations: Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law ('WGAD, Compilation of Deliberations: Deliberation No. 9'), para. 47.

violation *per se*.'[56] The International Court of Justice has further affirmed that Article 6 of the African Charter (the prohibition of arbitrary detention), applies to all forms of detention, 'whatever its legal basis and the objective being pursued'.[57]

Out of recognition for the importance of this right, the ICTR Appeals Chamber has clarified that even if the suspect is detained by national authorities and not under the authority of the Tribunal itself, the relevant organs of the Tribunal have a positive obligation to take such steps as are within their control, to ensure that the suspect's rights are fully respected.[58] The need for this clarification arose due to the many instances in which the Tribunal was compelled to address the situation of defendants, who had been arrested and detained by national authorities without charge, sometimes for years, whilst the ICTR Prosecutor decided if and when it wished to request the Tribunal to issue an arrest warrant for the person concerned.[59]

Given that the Prosecutor at the African Court will also depend on national authorities for the arrest and extradition of suspects, it is highly likely that this situation will also arise at the African Court. But, bearing in mind that the African Court seeks to establish a complementary system of criminal justice and human rights law,[60] there are even more cogent reasons for the African Court to interpret the relevant provisions in such a way as to ensure that 'the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person.'[61] Since immediate release is, in principle, the appropriate remedy for arbitrary detention,[62] the African Court must be willing to either implement or respect this remedy (if awarded at a national level), notwithstanding the fact that the Prosecutor at the African Court has decided to pursue a suspect, who has already been detained at a national level for an unreasonable length of time.

[56] A/HRC/19/57, para. 61, cited in Report of the Working Group on Arbitrary Detention: compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court, 30 June 2014, para. 13

[57] Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of Congo*), Merits, Judgment, I.C.J. Reports 2010, para. 77.

[58] *Prosecutor c. emanzaf Guinea v. Democratic Republic of Congo*), *Merits, Judgment, I.C.J. Reports 2010, para. 77. f arbitrary det Prosecutor v. Kajelijeli* Appeals Judgment, dated 23 May 2005, paras. 219–22.

[59] Melinda Taylor and Charles Chernor Jalloh, 'Provisional Arrest and Incarceration in the International Criminal Tribunals' 11 Santa Clara J. Int'l L. i (2012–2013) , p. 303.

[60] Article 4 of the Malabo Protocol.

[61] *Prosecutor v. Kajelijeli* Appeals Judgment, dated 23 May 2005, at para. 220.

[62] Report of the Working Group on Arbitrary Detention, A/HRC/30/36, 10 July 2015, para. 64, and recommendations set out at p. 22.

In terms of the particular implications of this right, 'the nature, cause and content of the charges' extend to firstly, the evidence, which the Prosecution relied upon to obtain the arrest warrant, and secondly, the evidence upon which the Prosecution intends to rely at trial. Even if the matter is not regulated explicitly by the Protocol or rules, human rights law dictates that the first *tranche* of evidence, that is, the evidence relied upon to obtain the arrest warrant, should be disclosed as soon as possible, so that the defendant can exercise his or her right to challenge the legality of the detention order.[63] At the ICTY and ICTR, the Rules stipulate that this must occur within 30 days after the accused is arrested,[64] whereas the deadline at the ICC falls to judicial discretion, although the Appeals Chamber has underlined that '[i]deally, the arrested person should have all such information at the time of his or her initial appearance before the Court'.[65]

3. The Right to Receive the Disclosure of Evidence Underpinning These Accusations in a Prompt Manner

In terms of the timing for the disclosure of Prosecution trial evidence, the courts differ on the question as to when disclosure should be completed. Whereas the ICTR and ICTY have, in exceptional cases, allowed the the Prosecution to disclosure witness statements after the trial has commenced,[66] the ICC require such disclosure to be completed prior to the commencement of the trial.[67]

[63] *Prosecutor v. Bemba*, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"', 16 December 2008, ICC-01/05–01/08–323, paras. 29–32, citing, *inter alia*, *Lamy v. Belgium*, no. 10444/83, 30 March 1989, para. 29 (ECHR).

[64] ICTY and ICTR: Rule 66(A)(i) of the Rules of Procedure and Evidence.

[65] *Prosecutor v. Bemba*, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"', 16 December 2008, ICC-01/05–01/08–323, para. 1.

[66] As noted by the ICTR Trial Chamber in *Prosecutor v. Gatete*, 'Rule 69(C), which formerly required disclosure before the commencement of trial, was amended on 6 July 2002 to expressly permit rolling disclosure. Nevertheless, full disclosure before trial is still often required. Not only does rolling disclosure shorten the period of preparation for the Defence provided for in Rule 66(a)(ii), its effect is also that the trial will begin, and Prosecution witnesses will be heard, before the Defence knows the names of all Prosecution witnesses or is informed of the entirety of their statements.' Case No. ICTR-00–6I-I, Decision on Prosecution Request for Protection of Witnesses, 11 February 2004, para. 6. For ICTY, see, *Prosecutor v. Mrksic et al.*, 'Decision on Prosecution's Additional Motion for Protective Measures of Sensitive Witnesses', Case No. IT-95–13/1-T, 25 October 2005.

[67] Article 64(3)(c) of the ICC Statute sets out the Trial Chamber's obligation to ensure that all documents or information is disclosed 'sufficiently in advance of the commencement of trial to enable adequate preparation of trial'.

In any case, the deadline must be determined through the lens of the defendant's right to a speedy trial, and right to adequate time and facilities to prepare the Defence. A UN Working Group established to identify the most effective means to speed up trials identified the timing of disclosure as one of the greatest causes of delays in the proceedings, and further recommended that all final versions of witness statements be made available to the Defence at an early stage of the pre-trial process.[68] This recommendation is logical: until disclosure is complete, it is difficult, if not impossible, for the Defence team to obtain instructions from the defendant, develop a strategy, and conduct their own investigation into the credibility and reliability of Prosecution evidence. Adding to the complexity of effective Defence preparations, the organization of Defence investigative missions *in situ* might depend on State cooperation, and the seat of the court and location of the defendant are likely to differ from the location of investigations, which renders it difficult, if not impossible, to conduct investigations at short notice, or whilst the trial is ongoing. These factors led the Trial Chamber in the ICC *Lubanga* case to set a deadline of three months before the commencement of the trial for the disclosure of Prosecution evidence.[69] This yardstick has been adopted in subsequent ICC cases, barring discrete exceptions which have been allowed in connection with specific items of evidence that cannot be disclosed at this point for exceptional reasons.[70] Notwithstanding these discrete exceptions, the Appeals Chamber has underscored *in obiter* that the disclosure of all incriminating prosecution evidence should be completed prior to the commencement of the trial itself.[71]

Given that the African Court, as a treaty based mechanism rather than a Security Council created Court, is likely to face many of the same logistical issues as the ICC in the area of Defence investigations, the three month disclosure deadline might be a more appropriate yardstick to adopt than the equivalent deadlines imposed at the ICTY and ICTR, although caveats will need to be built in as concerns 'exceptional' circumstances where important evidence could not be obtained, with reasonable diligence, at an earlier juncture.

[68] Report of the ICTY Working Group on Speeding Up Trials, S/2006/353, 31 May 2006, para. 21.

[69] *Prosecutor v. Lubanga*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 10 November 2007, ICC-01/04–01/06–1019.

[70] See most recently, *Prosecutor v. Ongwen*, 'Decision on the Prosecution request for variation of the time limit to provide its provisional list of witnesses and summaries of their anticipated testimony', ICC-02/04–01/15–453, 6 June 2016.

[71] *Prosecutor v. Katanga and Ngudjolo* Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial', 16 July 2010, ICC-01/04–01/07–2288, para. 43.

An issue which is linked to the right to be informed promptly of the charges is the question as to whether the charges can be supplemented or recharacterised throughout the trial proceedings. The *ad hoc* Tribunals permit the Prosecution to apply to amend and add additional charges throughout the trial proceedings, but do not permit the Judges to change the legal qualification of the charges themselves, whereas the ICC Statute does not allow the charges to amended after the trial has commenced, but does permit the Judge to recharacterise the legal qualification of the charges.

In terms of the position at the *ad hoc* Tribunals, in the ICTY *Kupreskic* case, in relation to the situation where the Prosecution case fails to establish the specific elements of the charges, but may nonetheless establish other offences (i.e. lesser included offences) which was not charged, the Trial Chamber determined that,[72]

it is questionable that the *iura novit curia* principle (whereby it is for a court of law to determine what relevant legal provisions are applicable and how facts should be legally classified) fully applies in international criminal proceedings.

After examining whether different national law jurisdictions permitted the judges to recharacterise the legal nature of the charges, the Chamber further opined that 'no general principle of criminal law common to all major legal systems of the world may be found'.[73] The Chamber also underlined that from a human rights perspective, the accused's right to be informed promptly of the charges might need to be protected more rigidly at an international court than in a domestic environment, so as to accommodate the uncertainty generated by the new and evolving notions of international crimes and international criminal procedural rules.[74]

In light of these considerations, the Chamber concluded that the most appropriate approach to firstly, avoid the situation in which an accused is acquitted due to the fact that the evidence proves different crimes, and secondly, preserve the accused's right to be informed promptly of the charges (including the legal qualification of those charges), would be to allow the Prosecution to rely fully on cumulative and alternative charges in the indictment,[75] and to

[72] *Prosecutor v. Kupreskic et al.*, Trial Judgment, para. 723.

[73] Id., para. 738.

[74] Id., para. 740.

[75] Id., para. 727. As explained by the Trial Chamber, cumulative charges concern the scenario in which the Prosecution contends that the facts – if established- would violated two or more different provisions of the Statute, and alternative charges concern the scenario in which the facts may violate either a general or a specific legal provision, depending on whether the Prosecution is able to establish all the relevant facts: i.e. aiding and abetting *versus* commission as a perpetrator.

consider amending the indictment to vary or include new charges, after the trial has commenced.[76] Nonetheless, the Chamber cautioned that before granting a request to amend the indictment, the Chamber should first establish that the proposed amendment, if granted, would not occasion undue prejudice to the accused's right to a fair trial: this assessment includes the impact on the accused's right to be promptly notified of the charges, the related right to have adequate time and facilities to prepare the Defence, and the right to be tried without undue delay.[77]

In contrast to the above approach, the ICC legal texts do not allow the Prosecution to amend or add additional charges *after* the trial has commenced,[78] but do allow the Judges to recharacterise the legal qualification of the charges, provided firstly, that the accused is given adequate notice of this possibility and afforded an opportunity to be heard and to adduce evidence, and secondly, that the recharacterisation does not exceed the facts and circumstances set out in the charges.[79]

Notwithstanding the reservations expressed by the ICTY Trial Chamber in the aforementioned *Kupreskic* case, the ICC Appeals Chamber affirmed the validity of the *iura novit curia* principle at the ICC, as embodied by Regulation 55 of the Regulations of the Court. The Appeals Chamber found, in particular, that the purpose of this provision, which was to 'close accountability gaps', was fully consistent with the objectives underpinning the ICC Statute.[80] The Appeals Chamber further concluded that requalifying the legal nature of the charges, after the commencement of the trial, was not itself incompatible with human rights law, provided that the requalification was consistent with the rights of the accused, and did not render the trial unfair.[81] The Appeals Chamber was nonetheless reluctant to provide any clear guidance as to the specific circumstances in which a requalification would

[76] Id., para. 742.

[77] *Prosecutor v. Karemera et al.*, Case No. ICTR-98–44-AR73, 'Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment', 19 December 2003 at para. 13; *Prosecutor v. Brdjanin and Talic*, Case No. IT-99–36-PT, 'Decision on Objections by Momir Talic to the Form of the Amended Indictment', 20 February 2001, para. 17.

[78] Article 61(9) of the ICC Statute.

[79] Regulation 55 of the ICC Regulations of the Court.

[80] *Prosecutor v. Lubanga*, 'Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change', 17 December 2009, ICC-01/04–01/06–2205, para. 77.

[81] Ibid., paras. 84, 85.

render the trial unfair, stating that such a determination would need to be made on a case-by-case basis.[82]

Since the issuance of the Lubanga judgment, this 'option' was exercised in almost every case completed thus far. In *Lubanga*, the Trial Chamber recharacterised the nature of the armed conflict from an international armed conflict, to an internal armed conflict.[83] In Bemba, the Trial Chamber gave the Defence notice that the defendant could be convicted under the 'should have known' form of command responsibility, but ultimately relied on the actual knowledge threshold in the judgment itself.[84]

In *Katanga*, the Trial Chamber recharacterised the nature of the armed conflict, and the mode of liability from indirect co-perpetration (Article 25(3)(a)), to liability as a person who contributed to a group of persons acting with a common purpose (Article 25(3)(d)).[85] The notice of the latter requalification was only provided *after* the close of the Defence case, which was, in turn, after the accused decided to waive his right of silence, and testify in his own defence. As observed in a strongly worded dissenting opinion from Judge Van den Wyngaert, given that Mr. Katanga's co-accused was simultaneously acquitted, there is an ineluctable appearance that Mr. Katanga might also been acquitted, if not for the proposed requalification.[86] The timing of the notice of the proposed requalification was upheld on appeal,[87] but with a caution that it 'is preferable that notice under regulation 55 (2) of the Regulations of the Court should always be given as early as possible'.[88] In line with this guidance, in the *Ruto & Sang* case, the Chamber invited submissions on the possibility of Regulation 55 being invoked, *prior* to the commencement of the trial.[89] Notably, during the course of this litigation, the Prosecution also advanced the position that notice as to a potential recharacterisation should be

[82] Ibid., paras. 85 and 86.

[83] *Prosecutor v. Lubanga*, 'Judgment Pursuant to Article 74 of the Statute', ICC-01/04–01/06–2842, 5 April 2012, paras. 531–65.

[84] *Prosecutor v. Bemba*, 'Judgment Pursuant to Article 74 of the Statute', ICC-01/05–01/08–3343, 21 March 2016, para. 57.

[85] *Prosecutor v. Katanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04–01/07–3436-tENG, 7 March 2014, paras. 30, 1170, 1230, 1235, 1441–84.

[86] *Prosecutor v. Katanga*, Judgment Pursuant to Article 74 of the Statute, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04–01/07–3436-AnxI, 10 March 2014, para. 132.

[87] *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', 27 March 2013, ICC-01/04–01/07–3363.

[88] Ibid. para. 24.

[89] *Prosecutor v. Ruto and Sang*, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, 12 December 2013, ICC-01/09–01/11–1122, para. 27.

given 'on or before the first day of trial'.[90] A similar approach to timing was also adopted in the subsequent *Gbagbo & Blé Goudé* Case.[91]

The ICC's heavy reliance on recharacterisation in its first cases should also be viewed in conjunction with the fact that ICC judges viewed recharacterisation as the 'lesser evil' compared to the possibility of relying extensively on cumulative charging.[92] As explained by Pre-Trial Chamber II in the *Bemba* case, cumulatively charging different crimes or modes of liability based on the same facts risked 'subjecting the Defence to the burden of responding to multiple charges for the same facts and at the same time delaying the proceedings'.[93]

But, whereas the respective Pre-Trial Chambers refused to to confirm cumulative or alternative charges in the first ICC cases,[94] later Pre-Trial Chambers adopted a more relaxed position. Thus, in the *Gbagbo* case, the Pre-Trial Chamber underlined that,[95]

Taking stock of past experience of the Court, the Chamber is also of the view that confirming all applicable alternative legal characterisations on the basis of the same facts is a desirable approach as it may reduce future delays at trial, and provides early notice to the defence of the different legal characterisations that may be considered by the trial judges.

Similarly, in the *Ntaganda* case, the Chamber affirmed that it could confirm alternative charges, based on the same facts, provided that each charge was supported by sufficient evidence to satisfy the evidential threshold for this stage of the proceedings.[96]

The pendulum at the ICC therefore seems to have swung towards the use of alternative charges, as the primary means for eliminating impunity gaps,

[90] *Prosecutor v. Ruto and Sang*, Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, ICC-01/09–01/11–433, para. 24.

[91] *Prosecutor v. Gbagbo & Blé Goudé*, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court, 19 August 2015, ICC-02/11–01/15–185, 20 August 2015, para.11.

[92] C. Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55', *Criminal Law Forum* (2005) 16: 1–31 at 3.

[93] Prosecutor v. Bemba, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo', ICC-01/05–01/08–424, 3 July 2009, para. 201

[94] *Prosecutor v. Bemba*, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo', ICC-01/05–01/08–424, 3 July 2009, paras. 190–205.

[95] *Prosecutor v. Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11–01/11–656-Red, para. 228.

[96] *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 14 June 2014, ICC-01/04–02/06–309, paras. 99–100.

combined with early notice of potential Regulation 55 recharacterisations, in order to address the possibility that the Trial Chamber might view the appropriate legal qualification in a different manner from the Pre-Trial Chamber or Prosecutor. In any case, there is growing consensus that the Chamber and the Prosecutor have a combined duty to resolve and settle the exact nature of the charges (in terms of both the facts, and and the legal qualification of these facts) as soon as possible, and preferably before the commencement of the trial.

This approach would be consistent with the case law of the ECCC. Although the civil-law oriented Statute allows judges to recharacterise the legal nature of the charges, in the *Duch* case, the Pre-Trial Chamber reviewed international standards concerning the right to be informed of the charges, and noted that these standards require that the 'indictment set out the material facts of the case with enough detail to inform the defendant clearly of the charges against him so that he may prepare his defence. The indictment should articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner. If an accused is charged with alternative forms of participation, the indictment should set out each form charged'.[97] The Chamber therefore ruled that '[c]onsidering that international standards require specificity in the indictment and Article 35 (new) of the ECCC Law provides that the accused should be informed in detail of the nature and cause of the charges', the legal qualification of the charges should be decided before the commencement of the trial stage, and not during the trial itself.[98]

The standards set out in international human rights judgments also militate in favour of early notification of any changes (factual or legal) in the nature of the charges. The ECHR has held in this regard that the power of a Chamber to recharacterise the legal qualification of the facts is subject to the defendant's right to be informed promptly of the charges, and to have adequate time and facilities to prepare his or her defence. The latter right must be implemented in a 'practical and effective manner and, in particular, in good time'.[99]

The Malabo Protocol is silent on the questions as to whether the indictment can be amended after the commencement of the trial, and whether the Judges can requalify the legal characterisation of the charges, at any point in the proceedings. This silence does not, however, resolve the issue as it is possible that the Judges might follow in the footsteps of the ICC judges, who

[97] *Prosecutor v. Kaing Guek Eav* ('Duch'), 'Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias "Duch"', 5 December 2008, at para 47.
[98] At paras. 50, 106.
[99] *Pélissier and Sassi v. France* (Application no. 25444/94), Judgment 25 March 1999, at para 62.

adopted an extremely significant legal provision on this point as part of the Court's internal 'routine' regulations. The ICC Appeals Chamber sought to enhance the legitimacy of the regulation by citing the fact that the regulations had been circulated to the State Parties for comment prior to their adoption, and no States had objected.[100] Although it is questionable as to whether the mere circulation of the regulations provided a sufficient safeguards as concerns the adoption of such a significant legal provision, the fact that the Chamber felt impelled to mention the role of the State parties suggests that the judicial promulgation of such a regulation – on its own – would not be an appropriate avenue for the adoption of a legal provision of this kind. Indeed, given the challenge of squaring such an approach with the rights of the suspect and defendant, it remains highly questionable as to whether the African Court should follow this approach. The better practice may well be to allow for alternative charges, in the indictment before commencement of the trial, but not recharacterisation of the charges once the trial has begun.

Clarity in the wording of the charges has also been a key problem at international courts, with vague language giving rise to disputes as to what is actually encompassed by the charges. This has triggered a rich vein of case law concerning the appropriate language which should be employed in indictments or charges, and the specific detail that should be provided, such as the identity of co-perpetrators by name or organisation, and the dates and locations of key events.[101] Given that some defendants were acquitted of charges on this basis,[102] it would be advisable for this issue to be addressed proactively, for example, any rules promulgated by the Court should specify firstly, which document is the primary accusatory instrument, secondly, the minimum

[100] *Prosecutor v. Lubanga*, 'Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change', 17 December 2009, ICC-01/04–01/06–2205, ICC-01/04–01/06–2205, para. 71.

[101] See for example, ICTY: *Prosecutor v. Pavković et al.* case, Case No. IT-03–70-PT, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, 8 July 2005, para. 12; ICTR: ICC: *Prosecutor v. Ruto, Kosgey & Sang*, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', 23 January 2012, ICC-01/09–01/11–373, paras. 93–104

[102] The ICTY Appeals Chamber set aside Blagoje Simic's convictions relating to his alleged membership of a joint criminal enterprise on the basis that this form of liability had not been pleaded clearly in the indictment or other ancillary documents: *Prosecutor v. Blagoje Simic*, Appeals Judgment, 28 November 2006, Case No.: IT-95–9-A, paras. 20–74. In the Kupreskic case, the Appeals Chamber acquitted Mirjan and Zoran Kupreskic due to the fact that the case against them had radically transformed during the trial process, as compared to the allegations in the indictment: *Prosecutor v. Kupreskic et al.*, Appeal Judgment, Case No.: IT-95–16-A, 23 October 2001, paras. 88–125.

content of such a document,[103] and thirdly, the means by which a defendant can challenge overly vague or defectively worded charges and the timing for such challenges. Challenges to the form of the indictment, when they could affect the fairness of the trial, imply that the nature of the rules in the ICTY and ICTR context could be more appropriate than the standard in the SCSL which denied the right of appeal to defendants by directing that all such challenge to the indictment motions be forwarded directly to the Appeals Chamber. In the context of the Malabo Protocol which has a pre-trial judge, this might not be as much of an issue if the matter is decided by the Trial Chamber with the possibility that the decision in question could be appealed to the Appeals Chamber.

4. The Right to Have Such Information Communicated in a Language Which the Defendant Understands

Translation and interpretation issues have bedevilled international and hybrid courts, both lengthening and increasing the costs of the proceedings. That being said, without either understanding or translation, an accused cannot effectively participate in the proceedings and instruct his defence. The right to defence therefore loses much of its utility.

In terms of the scope of the obligation to provide translations and interpretation, the text of the Malabo Protocol provides that the accused should be notified of the nature and cause of the charges in a 'language he understands'. As a first point, this formulation – whilst consistent with human rights law - waters down the equivalent right at the ICC, in the sense that the ICC text (and case law) stipulates that the relevant information must be provided in a language which the accused understands fully (*parfaitement* in French, which translates to 'perfectly'): this standard is met when the accused 'is completely fluent in the language in ordinary, non-technical conversation: it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer.'[104]

Given that the standard employed at the ICC turns on the inclusion of the word 'fully' in the Statute,[105] which is absent from the equivalent provision in

[103] See for example, Regulation 52 of the ICC Regulations of the Court.

[104] *Prosecutor v. Katanga and Ngudjolo*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages', 28 May 2008, ICC-01/04–01/07–522, para. 3.

[105] *Prosecutor v. Katanga and Ngudjolo*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages', 28 May 2008, ICC-01/04–01/07–522, paras. 2, 3, 40.

the Malabo Protocol, the African Court is free to depart from ICC legal precedent on this point. But, from a human rights perspective, the ultimate threshold that is adopted by the Court should take into account the complexity of the proceedings, and the right of the accused to effectively participate in such proceedings. When considered from the perspective of a defendant, who is appearing before a Court in a foreign country with foreign law and procedures, the added burden of attempting to divine witness testimony or the specific meaning of complicated international legal precepts in a foreign language that is only imperfectly understood can tip the scales towards an unfair trial. It is thus notable that although the ICTY and ICTR have a lower legal standard in their respective Statutes, the practice has been to arrange interpretation in the language in which the accused is fully conversant, even if the accused might be objectively conversant in the working languages of the Court. Thus, the accused Vojislav Seselj was permitted to utilise his preferred language of Bosnian/Croat/Serbian, notwithstanding the fact that he had taught in English as a professor in law at the University of Michigan in the United States of America.[106] In the *Milosevic* case, the Trial Chamber further underscored that,[107]

> Article 21, paragraph 4, of the Statute of the International Tribunal guarantees to the accused certain minimum rights, one of which is to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him,[. . .] in the opinion of the Trial Chamber and in the circumstances of this particular case, these guarantees are so fundamental as to outweigh considerations of judicial economy.

Apart from the question as to whether the accused has a right to receive translations and interpretations in a particular language, a further issues concerns the *scope* of this right i.e. does it extend to a right to receive the translation of the entire case file, or only selected documents that concern the charges.

The ICTY has distinguished between the circumstances of a self-representing defendant, and those of an accused represented by counsel. In the former scenario, the ICTY recognised in the Seselj case that the right to effectively participate in the proceedings requires that the defendant be provided all court filings, prosecution evidence, and exculpatory materials in a language which the defendant understands,[108] whereas in the later Karadzic

[106] *Prosecutor v. Seselj*, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, 9 May 2003.

[107] *Prosecutor v. Milosevic*, Decision on Prosecution Motion for Permission to Disclose Witness Statements in English, 19 September 2001.

[108] See for example, *Prosecutor v. Seselj*, Decision on Vojislav Seselj's Interlocutory Appeal against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para 9,

case, the ICTY denied his request for a similar range of translations, citing firstly, the fact that one of his legal advisors had publicly stated that the accused was proficient in English, and secondly, the fact that the accused benefitted from a significant number of legal associates who were proficient in English.[109]

In circumstances in which an accused is represented by Counsel, the accused has the right to receive the following materials in a language which the accused fully understands:[110]

> The material submitted by the Prosecution in support of the indictment;
> Prosecution witness statements and any statements taken from the accused;
> Exhibits, which the Prosecution tends to tender at trial; and
> Key documents such as the judgment.

The ICTR and ICC have blurred the issue as to translations required for the defendant and those required by Counsel since the issue has arisen primarily in relation to French speaking defendants represented by French speaking counsel, who are appearing opposite an English speaking Prosecution team. In the ICC *Ngudjolo* case, the Pre-Trial Chamber addressed the Defence requests for all evidence and filings to be translated into French (the language of both Counsel and the defendant) by specifying that the Defence had an obligation to compose itself so that it was able to work in both English and French,[111] a solution which did not resolve the independent language needs of the defendant. But, at the same time, as a result of this concurrence between the language spoken by Counsel and the defendant, both the ICTR and ICC have ordered that a broader range of procedural documents should be translated into the language of the accused/Counsel.[112]

[109] *Prosecutor v. Karadzic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Prosecution Motion Seeking Determination that the Accused Understands English 4 June 2009, paras. 15, 17.

[110] *Prosecutor v. Naletilic & Martinovic*, Decision on Defence's Motion Concerning Translation of All Documents 18 May 2001; *Prosecutor v. Delalic et al.*, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996.

[111] *Prosecutor v. Katanga & Ngudjolo*, Decision on the Defence Request concerning time limits, 27 February 2008, ICC-01/04–01/07–304.

[112] See for example, *Prosecutor v. Ngdujolo*, Decision on Mr Ngudjolo's second request for translation and suspension of the time limit, ICC-01/04–02/12–130, 7 August 2013 (translation of Prosecution request to reply to Defence response to appeal brief into French); *Prosecutor v. Muhimana*, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of Counsel, dated 6 November 2001, Case No. ICTR-95–1B-1 at para. 32.

Notwithstanding the above legal precedents, given the potential number of countries and languages that will fall under the purview of the African Court, it is likely that the practice of other specialized courts (or courts with more secure funding) is likely to be of scant assistance to the practical difficulty that the Court will face in reconciling the defendant's right to receive necessary translations, and their right to a speedy trial. The *Banda & Jerbo* case at the ICC foreshadows these types of difficulties: the language spoken by the defendants in that case was Zaghawa, an oral language, for which there were no trained translators or interpreters at the time that the case commenced.[113] The Chamber nonetheless rejected the Prosecution request to be exempted from the obligation to disclose witness statements in the language of the accused, and instructed the Prosecution to liaise with the Registry to identify practical solutions that were consistent with the rights of the accused.[114] This approach underscores that the solution is not to curtail the rights of the accused, but rather to target other causes of delays. This can include encouraging the Prosecution to bring focused, streamlined cases, to train interpreters and translators from the earliest stage of the investigation, to identify the key statements that will require translation at the earliest possible juncture, and to encourage the parties to consult with a view to identifying practical solutions that and consistent with the rights of the accused. In the African context, where many languages may not be written and are only oral in nature, an early decision would have to be made as to how to give effect to this right keeping in mind the likely paucity of resources.

5. The Right to Adequate Time and Facilities for the Preparation of His or Her Defence, and the Right to Communicate Freely with Counsel of His or Her Own Choice

The right to adequate time and facilities underpins the right to effective legal representation, and thus ensures that the defendant can exercise all other rights in a manner that is effective, and not illusory.

Although the right to have adequate time to prepare the defence, and the right to a speedy trial are often viewed as contradictory rights, the duty falls on the Chamber, Prosecution, and Registry to ensure that these rights can be respected in a complementary fashion. For example, as set out in ICC case

[113] *Prosecutor v. Banda & Jerbo*, Order to the prosecution and the Registry on translation issues, ICC-02/05–03/09–211, 7 September 2011.

[114] *Prosecutor v. Banda & Jerbo*, Order to the prosecution and the Registry on translation issues, ICC-02/05–03/09–211, 7 September 2011.

law and related policy, in order to ensure firstly, that the Defence has sufficient time to review Prosecution evidence in advance of the trial date, and secondly, that the trial date is set within a reasonable time period after the defendant's arrest, the Prosecution should endeavour to complete its investigations and related disclosure, to the extent possible, before the trial stage commences.[115] The Prosecution should also address any protective measures issues that could delay such disclosure in a timely manner.[116]

At the level of the Registry, there is a direct nexus between the level of resources provided to the Defence, and the ability of the Defence to conduct its preparation in an expeditious manner. It can, therefore, be short-sighted to cut Defence legal aid in circumstances in which the cuts will simply lengthen the time required for effective Defence preparation, which will in turn, lengthen the overall length of the proceedings (and related costs).[117]

In terms of the specific amount of resources that should be allocated to the Defence, although the right to equality of arms is enshrined in human rights law,[118] international courts and tribunals have consistently rejected Defence requests to have equivalent resources as their Prosecution counterparts, with the mantra that equality of arms means procedural equality (that is, the right to enjoy the same procedural rights), and not equality of resources, particularly since the Prosecution carries the burden of proof.[119]

Whilst this conclusion is undoubtedly valid as concerns a comparison of the budgetary needs of the prosecution over the course of the entire case as compared to that of the Defence, if both parties are conducting the same tasks with the same deadlines and facing the same burden of persuasion

[115] *Prosecutor v. Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', ICC-01/04–01/10–514, 30 May 2012, para. 44; ICC, Pre-Trial Practice Manual, p. 7, www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_(September_2015).pdf;

[116] *Prosecutor v. Katanga and Ngudjolo*, 'Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules', 26 April 2008, ICC-01/04–01/07–428-Corr, paras. 36, 60,-71, 82.

[117] *Prosecution v. Lubanga*, 'Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry', ICC-01/04–01/06–2800, 30 August 2011, paras. 45–61.

[118] General Principle 2(a), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance In Africa; HRC, General Comment 32 on Article 14, CCPR/C/GC/32, para.13.

[119] ICTY: *Prosecutor v. Prlic et al.*, 'Decision on Slobodan Praljak's Appeal against the Trial Chamber's Decision of 16 May 2008 on the Translation of Documents', 4 September 2008, IT-04–74-AR73.9, para. 29; *Prosecutor v. Orić*, Interlocutory decision on Length of Defence Case, IT-03–68-AR73.2, para. 7; ICTR: *Prosecutor v. Kayishema & Ruzindana*, Appeals Judgment, ICTR-95–1-A, 1 June 2001, para. 67.

(i.e. filing appeal briefs at the same time), then it may be unfair, and discriminatory to allocate less resources to the Defence. As found by the Human Rights Committee, discrimination arises where like things are treated in a different manner, with there being no rational basis for the difference.[120] It follows that even if equality of arms does not automatically equate to equality of resources, it *may* do so, where necessary to ensure procedural equality with the Prosecution. The resources allocated for individual cases must also take into consideration the characteristics of the case in question, for example, whether the case requires a significant amount of investigative travel or specific expertise in particular areas.[121]

Apart from the issue of *quantity* of resources, the Court also has a duty to ensure the *quality* of such resources, namely, that Counsel possess sufficient expertise in the subject matter before the Court to represent the accused in an effective manner. The ECHR has held in this regard that where States set up complex legal fora that require Counsel with specific competence, the State has a corresponding duty to ensure that the accused is in a position to exercise his or her rights before such fora, in an effective and fair manner.[122] The Malabo Protocol currently does not delineate any specific criteria that must be met by Counsel in order to appear before the Court. The African Court could, in this regard, take a leaf from the relevant regulations of other international courts, and require Counsel to possesses a minimum level of proficiency in criminal law and procedure. This requirement did not exist initially at the ICTY, but was later inserted (based on the equivalent wording of the ICC Rules) due to concerns regarding ineffective representation from Counsel, who had not practiced criminal law in a trial environment.[123] In relation to the Principal Defender who heads the Defence Office organ in the Malabo Protocol, a requirement was inserted mandating the highest level of

[120] **HRC, General Comment 18, Non-discrimination, as adopted at the Thirty-seventh session (1989), para. 13**

[121] UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by General Assembly Resolution A/RES/67/187, 20 December 2012 para. 62. 'The budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and to victims. Adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses.'

[122] *ECHR: Tabor v. Poland*, Application no. 12825/02, paras. 42–3 , citing *Vacher v. France*, judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, pp. 2148–9, §§ 24 and 28, and *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001)

[123] ICTY Manual on Developed Practices, Chapter XV Legal Aid and Defence Counsel Issues, paras. 6, 11.

professional competence and experience in the defence of criminal cases. The Principal Defender must also have at least 10 years of criminal law practise experience before a national or international court. As with the ad hoc tribunals and the ICC, which developed lists of counsel requiring certain competencies and certain years of criminal practice experience, one would expect the rules of procedure of the African Court to endorse similar standards since these form part of the best practices that may be learned from the many tribunals that preceded it.

The second limb of this sub-provision concerns the right to communicate freely, with Counsel of choice. As further elaborated in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, without the expectation that such communications will not be listened to, or otherwise monitored, the right to receive legal advice becomes largely illusory; there is therefore a positive duty on States, which are party to the African Charter, to refrain from surveilling or intercepting legal communications, and to provide the necessary facilities to enable confidential communications to take place within a detention setting.[124]

Although the text refers to the right to communicate confidentially with 'Counsel of choice', it is obvious that there may be various scenarios in which a defendant will require confidential legal assistance from Counsel who have not been chosen by the defendant, for example, a duty Counsel appointed to represent a suspect during a suspect interview, Counsel appointed by the Court, or a member of the Defence office. In terms of the latter possibility, Article 22(2)(c) of the Protocol vests the 'Defence Office' with the responsibility for providing legal advice and assistance to the Defence, and defendants. This vital source of assistance would be rendered ineffective if there was a possibility that communications between the Defence Office and the defendant or Defence were not protected by privilege. It would also be consistent with the case law of the ICC and SCSL to include Defence Office advice and assistance within the framework of legal privilege.[125]

The notion of privilege under the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa is also drafted broadly to encompass 'all communications and consultations between lawyers and their clients

[124] Section N3(e)(i) and (ii) Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

[125] SCSL: *Prosecutor v. Bangura et al.*, Decision on Prosecutor's additional statement of anticipated trial issues and request for subpoena in relation to the Principal Defender, SCSL-11–01-T-058, 3 September 2012, para. 23; ICC: *Prosecutor v. Gaddafi & Senussi*,' Decision on OPCD Requests', ICC-01/11–01/11–129, 27 April 2012, para. 12.

within their professional relationship';[126] the term 'lawyers' protects the right to communicate with all legally qualified members of a Defence team, not just the 'Counsel', and 'all communications' presumably includes not just verbal advice, but also written drafts and internal documentation prepared within the context of the professional lawyer-client relationship.

The Protocol does not address the issue as to whether there are any exceptions to the right to privileged communications. Whilst the STL incorporated an explicit exception into its Rules of Procedure and Evidence,[127] other Courts has read such an exception into the text: i.e. by concluding that any communications which fall outside the scope of a professional relationship, such as communications concerning the commission of fraud or a crime, are excluded from right to privilege.[128] In any case, in order to comport with human rights' requirements concerning the need for the legal basis for monitoring to be set out in clear and accessible legal texts,[129] it is advisable that the scope of confidentiality and its exceptions are set out in unequivocal terms in the Court's instruments, and any detention regulations. It is also necessary that there are procedures established to ensure safeguards against abuse (for example, the ability to obtain judicial review of monitoring decisions).[130]

6. The Right to a Speedy Trial

The right to expeditious proceedings is a critical aspect of the right to a fair trial: the defendant has an obvious right to clear his or her name as soon as

[126] Section N(3)(ii).

[127] For example, Rule 163(iii) of the STL Rules of Procedure and Evidence.

[128] ICC: *Prosecutor v. Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute', ICC-01/05–01/13–2275-Red, 8 March 2018, paras. 432–4; SCSL: *Prosecutor v. Bangura et al.*, SCSL-2011–02-T, Decision on Prosecutor's Request for Subpoena, 28 July 2012, paras. 13–14.

[129] ECHR: *Kruslin v. France*, Application no. 11801/85, paras. 32–6; *Kopp v. Switzerland*, App. No. 23224/94, para. 73. HRC: Concluding Observations on the Fifth Periodic Report of Sri Lanka, Human Rights Committee, UN Doc. CCPR/C/LKA/CO/5 (21 November 2014); Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, UN Doc. A/HRC/23/40 (17 April 2013).

[130] HRC: General Comment No. 16 on Article 17 (Right to Privacy), UN Doc. HRI/GEN/1/Rev.1 at 21 (8 April 1988), para. 10; U.N. General Assembly Resolution on the Right to Privacy in the Digital Age, UN Doc. A/RES/69/166 (18 December 2014); para. 4; Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. A/69/397 (23 September 2014), para. 45.

possible, and to litigate disputed facts whilst memories are still fresh, and evidence is available. And yet, this right has been honoured more often in the breach than in the observance, at previous international courts and tribunals. As set out *infra*, key sources of delay have included the practice of 'delayed disclosure', and the need to translate filings and evidence into different languages (including the language of the accused). Although some delays are inevitable, key lessons learned include convening regular trial management hearings and meetings during the pre-trial phase, so that the Chamber can follow the progress of disclosure and the parties can raise practical issues that might affect their preparation, and, for long and complex trials, appointing reserve judges in order to address the possibility that a judge might be forced to withdraw due to conflicts or illness. The establishment of a permanent Defence Office, which operates as a 'collective Defence memory',[131] will also facilitate the ability of individual Defence teams to acquaint themselves with the Court's procedures and case law, and thus respond to deadlines promptly.

7. The Right to Be Tried in His or Her Presence, and to Defend Himself or Herself in Person or through Legal Assistance of His or Her Choosing; to Be Informed, if He or She Does Not Have Legal Assistance, of This Right; and to Have Legal Assistance Assigned to Him or Her, in Any Case, Where the Interests of Justice So Require, and Without Payment by Him or Her in Any Case if He or She Does Not Have Sufficient Means to Pay for It

(a) THE RIGHT TO BE TRIED IN HIS OR HER PRESENCE Since a right can only be restricted through explicit language to that effect, the fact that no caveats have been attached to this article suggests that the Court will not have the power to conduct a trial *in absentia*. This does not, however, exclude the possibility that the defendant could waive the right to be present, or that there might be other scenarios that might justify convening discrete trial sessions in the absence of the defendant. At the *ad hoc* Tribunals and the ICC, defendants were allowed to waive the right to attend discrete hearings due to illness,

[131] 'As a permanent component of the Court, the Office seeks to create a collective defence memory and resource centre; in effect, to learn from the experiences of individual defence teams and provide whatever legal resources and advice that it can to ensure that defence teams achieve their full potential before the Court': X. Keïta, M. Taylor, 'The Office of Public Counsel for the Defence', *Behind the Scenes, the Registry of the International Criminal Court* 2010 (ICC Publication) pp. 69–71, at p. 70.

and at the ICC, the President and Vice-President of Kenya also sought to waive the right to attend hearings, due to political engagements. In disposing of the request, the Appeals Chamber confirmed that although this provision is framed as a right, it also imposed a duty on the defendant to attend hearings.[132] The Appeals Chamber nonetheless underlined that it would hamper the Chamber's ability to ensure fair and expeditious proceedings to impose a rigid limit on the scenarios that might justify continuing the trial in the absence of the defendant.[133] Rather, the Chamber has the discretion to authorise the absence of a defendant, if the following criteria are met:[134]

> the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.

In the absence of a waiver, the term 'presence' has also been interpreted to mean physical presence. The ICTR Appeals Chamber thus found that a proposal to move trial hearings to the location of a protected witness, which would require the defendant to participate by video-link, would infringe the accused's separate right to be physically present during the trial, particularly if the accused did not waive the right to be present (through written waiver, or through misconduct which resulted in the accused's expulsion from the courtroom).[135] In a similar vein, the African Court of Human and Peoples' Rights found that the domestic prosecution of Saif Gaddafi, in which the hearings were either conducted in his absence or through video-link, violated the right to a fair trial under article 7 of the African Charter.[136]

[132] *Prosecutor v. Ruto & Sang*, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"', para. 49.
[133] Ibid., para. 40.
[134] Ibid., para. 2.
[135] ICTR: *Prosecutor v. Zigiranyirazo*, 'Decision on Interlocutory Appeal', ICTR-2001–73-AR73, 30 October 2006, paras. 10–22.
[136] *African Commission v. Libya*, application 002/2013, para. 96.

(b) the right to legal representation Article 18 of the Protocol amends Article 36(6) of the Statute of the Court to provide that an accused is entitled to represent himself, or to be represented by an agent before the Court. Irrespective as to which choice is made, it is crucial that the defendant is informed of his or her right to legal representation in a clear and unambiguous manner, which could reasonably be understood by the defendant.[137] It is important that the language used to advise the suspect or defendant of this right does not suggest that asking for a lawyer would imply consciousness of guilt.[138]

Although a suspect or accused can 'waive' the right to legal representation, such a waiver must be informed, voluntary and unequivocal. The waiver also cannot have been obtained in coercive circumstances. Coercive circumstances can range from threats to improper inducements to cooperate, which negate the person's consent.[139] The ICTR has also found that the mere fact of interviewing a suspect in detention can create a presumption of coercive circumstances. A statement taken in such circumstances should be excluded, even if the defendant waives the right to counsel, if it is not clear that the waiver was informed and voluntary.[140]

(c) self-representation The extent to which defendants should be allowed to represent themselves in complex criminal trials has remained a vexed question for international courts and tribunals: rather than the law dictating the practice adopted by these courts, practical issues have tended to influence the law. For example, although the ICTY Trial Chamber initially upheld Slobodan Milosevic's right to represent himself, the Chamber later attempted to revoke it after delays occasioned by the deterioration in the defendant's health threatened to derail the trial.[141] On appeal, the Appeals Chamber affirmed that the right to represent oneself was not unfettered, and

[137] *Prosecutor v. Bagasora*, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004, para. 17.

[138] *Prosecutor v. Ruto & Sang*, 'Reasons for the Decision on Admission of Certain Evidence Connected to Witness 495, rendered on 17 November 2014', ICC-01/09–01/11–1753-Red, 11 December 2014, para. 37.

[139] *Prosecutor v. Halilovic* 'Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table', 19 August 2005, at para 38; *Prosecutor v. Sesay*, 'Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution', 30 June 2008, para 52.

[140] *Prosecutor v. Bagasora*, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004, para. 16.

[141] *Prosecutor v. Milošević*, 'Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel', IT-02–54-AR73.7, 1 November 2004, paras. 6–7.

could be overridden if necessary to secure the overriding right to a fair trial, but only if it was both necessary and proportionate to do so.[142] At the Special Counsel for Sierra Leone, the Trial Chamber cited the fact that the defendant's attempt to exercise this right would be likely to impede his co-defendants' right to a speedy trial, as part of its justification for overriding the right to self-representation.[143]

Since a defendant clearly cannot address the rigours of a trial process without some form of assistance, various solutions have been devised to preserve the defendant's right to represent himself, whilst ensuring that the process benefits from legal submissions and questioning from a skilled practitioner. In the *Milosevic* case, the defendant was assisted by chosen 'associates', who could communicate with the defendant on a privileged basis, but did not have legal standing to address the judges or file submissions on his behalf, and *amicus curiae*, appointed by the Registry, who did have such standing, but performed their responsibilities without instructions from the defendant.[144]

In *Seselj*, the defendant was also assisted by chosen legal associates, although all written and oral submissions emanated from the defendant. The Trial Chamber nonetheless reasoned that the right to self-representation was not necessarily incompatible with the right to legal representation, and therefore decided to appoint a 'stand by Counsel', who was tasked to assume responsibility for the Defence if the defendant engaged in misconduct.[145] This position nonetheless proved untenable. The first Counsel appointed in this capacity withdrew in order to file a defamation claim against the defendant.[146] The Chamber's later attempt to assign Counsel was then reversed by the Appeals Chamber, due to the Trial Chamber's failure to first caution the defendant that this would occur if he persisted in obstructionist conduct.[147] After the Trial Chamber attempted to appoint the same Counsel as 'standby Counsel', the defendant reacted by instigating a hunger strike in protest against the decision. Faced with this recalcitrance, the Appeals Chamber reversed on the appointment of standby Counsel, on the grounds that the

[142] Ibid., paras. 13–18.

[143] *Prosecutor v. Norman*, 8 June 2004 (Decision on the Application of Samuel Hinga Norman for Self- Representation under Article 17(4)(D) of the Statute of the Special Court), SCSL-04–14-T-125, 8 June 2004, para. 26.

[144] *Prosecutor v. Milošević*, Transcript of 30 August 2001, p. 7, and 'Order' of 16 April 2002.

[145] *Prosecutor v. Šešelj, Decision on Prosecutor's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence*, 9 May 2003.

[146] *Prosecutor v. Šešelj*, IT-03–67-PT, 'Decision of the Registrar', IT-03–67-PT, 16 February 2004, p. 2.

[147] *Prosecutor v. Šešelj*, Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, IT-03–67-AR73.3, para. 52.

appointment of the same Counsel created the impression that the Chamber was not implementing the spirit of the Appeals Chamber's prior ruling.[148] The case then concluded without any standby or appointed counsel.

In *Karadzic*, the defendant appointed his own Defence team (composed of lawyers who were qualified to act as Counsel), but conducted the questioning of witnesses and signed all written submissions. After the defendant engaged in what the Chamber described as obstructionist conduct, the Chamber also appointed two Counsel who acted as 'stand by Counsel'. The Chamber vested them with the mandate to assume representation of the accused, for example, by questioning witnesses, whenever requested by the Chamber to do so, in response to obstructionist conduct by the defendant.[149] The mandate was discontinued after closing submissions,[150] and the defendant elected to be represented by Counsel on appeal.[151]

A less confrontational approach has been to allow defendants to exercise some, but not all of the elements of the right to self-representation, whilst being represented by Counsel. The defendant Praljak was thus permitted to pose questions to witnesses, in particular, in relation to events in which he participates or on issues that fell within his expertise.[152] Tolimir was also authorised to represent himself, whilst retaining a 'legal advisor' who could attend hearings, and address the Chamber on discrete issues authorised by the Chamber.[153] In both these cases, the Court did not appoint or assign additional *amicus* or standby counsel.

In deciding which model might be best suited for the African Court, it is important to bear in mind that the ICTY did not benefit from the existence of an internal defence office, staffed by qualified lawyers who could either advise the defendant, or assume responsibility for aspects of the Defence at short notice.[154] In contrast, Charles Taylor was temporarily without Counsel due to

[148] *Prosecutor v. Šešelj*, Decision on Appeal against the Trial Chamber's Decision (no. 2) on Assignment of Counsel, IT-03–67-AR73.4, 8 December 2006, paras. 24, 26.

[149] *Prosecutor v. Karadzic*, 'Decision on the Appointment of Counsel and Order on Further Trial Proceedings', IT-95–5/18-T, 5 November 2009, para. 27.

[150] *Prosecutor v. Karadzic*, 'Decision on Standby Counsel', IT-95–5/18-T, 14 October 2014.

[151] *Prosecutor v. Karadzic*, Decision of the Registrar on Appointment of Counsel, 24 March 2016.

[152] *Prosecutor v. Prlic et al.*, 'Decision on Slobodan Praljak's Appeal of the Trial Chamber's Decision on the Direct Examination of Witnesses dated 26 June 2008,' 11 September 2008, paras. 19–22.

[153] *Prosecutor v. Tolimir*, 'Decision on Motion Requesting the Chamber to Allow the Accused's Legal Advisor to be Present in the Courtroom', IT-05–88/2-PT, 22 February 2010; 'Decision on Accused's Request to the Trial Chamber concerning Assistance of his Legal Advisor', IT-05–88/2-PT, 28 April 2010,

[154] See Charles C. Jalloh, *Does Living by the Sword Mean Dying by the Sword?*, 117 Penn St. L. Rev. 3, 708 (analyzing the evolution of the practice of international penal courts with regard

funding disputes with the Registry, the Chamber was able to appoint a duty counsel from the Defence office, who was able to assume responsibility for the Defence at short notice, due to the ongoing assistance provided by the Defence office to all external defence teams.[155] This suggests that rather than incurring the financial cost of appointing an external standby counsel or amicus, who might prove to be unnecessary, it might be more efficient to simply put the defendant on notice that if he conducts his defence in an obstructive manner, Counsel from the Defence Office may be appointed as Counsel in his case. For that possibility to be efficient, effective and ultimately not impairing of the defendant's rights, there should be sufficient counsel to assign to the different cases and to follow their progress. This would include appearance in court and receipt of documents such as disclosure and other materials relating to the substantive case. This would better enable the counsel to step in at a moment's notice to fill the gap in representation where assigned counsel has been terminated or resigned or the accused is not present in court even if insisting on his right to self-representation. This, for example, would permit her or him to continue with filings or replies to filings from the prosecution, pending the appointment of permanent counsel. This appeared to work well in the Taylor Case.

(d) representation through counsel At first glance, Article 46(a) appears to restrict the right to legal representation to 'accused' persons rather than suspects. Although this wording is in line with the equivalent provisions at other international courts and tribunals, the latter also have separate provisions governing the rights of suspects, for example, as concerns the rights of suspects during suspect interviews.[156] In contrast, the Malabo Protocol is silent as concerns the legal regime that applies to suspects.

This lacuna could be addressed, conceivably, through judicial interpretation, human rights law, domestic law, or the issuance of supplementary rules of procedure and evidence.

In terms of the first possibility, the term 'accused' could be interpreted judicially to encompass suspects as well as accused persons, although such an approach would not be consistent with the jurisprudence of other international criminal courts. The ICC has, for example, confirmed that the

to the right to self-representation from a more common law oriented approach that was deferential to the accused's preference to a more civil law model that emphasizes the integrity of the process).

[155] *Prosecutor v. Taylor*, 'Oral decision', Transcript of 25 June 2007, p. 45.

[156] Article 55, ICC Statute; Rules 42, and 43 of the ICTY, ICTR and SCSL Rules of Procedure and Evidence.

rights of suspects are governed by the specific regime set out in Article 55, rather than the general rights of the accused set out in Article 67(1). The ICC further relied on this distinction in order to conclude that suspects do not possess a general right to legal representation before their arrest and appearance at the Court.[157] Nonetheless, in contrast to the ICC, Article 22(C)(1) of the Malabo Protocol states that the role of the Defence Office is to ensure 'the rights of suspects, the accused, and any other person entitled to legal assistance'. In accordance with the *ejusdem generis* rule, the phrase 'any other' implies that suspects and the accused are also persons who are 'entitled to legal assistance'.

This lacuna could also be filled through domestic law in combination with African Charter obligations. The Protocol does not provide any detail as to the means by which the Prosecutor will conduct its investigations, and whether it will have a right to do so *in situ*, or whether it will depend on the efforts of national authorities. In terms of the latter, Article 46(L)(2)(b) provides that State parties shall cooperate with requests for the collection of evidence and taking of testimony and (2)(d) pertains to the reliance on national authorities to effect arrest and surrender to the Court. It can safely be assumed that these aspects will necessarily be addressed in the rules and regulations or other secondary instruments adopted by the Court. Although not stated explicitly, States would be required to effect these forms of cooperation in a manner which is consistent with both domestic law, including the law pertaining to the rights of suspects, and any international legal obligations, including those deriving from the African Charter, and Article 9 of the ICCPR. The African Commission has affirmed that such minimum rights includes the right to legal representation from the moment at which a person is deprived of his or her liberty.[158] Article 9 of the ICCPR also protects the rights of all detainees to access legal representation.[159]

In any case, given that the Preamble to the Malabo Protocol underscores the the ACJ's commitment to promoting respect for human and peoples'

[157] *Prosecutor v. Kony et al.*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009, 16 September 2009, ICC-02/04–01/05–408, paras. 65–6; *Prosecutor v. Gaddafi and Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi"', 24 July 2014, ICC-01/11–01/11–565, paras. 147–8.

[158] *African Commission v. Libya*, application 002/2013, para. 93; *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, Communication 334/06, para 172; Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa, as annexed to UN GA Res. A/55/89, 4 December 2000, paras. 20, 27.

[159] General Comment no. 35 on Article 9, CCPR/C/GC/35 , para. 58.

rights under the ACHPR, and its complementary relationship with the African Commission, it seems likely that the ACJ will endeavour to interpret and apply the Protocol in a manner that avoids the current lacuna concerning explicit suspects' rights.

(e) THE RIGHT TO LEGAL ASSISTANCE IN THE INTERESTS OF JUSTICE, OR WITHOUT PAYMENT IF THE ACCUSED DOES NOT HAVE SUFFICIENT MEANS In order for the right to legal representation to be effective, there is also a corollary right to legal aid.[160] This right raises three issues: firstly, which criteria should govern the Court's assessment as to whether the accused has sufficient means, secondly, is there any basis for allocating legal aid to a defendant even if the defendant is not indigent, and thirdly, can an accused, who receives legal aid, choose his or her lawyers freely.

Regarding the first issue, the Malabo Protocol provides no guidelines concerning the Court's assessment as to whether an accused has 'sufficient means' to fund legal costs fully or partially. Each international/internationalised court also employs a different formula and system for assessing whether the defendant is indigent.[161] There are, however, some practical considerations that can be gleaned from the experiences of these courts and tribunals. In particular, any assessment as to whether an accused can fund his or her costs must take into consideration the likely length of the proceedings, the extent to which the accused can liquidate his or her assets or realize their value in a manner which is consistent with his or her right to be represented as soon as is practicable,[162] and the defendant's ongoing obligations to dependents and third parties.[163] In order to avoid some of these issues, the general practice has been to allocate legal aid on a provisional basis until a proper

[160] *Artico v. Italy*, ECHR Judgment of 13 May 1980, para. 33.

[161] See 'Interim report on different legal aid mechanisms before international criminal jurisdictions', ICC-ASP/7/12, 19 August 2008.

[162] ICC: *Prosecutor v. Bemba*, Redacted version of 'Decision on legal assistance for the accused' ICC-01/05–01/08–567-Red, 26 November 2009.

[163] ICC: Regulation 84(2) of the Regulations of the Court specifies that the Court shall base its assessment on the means which the applicant 'has direct or indirect enjoyment or power to freely dispose', and further specifies that the Court shall allow necessary and reasonable expenses, which has been interpreted to include the living expenses of dependents. Unlike the ICC, the ICTY included the assets of dependents in its assessment of the total value of assets available for the costs of the Defence. Nonetheless, in the *Karadzic* case, the Presidency recognised the difficulty in compelling a spouse to contribute her resources to the costs of her husband's defence, and therefore found that the assets were not 'available': *Prosecutor v. Karadzic*, 'Decision on Indigence', MICT-13–55-A, 24 June 2016.

assessment of the accused's indigence has been made.[164] Alternatively, if the accused's assets are frozen or not easily liquidated, Courts have provided legal aid with the caveat that the Court, rather than the Defence, will seek to recuperate the expenses from the accused.[165]

Human rights law also specifies firstly that the process used to determine the financial means of an accused should not be unfair, arbitrary, or unreasonably complex or delayed,[166] and secondly, that provisional legal aid should be allocated immediately to suspects who require legal representation on an urgent basis, to avoid any prejudice arising whilst issues of indigence are determined.[167]

Apart from the scenario in which an indigent accused receives legal aid, the wording of Article 46(A) also envisages that 'legal assistance' can be granted 'in the interests of justice', that is, even if the defendant could, in theory, pay for his or her defence. As noted above, international courts and tribunals have granted legal aid to non-indigent defendants in circumstances in which there were practical impediments as concerns the ability of the defendant to access or dispose of his or her assets. In this specific circumstance, the defendant has remained obligated to refund the legal aid, once the practical impediments were resolved. The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems further envisage that '[l]egal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty'.[168]

International criminal cases fulfil the last last two criteria. They are exceedingly complex, which in turn, drives up the related costs of mounting an effective defence, such that the costs are vastly higher than the equivalent costs for a domestic trial. The penalties also range to the highest sentence available (life), the imposition of a potential fine, and reparations.

[164] Article 11 of the ICTY Directive on the Assignment of Counsel, Regulation 85 of the ICC Regulations of the Court, ICC 01/04–490-tENG, 26 March 2008, pp. 3–4; ICC-01/04–01/06–63; ICC-01/04–01/07–79, ICC-01/04–01/07–298; ICC- 01/04–01/07–562; ICC-01/04–01/07–563, ICC-CPI-20120117-PR762

[165] ICC-01/05–01/08–568, para. 6.

[166] *Del Sol v. France*, Application no. 46800/99, para. 26; *A. B. v. Slovakia*; *Tabor v. Poland*, Application no. 12825/02 ; Bakan v. Turkey, Application no. 50939/99, *VM v. Bulgaria*, Application no. 45723/99, *Santambrogio v. Italy*, Application no. 61945/00,

[167] Para. 41(c) (Guideline 1. Provision of legal aid), United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UNODC, 2013: 'Persons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined (. . .)'.

[168] Principle 3, para. 21, ibid.

A further consideration that merits legal assistance 'in the interest of justice' is that according to the SCSL, the role of Defence Counsel 'is institutional and is meant to serve, not only the interests of his client, but also those of the Court and the overall interests of justice'.[169] This description of the role of Counsel implies that the institution itself has an overriding duty to ensure that a defendant is not deterred from seeking legal representation due to the impact that the related costs will have on the defendant (and his or her family's) resources.[170]

In terms of the third issue, that is, the extent to which the accused's indigent status impacts on the right to freely choose counsel, most international courts have found that the right to freely choose counsel, and more particularly, replace counsel, is limited for indigent defendants.[171] That being said, bearing in mind the practical difficulties associated with imposing Counsel on a defendant during the course of a lengthy and complex trial, there is a general preference for acceding to the wishes of the defendant, if there are no legal impediments to Counsel's appointment.[172] The ICC has, in particular, underscored that an accused, even if indigent, should be afforded a full and effective chance to choose a qualified counsel.[173]

[169] *Prosecutor v. Sam Hinga Norman et al.*, SCSL-04–14-T, Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(D) of the Statute of the Special Court, 8 June 2004, para. 23.

[170] Some defendants at international courts have opted to represent themselves after disputes with the Registry concerning funding. See, for example, *Prosecutor v. Krajisnik*, Transcript 5 July 2007, pp. 108–9; *Prosecutor v. Prlic et al.*, 'Decision on Praljak's Request for Stay of Proceedings', IT-04–74-A, 27 June 2014, paras. 2–6. The ECHR has also found that the right to a fair trial could be engaged in circumstances where the obligation to reimburse defence costs is so onerous that it could deter defendants from exercising their right to legal representation: *Ognyan Asenov v. Bulgaria*, app. no. 38157/04, para. 44.

[171] *Prosecutor v. Nahimana et al.*, 'Decision on Withdrawal of Co-Counsel', ICTR-99–52-A, 23 November 2006, para. 10. *Prosecutor v. Blagojevic & Jokic*, Appeals Judgment, IT-02–60-A, 9 May 2007, paras. 14, 17.

[172] *Prosecutor v. Martic*, Decision on Appeals Against Decision of the Registry', IT-95–11-PT, 2 August 2002, 'CONSIDERING that the jurisprudence of the International Tribunal and of the International Criminal Tribunal for Rwanda3 indicates that the right of the indigent accused to counsel of his own choosing may not be unlimited but that, in general, the choice of any accused regarding his Defence Counsel in proceedings before the Tribunals shall be respected; that, in the view of the Chamber, the choice of all accused should be respected unless there exist well-founded reasons not to assign Counsel of choice'.

[173] *Prosecutor v. Lubanga*, 'Reasons for 'Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense' filed on 20 February 2007' issued on 23 February 2007', ICC-01/04–01/06–844, 9 March 2007, paras. 12–16.

A final point of significance concerns the source of funds for legal aid. Article 46M of the Malabo Protocol specifies that the Assembly shall establish a Trust fund for legal aid. This suggests that legal aid will be funded through voluntary donations, rather than regular contributions, which is likely to generate uncertainty concerning the existence and scope of any annual legal aid budget. Such an outcome would be deleterious to the effective representation of defendants at the Court, and generate a potential structural inequality of arms if the Prosecution is funded through regular contributions, and thus better equipped to prepare and conduct the litigation without the concern that funding could dissipate at critical junctures.

This is an interesting approach, considering that in the current African Court in Arusha, which addresses human rights issues only, funding for legal aid for litigants is through assessed contributions to AU member states. Arguably, such a funded scheme is even more imperative when it comes to the use of criminal law in the future Court given the implications for the suspect in terms of denial of their liberty. Voluntary contributions received from partners and others are managed through a Trust Fund in the Arusha Court. And it may be that the inadequate funding for the current scheme gave rise to the desire to have a trust fund. However, it would be important that such a funding scheme is not left to the vagaries of a donations based scheme as that would not provide the kind of certainty and foundation required to meaningfully give effect to that right.[174]

Indeed, we might look at the current African Court, which contains provision for legal aid for persons wishing to initiate a case before the Court. The legal basis stems from Article 10 of the Protocol to the African Charter on the Establishment of the African Court of Human and Peoples' Rights which, in Article 10, provides that 'Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.' This right is addressed in Rule 31 of the Rules of Procedure and Evidence which provides for the provision of free legal representation and or legal assistance to any party in the interest of justice and within the limits of the financial resources available. As part of the determination of the entitlement, the Court may consider the applicant poor unless evidence is adduced stating otherwise; or require the applicant to declare his means or possibly those of his close relatives. Access to

[174] www.african-court.org/en/images/Legal%20Aid%20Scheme/Policy/Legal_Aid_Policy_as_amended_in_2014.pdf?4ea03332baad719f3a6b2ef8c979f25c=d61cd09dc7944075277b31d65b70c955.

the support needed by the litigants is determined by indigence, the need for equality of arms and a determination that representation would be in the interests of justice. It might be expected that such a system would serve as a sort of model for the future African Court though care will have to be exercised to account for the specificities of the new criminal law mandate.

8. The Right to Examine, or Have Examined, Witnesses and to Obtain Their Attendance under the Same Conditions as the Prosecution

The right to obtain the attendance of witnesses, under the same conditions as the Prosecution, is a fundamental element of equality of arms.[175] Since the Prosecution bears the burden of proof, it does not translate to numerical equality in terms of the number of witnesses who may be called, or the length of time for the presentation of the case, but it does require the Chamber to ensure basic proportionality between the Prosecution and the Defence on such issues.[176]

Moreover, the fact that the Defence and the Prosecution might have the same theoretical possibility to call witnesses will not, in itself, satisfy the right to a fair trial if there are structural, political, or safety issues that might deter witnesses from testifying for the Defence.[177] For example, if the defendant is a political opponent, witnesses might be reluctant to testify 'for the Defence' due to the negative connotations associated with doing so. In such circumstances, it is crucial that the Court has the power to either *subpoena* witnesses, or to call them as witnesses of the 'Court' rather than the 'Defence'. The subpoena power should be included in the rules of procedure of the future court, based on the model of the ad hoc tribunals, though modalities will have

[175] *Prosecutor v. Oric*, 'Interlocutory Decision on Length of Defence Case', IT-03–68-AR73.2, 20 July 2002, para. 7.

[176] *Prosecutor v. Prlic et al.*, 'Decision after Remand', IT-04–74-AR73.4, 11 May 2007, para. 38.

[177] In the context of decision whether to refer cases back to Rwanda under Rule 11 *bis*, the ICTR found that the right to a fair trial would be compromised if the Defence were unable to call witnesses due to protection concerns: *Prosecutor v. Gaspard Kanyarukiga*, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, ICTR-2002–78-R11bis, 30 October 2008, paras. 26–27. Similarly, in the *Gaddafi* case, the ICC Pre-Trial Chamber found that the existence of a witness protection programme for both Prosecution and Defence witnesses , and the practical ability of the Court to obtain the attendance of witnesses, were relevant to the Court's assessment as to whether domestic courts would be 'able' to conduct trial proceedings in an effective manner: *Prosecutor v. Gaddafi & Sennussi*, 'Public Redacted Decision on Admissibility', ICC-01/11–01/11–344-Red, 31 May 2013, paras. 209–11.

to be provided for states that are unable to arrest and surrender their nationals to the court to enable them to testify. If, after exhausting various avenues for securing access to witness testimony or evidence, the Court is unable to secure basic equality in terms of access to witnesses or exculpatory evidence, it might be necessary to stay the proceedings and release the defendant.[178]

Although the right to 'examine' witnesses has often been described as the right of the defendant to 'confront' adverse testimony in court, the notion of confrontation must also be interpreted in a manner which is consistent with witness protection and the logistical imperatives associated with international trials. The right will not be infringed merely because the witness testifies *via* video-link or is shielded from the accused by a partition in the courtroom,[179] although the frequent use of such measures could create an appearance that the accused is a 'dangerous' person, which has implications for the presumption of innocence. Moreover, given that testimony *via* video-link impacts on the ability of the Judges to assess the credibility and demeanour of the witness, the ICTR Appeals Chamber has further held that 'it would be a violation of the principle of the equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person'.[180]

The passive phrase, 'have examined', suggests that this right could be complied with even if someone external to the Defence examined the witness. This possibility is reflected in ICC provisions concerning 'unique investigative situations', which allow the Chamber to consider appointing an '*ad hoc*' Counsel to question a witness on behalf of an absent defendant, if there is a risk that the testimony might not be available at trial.[181] The STL Rules of Procedure and Evidence also presage that the Court may appoint a 'special counsel' to represent the interests of the defence in connection with information protected by national security or confidentiality agreements.[182] Bearing in mind critical commentary as to whether Counsel can adequately represent

[178] ICTY: *Prosecutor v. Tadic*, Appeals Judgment, IT-94–1-A, 15 July 1999, paras. 51–2; ICC: *Prosecutor v. Lubanga*, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', ICC-01/04–01/06–1486, 21 October 2008, paras. 4–5.

[179] ICC: *Prosecution v. Lubanga*, Decision on various issues related to witnesses' testimony during trial, ICC-01/04–01/06–1140, 29 January 2008, paras. 35, 41.

[180] *Prosecutor v. Gaspard Kanyarukiga*, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, ICTR-2002–78-R11bis , 30 October 2008, para. 33.

[181] ICC Article 56(2)(d) of the Statute.

[182] Rule 119 of the RPE.

the interests of the defendant without the benefit of instructions,[183] the Court should give careful consideration as to whether such scenarios are compatible with the defendant's overarching right to a fair trial.

9. The Right to Have the Free Assistance of an Interpreter

The issue of language rights has been discussed above, in the context of the translation of disclosure and court filings.

10. The Right Not to Be Compelled to Testify against Himself or Herself or to Confess Guilt

This language mirrors that of Article 14 of the ICCPR, and the respective fair trial provisions at the ICTY, ICTR and SCSL, but lacks the explicit language in the ICC Statute concerning the right to 'remain silent without such silence being a consideration in the determination of guilt or innocence'.[184] Although the right to silence might seem to be an obvious corollary of the right not to be compelled to testify, this language also protects the defendant against the possibility that the Court might draw adverse inferences against a defendant who chooses not to testify.[185] The ICC Appeals Chamber has further clarified that this language protects the defendant from being pressured to provide information about his defence at early stages of the case (for example, as a condition for obtaining disclosure).[186]

The fact that the Malabo protocol lacks this language does not, however, mean that the protections afforded to defendants against adverse inferences are less than that of the ICC. It is notable in this regard that in the *Celebici* case, the ICTY Appeals Chamber found that although the ICTY Statute lacked an explicit protection against adverse inferences, it also lacked an explicit power to draw such inferences:[187]

[183] ECHR: *A & others v. The United Kingdom*, App. no. 3455/05, (Grand Chamber) para. 220.
[184] Article 67(1)(f), ICC Statute.
[185] *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04–01/06–1433, 11 July 2008, Partly dissenting opinion, Judge Pikus, para. 14.
[186] *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04–01/06–1433, 11 July 2008, para.1.
[187] *Prosecutor v. Delalic et al.*, Appeals Judgment, IT-96–21-A, 20 February 2001, para. 783.

Should it have been intended that such adverse consequences could result, the Appeals Chamber concludes that an express provision and warning would have been required under the Statute, setting out the appropriate safeguards. Therefore, it finds that an absolute prohibition against consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules, reflecting what is now expressly stated in the Rome Statute.

Although a defendant cannot be compelled to testify against himself, the ICTY Appeals Chamber has confirmed that defendants can be subpoenaed to testify in other cases.[188] Moreover, although a defendant cannot be compelled to testify in their Defence, Trial Chamber II found in the ICC *Katanga & Ngudjolo* case that once a defendant has elected freely to do so, the privilege against self-incrimination ceases to apply and they can be questioned in the same manner as any other witness.[189] In reaching this finding, the Chamber emphasised that a defendant could also elect to provide an unsworn statement, in which case they could not be compelled to answer questions.[190] The Malabo Protocol does not afford the defendant with the right to provide an unsworn statement, although it is possible that the opportunity to provide such a statement might be set out in the Rules of Procedure and Evidence, as is the case with the ICTY.[191]

11. The Right to Have the Judgment Pronounced Publicly

This is an obvious element of the right to public proceedings, as discussed above.

12. The Right to Be Informed of His or Her Right to Appeal

The Malabo Protocol does not address the specific contours of the right to an appeal, but in order to comport with human rights law, it is essential that the defendant possesses the right to appeal on both questions of law and fact.[192]

[188] The defendant Dragan Jokic was convicted of contempt for refusing to testify in the Popopvic case: *Dragan Contempt Proceedings Against Dragan Jokic*, 'Judgment on Allegations of Contempt', IT-05–88- R77.1-A, 25 June 2009.

[189] 'Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused', ICC-01/04–01/07–3153, 13 September 2009, paras. 7–12.

[190] Ibid., para. 12.

[191] Rule 84 *bis* of the ICTY Rules of Procedure and Evidence.

[192] As delineated by Principle O(10)(a)(i), of the *Principles and Guidelines on the Right to a Fair Trial in Africa*, the right to an appeal includes the right to have a competent court review both law and facts in a genuine and timely manner.

It is imperative that this right be addressed in the rules and that suspects and accused persons be informed of them.

3. CONCLUSION

As will be apparent from the above analysis, a fair trial is a multi-faceted notion, which depends not only on the specific wording of legal texts, but the willingness and ability of the Court to make the implementation of fair trial rights a reality. Given the political and financial considerations at play, this will be no easy task. Nonetheless, as underscored by the African Commission, 'a State party to the African Charter regardless of its level of development must meet certain minimum standards regarding fair trial or due process conditions'.[193] These observations apply with even greater force to the Court, particularly as States will be likely to look to it as the standard bearer for criminal justice in Africa. Considering that the criminal jurisdiction is effectively 'twinned' to the Court's human rights jurisdiction, the Court's success will depend on its ability to demonstrate that complex criminal investigations and prosecution can be conducted in a manner, which is fully consistent with human rights obligations, including the right to a fair trial.

Of further note, the African Court of Human and Peoples has found that States have a positive duty to take steps to ensure that the right to a fair trial is respected within their jurisdiction.[194] It follows that having elected to establish such a Court, State Parties also have a corollary duty to ensure that the Court is sufficiently funded and politically supported to fulfil its promise to bring fair and impartial justice to victims and defendants in Africa.

The text of the Malabo Protocol is, itself, a promising step in this direction. Apart from the fact that the establishment of the criminal division will play an important role in 'plugging the impunity gap' for victims (and will indeed provide a unique forum for accountability as concerns crimes perpetrated by corporations), the attention given to structural equality of arms, through the establishment of an internal Defence Office, suggests that key lessons have been learned as concerns the problems faced by the Defence at other international courts and tribunals, and that as the 'newest court on the block', the Court may in fact be better placed than its predecessors to achieve fair and

[193] *Article 19 v. The State of Eritrea*, African Commission on Human and Peoples' Rights, Communication No. 275/ 2003 (2007), citing to Human Rights Committee, Albert Womah Mukong vs. Cameroon. Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991 of 10 August 1994.

[194] See also *African Commission v. Libya*, application 002/2013, para. 50.

effective justice. This may depend on the extent to which these lessons learned continue to be filtered through to the adoption of secondary legal instruments, such as the Rules of Procedure and Evidence, but a key litmus test as to whether the nacscent promise to respect equality of arms will be realized is whether a Principal Defender will be appointed at the same time as the Prosecutor, so that Defence issues can be voiced and effectively represented at every stage of the proceedings before the Court.

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Article 46L

Promoting an Effective Cooperation Regime

DIRE TLADI

1. INTRODUCTION

The success of an international criminal justice mechanism is likely to depend on cooperation with States. It is thus generally expected for statutes of international criminal tribunals to provide some mechanism for cooperation between the tribunal and States.[1] It was thus to be expected that the AU would include some provisions on cooperation in the Statute of the African Court, annexed to the Malabo Protocol.

Yet, experience shows that having provisions on cooperation in a statute does not guarantee cooperation. Obtaining cooperation very often depends on the right legal framework, including absence of conflicting obligations, as well as consistent political interest and potential consequences of non-cooperation. To these, one might add the potential consequences of cooperation if that cooperation requires the arrest of sitting of head of another State. The recent, and much publicized, alleged case of non-cooperation of South Africa in the arrest of the Sudanese President, Al-Bashir, while attending the African Union (AU) Summit in Johannesburg is illustrative of how these factors can lead to cases of non-cooperation.[2] In that case, the presence of a conflict of obligations between the rules of customary international law and the Summit Host Agreement between South Africa and the AU, on the one hand and, on the

[1] See, e.g. Art. 27 and 29 of the Statute of the International Criminal Tribunal for Former Yugoslavia (1993). See also Art. 26 and 28 of the Statute of the International Criminal Tribunal for Rwanda (1994).

[2] See, e.g. J. P. Ongeso, 'Al Bashir: What the Law Says about South Africa's Duties', available online at www.enca.com/opinion/al-bashir-what-law-says-about-south-africas-duties (last visited on 20 July 2015).

other hand, the duty to cooperate under the Rome Statute,[3] was a significant factor in the eventual non-arrest of Al-Bashir.

Also, significant, however, were the political dynamics. Arresting an African head of State to surrender him to the ICC, at a meeting of heads of the African Union when the latter organization had a policy of non-cooperation with the ICC, and just a few months after xenophobic attacks against nationals from other African States in South Africa was, quite apart from all the legal controversies, politically impossible. Politically, with South Africa keen to shed the label of 'big brother' on the continent, a decision to arrest Al-Bashir could have set South Africa's relations with other African States and the African Union back. South Africa would likely have been sanctioned by the AU, possibly expelled or suspended from the organization. More than likely, potential consequences, both legal and political, could have a played a role in the events surrounding Al-Bashir's presence and departure from South Africa.

The stark consequences for South Africa, should it have decided to ignore its political and legal commitments to the AU can be compared with the almost non-existent consequences for the non-arrest of Al-Bashir. From the experience of the previous seven cases of non-cooperation (Kenya, Djibouti, Chad on two occasions, Malawi, Nigeria and the DRC),[4] the consequence of non-arrest was a referral to an apparently disinterested the Security Council and the ICC Assembly of States Parties and nothing else. Politically neither the Security Council nor the Assembly of States has shown any appetite, despite the potential tools at their disposal, for action against non-cooperating States.[5]

[3] See for discussion, D. Tladi, 'The Duty on South Africa to Arrest and Surrender Al Bashir under South African and International Law: A Perspective from International Law', **13** *Journal of International Criminal Justice* (2015) 1027; E. de Wet, 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law', **13** *Journal of International Criminal Justice* (2015) 1049; M. J. Ventura, 'Escape from Johannesburg?: The Sudanese President Al-Bashir Visits South Africa and the Implicit Removal of Head of State Immunity by the UN Security Council in Light of *Al-Jedda*', **13** *Journal of International Criminal Justice* (2015) 1025. See also D. Akande, 'The Bashir Case: Has the South African Supreme Court Abolished Immunity for All Heads of States?', 29 March 2016 *European Journal of International Law Talk!*

[4] Since the events in South Africa there have been two further cases of non-cooperation, namely Djibouti and Uganda. See *Decision on the Non-Compliance by the Republic of Uganda with the Request for the Arrest and Surrender of Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute: In the Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05–01/09), 11 July 2016 (Pre-Trial II); *Decision on the Non-Compliance by the Republic of Djibouti with the Request for the Arrest and Surrender of Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute: In the Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05–01/09), 11 July 2016 (Pre-Trial II).

[5] D. Tladi, 'When Elephants Collide It Is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic', **7** *African Journal of Legal Studies* (2014) 381.

On the other hand, the legal consequences of acting inconsistently with the customary international law and Host Agreement obligations would have meant the suspension of South Africa from the AU.

The role of competing obligations as a factor determining cooperation is not only limited to the political. As a matter of international law, any breach of a rule, whether customary international law rules on immunity, the AU Host Country Agreement or the duty to cooperate under the Rome Statute implies the responsibility of a State. Yet when these obligations pull in opposite directions, their impact on a decision to cooperate or not is significantly diminished since any decision taken would, in any event, implicate that State's responsibility – a case of 'damned if you do, damned if you don't'. All of these considerations that affect the will to cooperate should play some role in the development of a system of cooperation with the African Court. In particular, to the extent possible, avoiding conflict with other legal regimes is a key ingredient to enhancing cooperation.

In the light of the issues highlighted above, this chapter addresses the provisions on cooperation in the Malabo Protocol. I begin, in the next section, by addressing some issues of context, including the importance of cooperation for the success of an international criminal justice system. I then provide a descriptive analysis of the provision on cooperation in the Malabo Protocol. Finally, I evaluate the prospects for the success of the cooperation regime before offering some concluding remarks. The Malabo Protocol follows other international criminal tribunals with track records of successes and challenges. The experience of the ICC, a Court established by treaty like the AU Court, provides a particularly useful vantage point from which to evaluate the provision on cooperation in the Malabo Protocol.

2. CONTEXT: THE IMPORTANCE OF COOPERATION

The importance of cooperation for the success of international criminal courts and tribunals cannot be overemphasized.[6] The importance of cooperation in the Rome Statute system is reflected in the elaborate framework for

[6] See for discussion B. Swart, 'General Problems' in A. Cassesse, P. Gaeta and J.R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary (Volume II)* (2002), at 1598, who describes the ICC, for example, as a 'giant without arms and legs who needs artificial limbs to walk and work'. See also A. Ciampi, 'The Obligation to Cooperate' in A. Cassesse, P. Gaeta and J.R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary (Volume II)* (2002), at 1607. See especially Bert Swart 'Arrest and Surrender' in Antonia Cassesse, Paola Gaeta and John RWD Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary (Volume II)* (2002), at 1640.

cooperation in Part Nine of the Rome Statute[7] as well as the constant reaffirmation of the duty to cooperate by the Assembly of State Parties.[8] As with the ICC, the effectiveness of the African court in the execution of its criminal jurisdiction, would be greatly diminished without cooperation. Like other international criminal courts and tribunals, the African Court and its criminal chamber will not have a police force at its disposal to arrest persons with outstanding arrest warrants nor will it be able to freeze assets, or provide prisons for holding convicted persons. The African Court will, without the cooperation of States, find it difficult to secure witnesses, obtain documents and other evidence. Only States, which exercise sovereignty over territory, can perform these functions unhindered.

While cooperation is central to the success of international criminal courts and tribunals, recent experience with the ICC shows that when difficulties and conflicts between various interests and obligations arise it is very often cooperation that suffers.[9] In the wake of political (and legal) tensions between the AU and the ICC, the AU decided that African States were not to cooperate with the ICC in the case of the ICC against Al-Bashir.[10] In a sense, the AU decided to 'hit' the ICC where it would hurt the most – in the area of State cooperation. Similarly, when African states have been faced with political and legal dilemmas involving cooperation, it has been cooperation that has received the short end of the stick. To date, in addition to the most recent case of South

[7] Part 9 of the Rome Statute contains a general obligation to cooperate n Art. 86 ('States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigations and prosecution of crimes within jurisdiction of the Court.'). Art. 87, for example, provides general provisions on requests for cooperation, Art. 89 to 92 relates to various aspects of the duty to arrest and surrender, while Art. 93 contains a list of other forms of cooperation and assistance.

[8] See, e.g. 2014 Assembly of States Parties Resolution on Cooperation (ICC-ASP/12/Res. 13) which stresses, in the preamble, the 'importance of effective and comprehensive cooperation and judicial assistance . . . to enable the Court to fulfil its mandate.' Paragraph 2 of the same resolution emphasizes 'the importance of the timely and effective cooperation and assistance from States Parties' Particularly in the context of the non-execution of arrest warrants, paragraph 2 of the resolution continues to stress 'that the protracted non-execution of Court requests has a negative impact on the ability [of the ICC] to execute its mandate, in particular when it concerns the arrest and surrender of individuals subject to arrest warrants.'

[9] See generally, Tladi supra note 5.

[10] See, e.g. § 4 of the Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245 (XIII), 3 July 2009; § 5 of the Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting of the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.296(XV), 27 July 2010; § 5 of the Decision on the Implementation of the Decisions on the International Criminal Court (ICC), Assembly/AU/Dec.336(XVIII), 1 July 2011.

Africa, there have been cases of non-cooperation in the arrest and surrender of Al-Bashir, namely Kenya, Malawi, Chad (on two occasions), Nigeria, the Democratic Republic of the Congo, the Central African Republic and Djibouti (on two occasions) and Uganda. The Kingdom of Jordan has also been found guilty of non-cooperation in the arrest and surrender of Al Bashir.

It should be stated that it is not only the AU that has contributed to non-cooperation. Several decisions of non-cooperation have been transmitted to the Assembly of States Parties and the Security Council in accordance with Article 87(7) of the Rome Statute.[11] In 2011, the Assembly of States Parties adopted a set of procedures for addressing cases of non-cooperation (hereinafter the 'Assembly Procedures') to promote compliance with the duty to cooperate.[12] The Assembly Procedures makes provision for, *inter alia*, the appointment of 'a dedicated facilitator to consult on a draft resolution containing concrete recommendations' concerning the State that is guilty of non-cooperation.[13] Yet in all the cases of non-cooperation referred to the Assembly of States, there has not been a single dedicated facilitator or a resolution with concrete recommendations. While it is possible to speculate on the reasons why the Assembly of States has never acted on non-cooperation cases referred to it, this inaction, at best, shows a lack of commitment to act in the face of non-cooperation and, at worst, a sacrifice of cooperation at the political altar. It might also be just a reflection of the fact that it is difficult to conceive of real sanctions. The only real sanction is probably suspension, but this is politically not possible when the ICC is trying to achieve universality.

[11] Art. 87(7) of the Rome Statute provides that where "a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council." See, e.g. *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Recent Visit to Djibouti*, *Situation in Darfur, Sudan: The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, ICC-02/05–01/09 (12 May 2011); *Decision Pursuant to Art. 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, *Situation in Darfur, Sudan: The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, ICC-02/05–01/09 (12 December 2011); *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, *Situation in Darfur, Sudan: The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, ICC-02/05–01/09 (9 April 2014).

[12] Assembly Procedures Relating to Non-Cooperation contained in the Annex to the 2011 Assembly of States Parties Resolution on Strengthening the International Criminal Court and the Assembly of States Parties (ICC-ASP/10/Res.5).

[13] See Ibid., at § 14(f).

The same cases of non-cooperation referred to the Assembly of States have also been referred to the Security Council under Article 87(7). Like the Assembly of States Parties, the Security Council has not, in any of those cases, taken action in response to address these cases of non-cooperation.[14] Indeed the lack of seriousness with which the Security Council takes cooperation is also reflected in the resolutions adopted by the Security Council referring situations to the ICC. In both resolutions, Resolution 1593 and Resolution 1970, the Security Council places a duty on the situation country to cooperate with the ICC, but does not place a similar duty on other States to cooperate with the ICC.[15] Of course, States Parties would be obliged under the Rome Statute but this obligation would not be underpinned by the supremacy of Security Council resolutions.[16] If the Council valued cooperation above other interests, a duty to cooperate would be placed on all States in the resolution, to avoid a conflict of legal obligations.[17]

While cooperation is central to the success of international courts and tribunals, it appears that all too often it is sacrificed in favour of other interests. To promote the success of the African Court, in particular with respect to its criminal mandate, it is important that the framework for cooperation takes into account the factors that might undermine cooperation.

3. COOPERATION IN THE AMENDMENT PROTOCOL

While the Malabo Protocol does not provide as comprehensive a framework as that provided for in the Rome Statute, Article 46L does contain important elements of cooperation. It contains a general obligation for States Parties to 'cooperate with the Court in the investigation and prosecution' of crimes

[14] See in addition to the cases referred to, see also *Decision on the Non-Compliance by Libya with a Request for Cooperation by the Court and Referring the matter to the United Nations Security Council*, *In the Case of the Prosecutor v Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, ICC-01/11–01/11 (10 December 2014).

[15] See § 2 of United Nations Security Council Resolution 1593 (2005) and § 5 of United Nations Security Council Resolution 1970 (2011) which both state as follows: '*Decides* that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully'.

[16] On the implications of this AU-ICC tensions, and the immunities debate, see Dire Tladi 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Non-Cooperation' (2013) **11** *Journal of International Criminal Justice*, 199, at 208.

[17] On the possible reasons for the Security Council's minimalist approach to cooperation in referral to the ICC, see Tladi, supra note 16, at 393 *et seq*.

under the Statute of the Court.[18] The cooperation provision also contains a non-exhaustive list of the forms of cooperation.[19] The list contains many of the forms of cooperation that are also found in the Rome Statute, including the 'identification and location of persons',[20] 'taking of testimony',[21] 'service of documents',[22] and 'identification, tracing and freezing or seizure of proceeds'[23] of crimes under the jurisdiction. The amended Statute also provides for the enforcement of sentences 'in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.'[24] As with similar provisions in statutes of other tribunals, this provision does not lay down an obligation to accept prisoners except in cases where a subsequent agreement to that effect has been included.[25] Finally, as a general point, like the Rome Statute, the Malabo Protocol provides the possibility for cooperation with other 'regional or international court, non-State Parties' and other partners.[26] While such cooperation may be ad hoc, i.e. without any prior agreement, the Protocol recognizes that conclusion of agreements would facilitate cooperation with other entities.[27]

Unlike the Rome Statute, arrest and surrender in the African Court Statute is provided for in the list of forms of cooperation and assistance, and not in a separate and more detailed provisions.[28] Article 46L(2)(e) provides for States Parties to cooperate with the Court in the 'arrest, detention or extradition' of persons while Article 46L(2)(f) provides for the 'surrender or the transfer of the accused to the Court.' In the context of cooperation with the Court, it is not clear what the difference is between 'surrender or transfer', on the one hand and, on the other hand, 'extradition'. Extradition normally refers to the transfer of persons to another State while surrender and/or transfer is normally reserved for transfer to international courts. However, Article 46L is concerned with

[18] Art. 46L (1) of the Statute of the Court.
[19] The list in Art. 46L(2) is qualified by the phrase 'including but not limited to'. It also contains the catch-all phrase 'or any other type of assistance' in Art. 46L(2)(g) of the Statute of the Court.
[20] Art. 46L(2)(a) of the Statute of the Court.
[21] Art. 46L(2)(b) of the Statute of the Court.
[22] Art. 46L(2)(c) of the Statute of the Court.
[23] Art. 46L(2)(f) of the Statute of the Court. See also Art. 46J*bis* of the Statute of the Court.
[24] Art. 46J of the Statute of the Court.
[25] See, similarly, Art. 103 of the Rome Statute. See also Art. 27 of the Statute of the International Criminal Tribunal for Former Yugoslavia (1993) and Art. 26 of the Statute of the International Criminal Tribunal for Rwanda (1994).
[26] Art. 46L(3) of the Statute of the Court.
[27] Id. ("The Court . . . may conclude Agreements for such purpose').
[28] Art. 46L(2)(e) and (f) of the Statute of the Court. In the Rome Statute, arrest and surrender is provided for in Art. 89, which contains 4 paragraphs, Art. 90, which has 8 paragraphs, Art. 91, which 4 paragraphs and Art. 92, which has 4 paragraphs.

cooperation *with the Court* and, in that context, the distinction between transfer to an international court and extradition to another state does not seem particularly meaningful.

There are some forms of cooperation in the Rome Statute that are not mentioned in Article 46L (2) of the Statute, such as the questioning of persons,[29] 'examination of places or sites'[30] and the 'provision of records and documents'.[31] However, all of these can be covered, either by other related forms of cooperation, the catch-all 'or any other type of assistance' or by the fact that the list is described as a non-exhaustive list. While it true that the Statute of the Court does not go into any detail, as is the case with the Rome Statute,[32] on the modalities for cooperation this is not necessarily a weakness in the cooperation framework. These more administrative or bureaucratic details are rarely ever the cause of non-cooperation and can often be worked out in the practice of the Court, in its interaction with States parties.

Notable by its absence in the African Court Statute is an exception to cooperate similar to Article 98 of the Rome Statute. Such a provision may have been seen as unnecessary since the exercise of jurisdiction over officials with immunity is excluded by Article 46A *bis* of the Statute of the African Court.[33] However, it should be recalled that the phrase 'officials' in the Statute remains to be interpreted by the Court, and it may be that in the future Article 46 A *bis* could be interpreted by the Court as not applying to all officials entitled to immunity under international law.[34] Moreover, depending on the interpretation of the phrase 'during their tenure in office', immunity under Article 46 A*bis* may cease after a person leaves office even for acts performed in an official capacity while in office. This would mean the Court would be entitled to exercise jurisdiction over some individuals who are no longer officials in respect of acts for which they retain immunity under customary international law. At any rate, it may well be that it is necessary to provide an exception from the duty to cooperate for other reasons, such as national security. While the Rome Statute does contain an elaborate regime in Article 72 for dealing with materials that could prejudice national security, Article

[29] See Art. 93(1)(c) of the Rome Statute.
[30] See Art. 93(1)(g) of the Rome Statute.
[31] See Art. 93(1)(i) of the Rome Statute.
[32] The Rome Statute, for example, specifies what must be contained in a request for arrest in surrender, Art. 91, which has four sub-Art.s, two of which have a further seven sub-paragraphs between them. See also Art. 96 of the Rome Statute which describes, in some detail, the content of a request for forms of assistance.
[33] See Chapter 29 in this volume.
[34] Ibid.

93(4) makes it plain that a State may deny a request to provide information or documents if the provision of such information or documents would prejudice national security.

As discussed above, experience with the ICC's referral of cases of non-cooperation to political bodies does not reveal a promising pattern. Nonetheless, there is a value of such referral, even if it does lead to any concrete results of sanction. It serves, in the first place, to place the issue on the agenda and to afford States the opportunity to discuss the matter. Whether States take the opportunity or not is an altogether different matter. Second, whatever the consequences (or lack thereof), States generally do not like to be shown in bad light in reports before international organizations. Finally, while empirically political bodies have not acted on cases of referral of non-cooperation, that does not mean this will always be the case. Providing for referral of non-cooperation creates the possibility, even if remote, of some action. The Malabo Protocol could, therefore, have made provision for a referral of cases of non-cooperation.

There are other aspects of cooperation that could have been addressed in Statute. For one thing, the Statute does not address the potential for conflicting requests of cooperation, particularly in relation to arrest and surrender.[35] The nature of the crimes covered in the Statute, namely international and transnational crimes, creates the potential for multiple claims of jurisdiction, with the potential for multiple requests for surrender or extradition. A provision on how a requested State is to priorities these requests could be useful to avoid conflict between States *inter se*, and States and the Court. The Statute could also have provided for a consultation mechanism, for those cases where a States have difficulty cooperating with the Court.[36] Finally, in the light of the complementary jurisdiction of the Court, a provision promoting, if not obliging, interstate cooperation to foster domestic investigations and prosecution would have been advisable. Such a provision is also lacking in

[35] See for comparison Art. 90 of the Rome Statute which addresses the issue of competing requests for surrender and extradition.

[36] See for comparison Art. 97 of the Rome Statute. The only use of Art. 97 of the Rome Statute, so far, in the case of South Africa, probably didn't have the desired results. In that case, the ICC was dissatisfied because South Africa proceeded to permit Al Bashir's entry into South Africa and did not arrest him. South Africa, for its part, was dissatisfied because what was seen as a political process of dialogue was, from its perspective, abused when, subsequent to the consultations the ICC issued a 'decision' confirming the duty of South Africa to arrest and surrender without a proper judicial hearing. See *Decision following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is under the Obligation to immediately Arrest and Surrender Omar Al Bashir, Situation in Darfur: Prosecutor v Omar Hassan Al Ahmad Al Bashir*, Pre-Trial Chamber II, ICC-02/05–01/09 (13 June 2015).

the Rome Statute and there have been efforts to address this gap.[37] The gap is particularly acute given the Malabo Protocol establishes jurisdiction over transnational crimes which are ordinarily prosecuted in domestic courts.

While there are certainly provisions that could have been included, for example exception from the duty to cooperate and provisions on interstate cooperation, on the whole the legal framework for cooperation under the Statute is sufficiently comprehensive to facilitate cooperation with the Court. Experience from the early years of the ICC, however, shows that a sufficient legal framework does not always translate to full cooperation. Moreover, adequacy of the international framework is also often insufficient. A strong domestic framework to implement the international law framework is very often crucial. Indeed, in South Africa, the Supreme Court of Appeal found that there was a duty to arrest Al-Bashir based almost entirely on domestic law.[38] I turn now to address potential challenges and opportunities for effective cooperation.

4. PROSPECT FOR FULL AND EFFECTIVE COOPERATION

As a general rule, States cooperate with international criminal courts and tribunals in accordance with their obligations. It is mainly when there are in conflicts in obligations and/or when national interests are negatively implicated that obligations to cooperate are likely not to be complied with. This includes national interests relating to political relationships with States and international organizations, as is the case in relation to the request for the arrest and surrender of Al-Bashir which would affect not only an African State Parties' relations with the Sudan but also with the AU. Arresting a sitting foreign head of State (or maybe even a former head of State who still has the respect of his State) is, quite apart from the issue of immunities, politically more risky or undesirable than arresting and surrendering a person from another State who does not hold high office. In this sense, the inclusion of Article 46 A *bis* on the respect of immunities will not only reduce the possibility of a conflict in legal obligations, but will also reduce the potential for the conflict between political interests and the duty to cooperate.

However, even with the preservation of immunity under the Statute, there remains the possibility for non-cooperation with requests from the Court. As mentioned above, for example, there remains the possibility of a restricted

[37] See for discussion D. Tladi, 'A Horizontal Treaty on Cooperation in International Criminal Matters: The Next Step in the Evolution of a Comprehensive International Criminal Justice System?', **29** *Southern African Public Law* (2014) 368.

[38] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA).

interpretation of Article 46 A *bis* by the Court, potentially re-establishing the immunity-cooperation conflict. At any rate, when it comes to prosecutions of certain offences in the material jurisdiction of the African Court, it is unlikely that a government that has successfully taken over power through unconstitutional change of government would cooperate with the Court in proceedings related to the crime of unconstitutional change in government. Other reasons for non-cooperation may include, for example, an appeal to national security where requested documents or materials are deemed classified. Whatever the reason, there remains the possibility for non-cooperation with the requests of the Court.

The possibility brings into sharp focus the question of consequences for non-cooperation. Leaving aside the debate on the correct interpretation of the Rome Statute and its Article 98, part of the reason for the continued non-cooperation with the ICC is the impotence of the enforcement mechanisms for non-cooperation with Rome Statute obligations, namely the Security Council and the Assembly of States Parties. Thus, when faced with competing obligations and interests, States Parties to the Rome Statute are likely to choose other obligations over those under the Rome Statute since violations of the latter do not carry any real consequences.

A mechanism that could prove useful in facilitating cooperation with the obligations under the Statute may be the powers of the African Union's Assembly of Heads of State to sanction non-compliance with AU decisions under Article 23 of the AU Constitutive Act. As discussed, however, this would require the power to refer cases of non-cooperation to the Assembly. At any rate, whether this will be applied will be dependent on the political will of the Assembly which, like the Security Council, is a political body that takes into account political considerations in its decisions to exercise the powers to sanction. Political pressure from other States Parties to the African Court, including through exertion of economic pressure, on a non-complying state, might be yet another option for ensuring compliance. It is widely reported, for example, that the decision of Malawi to withdraw from hosting the AU Summit in 2012 was the threat of withdrawal of aid by mainly European States Parties to the Rome Statute.[39] However, whether powerful African States

[39] See 'Malawi Withdraws from Hosting the AU Summit' available at www.nyasatimes.com/2012/06/08/malawi-withdraws-from-hosting-the-au-summit/ (last accessed 25 July 2015). See also 'Ethiopia to Host African Union Summit After Omar Al-Bashir-Row' available at www.bbc.com/news/world-africa-18407396 (last accessed 25 July 2015) where former President is reported to have said that 'welcoming Mr. Bashir to Malawi risked damaging relations with donors' and where it is reported further that 'Malawi recognizes the ICC and is keen to restore foreign aid flows'.

would be willing to exert that kind of pressure, and risk damaging relations with other States for the sake of the African Court is also unlikely.

5. CONCLUSION

The Statute establishes a strong and coherent legal framework for cooperation with the Court. While there are certainly other provisions that could have been included, this framework, based on comparable frameworks in the statutes of other international criminal tribunals, is comprehensive and addresses all necessary elements. This framework contains the provisions necessary to facilitate cooperation. Moreover, the inclusion of a provision respecting the immunity of officials, will significantly reduce incidences likely to lead to non-cooperation. Cooperation, however, is not dependent only on the legal framework. Where cooperation conflicts with political interests of States Parties there may, however, still be cases of non-cooperation.

In cases of potential non-cooperation from States Parties, the most important indicator of whether cooperation will take place will be the political will of other States Parties of the African Court, whether individually through influence, including economic pressure, or collectively through, for example, the power of the Assembly of Heads of State of the African Union to sanction members for non-compliance with the AU decisions. The experience of the ICC, however, does not paint a picture of promise. Whether AU Member States, given their relative homogeneity, will lead to different results remains to be seen.

C

Modes of Participation, Immunity, Defences, Sentences and Reparations

26

Modes of Liability and Individual Criminal Responsibility

WAYNE JORDASH QC AND NATACHA BRACQ

1. INTRODUCTION

The last two decades have been a period of remarkable growth in the prospects for accountability at the international level through the establishment of an array of international criminal tribunals, including the International Criminal Court (ICC). Despite well documented (and ongoing) travails, these institutions have driven understanding, debate and codification of important aspects of the legal framework required to ensure individual criminal liability for serious violations of international humanitarian law (IHL).

For reasons and motivations that will remain a source of debate and a degree of understandable cynicism, these developments appear to have breathed life into the African Union (AU)'s own efforts towards a regional mechanism governed by its own African Court of Justice and Human Rights Statute (AU Statute).[1] On one view, the proposed AU Statute represents an attempt to improve on its predecessors, such as the Rome Statute that governs the ICC, including expanding the range of applicable crimes and modes of liability, as well as containing an unprecedented recognition of corporate liability in international criminal law.

However, obviously, expansions and modifications do not necessarily equate to genuine progression or enhanced effectiveness. As will be discussed

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[1] For the purpose of this article, the AU Statute refers to the proposed Statute of the African Court of Justice and Human Rights as amended by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) adopted in June 2014.

in this Chapter, the AU's approach to modes of liability in Article 28N of the proposed Statute, whilst being ambitious and innovative, particularly with regard to the addition of new modes of liability that provide an expanded range of ways that crimes may be committed, may not foreshadow improvement or increased efficiency in the AU's putative adjudicative processes.

On examination, in many instances, it is questionable whether these additions will produce sufficiently specific or certain modes of liability to facilitate effective or more efficient prosecutions. Modes of liability are 'linking principles' used to connect accused with particular actions, criminals with other criminals, past decisions with consequences, either foreseen or unforeseen and punishment with moral desert.[2] As such, especially in complex cases, they must be clearly and specifically defined if they are to prove fit for purpose in the practical setting of a courtroom. As will be discussed in this Chapter, the proposed AU Statute's approach to liabilities and their probable impact upon these linking capabilities raise many preliminary concerns. If Article 28N proceeds in its current form, the new African Court of Justice and Human Rights (AU Court) will face difficult challenges concerning many of the proposed new modes of liability, including their application to a range of old (e.g. genocide or crimes against humanity) and new (e.g. corruption or piracy) crimes and new types of entities (e.g. legal persons) and their overall impact upon future trials.

This Chapter does not purport to address each and every concern arising from the drafting of Article 28N. It is a preliminary analysis of some of the most obvious and pressing issues that suggest that the overall approach to modes of responsibility in Article 28N lacks the clarity and required to provide routes to the effective adjudication of the range of crimes and to keep trials moving. Some of these problems may have arisen due to simple drafting errors, such as, perhaps, the absence of a clear distinction between principal and accessory liability; others however appear to originate from (well intentioned) practical missteps that include the introduction of a range of new modes of liability (e.g. organizing, directing, facilitating, financing and counselling) that appear to be duplicative or overlapping, with no apparent purpose other than to provide anxious prosecutors with the reassurance that every iota of conceivable misconduct is captured within its reach.

Nonetheless, throughout this Chapter, the authors have endeavoured to keep in mind an obvious practical reality, namely that every international tribunal must engage 'in a 'continuous quest' for theories of liability that can

[2] J. D. Ohlin, 'Second-Order Linking Principles – Combining Vertical and Horizontal Modes of Liability', 25 *Leiden Journal of International Law* (2012) 771, at 772.

adequately address the systemic character of international crimes'.[3] Modes of participation inspired by domestic legislation and integrated into international tribunals' statutes may not always be a perfectly good fit to address the challenges confronting international criminal law. They must continuously evolve (or be revealed) as new types of involvement or means of participation are exposed in real life trials. Bringing individuals to justice under the (sometimes restrictive) confines of international criminal statutes demands a considerable degree of judicial creativity with regard to honing their utility if misconduct is to be captured and individuals are to be allowed due process and fairly held accountable for any crimes.

As for the latter, due process demands that any judicial creativity must proceed cautiously. Modes of liability may only be interpreted in light of the objectives and principles of international criminal justice. Tribunals must ensure respect for fundamental due process considerations, such as the principles of *nullum crimen sine lege*, and *nulla poena sine lege* that are well-established principles in customary international law and apply to the various modes of liability, as well as being codified in the Rome Statute.[4] Amongst several other prerequisites, such principles demand clarity of pleading of the modes of liability[5] and that criminal liability should be individual, and sufficiently foreseeable and accessible at the time of the commission of the act or omission.[6]

[3] M. Cupido, 'Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014) 128–65, at 128, see also H.G. van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility', 7 *JICJ* (2009), at 307.

[4] Art. 15 International Covenant on Civil and Political Rights. See also Art. 11(2) Universal Declaration of Human Rights; Articles 22 and 23, Rome Statute (ICCSt.). See also, 'Commentary of the Rome Statute: Part 3', *Case Matrix Network*, available online at: www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, (Portland: Hart Publishing, 2009), at 29, ft.103; B. Swart, 'Modes of International Criminal Liability', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, (Oxford: Oxford University Press, 2009), at 92.

[5] M. Aksenova, 'Returning to Complicity for Core International Crimes', *FICHL Policy Brief Series No. 17* (2014), at 2.

[6] B. Swart, 'Modes of International Criminal Liability', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, (Oxford: Oxford University Press, 2009), at 92. See also K. Ambos, *Treatise on International Criminal Law*, Volume I: Foundations and General Part, (Oxford: Oxford University Press, 2013), at 93; S Bock, 'The Prerequisite of Personal Guilt and the Duty to Know the Law in the Light of Article 32 ICC Statute', 9 *Utrecht Law Review* (2013) 184, at 184; Judgment, *Tadić* (IT-94–1-A), Appeals Chamber, 15 July 1999, § 186.

Whatever the rights or wrongs of Article 28N, the AU Court's challenges will be no different and, in the end, much will depend on the inventiveness and practical knowhow of the judges working to meet the multifarious demands of the trial processes. However, as will be discussed in this Chapter, given the serious ambiguities and anomalies that run through the critical terms of Article 28N, the drafters have handed these judges a herculean, if not impossible, task. In summary, Article 28N's drafting may give rise to insuperable obstacles that stand in the way of both the practical and principled application of international law within the AU Court.

Criminal law frameworks generally rest on one of two basic models of criminal liability 'the unitary perpetrator model' and 'the differential participation model'.[7] The first Section of the Chapter examines whether the drafters of 28N intended to opt for one of these models. On the face of the pleading, Article 28N may have adopted a unitary participation model. It contains a broad mix of modes that include both principal and accessorial modes of liability. However, as will be discussed, this is far from clear. Article 28N contains a myriad of overlapping modes of liability that suggest that the drafter may have been more focused on ensuring that the provision captured every conceivable form of conduct, rather than making an active selection for one and not the other. As unlikely as it may seem, it may be that the drafter simply stumbled into the unitary participation model whilst focused upon this objective.

The second Section of the Chapter examines the various modes of liability contained in Article 28N Statute and discusses some of the interpretative issues that will arise. Article 28N introduces an array of modes of responsibility that have not been part of modern international criminal law statutes. While reproducing many of the modes of liability that are usual, Article 28N includes new forms of complicity, namely organizing, directing, facilitating, financing, counselling and 'accessory before and after the fact'. As will be discussed, these 'new' and overlapping modes of liability may not in the final analysis prove necessary, let alone useful, as vehicles for practical criminal process and adjudication. Most indictments and trials at the international level suffer from overload and vagueness and the pleading of a multitude of liabilities that play no meaningful role in the proceedings, proceedings are likely to do nothing more than distract from the core issues in contention. Additionally, many trials over the last few decades have already suffered the deleterious effects of judicial attempts to assemble joint enterprise forms of liability from statutes that failed to adequately contemplate the challenges of linking remote 'masterminds' to those

[7] S. Finnin, *Elements of Accessorial Modes of Liability: Article 25(3) (b) and (c) of the Rome Statute of the International Criminal Court*, (Leiden: Martinus Nijhoff Publishers, 2012), at 12.

directly perpetrating the crimes. As will be discussed in the second Section, there is little to suggest that several of the liabilities that constitute 'commission' in the AU Statute will not lead to the same process problems and appear to have been included without a reasoned consideration of necessity or practical utility.

Finally, the third Section of the Chapter will examine Article 46C of the AU Statute and the manner in which it innovates to define a form of corporate criminal liability in international criminal law. Article 46C appears to describe a mode of liability that is close to the Australian 'corporate culture' model of corporate criminal liability which is a variant of the organizational liability model (and not the identification or vicarious model). However, many questions concerning its physical and mental elements remain *unanswered* and in need of significant judicial interpretation if it is to provide a useful mechanism for determining whether corporations are responsible for criminal conduct. One thorny but essential question concerns more generally how Article 46C will interact with Article 28N, particularly with regard to the aiding and abetting mode of liability.

A. *The Distinction between Principal and Accessory Modes of Liability in the Proposed AU Statute*

1. International Criminal Law's Approach

Criminal law processes at the domestic or international level generally opt for one of two approaches when ascribing liability for action against individuals, either the 'unitary perpetrator model' or the 'differential participation model'.[8] According to the unitary perpetrator model, every person who contributes to the crime is considered a perpetrator regardless of the nature of his or her participation.[9] This 'expansive' notion of perpetratorship is based on the premise that a plurality of persons implies a plurality of offences.[10] Whoever 'contributes any cause to the commission of a crime, regardless of how close or

[8] A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002), at 781–3.

[9] A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002) 767–822, at 767, 781–2. See also S. Finnin, *Element of Accessorial Modes of Liability: Article 25(3) (b) and (c) of the Rome Statute of the International Criminal Court*, (Leiden: Martinus Nijhoff Publishers, 2012), at 12; E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press 2012), at 66.

[10] E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), at 66.

distant the cause from the final result, they must be considered as (co-) author of the crime'[11] and '[q]uestions of causation, mens rea, justification and excuse arise independently from the participant's own act and a conviction is of the crime proper'.[12] The unitary model obviates any need for distinguishing between participants in wrongdoing: '[t]here are no accomplices; all are principals'.[13] Under this theory, the actual contribution of the individual is significant only with regard to sentencing.[14]

In contrast, the 'differential participation model' distinguishes between perpetrators and accessories. In basic terms, perpetrators are those at the centre of the crime, while accessories assist in, or prompt its commission and act, for instance, as solicitors, instigators, or aiders and abettors.[15] This model is based on the assumption that participation in a crime can be so different in weight and proximity that each person should be treated differently according to their involvement.[16] This model is not only relevant for assessing an appropriate sentence, but also for clarifying the individual criminal liability for acts or omissions.[17]

Jackson identifies three stages of differentiation in the participation in wrongdoing: (1) the doctrinal differentiation that distinguishes amongst participants in wrongdoing at the level of legal doctrine. At this level, the law recognizes the category of accomplices with certain doctrinal requirements of conduct and fault; (2) the differentiation in the attribution of responsibility which distinguishes among participants in wrongdoing at the stage of

[11] A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002) 767–822, at 767, 781.

[12] E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), at 66.

[13] M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2013), at 18.

[14] S. Finnin, *Element of Accessorial Modes of Liability: Article 25(3) (b) and (c) of the Rome Statute of the International Criminal Court*, (Leiden: Martinus Nijhoff Publishers, 2012), at 13, see also A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002), 767–822, at 767, 781.

[15] A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002), 767–822, at 767–822, 767, 782. *See also* E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), at 66.

[16] A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002), 767–822, at 767–822, 767, 782. *See also* E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press 2012), at 66.

[17] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', 5 *Journal of International Criminal Justice* (2007) 953, at 955.

conviction or responsibility. The attribution of responsibility is not linked to the wrong of the principal but to the accessories' own contribution to that wrong; and (3) the differentiation in the consequences of responsibility which distinguishes among participants at the sentencing or remedial stage of the system.[18] In stage (3), variance in role is expressed at the sentencing level.[19] According to Jackson, the principles of culpability and fair labelling require differentiation amongst participants at each of these three stages.[20]

At the sentencing stage, this model allows 'for both sentencing guidelines according to the various modes of participation and also a unitary range of sentencing'.[21] In the latter case, each contribution to the crime is considered on its own:[22] 'by either upgrading perpetrators or downgrading accessories'.[23] Courts thus determine the penalty according to the mode and degree of participation.[24]

Many international criminal law commentators consider that distinguishing between principal perpetrators and accomplices is an important asset to international criminal law, especially in the identification of the masterminds behind the crimes.[25] This support was echoed most recently during the academic debate arising from Stewart's argument that accomplice liability in international criminal law should be reduced to a single notion of perpetration.[26]

[18] M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press 2013), at 22.
[19] E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), at 67.
[20] M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2013), at 22.
[21] H. Vest, 'Problems of Participation – Unitarian, Differentiated Approach, or Something Else?' 12 (2) *J. Int. Criminal Justice* (2014) 295–309, at 307.
[22] E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), at 66.
[23] A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002) 767–822, at 782.
[24] H. Vest, 'Problems of Participation – Unitarian, Differentiated Approach, or Something Else?' 12 (2) *Journal of International Criminal Justice* (2014) 295–309, at 307.
[25] H. Vest, 'Problems of Participation – Unitarian, Differentiated Approach, or Something Else?' 12 (2) *Journal of International Criminal Justice* (2014) 295–309, at 302. *See also* E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), at 80 and M. Jackson, The Attribution of Responsibility and Modes of Liability in International Criminal Law, 29 *Leiden Journal of International Law* (2016) 879–95; G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 319.
[26] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 165.

Stewart observes (correctly) that complicity has not been sufficiently dealt with 'in the scholarly revolt against international modes of liability'.[27] Instead the debate has mainly focused on joint criminal enterprise, command responsibility, perpetration and co-perpetration.[28] Consequently, complicity has escaped some of the criticism that has befallen other modes of liability.[29] Stewart argues that complicity conflicts with both: (1) the existence of congruence between the mental element of the crime and the mental element required of the accomplice and (2) the need for a causal connection between the accomplice's acts and the harm contemplated in the crime.[30] In the end, he concludes, that the differentiated approach violates the principles of culpability[31] and fair labelling.[32]

Stewart suggests 'the source of complicity's departures from basic principles [...] stems from international criminal law's emulation of objectionable domestic criminal doctrine'.[33] He further argues, 'complicity's most objectionable characteristics are inherited from domestic exemplars that some scholars denounce as a conceptual "disgrace"'.[34] For example, referring to the debate on the mental element for accessorial liability, more particularly the competing rationale for the purpose/knowledge/recklessness standards, Stewart states:

> On closer inspection, none of the three highly debated standards (purpose, knowledge, recklessness) is theoretically justifiable. Like other modes of liability in international criminal justice, all three violate the principle of culpability in certain circumstances because they all tolerate the imposition of a crime's stigma in situations in which the person convicted of the offence did not make the blameworthy choice necessary to be found guilty of that particular offence. Many point out the perversity of using JCE III to escalate blame for genocide in this manner, but what about instances in which

[27] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 168.
[28] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 165; M. Jackson, The Attribution of Responsibility and Modes of Liability in International Criminal Law, 29 *Leiden Journal of International Law* (2016) 879–95, at 882.
[29] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 171.
[30] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 185.
[31] Stewart argues that the accessory modes of liability 'tolerate the imposition of a crime's stigma in situations in which the person convicted of the offence did not make the blameworthy choice necessary to be found guilty of that particular offence'. J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 193.
[32] Stewart argues that the label of a crime is a key element of punishment that must match an accused's guilt, regardless of the number of years in prison an accused is to serve. J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 176–7.
[33] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 165 and 171.
[34] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 169.

complicity has an identical effect? With accessorial liability, individuals are also held responsible for genocide where they knew or were merely aware that genocide was one of a number of crimes that would *probably* be committed. These scenarios, which are actually more common in practice, violate culpability too. Tellingly, these violations are explicitly based on examples drawn from a host of Western systems.[35]

As a consequence, Stewart argues that complicity 'should collapse along with all other modes of liability into a single broad notion of perpetration',[36] where a principal is any participant who 'made a substantial causal contribution to a prohibited harm while harboring the mental element necessary to make him responsible for that crime'.[37] In line with the unitary model, the accomplice's contribution to the crime can be accounted for at the sentencing stage.[38]

However, several well respected academics in area of analysis, including Jackson, Ohlin, Robinson, Werle and Burghardt have rejected this radical proposal and reiterated their support for a differentiated system of responsibility for international crimes.[39] While agreeing with Stewart's criticism that the current interpretation of accessorial modes of liability in international criminal law is far from perfect, they consider that distinguishing between principal perpetrators and accomplices remains important to international criminal law, especially in the identification of the masterminds behind the crimes.[40]

[35] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 193–4.
[36] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 166.
[37] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 207.
[38] J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), at 207.
[39] See e.g. G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 304; D. Robinson, 'LJIL Symposium: Darryl Robinson comments on James Stewart's "End of Modes of Liability"', *Opinio Juris*, (21 March 2012), available at opiniojuris.org/2012/03/21/ljil-robinson-comments-on-stewart/; T. Weigend, 'LJIL Symposium: Thomas Weigend comments on James Stewart's "The 'End of Modes of Liability for International Crimes'", *Opinio Juris*, (22 March 2012), available at opiniojuris.org/2012/03/22/ljil-weigend-comments/; J. Ohlin, 'LJIL Symposium: Names, Labels, and Roses', *Opinio Juris*, (23 March 2012), available at opiniojuris.org/2012/03/23/ljil-names-labels-and-roses/; M. Jackson, The Attribution of Responsibility and Modes of Liability in International Criminal Law, 29 *Leiden Journal of International Law* (2016) 879–95; B. Van Schaak, 'The Many Faces of Complicity in International Law', 109 *Proceedings of the Annual Meeting (American Society of International Law)* (2015) 184–8.
[40] H. Vest, 'Problems of Participation – Unitarian, Differentiated Approach, or Something Else?' 12 (2) *Journal of International Criminal Justice* (2014) 295–309, at 302. *See also* E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), at 80 and M. Jackson, The Attribution of Responsibility and Modes of Liability in

According to Werle and Burghardt, Jackson's arguments that the principles of culpability and fair labelling are conflicted do not hold water.[41] They suggest that both models (unitary and differentiated) may be appropriate for international criminal law. Nevertheless, they conclude that, 'certain normative and empirical features of international criminal law, in general, and of the system of the ICC Statute in particular, weigh heavily in favor of a differentiation model, where modes of participation are indicative of the degree of criminal responsibility'.[42] To their minds, international criminal law is charged with developing 'normative criteria for gradation of responsibility' insofar as the discipline deals with 'the most serious crimes committed by a large number of persons in complex factual scenarios'.[43]

Accordingly, they consider that modes of participation are necessary indicators of the degree of individual criminal responsibility.[44] The differentiation model involves key procedural consequences such as the obligation of the prosecution to set out facts and legal elements of the charges in detail; the application of different legal thresholds to the different modes of participation; and a more transparent and predictable sentencing process.[45] By contrast, the unitary model avoids the 'thorny issue of normative gradation for the purpose of a guilty verdict, only to find it again at the sentencing stage'.[46]

International Criminal Law, 29 *Leiden Journal of International Law* (2016) 879–95; G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 319.

41 G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 304 and 305.

42 G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 304 and 306.

43 G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 318.

44 G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 318.

45 G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 318.

46 G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 318.

> No matter how difficult is the task of defining the criteria that may be used to establish the degree of blameworthiness, it is one we cannot shy away from without abandoning the constitutive idea of international criminal law itself – the idea of *individual* criminal responsibility.[47]

For Jackson, Stewart's proposal is also flawed and the expressive benefits of a unitary model of responsibility are more illusory than real.[48] According to Jackson, even if there were some benefit to Stewart's proposal, it overrides the fundamental principles of culpability and fair labelling that underpin a differentiated model of participation in crime.[49] Jackson argues that eliminating complicity would potentially violate the principle of fair labelling in criminal law, which requires that 'wrongdoing is labelled accurately and, with a sufficient degree of specificity to distinguish law-breaking of a different kind or gravity'.[50] Jackson and Ohlin highlighted that otherwise 'some participants' responsibility would be radically over-weighted, others radically under-weighted, and the system would tell us virtually nothing about what the wrongdoer did'.[51]

Jackson eloquently summarizes the importance of the differentiated model:

> A unitary model of participation is inconsistent with how we do, and ought to, think about responsibility. To borrow Darryl Robinson's example, the groom, bartender, and guest are all participants in a wedding. Indeed, they may all causally contribute to it. But we would not deny profound differences in their roles. Likewise, in the context of wrongdoing, complicity is a necessary element of a complete account of morality and responsibility. Gardner argues that 'the distinction between principals and accomplices is embedded in the structure of rational agency. As rational beings, we cannot live without it'. There are two elements to Gardner's account. The first concerns the wrongness of complicity: we should be concerned with not

[47] G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 319.

[48] M. Jackson, The Attribution of Responsibility and Modes of Liability in International Criminal Law, 29 *Leiden Journal of International Law* (2016) 879–95, at 889, J. D. Ohlin, 'LJIL Symposium: Names, Labels, and Roses', *Opinio Juris*, (23 March 2012), available at opiniojuris.org/2012/03/23/ljil-names-labels-and-roses/.

[49] Jackson, The Attribution of Responsibility and Modes of Liability in International Criminal Law, 29 *Leiden Journal of International Law* (2016) 879–95, at 891.

[50] M. Jackson, The Attribution of Responsibility and Modes of Liability in International Criminal Law, 29 *Leiden Journal of International Law* (2016) 879–95, at 888.

[51] M. Jackson, The Attribution of Responsibility and Modes of Liability in International Criminal Law, 29 *Leiden Journal of International Law* (2016) 879–95, at 890, J. D. Ohlin, 'LJIL Symposium: Names, Labels, and Roses', *Opinio Juris*, (23 March 2012), available at opiniojuris.org/2012/03/23/ljil-names-labels-and-roses/.

only the harms we do ourselves but also those we help or influence others to do. The second concerns the scope of that wrong: both principals and accomplices should be responsible for their own actions.[52]

Finally, according to Robinson, the differentiation model has an expressive function by reflecting 'meaningful moral differences between those who cause or control the crime and those who made blameworthy but minor and secondary contributions'.[53] As an illustrative example, Robinson explains that the 'should have known' standard of command responsibility has been accepted as a justifiable element in the context of a command relationship. The unitary model will not provide such flexibility and would have to either allow the 'should have known' standard in all contexts or prohibit it entirely.[54]

Therefore, unsurprisingly perhaps, the ad hocs have tended to interpret their Statutes to distinguish between principals and accomplices and have to a greater or lesser degree adopted the 'differential participation model'. The classic principal modes of liability at these tribunals are commission and joint commission. Among the accessory modes of liability, there are two main ways in which an individual may act as an accomplice; either ordering, planning, and instigating (which describe proximity between the perpetrator and the commission of the crime), or aiding and abetting (which generally entails a subsidiary contribution to the criminal act).

However, the ad hocs' Statutes do not contain these express distinctions and instead place principal liability at the same level and within the same category as accessorial liability.[55] Instead, these distinctions have largely evolved through a process of incremental interpretation and jurisprudential development. As is now part of international justice's well known legacy, it was only in 1999, when grappling with the complexity of how to define a joint criminal enterprise (JCE) liability to cope with contributions to collective action, that

[52] M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2013) at 18. Footnotes omitted.

[53] D. Robinson, 'LJIL Symposium: Darryl Robinson comments on James Stewart's "End of Modes of Liability"', *Opinio Juris*, (21 March 2012), available at opiniojuris.org/2012/03/21/ljil-robinson-comments-on-stewart/.

[54] D. Robinson, 'LJIL Symposium: Darryl Robinson comments on James Stewart's "End of Modes of Liability"', *Opinio Juris*, (21 March 2012), available at opiniojuris.org/2012/03/21/ljil-robinson-comments-on-stewart/.

[55] Art. 7(1) reads as follows: A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime. A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002), 767–822, at 767–822, 767, 781.

the *Tadić* ICTY Appeals Chamber distinguished between principal and accessory liability:

> In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.
>
> (i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal. (. . .)[56]

In 2003, the ICTY Appeal Decision in the *Milutinović* case further clarified that, under customary international law (and therefore under Article 7 of the ICTY Statute), the doctrine of JCE gave rise to principal liability.[57] Subsequently, the ICTY has relied upon these two decisions as a basis upon which they could distinguish between principal and accessory liability.[58] Similarly, at the ICTR, the Court relied upon the *Tadić* Decision to hold that Article 6 of their Statute (which mirrors Article 7 of the ICTY Statute) expresses a distinction between principal and accessory liability.[59] Consistent with the maintenance of these distinctions, accessory modes of responsibility generally attract a lower sentence than those resulting from responsibility as a co-perpetrator.[60]

This distinction is more apparent on the face of the Rome Statute. However, judicial interpretation has created a degree of uncertainty concerning the nature of the distinction that is yet to be resolved. In the first place, the Rome Statute expressly enumerates four types of criminal responsibility:

[56] Judgment, *Tadić* (IT-94–1-A), Appeals Chamber, 15 July 1999, § 229.

[57] Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, *Milutinović et al.* (IT-99–37-AR72), Appeals Chamber, 21 May 2003, §§ 20–1.

[58] H. Olásolo, 'Developments in the Distinction between Principal and Accessorial Liability in Light of the First Case-Law of the International Criminal Court', in C. Stahn and G. Sluiter (ed.), *The Emerging Practice of the international Criminal Court*, (Leiden: Koninkljke Brill NV, 2009), 339–60, at 344–45. Judgment, *Krnojelac* (IT-097–25-A) Appeals Chamber, 17 September 2003, §§ 30 and 73; Judgment, *Blaskić* (IT-95–14-A), Appeals Chamber, 29 July 2004, § 33; Judgment, *Kvočka et al.* (IT-98–30/1-A), Appeals Chamber, 28 February 2005, §§ 79 and 91; Judgment, *Vasiljević*, (IT-98–32-A), Appeals Chamber, 25 February 2004, §§ 95, 102 and 181–2; Judgment, *Krstić* (IT-98–33-A), Appeals Chamber, 19 April 2004, §§ 134, 137, 266–9.

[59] H. Olásolo, 'Developments in the Distinction between Principal and Accessorial Liability in Light of the First Case-Law of the International Criminal Court', in C. Stahn and G. Sluiter (ed.), *The Emerging Practice of the international Criminal Court*, (Leiden: Koninkljke Brill NV, 2009), 339–60, at 346. Judgment, *Ntakirutimana et al.* (ICTR-96–10-A and ICTR-96–17-A), 13 December 2004, § 462. Judgment, *Simba* (ICTR-01–76-T), Trial Chamber, 13 December 2005, § 389.

[60] Judgment, *Vasiljević*, (IT-98–32-A), Appeals Chamber, 25 February 2004, § 182; Judgment, *Krstić* (IT-98–33-A), Appeals Chamber, 19 April 2004, § 268.

(1) committing a crime – perpetration and co-perpetration[61]; (2) ordering and instigating[62]; (3) aiding and abetting[63]; and (4) contributing to the commission of a crime by a group of persons acting with a common purpose.[64] In *Lubanga*, the first case at the ICC, Pre-Trial Chamber I drew several distinctions between these modes of liability, noting that:

> [The Rome Statute] distinguished between (i) the commission *stricto sensu* of a crime by a person as an individual, jointly with another or through another person within the meaning of Article 25(3)(a) of the Statute, and (ii) the responsibility of superiors under Article 28 of the Statue and 'any other forms of accessory, as opposed to principal liability provided for in Article 25(3)(b) to (d) of the Statute' [ordering, soliciting and inducing, aiding and abetting and contribution].[65]

Similarly, in 2010, the *Mbarushimana* Pre-Trial Chamber found that Article 25(3) entailed a hierarchy of responsibility and described the modes of liability as being arranged in accordance with 'a value oriented hierarchy of participation in a crime under international law', where the 'control over the crime decreases' as one moves down the sub-paragraphs.[66] This is consistent with a value-oriented hierarchy of participation in a crime that places commission as the highest degree of individual responsibility and contribution to a group crime as the 'weakest mode of participation'.[67]

However, with specific focus upon sentencing principles, the *Katanga* Trial Chamber appears to have chipped away at this erstwhile clarity. Whilst using the 'differential participation model' to classify principals and accessories, the *Katanga* Trial Chamber rejected the *Mbarushimana* Pre-Trial Chamber's decision and held that the distinction between the different modes of liability as principal or accomplice did not amount to a hierarchy of blameworthiness. The Chamber also stated that there was no rule in the Statute or the Rules of Procedure that necessitated the imposition of lower sentences for accomplices

[61] Art. 25(3)(a) ICCSt.
[62] Art. 25(3)(b) ICCSt.
[63] Art. 25(3)(c) ICCSt.
[64] Art. 25(3)(d), ICCSt.
[65] Decision on the Confirmation of Charges, *Lubanga Dyilo* (ICC-01/04–01/06), Pre-Trial Chamber, 29 January 2007, § 320, citing Arrest Warrant Decision, *Lubanga Dyilo* (ICC-01/04–01/06), Pre-Trial Chamber, 10 February 2006, § 78; Judgment, *Katanga* (ICC-01/04–01/07), Trial Chamber, 8 March 2014, § § 486–8.
[66] Confirmation of Charges, *Mbarushimana* (ICC-01/04–01/10) Pre-Trial Chamber, 16 December 2011, § 279.
[67] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', 5 *J Int Criminal Justice* (2007) 953, at 957.

as against principals. Referring to national criminal codes, such as that operative in Germany, where the sentence for each is identical (even if mitigation may lower the eventual sentence of the aider[68]), the Chamber concluded that there was no automatic correlation between modes of liability and penalty.[69] Accordingly, a person responsible as an instigator may incur a penalty akin or even identical to that handed down against a person found responsible as a perpetrator of the same crime.[70]

In sum, the ICCs' precise approach to these foundational issues remains a work in progress. Although the modes of liability in the Rome Statute appear embedded in a differential participation model, there is still plenty of room for manoeuvre before the Appeals Chamber proffers some certainty to these issues, especially with regard to the sentencing provisions.[71]

2. Article 28N's Approach

Turning to Article 28N of the AU Statute and which of the two models are intended, it begins with the phrase: 'An offence is *committed* by any person who, in relation to any of the crimes or offences provided for in this Statute: [sub-paragraphs]'.[72] The three subsequent sub-paragraphs contain a broad mix of overlapping modes that include both principal and accessorial modes of liability. Sub-paragraph (i) lists a series of liabilities, namely, 'incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute'. The second and third sub-paragraphs respectively refer to accessorial liability: 'aiding and abetting' and a mode of joint liability for anyone who 'is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy'.

As may be seen, this construction is anything but straightforward. On the face of the pleading, Article 28N adopts a unitary participation model whereby anyone who contributes to the crime is to be held liable as principal. The overarching definition of commission suggests that Article 28N entails only one main mode of liability (i.e. 'commission') that is sub-divided into several forms (as outlined in the three sub-paragraphs referenced above). In the AU Statute, the imputation of the conduct of a principal to an accomplice is

[68] Sections 25–7 German Criminal Code.
[69] Judgment, *Katanga* (ICC-01/04–01/07), Trial Chamber, 8 March 2014, § 1386.
[70] Judgment, *Katanga* (ICC-01/04–01/07), Trial Chamber, 8 March 2014, § 1386.
[71] H. Vest, 'Problems of Participation – Unitarian, Differentiated Approach, or Something Else?' 12 (2) *J Int Criminal Justice* (2014), 295–309, at 307.
[72] Emphasis added.

achieved by including complicit conduct within the terms of commission. This approach appears to be broadly consistent with the approach taken by certain African States (e.g. Kenya,[73] Tanzania,[74] Nigeria[75] and Zambia[76]) whereby commission is elaborated as a catchall category into which falls all manner of other forms: for example, the person who aided and abetted, counselled or procured a person to commit the act is regarded as the person who committed the act.

As outlined above, the AU Statute's approach contrasts with the current trend in international criminal law. Consequently, the adoption of the unitary participation model in the proposed AU Statute may have adopted a path that veers away from a strict adherence to principles of culpability and fair labelling. As discussed above, in international criminal law, these principles suggest differentiation amongst participants in crime, not only at the sentencing stage, but also in the attribution of responsibility. Accordingly, a statute where modes of participation are indicative of the nature and degree of individual criminal responsibility may more accurately and adequately reflect the complex factual situations, the large number of perpetrators, the variance in involvement, and the seriousness of the crimes that may be considered by the new Court. Therefore, as with the ICC, the guarantee of a distinction between these different forms of individual responsibility may be important to ensure the legitimacy of the work of the AU Court.[77]

A closer examination of Article 28N's unitary participation formulation raises even more doubts about its ability to achieve some of these aims. Not only does Article 28N define the commission of an offence as the same as an *attempted* commission of an offence (an 'offence is committed by a person who, in relation to any of the crimes or offences provided for the Statute also attempts to commit any of the offences set forth'), many of the forms of commission, beyond reassuring the anxious drafter that every conceivable direct or indirect act or omission falls within its terms, appear to serve little or no useful purpose.

As will be further discussed below,[78] irrespective of whether they are forms of direct or indirect commission, the appearance of a number of these overlapping modes of liability serves only to confuse rather than clarify or enhance

[73] Section 20 2012 Penal Code (Chapter 63).
[74] Section 22 1981 Penal Code (Chapter 16).
[75] Section 529 Criminal Code Act (Chapter 77) (1990).
[76] Section 2 Penal Code (Amendment) Act, 2012 [No. 1 of 2012].
[77] M. Aksenova, 'The Modes of Liability at the ICC', *International Criminal Law Review* (2015) 629–64, at 659.
[78] *See* Section 'Overloading the Statute with New Modes of Liability'.

effective assessment of individual culpability. A striking illustration of this potential may be seen in the use of 'co-principal' in sub-paragraph (i) which suggests that Article 28N is designed to encompass a mode of joint commission. However, this reference appears to overlap with, or even mirror, the notion of 'collaboration' in sub-paragraph (iii). Similarly, incitement and instigation are both included in Article 28 as forms of commission. However, as instigating requires acts that influence the direct perpetrator by inciting, soliciting or otherwise inducing him to commit the crime,[79] Article 28N's inclusion of both incitement and instigation may therefore have created unhelpful overlap or even duplication.

Therefore, although Article 28N may reflect an intention to adopt a 'unitary participation model', this intention is made less clear by the myriad of additional modes of liability. As unlikely as it may seem, it may be that the drafter simply stumbled into adopting the unitary participation model but then departed from this model through a determination not to be caught short.

Moreover, other aspects of the Statute, such as Article 43A addressing sentencing, fails to proffer any decisive clarification of these important questions. In stating that '[i]n imposing the sentences, the Trial Chambers shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted persons'[80] it reproduces the provision of the ICTY and ICC Statutes. As discussed above, the ICTY has interpreted these provisions as reflective of the differential model,[81] whereas the ICC Trial Chamber in *Katanga* has done otherwise.

3. Overloading the Statute with Multiple Modes of Liability

As mentioned above, Article 28N introduces an array of modes of responsibility that have not been part of modern international criminal law statutes. While reproducing many of the modes of liability that are the norm in the ad hocs' Statutes, Article 28N includes new forms of complicity, namely organizing, directing, facilitating, financing, counselling and 'accessory before and after the fact'.

However, these 'new' and overlapping modes of liability may not be necessary, let alone useful, to cope with the rigours of practical criminal process and

[79] Judgment, *Orić* (IT-03–68-T), Trial Chamber, 30 June 2006, § 271.
[80] Art. 24(2) ICTYSt. See also Art. 78(1) ICCSt.
[81] Judgment, *Vasiljević*, (IT-98–32-A), Appeals Chamber, 25 February 2004, § 182; *Krstić* (IT-98–33-A), Appeals Chamber, 19 April 2004, § 268.

adjudication. Whether one accepts the (persuasive) arguments of commentators such as Ambos, who have recommended a radical reduction in the range of modes of liability and 'a rule limiting complicity (secondary participation) to inducement/instigation and other assistance ("aiding and abetting")',[82] it is difficult to understand the purpose of loading the AU Statute in this manner. In particular, it is already difficult to delineate some of the modes of accessory liability contained in the ad hocs' and ICC Statutes: planning, ordering, instigating, aiding and abetting and contributing are in practice almost impossible to separate from each other,[83] especially when viewed through (anticipated) complexity of a range of concurrent criminal and non-criminal action. There are many such overlaps, including between abetting, ordering and inducing,[84] as well as a lack of a clear demarcation between soliciting and inducing, that each appear to encompass a situation where a person is influenced by another to commit a crime.[85]

In reality, the tendencies of most international prosecutors to overload and plead as vague an indictment as loose pleading standards allow, often leads to indictments and trials at the international level that suffer from a multitude of overlapping liabilities that play little role in the proceedings other than to distract from the core issues in contention. As will be discussed below, there is little to suggest that several of the liabilities that constitute 'commission' in the AU Statute do not equally foreshadow a level of distraction that may serve to undermine the precision and the accuracy of the adjudication.

B. *The New Modes of Liability*

As noted above, Article 28N sub-paragraph I includes organizing, directing, facilitating, financing and counselling as forms of commission. These are modes of liability that have not been deployed at the ad hocs or the ICC. Indeed, most of these new modes of liability seem to have been derived or adopted from the UN Convention on Transnational Organized Crime

[82] K. Ambos, 'Article 25' in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 3rd ed, (München/Oxford/Baden-Baden: C.H. Beck Hart Nomos 2016), 979–1029, at 1022: See also Stewart, footnote 28–44 above.

[83] K. Ambos, 'Article 25' in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 3rd ed, (München/Oxford/Baden-Baden: C.H. Beck Hart Nomos 2016), 979–1029, at 1022.

[84] W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 434.

[85] B Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the Ad hoc Tribunals', 12 *International Criminal Law Review* (2012) 1, at 57.

(UNTOC) which requires State parties to adopt legislative measures to establish as specific criminal offences the following conduct: organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.[86]

1. Organizing and Directing

As noted, 'organizing' and 'directing' are forms of liability that are not employed at the ad hocs or at the ICC. Nevertheless, their insertion in Article 28N appears to have been inspired by international and regional instruments that seek to address and criminalize terrorism and organized crime. Organizing and directing, along with facilitating (see below), are contained in UNTOC Article 5(1)(b) that lists modes of liability in relation to an array of organized crime. The Council of Europe Convention on the Prevention of Terrorism also requires state parties to adopt such measures as may be necessary to establish as a criminal offence 'organizing or directing others to commit' the offences of public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism.[87] Research, however, suggests that most states have not chosen to incorporate these particular modes of liability into their criminal legislation and the majority have instead elected to utilize more classic modes of liability such as aiding and abetting.[88]

Undoubtedly, although there are lessons to be learnt from the ad hocs and the ICC, these 'new' modes of liability will require novel and extensive judicial interpretation if they are to be useful. Although organizing is not a form of liability at the ad hocs or the ICC, the conduct encapsulated appears to be the same as, or closely resembles, that captured by the 'planning' mode of liability deployed at the ad hocs. Organizing is commonly defined as making arrangements for something to happen.[89] According to the ad hocs' jurisprudence, an individual may be held liable when he did not physically commit a crime but participated in its planning. Planning is defined as one or several persons contemplating the commission of a crime at both the

[86] Art. 5(1) (b) which states that each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (. . .) (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

[87] *Council of Europe Convention on the Prevention of Terrorism*, 2005, Council of Europe Treaty Series No.196, Art. 9.

[88] See e.g. Art. 234a Criminal Code of Albania; Art. 109 Criminal Code of Bulgaria; Art. 11 Cyprus Combating Terrorism Act of 2010.

[89] Cambridge Dictionary. Available online at: http://dictionary.cambridge.org/dictionary/british/organize?q=organise.

preparation and execution phases.[90] The *actus reus* of planning requires that one or more persons design the criminal conduct that is later perpetrated. The planning should have been a factor substantially contributing to the criminal conduct.[91] The required *mens rea* is the intent to plan the commission of the crime or, at a minimum, the awareness of a substantial likelihood that a crime will be committed in the execution of that plan.[92] An accused cannot be charged with both planning and committing (or ordering) on the same facts. However, planning may be considered an aggravating circumstance.[93]

Similar convergence and overlaps may be seen with regard to Article 28N's 'directing' mode of liability. Directing appears to be the same as ordering someone, especially officially,[94] and this appears to be similar to, or the same as, 'ordering' (as commonly applied at the ad hocs and the ICC). At the ad hocs, responsibility for ordering requires proof that a person in a position of authority used that authority (*de jure* or *de facto*) to instruct another to either commit an offence that in fact occurs or is attempted or perform an act or omission in the execution of which a crime is carried out.[95] The order must have been a factor substantially contributing to the physical perpetration of a crime or underlying offence.[96] The ICC has taken a similar approach.[97]

[90] Judgment, *Akayesu* (ICTR-96–4-T), Trial Chamber, 2 September 1998, §.480, reiterated in Judgment, *Krstic* (IT-98–33-T); Trial Chamber, 2 August 2001, § 601; Judgment, *Blaškić* (IT-95–14-T), Trial Chamber, 3 March 2000, § 279; Judgment, *Kordić and Cerkez* (IT-65–14/2), Trial Chamber, 26 February 2001, § 386; and Judgment, *Naletilić et al.* (IT-98–34-T), Trial Chamber, 31 March 2003, § 59. The Rome Statute does not contain a specific planning liability.

[91] Judgment, *Kordić and Cerkez* (IT-65–14/2-A), Appeals Chamber, 17 December 2004, § 26; Judgment, *Limaj et al.* (IT-03–66-T), Trial Chamber, 30 November 2005, § 513; Judgment, *Dragomir Milosević* (IT-98–29/1-T), Trial Chamber, 12 December 2007, § 956.

[92] Judgment, *Kordić and Cerkez* (IT-65–14/2-A), Appeals Chamber, 17 December 2004, § 31; Judgment, *Limaj et al.* (IT-03–66-T), Trial Chamber, 30 November 2005, § 513.

[93] Judgment, *Stakić* (IT-97–24-T), Trial Chamber, 29 October 2003, § 443; Judgment, *Dragomir Milosević* (IT-98–29/1-T), Trial Chamber, 12 December 2007, § 956.

[94] Cambridge Dictionary. Available online at: http://dictionary.cambridge.org/dictionary/british/direct.

[95] Judgment, *Kordić and Cerkez* (IT-65–14/2-A), Appeals Chamber, 17 December 2004, § 28; Judgment, *Limaj et al.* (IT-03–66-T), Trial Chamber, 30 November 2005, § 515; Judgment, *Semanza* (ICTR-97–20-A), Appeals Chamber, 20 May 2005, § 361; Judgment, *Muhimana* (ICTR-9501B-T), Trial Chamber, 28 April 2005, § 505; Judgment, *Karera* (ICTR-01–74-A) Appeals Chamber, 2 February 2009, § 211; Judgment, *Nahimana et al.* (ICTR-99–52-A) Appeals Chamber, 28 November 2007, § 481.

[96] Judgment, *Milutinović et al.* (IT-05–87-T), Trial Chamber, 26 February 2009, § 88; Judgment, *Strugar* (IT-01–42-T), Trial Chamber, 31 January 2005, § 332.

[97] Decision on the Prosecutor's Application under Article 58, *Mudacumura* (ICC-01/04–01/12), Trial Chamber, 13 July 2012, § 63, see also Decision on the Confirmation of Charges, *Natanga* (ICC-01/04–02/06) Pre-Trial Chamber, 9 June 2014, § 145.

In addition, the accused need only instruct another to carry out an act or engage in an omission – and not necessarily a crime or underlying offence per se – if he has the intent that a crime or underlying offence be committed in the execution of the order, or if he is aware of the substantial likelihood that a crime or underlying offence will be committed.[98] The ICC similarly requires the person to be at least aware that the crime would be committed in the ordinary course of events as a consequence of the execution or implementation of the order.[99]

2. Facilitation

In international criminal law, facilitation does not constitute a stand-alone mode of liability but is closely related to, or the same as, the concept of aiding and abetting: 'mere' facilitation may suffice for aiding and abetting.[100]

Similar to the inclusion of 'organizing' and 'directing', Article 28N's adoption of 'facilitation' appears to have been inspired by UNTOC and the need for modes of responsibility suited for the prosecution of specified crimes such as terrorism, trafficking in persons or drugs. As noted above, Article 5(1)(b) states that each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (. . .) (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group. However, likewise, the Convention does not offer any insight into the essential constituent elements, preferring to allow States a degree of flexibility in transposing the provision into their domestic legislation. A study of a selection of 15 countries suggests that very few countries have opted to rely upon facilitation as a specific mode of liability and instead rely on the aiding and abetting mode of liability.[101]

[98] Judgment, *Milutinović et al.* (IT-05–87-T), Trial Chamber, 26 February 2009, § 85, fn. 94

[99] Arrest Warrant Decision *Mudacumura* (ICC-01/04–01/12–1-Red) Pre-Trial Chamber, § 63, see also Decision on the Confirmation of Charges, *Natanga* (ICC-01/04–02/06) Pre-Trial Chamber, 9 June 2014, § 145.

[100] Judgment, *Orić* (IT-03–68-T), Trial Chamber, 30 June 2006, §§ 271–2. *See also* Article 25(3)(c) ICCSt.

[101] Among 15 countries, facilitation was only found in 2 criminal legislations (Spain and Germany). The other 13 did not contain facilitation as a specific accessory mode of liability (France, Ukraine, the United States, Poland, the Netherlands, Norway, Estonia, Austria, Albania, Portugal, Sweden, Croatia, Finland). Several domestic criminal codes consider an accomplice any person who aided or abetted the principal perpetrator(s) through acts that facilitated the crime: Art. 66, Belgium Criminal Code; Art. 121–7 French Criminal Code, Art. 27 Criminal Code of Ukraine and §2, US Criminal Code, Art. 18(3), Polish Penal Code, Sections 48 and 49, Dutch Criminal Code.

3. Financing

In international criminal law, financing is not considered as a mode of liability per se. On the contrary, it is generally an act or conduct that constitutes a way or form of aiding and abetting the crime. An emblematic example may be seen in the *Stanišić and Simatović* case at the ICTY wherein the accused are charged with aiding and abetting war crimes and crimes against humanity for, *inter alia*, allegedly financing training camps and special units of the Republic of Serbia State Security and other Serb Forces.[102]

Similar to the above-mentioned modes of liability, the inclusion of 'financing' within Article 28N appears to be inspired by the introduction of an array of economic crimes within the AU Statute, such as terrorism, trafficking in humans or drugs, and piracy. The UN Convention for the Suppression of the Financing of Terrorism observes that the 'financing of terrorism is a matter of grave concern to the international community as a whole' and states that 'any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used. . .'.[103] Recently, on 31 March 2017, the European Union took a similar approach; publishing Directive 2017/541 on combating terrorism, thereby imposing on member states the obligation to criminalize the financing of terrorism.[104] The Directive states, *inter alia*, that 'criminalization should cover not only the financing of terrorist acts, but also the financing of a terrorist group, as well as other offences related to terrorist activities, such as the recruitment and training, or travel for the purpose of terrorism, with a view to disrupting the support structures facilitating the commission of terrorist offences.'[105]

Financing terrorism is defined as providing or collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the

[102] Third Amended Indictment, *Stanišić and Simatović* (ICTY-03–69-T), 10 July 2008.

[103] *International Convention for the Suppression of the Financing of Terrorism*, General Assembly Resolution 54/109 of 9 December 1999, Art. 2.

[104] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88 of 31/3/2017, at 6, available online at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.088.01.0006.01.ENG&toc=OJ:L:2017:088:FULL.

[105] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88 of 31/3/2017, at 6, § 14.

knowledge that they are to be used, in full or in part, to commit, or to contribute to the commission of, any of specific offences such as terrorist offences and offences related to a terrorist group and offences related to terrorist activities (i.e. public provocation to commit a terrorist offence, recruitment or providing training for terrorism).[106] For certain offences, such as terrorist offences, it is not necessary that the funds be in fact used, in full or in part, to commit, or to contribute to the commission of, any of those offences, nor is it required that the offender knows for which specific offence or offences the funds are to be used.[107]

Thus, one can see where the drafter of Article 28N was headed. However, less clear is its value – particularly in light of the implicit incorporation of financing at the ad hocs as one of a range of similarly incriminating acts (alongside such acts as the provision of logistics, training or propaganda) alleged to support terrorism. It appears as if the drafters, without considering need or utility, merely adopted the literal terms of the UN Convention for the Suppression of the Financing of Terrorism and other similar international agreements thereby creating a 'new' liability that is at best duplicative.

4. Counselling

Although this mode of liability is new in international criminal law, it has been widely used by national jurisdictions,[108] and is also contained in several African Criminal Codes (e.g. Ghana,[109] Kenya,[110] Tanzania,[111] Nigeria[112] and Zambia[113]). For example, under the United Kingdom (UK) Serious Crime Act 2007, a person may become a party to a crime as a secondary party (who aids, abets, counsels or procures the commission of an offence).[114]

However, the mode of liability appears to overlap substantially with abetting as well as instigating that, as argued above, might itself be

[106] Art. 11(1) Directive (EU) 2017/541.
[107] Art. 11(1) Directive (EU) 2017/541.
[108] E.g. Section 11(2) 1995 Australian Criminal Code; Sections 4(1.1) and 6(1.1) Crimes Against Humanity and War Crimes Act 2000 (Canada); Section 8 UK Accessories and Abettors Act 1861; Section 2, Title 18 US Criminal Code.
[109] Section 20 Criminal Code of Ghana, 1960 (Act 29).
[110] Section 20 Penal Code 2012 of Kenya (Chapter 63).
[111] Section 22 Penal Code 1981 of Tanzania (Chapter 16).
[112] Section 529 Criminal Code Act of Nigeria (Chapter 77) (1990).
[113] Section 2 Penal Code (Amendment) Act of Zambia, 2012 [No. 1 of 2012].
[114] N. Jain, 'The Control Theory of Perpetration in International Criminal Law', 12 *Chi. J. Int'l L.* (2013) 159, at 156.

considered as an umbrella term that also encompasses incitement and encouragement. UK courts, for example, have accepted that counselling and abetting were very similar. In *Attorney General's Reference (No 1 of 1975)*, it was held that a meeting of minds between two persons was necessary to hold someone liable for abetting or counselling a crime.[115] While abetting involves some form of encouragement communicated to and known by the principal to commit the crime (before or during the act), counselling refers to conduct prior to the commission of the crime such as advising on an offence or supplying information necessary to commit the offence.[116] Counselling involves 'advising, soliciting, encouraging, or threatening the principal to commit an offence'. In Canada, a similar approach has been taken: counselling involves 'actively inducing'.[117] It includes procuring, soliciting or inciting.[118]

Nevertheless, it might be argued that the Article 28N's term 'counselling' evokes a particular type of instigation and therefore may in turn have a useful delineating and expressive purpose. It may help to capture conduct and express specific wrongdoing that is particularly relevant for the new financial crimes, such as the liability of a lawyer or accountant who knowingly provides advice in furtherance of money laundering or corruption. However, in the context of Article 28N and the many new modes of liability, some doubt must arise whether another mode of liability adds to the confusion or will prove to be of real benefit in delineating and prosecuting specific conduct or otherwise promoting fair labelling. As with many of these concerns, only time and practical adjudication will tell.

C. *The Classic Modes of Liability in International Criminal Law*

1. Aiding and Abetting

Article 28N includes the aiding and abetting mode of liability. It does not elaborate on the constituent elements. Its definition is limited to the statement that an offence is committed by any person who, in relation to any of the

[115] *Attorney General's Reference (No 1 of 1975)* [1975] 1 QB 773 (CA), 779.
[116] N. Jain, 'The Control Theory of Perpetration in International Criminal Law', 12 *Chinese Journal of International Law* (2013) 159, at 160.
[117] *R* v. *Sharpe* [2001] SCC 2, .56.
[118] Section 22(3) Canadian Criminal Code.

crimes or offences provided for in the Statute, aids or abets the commission of any of the offences set forth in the Statute.

Aiding and abetting has been commonly used by the prosecution at the ad hocs and will likely be frequently used at the ICC in its future trials. Similarly, the Statutes of the ad hocs and the ICC include aiding and abetting as a form of liability but without elaboration. However, those terms and the way in which the ad hocs have approached the liability provide a number of lessons for any future AU Court.

The ad hocs and the ICC Statutes define the mode of liability differently. The ad hocs' Statutes consider that a person who aided and abetted in the planning, preparation or execution of a crime shall be individually responsible for the crime.[119] The Rome Statute states that:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.[120]

The Rome Statute definition appears to contain additional elements: 'for the purpose of facilitating', 'otherwise assists', 'attempted' and 'including providing the means'. There is little guidance thus far concerning how the ICC will interpret these defining elements. Although two accused have been recently convicted of aiding and abetting or otherwise assisting the commission of the offence of presenting false evidence and corruptly influencing witnesses in the recent contempt case in *Prosecutor* v. *Bemba Gombo et al.*, the ICC judges did not provide any real insight into Article 25(3)(c).[121]. In *Blé Goudé*, the ICC provided the following clarification: 'In essence, what is required for this form of responsibility is that the person provides assistance to the commission of a crime and that, in engaging in this conduct, he or she intends to facilitate the commission of the crime.'[122]

In contrast, the ad hocs have clarified the basic elements of this mode of liability. The ad hocs define the *actus reus* of aiding and abetting as carrying out acts to assist, encourage or lend moral support to the commission of a

[119] Art. 7(1) ICTYSt and Art. 6(1) ICTRSt.
[120] Art. 25(3) (c) ICCSt.
[121] Judgment, *Bemba Gombo et al.* (ICC-01/05–01/13), Trial Chamber, 19 October 2016.
[122] Decision on the confirmation of charges against Charles Blé Goudé, *Blé Goudé* (ICC-02/11–02/11), Pre-Trial Chamber; 11 December 2014, § 167.

certain specific crime and this support has a substantial effect upon the perpetration of the crime.[123] The criminal participation must have a direct and substantial effect on the commission of the offence.[124] In other words, 'the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed'.[125] The ICTY has interpreted the notion of 'substantial contribution' in a broad way by including encouragement of the perpetrator or tacit approval.[126]

However, as the debate concerning whether 'specific direction' was part of international customary law and an element of aiding and abetting shows, the development, or clarification, of the elements of aiding and abetting at the ad hocs has not been without controversy. On the contrary, in the *Perišić* case, the ICTY Appeals Chamber considered whether specific direction was an element of aiding and abetting. After reviewing the ICTY and ICTR case law, it concluded that specific direction was an element of the *actus reus* of aiding and abetting.[127] As the Chamber explained, the element of specific direction establishes a culpable link between assistance provided by an accused and the crimes of principal perpetrators.[128] The Chamber further explained that for acts geographically or otherwise proximate to the crimes of principal perpetrators, specific direction might be demonstrated implicitly through discussion of other elements of aiding and abetting liability, such as substantial contribution. However, where an aider and abettor is remote from the crimes the other elements of aiding and abetting may not be sufficient to establish specific direction. In such cases, specific direction should be specifically considered.[129]

However, this decision was highly controversial and subsequently reversed by ICTY Appeals Chamber decisions. In 2014, in the *Šainović et al.* case, the Appeals Judgment concluded that 'specific direction' was not an element of aiding and abetting liability 'accurately reflecting customary international law and the legal standard that has been constantly and consistently applied in

[123] Judgment, *Blagojević and Jokić* (IT-02–60-T), Trial Chamber, 17 January 2005, § 726; Judgment, *Limaj et al.* (IT-03–66-T), Trial Chamber, 30 November 2005, § 517.
[124] Judgment, *Delalic et al.* (IT-96–21), Trial Chamber, 16 November 1998, § 326; Judgment, *Furundzija* (IT-95–17/1-T), Trial Chamber, 10 December 1998, §§ 223, 234; Judgment, *Aleksovski*, (IT-95–14/1-T), Trial Chamber, 25 June 1999, § 129.
[125] Judgment, *Tadić* (IT-94–1-A), Appeals Chamber, 15 July 1999, § 688.
[126] Judgment, *Brđanin* (IT-99–36-A), Appeals Chamber, 3 April 2007, § 273.
[127] Judgment, *Perišić* (IT-02–81-A), Appeals Chamber, 28 February 2013, § 36.
[128] Judgment, *Perišić* (IT-02–81-A), Appeals Chamber, 28 February 2013, § 37 citing to Judgment, *Blagojević and Jokić* (IT-02–60-A), Appeals Chamber, 9 May 2007, § 189; Judgment, *Tadić* (IT-94–1-A), Appeals Chamber, 15 July 1999, § 229; Judgment, *Rukundo* (ICTR-2001–70-A), Appeal Judgment, 20 October 2010, §§ 48–52.
[129] Judgment, *Perišić* (IT-02–81-A), Appeals Chamber, 28 February 2013, §§ 39–40.

determining aiding and abetting liability.'[130] The Appeals Chamber noted that, prior to the *Perišić* Appeals Judgment, 'no independent specific direction requirement was applied by the Appeals Chamber to the facts of any case before it'.[131] The Appeals Chamber affirmed that 'under customary international law, the *actus reus* of aiding and abetting consists of practical assistance, encouragement, or moral support with a substantial effect on the perpetration of the crime'.[132] Recently, the ICTY Appeals Chamber in the *Stanišić and Simatović* case re-affirmed the *Šainović* ruling overturning decisions that rested upon the application of this element.[133]

With regards to the *mens rea*, the ad hocs determined that an aider and abettor should have known that his acts would assist in the commission of the crime by the principal perpetrator and must be aware of the 'essential elements' of the crime. It does not require that he share the intention of the principal perpetrator of such crime.[134] The ICTY recognized that knowledge is an element of aiding and abetting under customary international law.[135] However, it is not necessary that the aider and abettor knew the precise crime that was intended or actually committed, as long as he was aware that one or a number of crimes would probably be committed, and one of these crimes was in fact committed.[136]

As noted above, Article 25(3)(c) of the Rome Statute further requires that the assistance be made 'for the purpose of facilitating the commission of [the] crime', thus introducing an additional subjective threshold to the ordinary *mens rea* requirement of aiding and abetting.[137] This new element departs from customary international law as considered and determined in the *ad*

[130] Judgment, *Šainović et al.* (IT-05–87-A), Appeals Chamber, 23 January 2014, §§ 1649–50. See also, Judgment *Mrkšić and Šljivančanin* (IT-95–13/1-A), Appeals Chamber, 5 May 2009, § 159; confirmed by Judgment, *Milan Lukić and Sredoje Lukić* (IT-98–32/1-A) Appeals Chamber, 4 December 2012, § 424.

[131] Judgment, *Šainović et al.* (IT-05–87-A), Appeals Chamber, 23 January 2014, § 1651.

[132] Judgment, *Šainović et al.* (IT-05–87-A), Appeals Chamber, 23 January 2014, § 1649.

[133] Judgment, *Stanišić and Simatović* (IT-03–69-A) Appeals Chamber, 9 December 2015, §§ 104–7.

[134] Judgment, *Milan Lukić and Sredoje Lukić* (IT-98–32/1-A) Appeals Chamber, 4 December 2012, § 428; Judgment, *Blagojević and Jokić* (IT-02–60-T), Trial Chamber, 17 January 2005, § 727; Judgment, *Limaj et al.* (IT-03–66-T), Trial Chamber, 30 November 2005, § 518; Judgment, *Krnojelac* (IT-097–25-A) Appeals Chamber, 17 September 2003, § 51.

[135] Judgment, *Šainović et al.* (IT-05–87-A), Appeals Chamber, 23 January 2014, § 1649.

[136] Judgment, *Strugar* (IT-01–42-T), Trial Chamber, 31 January 2005, § 350; Judgment, *Haradinaj et al.* (IT-04–84-A), Appeals Chamber, 19 July 2010, § 58.

[137] K. Ambos, 'Article 25' in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 3rd ed, (München/Oxford/Baden-Baden: C.H. Beck Hart Nomos 2016), 979–1029, at 1009.

hocs' case law detailed above. As outlined above, in the *Blé Goudé* case, the ICC stated that: 'what is required for this form of responsibility is that the person intends to facilitate the commission of the crime.'[138]

Whether this interpretation of 'purpose' is wholly justified will remain an ongoing debate for many years. However, what is plain is that 'purpose' implies a subjective element stricter than mere knowledge that the accomplice aided or abetted the commission of the crime.[139] This higher threshold however only refers to the act of facilitation, not the crime itself. Accordingly, this version of aiding and abetting requires a double mental element: one for the act of assistance and one for the crime.[140]

Given Article 28N's failure to elaborate on the elements of the aiding and abetting mode of liability, it is not clear what path will be taken by the AU Court to its constituent elements. As the experience at the ICTY has shown, international courts have considerable discretion in interpreting the plain words of a statute. Given that Article 28N fails to proffer any meaningful insight into the constituent elements of aiding and abetting, any future AU Court have considerable room to decide whether to opt for the ICC's more demanding approach – requiring a demonstration of the purpose of facilitation of the crime – or the ICTY's 'purposeless' approach.

INSTIGATING – INCITING Like the ad hocs and ICC statutes, Article 28N includes both incitement and instigation. However, although the ad hocs' and ICC statutes provide for both concepts, they draw a distinction between 'incitement or instigation generally and direct and public incitement to genocide'.[141]

[138] Decision on the confirmation of charges against Charles Blé Goudé, *Blé Goudé* (ICC-02/11–02/11), Pre-Trial Chamber, 11 December 2014, § 167.

[139] K. Ambos, 'Article 25' in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 3rd ed, (München/Oxford/Baden-Baden: C.H. Beck Hart Nomos 2016), 979–1029, at 1009; A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002), at 801.

[140] K. Ambos, 'Article 25' in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 3rd ed, (München/Oxford/Baden-Baden: C.H. Beck Hart Nomos 2016), 979–1029, at 1009; A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002), at 801. *See also* J. Stewart, 'An Important New Orthodoxy on Complicity in the ICC Statute?' (2015) available online at http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/; T. Weigend, 'How to Interpret Complicity in the ICC Statue' (2014), available online at: http://jamesgstewart.com/how-to-intepret-complicity-in-the-icc-statute/.

[141] W. K. Timmermann, 'Incitement in international criminal law', 88 *International Review of the Red Cross* (2006), 823, at 838, available online at www.icrc.org/eng/assets/files/other/irrc_864_timmermann.pdf.

While the first category (incitement/instigation)[142] is considered as encompassing accessory modes of liability (punishable only where it leads to the actual commission of an offence intended by the instigator[143]), the second category (direct and public incitement)[144] has been held to be an inchoate crime only applicable to the crime of genocide.[145]

The AU Statute fails to draw these distinctions, namely incitement is only included as a mode of liability (first category). Unlike the AU Statute, the ad hocs and the ICC statutes expressly refer to the inchoate crime of direct and public incitement to commit genocide.[146] Incitement is only mentioned once in the AU Statute, as the first in a long line of modes of liability that include instigating, organizing, facilitating and financing.

Turning to the potential interpretation of this mode of liability, the ad hocs' jurisprudence determines that conduct that constitutes incitement is also encompassed by instigation. Instigating has been defined at the ad hocs as 'prompting', 'urging or encouraging' another to commit an offence.[147] In sum, instigating requires acts that influence the direct perpetrator by inciting, soliciting or otherwise inducing him to commit the crime.[148]

As noted above, although the Rome Statute does not expressly refer to instigating, inducing and soliciting have been interpreted as substantially

[142] See Art. 7(1) ICTYSt and Art. 6(1) ICTRSt. Although the Rome Statute does not expressly refer to instigation, inducing and soliciting in Article 25(3) (b) have been interpreted as covering the same substantial ground. See Decision on the confirmation of charges against Laurent Gbagbo, *Laurent Gbagbo* (ICC-02/11–01/11), Pre-Trial Chamber, 12 June 2014, §§ 242–243.

[143] Judgment, *Musema* (ICTR-96–13), Appeals Chamber 16 November 2001, § 120; Judgment, *Rutaganda*, (ICTR-96–3), Trial Chamber, 6 December 1999, § 38; Judgment, *Ndindabahizi*, (ICTR-2001–71-I), Trial Chamber, 15 July 2004, § 456; Decision on Motions for Judgment of Acquittal, *Bagosora et al.* (ICTR-98–41-T), Trial Chamber, 2 February 2005, § 17. See also W. K. Timmermann, 'Incitement in International Criminal Law', *88 International Review of the Red Cross* (2006), 823, at 839, available online at www.icrc.org/eng/assets/files/other/irrc_864_timmermann.pdf.

[144] See Art. 4(3) (c) ICTYSt, Art. 2(3) (c) ICTRSt, and Art. 25(3) (e) ICCSt.

[145] W. K. Timmermann, 'Incitement in International Criminal Law', *88 International Review of the Red Cross* (2006), 823, at 839, available online at www.icrc.org/eng/assets/files/other/irrc_864_timmermann.pdf.

[146] Art. 4(3) (c) ICTYSt, Art. 2(3) (c) ICTRSt, and Art. 25(3) (e) ICCSt.

[147] Judgment, *Akayesu* (ICTR-96–4-T), Trial Chamber, 2 September 1998, § 482; Judgment, *Blaškić* (IT-95–14-T), Trial Chamber, 3 March 2000, § 280; Judgment, *Krstic* (IT-98–33-T); Trial Chamber, 2 August 2001, § 601, Judgment, *Kordić and Cerkez* (IT-65–14/2), Trial Chamber, 26 February 2001, § 387; Judgment, *Bagilishema* (ICTR-95– 1 A-T), Trial Chamber, 7 June 2001, § 30. At the ICC, inducing and soliciting are defined as 'prompting another commit a crime'. Decision on the Confirmation of Charges, *Bemba Gombo et al.* (ICC-01/05–01/13) Pre-Trial Chamber, 11 November 2014, § 34.

[148] Judgment, *Orić* (IT-03–68-T), Trial Chamber, 30 June 2006, § 271.

covering the same ground.[149] In *Harun*, the ICC considered inducing equivalent to inciting.[150]

Whilst it is sufficient at the ad hocs to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime,[151] the ICC requires the inducement (instigation) to involve exertion of influence over another person to commit a crime and the existence of a *direct effect* on the commission of the crime.[152] An analysis of the case law at the ICC suggests that the 'direct effect' criterion is the same as the ad hoc's 'substantial effect' criterion.[153] At both the ad hocs and the ICC, it needs to be shown that the accused should have been aware of the likelihood that the commission of a crime would be a probable consequence of his acts.[154]

In sum, the case law of the ad hocs and the ICC suggests that instigating (as a mode of liability) may be considered to be an umbrella term that includes inciting/inducing the crime. The inclusion of both incitement and instigation in Article 28N appears to disregard this jurisprudential history in favour of more duplication.

2. Joint (Principal and Accessory) Liability

Article 28N appears to address crimes committed as part of joint plans involving various masterminds and physical perpetrators. It states, *inter alia*, that:

> An offence is committed by any person who, in relation to any of the crimes or offences provided for in this Statute:

[149] Decision on the confirmation of charges against Laurent Gbagbo, *Laurent Gbagbo* (ICC-02/11–01/11), Pre-Trial Chamber, 12 June 2014, §§ 242–243.

[150] Warrant of Arrest for Ahmad Harun, *Harun* (ICC-02/05–01/07–2), Pre-Trial Chamber, 28 April 2007, § 353. See also S. Finnin, *Elements of Accessorial Modes of Liability: Article 25(3) (b) and (c) of the Rome Statute of the International Criminal Court*, (Leiden: Martinus Nijhoff Publishers, 2012), at 60.

[151] Judgment, *Kordić and Cerkez* (IT-65–14/2-A), Appeals Chamber, 17 December 2004, § 27; Judgment, *Limaj et al.* (IT-03–66-T), Trial Chamber, 30 November 2005, § 514; Judgment, (IT-03–68-T), Trial Chamber, 30 June 2006, § 274; Judgment, *Nahimana et al.* (ICTR-99–52-A), Appeals Chamber, 28 November 2007, § 480.

[152] Decision on the Confirmation of Charges, *Ntaganda* (ICC-01/04–02/06) Pre-Trial Chamber, 9 June 2014, § 153.

[153] M. Jackson, *Complicity in International Law*, (Oxford University Press, 2015), 67.

[154] Judgment, *Kordić and Cerkez* (IT-65–14/2-A), Appeals Chamber, 17 December 2004, § 32; Judgment, *Nahimana et al.* (ICTR-99–52-A), Appeals Chamber, 28 November 2007, § 480; Judgment, *Nchamihigo* (ICTR-2001–63-A), Appeals Chamber, 18 March 2010, § 61. See Decision on the Confirmation of Charges, *Natanga* (ICC-01/04–02/06) Pre-Trial Chamber, 9 June 2014, § 153.

> i. Incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, ***co-principal***, agent or accomplice in any of the offences set forth in the present Statute;
> (. . .)
> iii. Is an accessory before or after the fact or in any other manner participates in a ***collaboration*** or conspiracy to commit any of the offences set forth in the present Statute.[155]

This aspect of Article 28N may represent some form of tacit recognition of the experience of the ad hocs and the ICC and international criminal law in general, namely that in most instances cases are likely to be largely focused upon crimes and accountability involving criminal plans, collective action and the examination of 'a multi-perpetrator setting'.[156] Modern international criminal law has continuously wrestled with the collective nature of crime involving multiple masterminds and many physical perpetrators that make it difficult to isolate the conduct of each accused.[157]

As a consequence, this area of international criminal law has given rise to a degree of judicial innovation that has led to understandable critique and controversy.[158] Indeed, arguably, this area is the most contentious area of substantive international criminal law.[159] In sum, to take into account the manner in which superiors or individuals remote from the crimes actually operate, the ad hocs and the ICC have sought to develop expansive interpretations of the notion of commission. However, these hand-made developments have raised legitimate due process concerns, such as those revolving around fundamental principles of law such as *nullum crimen sine lege* and *nulla poena sine lege*.[160] The AU Court will have to grapple with these same issues.

[155] Emphasis added.

[156] S. Wirth, 'Committing Liability in International Criminal Law' in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009), at 329.

[157] S. Wirth, 'Committing Liability in International Criminal Law' in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009), at 329.

[158] *See* J. D. Ohlin, 'Joint Intentions to Commit International Crimes', Vol. 11 No. 2, *Cornell Law Faculty Publications Paper* 169, at 694; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, (Portland: Hart Publishing, 2009), at 29, ft.103; B. Swart, 'Modes of International Criminal Liability', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, (Oxford: Oxford University Press, 2009), at 92.

[159] J. D. Ohlin, 'Joint Intentions to Commit International Crimes', Vol. 11 No. 2, *Cornell Law Faculty Publications Paper* 169, at 694.

[160] Art. 15 International Covenant on Civil and Political Rights. See also Art. 11(2) Universal Declaration of Human Rights; Arts 22 and 23 ICCSt. See 'Commentary of the Rome Statute: Part 3', *Case Matrix Network*, available online at: www.casematrixnetwork.org/cmn-

As will be discussed below, in light of the drafting, the path through many of these thorny issues is far from clear.

Firstly, it is important to note that international criminal law has not arrived at a universally accepted doctrine or approach to these collective criminal actions. Each attempt has been widely criticized and little agreement seems to exist on the most appropriate model to prosecute collective crimes. There are three main doctrines that have been used at the international level: conspiracy (inchoate crime), JCE and co-perpetration (modes of liability). These will be briefly considered below.

Conspiracy was introduced into international criminal law through the Nuremberg and Tokyo Charters.[161] However, conspiracy is an inchoate crime (and not a mode of liability).[162] It was a crime that assisted in linking 'several individuals in one general criminal scheme, facilitating their prosecution and making it easier to obtain convictions against the alleged defendants.'[163] The Tokyo tribunal defined conspiracy to wage aggressive or unlawful war as an agreement by two or more persons to commit this crime.[164] The accused must have participated or contributed in the aggressive war. Additionally, the accused must have had knowledge of the conspiracy's aggressive aims and the special intention to support the objects of the conspiracy.[165] Both the Nuremberg and Tokyo tribunals restricted conspiracy to crimes against peace and rejected its application to other crimes.[166] Conspiracy was later introduced in the ad hocs Statutes in relation to the crime of genocide.[167]

knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, (Portland: Hart Publishing, 2009), at 29, ft.103; B. Swart, 'Modes of International Criminal Liability', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, (Oxford: Oxford University Press, 2009), at 92.

[161] J. R. A. Okoth, *The Crime of Conspiracy on International Criminal Law* (The Hague: Asser Press, 2014), at 3.

[162] Conspiracy was considered as an inchoate crime and not a specific mode of liability, either related to the crime of aggression (Nuremberg and Tokyo) or to the crime of genocide (ICTY/ICTR). In general, the international judges have used it to prosecute complete crimes. See J. R. A. Okoth, *The Crime of Conspiracy on International Criminal Law* (The Hague: Asser Press, 2014), at 143.

[163] J. R. A. Okoth, *The Crime of Conspiracy on International Criminal Law* (The Hague: Asser Press, 2014), at 3.

[164] Judgment, IMTFE, 4 November 1948, in J. Pritchard and S. M. Zaide (eds), *The Tokyo War Crimes Trial*, Vol. 22, at (48, 448).

[165] J. R. A. Okoth, *The Crime of Conspiracy on International Criminal Law* (The Hague: Asser Press, 2014), at 119.

[166] See Judgment, IMTFE, 4 November 1948, in J. Pritchard and S. M. Zaide (eds), *The Tokyo War Crimes Trial*, Vol. 22, at (48, 451).

[167] Art. 4(3) (b) ICTYSt and Art. 2(3) (b) ICTRSt.

In addition, Articles 25(3)(d) of the Rome Statute provides for a new accessory mode of liability for collective actions: the contribution to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. This paragraph was adopted as a compromise with conspiracy and was taken from the 1998 Anti-terrorism Convention.[168] The drafters of the Rome Statute rejected the concept of conspiracy as an inchoate crime and instead adopted a concept of complicity in a group crime as a mode of participation in crime. Conspiracy was deemed as a 'very divisive issue' by the drafters.[169] In the *Katanga* judgement, the Trial Chamber noted that this accessory mode of liability was introduced in the Rome Statute in order to ensure that the accomplices whose conduct do not amount to aiding and abetting are prosecuted before the ICC.[170] It further explained that this mode of liability is not a form of JCE in so far as the accused is only liable for the crimes he contributed to the commission of and not all the crimes part of the common plan.[171] Regarding the level of contribution, the ICC found that the individual criminal responsibility under Article 25(3)(d) needed to reach 'a certain threshold of significance below which responsibility under this provision [did] not arise'.[172] It further held that the contribution must be at least significant.[173]

To hold criminally liable individuals committing collective crimes, the ad hocs developed a new mode of participation, the concept of JCE, a common law influenced doctrine[174] that attempted to capture the collective nature of international crimes. It is a form of commission to assign responsibility to individuals, who did not physically commit the criminal acts but acted with the intent to aid those who did, that arose from an expansive interpretation of

[168] K. Ambos, 'Article 25' in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 3rd ed, (München/Oxford/Baden-Baden: C.H. Beck Hart Nomos 2016), 979–1029, at 1010; A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002), at 802.

[169] W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 437.

[170] Judgment, *Katanga* (ICC-01/04–01/07), Trial Chamber, 8 March 2014, § 1618.

[171] Judgment, *Katanga* (ICC-01/04–01/07), Trial Chamber, 8 March 2014, § 1619.

[172] Confirmation of Charges, *Mbarushimana* (ICC-01/04–01/10) Pre-Trial Chamber, 16 December 2011, §§ 276, 283.

[173] Confirmation of Charges, *Mbarushimana* (ICC-01/04–01/10) Pre-Trial Chamber, 16 December 2011, § 283. *See also* Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), *Katanga* (ICC-01/04–01/07), Trial Chamber, 22 May 2013, § 16.

[174] N. Jain, 'The Control Theory of Perpetration in International Criminal Law', 12 *Chinese Journal of International Law* (2013) 159, at 162.

the word 'committing' under Article 7(1) of the ICTY Statute.[175] In summary, '[w]hoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.'[176] All the participants are equally guilty of the crime regardless of the role each played in its commission.[177]

The doctrine of JCE comprises three forms where accused have associated with other criminal persons, intended to commit a crime, joined others to achieve this goal and made a significant contribution to the commission of the crime. Thus, an individual can be held liable for the actions of other JCE members, or individuals used by them, that further the common criminal purpose (first category of JCE -basic) or criminal system (second category of JCE – systemic or 'concentration camp cases'), or that are a natural and foreseeable consequence of the carrying out of this crime (third category of JCE – extended).

The three forms of JCE share the same *actus reus*, namely (i) a plurality of persons (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute (iii) the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute (physical participation, assistance in, or contribution to, the execution of the common plan or purpose).[178]

Regarding the *mens rea*, each form requires its own elements: JCE I requires proof that all participants shared the same criminal intent. It is necessary to establish that the accused voluntarily participated in the enterprise and intended the criminal result.[179] JCE II requires that the accused must have personal knowledge of the system of ill-treatment (whether proven

[175] See Judgment, *Tadić* (IT-94–1-A), Appeals Chamber, 15 July 1999, §§ 186–90.

[176] Judgment, *Tadić* (IT-94–1-A), Appeals Chamber, 15 July 1999, § 190; Decision on Motion Challenging Jurisdiction, *Ojdanić*, (IT-99–37) Appeals Chamber, 21 May 2003, .20; Judgment, *Krnojelac* (IT-097–25-A) Appeals Chamber, 17 September 2003, §§ 28–32, 73.

[177] Judgment, *Vasiljević* (IT-98–32-T), Trial Chamber, 29 November 2002, § 67; Judgment, *Krnolejac (*IT-97–25-T) Trial Chamber, 15 March 2002, § 82.

[178] Judgment, *Krnojelac* (IT-097–25-A) Appeals Chamber, 17 September 2003, § 31; Judgment, *Tadić* (IT-94–1-A), Appeals Chamber, 15 July 1999, § 227; Judgment, *Blagojević and Jokić* (IT-02–60-T), Trial Chamber, 17 January 2005, § 698; Judgment, *Stakić* (IT-97–24-A), Appeals Chamber, 22 March 2006, § 64; ICTY, Judgment, *Brđanin* (IT-99–36-A), Appeals Chamber, 3 April 2007, § 430.

[179] Judgment, *Blagojević and Jokić* (IT-02–60-T), Trial Chamber, 17 January 2005, § 703; Judgment, *Krnojelac* (IT-097–25-A) Appeals Chamber, 17 September 2003, § 30.

by express testimony or inferred from the accused's position of authority), as well as the intent to further this concerted system of ill-treatment.[180]

For JCE III, a member of the joint criminal enterprise may be held liable for a crime or crimes which he did not physically perpetrate if, having the intent to participate in and further a common criminal design or enterprise, the commission of other criminal acts was a natural and foreseeable consequence of the execution of that enterprise, and, with the awareness that such crimes were a 'natural and foreseeable' consequence of the execution of that enterprise, he participated in that enterprise.[181]

Finally, the ICC has taken a different approach to these 'joint action' challenges. Instead of conspiracy as an inchoate crime or JCE as a mode of liability, the ICC has enunciated the notion of co-perpetration using the concept of control over the crime. This implies that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.[182] The ICC has also expanded this collective mode of liability to include indirect co-perpetration to capture the relationship between co-perpetrators who controlled separate militias, each committing crimes that were part of the common plan.[183]

An in-depth analysis of the merits of each approach to joint action crimes is outside the confines of this Chapter. However, as noted above, there is extensive commentary examining each approach with critics of each and every approach.[184]

[180] Judgment, *Krnojelac* (IT-097–25-A) Appeals Chamber, 17 September 2003, § 32.

[181] Decision on Form of Further Amended Indictment and Prosecution Application to Amend, *Brđanin* (IT-99–36-PT), Pre-Trial Chamber, 26 June 2001, § 30, Judgment, *Blagojević and Jokić* (IT-02–60-T), Trial Chamber, 17 January 2005, § 703; Judgment, *Krnojelac* (IT-097–25-A) Appeals Chamber, 17 September 2003, § 30.

[182] Decision on the Confirmation of Charges, *Lubanga Dyilo* (ICC-01/04–01/06), Pre-Trial Chamber, 29 January 2007, §§ 328–30

[183] Decision on the Confirmation of the Charges, *Katanga and Ngujolo Chui* (ICC-01/04–01/0) Trial Chamber, 30 September 2008, § 493.

[184] See e.g. J. D. Ohlin, 'Organizational Criminality, in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014); J. D. Ohlin, 'Joint Intentions to Commit International Crimes', Vol. 11 No. 2, *Cornell Law Faculty Publications Paper* 169; S. Manacorda and C. Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law, 9 *Journal of International Criminal Justice* (2011) 159; M. Cupido, 'Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration', in E. van Sliedregt, & S, Vasilev (eds), *Pluralism in International Criminal Law*, (Oxford: Oxford University Press, 2014), 128–65; C. Meloni, 'Fragmentation of the Notion of Co-Perpetration in International Criminal Law?'

In sum, conspiracy was extensively criticized and rapidly abandoned. The records of the international tribunals show that the prosecution of conspiracy proved to be a difficult task.[185] As a result, the tribunals adopted a strict approach to the conspiracy charge.[186] These narrow definitions failed to comprehensively encompass the criminal conduct and arguably created a system that permitted defendants to evade criminal responsibility for conduct deserving of it.[187]

Regarding JCE, the lack of distinction between principals and accessories and the foreseeability requirement at the centre of JCE III are considered to be major problems. Commentators argue that the JCE doctrine systematically eviscerates the distinction between principals and accessories. All accused will be convicted of the same thing if they intended to contribute to the common plan.[188] Furthermore, it is correctly argued, JCE III endangers the principle of individual and culpable responsibility by introducing a form of collective liability, or guilt by association.[189] Convictions ultimately rest upon a lowered *mens rea* – a type of recklessness (*dolus eventualis*) and not a clear intent that the crimes be committed or awareness that those crimes were going to be committed.

The ICC concept of (indirect) co-perpetration is thought to reflect a more objective rationale than JCE.[190] Commentators argue that the participants' contribution to a criminal endeavour is defined more precisely.[191] Moreover,

in L. van den Herik and C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2012).

[185] J. R. A. Okoth, *The Crime of Conspiracy on International Criminal Law* (The Hague: Asser Press, 2014), at 143.

[186] J. R. A. Okoth, *The Crime of Conspiracy on International Criminal Law* (The Hague: Asser Press, 2014), at 143.

[187] J. R. A. Okoth, *The Crime of Conspiracy on International Criminal Law* (The Hague: Asser Press, 2014), at 93.

[188] J. D. Ohlin, 'Organizational Criminality, in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), at 107–126.108. See J. D. Ohlin, 'Joint Intentions to Commit International Crimes', Vol. 11 No. 2, *Cornell Law Faculty Publications Paper* 169, at 714–15.

[189] S. Manacorda and C. Meloni, 'Indirect Perpetration Versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law, 9 *Journal of International Criminal Justice* (2011) 159, at 166.

[190] M. Cupido, 'Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration', in E. van Sliedregt, & S, Vasilev (eds), *Pluralism in International Criminal Law*, (Oxford: Oxford University Press, 2014), 128–65, at 128.

[191] C. Meloni, 'Fragmentation of the Notion of Co-Perpetration in International Criminal Law?' in L. van den Herik and C. Stahn (ed.), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2012) 481, at 501.

the concept maintains a distinction between principal and accessory.[192] Only those who had control over the crime would be held liable as perpetrators, the others will be liable as accomplices.

However, a closer examination of these apparent benefits raises serious questions concerning whether the control theory has really improved upon the JCE doctrine in these culpability and legality aspects. Critics argue that the 'control over the crime' approach requires an 'essential' contribution of the perpetrator to the crimes, departing from the 'significant' contribution required for JCE. Commentators have highlighted the difficulty of assessing what constitutes the 'essential contribution', particularly that this 'requires a hypothetical and nearly impossible counterfactual inquiry into whether the defendant's behavior constituted an essential contribution to the crime'.[193]

The *mens rea* requirements of co-perpetration also raise serious culpability issues that mirror some of the concerns with JCE III. Co-perpetrators 'intend' the crime if they are aware of the risk that the physical perpetrators will commit the offence and the co-perpetrators reconcile themselves to this risk or consent to it.[194] As stated by Ohlin, at most this is a form of recklessness/*dolus eventualis*, which closely resembles JCE III.[195] As discussed above, mere awareness even of a high risk that the crime will occur is not sufficient to found liability under JCE I and II.[196] As Ohlin has also correctly concluded, this approach consists of a 'combination of *awareness* of joint control over the crime with an intentionality requirement that is so watered down that the control requirements appears to be doing all the heavy lifting'.[197]

As may be seen from this brief discussion concerning commonly held due process critiques with regard to conspiracy, JCE and co-perpetration, the AU will be required to steer a path through these various approaches to design an

[192] J. D. Ohlin, 'Organizational Criminality', in, E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), 114.

[193] J. D. Ohlin, 'Co-Perpetration: German *Dogmatik* or German Invasion', in Stahn, C., (ed) *The Law and Practice of the International Criminal Court*, (*Oxford*: Oxford University Press, 2015), 517–38, at 527.

[194] Decision on the Confirmation of Charges, *Lubanga Dyilo* (ICC-01/04–01/06), Pre-Trial Chamber, 29 January 2007, § 351.

[195] J. D. Ohlin, 'Joint Intentions to Commit International Crimes', Vol. 11 No. 2, *Cornell Law Faculty Publications Paper*, 169, at 734.

[196] B Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the Ad hoc Tribunals', (2012) 12 *International Criminal Law Review* 1, at 42.

[197] J. D. Ohlin, 'Joint Intentions to Commit International Crimes', Vol. 11 No. 2, *Cornell Law Faculty Publications Paper* 169, at 724.

appropriate and practical liability that links individuals to crimes of this nature whilst avoiding this entangled history of due process concerns.

However, the drafters of Article 28N have not provided the basis for a firm beginning. Article 28N appears to suffer from a range of problems that provides fertile ground for a range of confused judicial responses to these most complex problems. First, Article 28N does not appear to expressly opt for, or favour, any of these aforementioned approaches. As the ad hocs and the ICC have demonstrated, this fact alone is not an obstacle to developing expanded notions of commission to deal with joint action crimes. However, on the face of Article 28N, the drafters have hamstrung any future deliberation by failing provide a clear indication of what was intended or which option might best be employed at the future AU Court. Instead, the drafting leaves the door open for all of the above.

As discussed above, unlike the ICC, the ad hocs' Statutes failed to articulate any mode of liability that encompassed joint action crimes. Instead, JCE was read into the statutes through a series of creative decisions at the trial and appellate level. Article 28N appears to suffer from the opposite problem and includes a range of definitions that might (or might not) be referencing expanded notions of commission or accessory with a view to encompassing joint action conduct. These include, participation as 'a principal, co-principal, agent or accomplice'; as an 'accessory before or after the fact'; or any individual that 'in any other manner participates in a collaboration or conspiracy to commit any of the offences set forth in the present Statute'. It is therefore difficult, if not impossible, to assess what was in the drafters' mind. The duplication of distinct notions such as the civil law notion of collaboration (also known as *association*) and the common law notion of conspiracy sitting alongside the conduct of 'principals, co-principals, agent or accomplice' is likely to challenge even the best of jurists and academicians, let alone those advocates struggling in the trenches of a future court room.

It appears that the inclusion of conspiracy and collaboration (*association*) in Article 28N was at least in part heavily influenced by Article 6(1)(b)(ii) of the UNTOC. Article 6(1)(b) states that State Parties shall establish as criminal offences the 'participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of [laundering of proceeds of crime].' However, the interpretative guide of the UNTOC explains that the two approaches were not introduced into the instrument with the expectation that both would be transposed into the same domestic law. It was to reflect the fact that some countries had conspiracy in their law, while others had criminal association (*association de*

malfaiteurs) laws and effective transposition of the Convention at the domestic level involved respect for respective legal tradition and culture.[198]

As a means of incorporating differing legal traditions, this latitude makes practical sense. However, including both in a statute, less so. The two concepts have different elements but essentially cover the same conduct. Conspiracy may be shown through mere proof of an intentional agreement to commit serious crimes for the purpose of obtaining a financial or other material benefit. Since most civil law countries do not recognize conspiracy or do not allow the criminalization of a mere agreement to commit an offence, association focuses on the conduct of the accused. It requires proof of the participation in criminal activities and the general knowledge of the criminal nature of the group or of at least one of its criminal activities or objectives.[199] If a person takes part in non-criminal action that nonetheless may be supportive of criminal activities, the knowledge that such involvement will contribute to the achievement of a criminal aim of the group will also need to be established.[200]

In addition to this duplication, the current reference in Article 28N of the AU Statute to 'accessory before or after the fact' and 'participation in any other manner' adds more repetition. Accessory before the fact traditionally encompasses ordering, soliciting or inducing.[201] Therefore, this provision appears to reiterate the accessory modes of liability already detailed in paragraph (i) of Article 28N.

In sum, not only is Article 28N duplicative and confused, it fails to offer any clarity as to what joint liabilities were intended or are favoured. It appears to do little more than leave the entirety of the interpretation of these complex issues to the (unfortunate) judges who will be forced to grapple with these issues in the course of future proceedings with little or no guidance of the drafters' intent.

[198] United Nations Office on Drugs and Crimes, *Legislative Guides for the Implementation of the United Nations Conventional against Transnational Organized Crime and the Protocol Thereto*, (United Nations, 2004) 51.

[199] United Nations Office on Drugs and Crimes, *Legislative Guides for the Implementation of the United Nations Conventional against Transnational Organized Crime and the Protocol Thereto*, (United Nations, 2004) 57–63.

[200] United Nations Office on Drugs and Crimes, *Legislative Guides for the Implementation of the United Nations Conventional against Transnational Organized Crime and the Protocol Thereto*, (United Nations, 2004) 64.

[201] A. Eser, 'Individual Criminal Responsibility' in A. Cassese, P. Gaeta and J. Jone (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I, (Oxford: Oxford University Press, 2002), 767–822, at 767, 795.

D. *Corporate Criminal Liability*

The AU Statute is the first to introduce the concept of corporate criminal liability in international criminal law.

Article 46C

Corporate Criminal Liability

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.
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.

Although it was discussed during the negotiation of the Rome Statute, the French proposal to include corporate criminal liability was rejected by the States.[202] However, several domestic regimes have granted their courts jurisdiction over international crimes committed by corporations. Corporate criminal liability has been recognized in the Anglo-American legal systems since the mid-90s and there has been progressive adoption of laws extending the court's jurisdiction to companies in other legal systems in the last decades.[203] Two surveys of national jurisdictions revealed that over twenty states in America, Europe, Asia, and Oceania (e.g. Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, the United Kingdom and the United States) have adopted laws allowing the prosecution of corporate

[202] W. Schabas, *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability* (London: Cameron May Publishers, 2008) 507.

[203] J. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, (Open Justice Initiative Publication 2012), 79.

entities.[204] Several African states have also adopted corporate criminal liability provisions, such as Ethiopia,[205] Botswana,[206] Kenya,[207] Malawi,[208] Namibia,[209] Rwanda,[210] South Africa[211] and Zimbabwe.[212] As will be discussed below, there have been a variety of approaches with regard to the form and scope of the liability adopted, in sum, vicarious liability, the identification model and the 'organizational' liability framework. An analysis of the various models of criminal liability suggests that the drafters of the AU Statute appear to have intended to design a mode of liability that is close to the Australian 'corporate culture' approach which is a variant of the organizational liability approach. These issues will be discussed below.

1. The Various Models of Corporate Liability in Domestic Legislations

In the common and civil law legal systems, three main types of corporate liability may be distinguished. The common law variant is the vicarious liability, or *respondeat superior*, used in Austria, Ethiopia, Namibia, South Africa, the United States and Zimbabwe. Under this model, any crime committed by individual employees or agents are directly imputed to the corporation provided that the offence was committed in the course of their duties, and intended to benefit the corporation.[213] The *actus reus* and *mens rea*

[204] A. Ramasastry and R. C. Thompson, *Commerce, Crime and Conflict, Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of sixteen Countries*, Fafo (2006), available online at http://biicl.org/files/4364_536.pdf and M. Donaldson and R. Watters, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations*, United Nations Special Representative of the Secretary-General on Human Rights and Business, February 2008, available online at: http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf.

[205] Art. 34, Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004.

[206] §24, Penal Code of Botswana.

[207] §23, Penal Code of Kenya.

[208] §25, Malawian Proceeds of Serious Crime and Terrorist Finance Act No. 11 of 2006.

[209] §356, Penal Code of Namibia, Act No. 25 of 2004.

[210] Art. 33, Penal Code of Rwanda, Organic Law Instituting the Penal Code, No. 01/2012/OL of 2012.

[211] §332, South African Criminal Procedure Act of 1977.

[212] §277, Zimbabwe Criminal Law (Codification and Reform) Act No. 23/2004 of 2004.

[213] See for example J. Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge', 56 *Netherlands International Law Review* (2009) 333, at 337 or O. De Schutter, A. Ramasastry, M. B. Taylor, R. C. Thompson, *Human Rights Due Diligence – The Role of States*, International Corporate Accountability Roundtable (ICAR), the European Coalition for Corporate Justice (ECCJ), the Canadian Network on Corporate Accountability (CNCA), (2012), at 12.

are therefore related to the employee and not the company. A company may however avoid liability by demonstrating that they put in place effective due diligence programmes.[214] For example, in Ethiopia, a corporation can be held liable if a crime has been committed by one of its director or employee in connection with the activities of the corporation.[215] The act of the director or the employee should have been committed with the intent of promoting the interest of the corporation by using unlawful means, by violating its legal duty or by unduly using the corporation as a means.[216]

Another model is the identification model used in Canada, Rwanda and the United Kingdom. Under this model, only the crimes committed by individual senior officers and employees may be imputed to the corporation. The conduct and state of mind of these senior officers and employees is considered as that of the corporation. The definition of senior officer or employee, however, varies between the countries. For example, in the United Kingdom, directors and senior managers are the corporation's 'directing mind and will'.[217] These individuals are considered to be the embodiment of the company.[218] This theory has been widely criticized for being too restrictive and not representative of the horizontal or decentralized decision-making structure of many companies.[219]

The final model is the 'organizational' liability. Under this model, 'a corporation is liable because its "culture", policies, practices, management or other characteristics encouraged or permitted the commission of the offence'.[220] The liability of the company is not only limited to the acts of its employees, senior officials or agents but also applies to the 'corporate culture'. These provisions are 'arguably the most sophisticated model of corporate

[214] O. De Schutter, A. Ramasastry, M. B. Taylor, R. C. Thompson, *Human Rights Due Diligence – The Role of States*, International Corporate Accountability Roundtable (ICAR), the European Coalition for Corporate Justice (ECCJ), the Canadian Network on Corporate Accountability (CNCA), (2012), at 12.

[215] Art. 34, Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004.

[216] Art. 34, Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004.

[217] House of Lords, *Tesco Supermarkets Ltd* v. *Nattrass* (Tesco) [1972] AC 153.

[218] J. Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge', 56 *Netherlands International Law Review* (2009) 333, at 337–8.

[219] J. Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge', 56 *Netherlands International Law Review* (2009) 333, at 338.

[220] M. Donaldson and R. Watters, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations*, United Nations Special Representative of the Secretary-General on Human Rights and Business, February 2008, at 4, available online at: http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf.

criminal liability in the world'.[221] Our research did not identify any African states countries with similar models. Australia appears to be the best example of this model,[222] and will be discussed further below in an attempt to shine light on Article 46C.

Under the Criminal Code of Australia, where an employee, agent or officer of a body corporate, acting within the actual or apparent scope of their employment, or within their actual or apparent authority, commits a crime, the *actus reus* must also be attributed to the body corporate.[223] If intention, knowledge or recklessness is the requisite subjective element, it will only be attributed to the body corporate if that body corporate expressly, tacitly or impliedly authorized or permitted the commission of the offence.[224] Authorization or permission for the commission of a crime may be established on four bases, including where 'a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance'.[225]

The 'corporate culture' model seems to encompass the notion of policy included in the AU Statute. As noted, Article 46C of the AU Statute states that: '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.' This appears to suggest that a company will be directly liable for any criminal act committed in furtherance of the corporate policy.

In this regard, companies may be involved as a perpetrator in international crimes in various contexts. First, direct liability will exist where a company may directly take part in the crime as a perpetrator when the company's general goal is to commit a crime (e.g. money laundering or trafficking in drugs) or indirectly, when, in accomplishing its economic objective, the company commits a crime with intent or knowledge (e.g. corruption, trafficking in persons).[226] These will be discussed below.

[221] M. Donaldson and R. Watters, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations*, United Nations Special Representative of the Secretary-General on Human Rights and Business, February 2008, at 10, available online at: http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf, quoting J. Clough and C. Mulhern, *The Prosecution of Corporations* (Melbourne: Oxford University Press, 2002), at 38. See also, N. Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault', 75 *Journal of Criminal Law* (2011) 414, at 434.

[222] Part 2.5 Australian Criminal Code.

[223] Division 12.2 Australian Criminal Code.

[224] Division 12.3 Australian Criminal Code.

[225] Division 12.3 (2) Australian Criminal Code.

[226] See A. Reggio, 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading with the Enemy" of Mankind', 5 *International Criminal Law Review* (2005) 623, at 653.

2. Principal Corporate Liability

With regards to direct liability, the role of a company usually does not raise complex legal issues.[227] The general principle of the principal liability developed in international criminal law may easily be applied. The company should have directly perpetrated the crime (through its employees, agents or officials) with knowledge and intent.

Intent may be established by proving that it was 'the policy of the corporation to do the act which constituted the offence'.[228] Policy is defined as 'the most reasonable explanation of the conduct of that corporation'.[229] As may be seen, this AU Statute requirement, however, raises a number of potential due process issues. The policy of a company may prove to be difficult to identify. Whilst a wide interpretation of the concept of policy may facilitate the prosecution of corporations, an overly expansive interpretation or acceptance of any reasonable explanation proffered by the Prosecution, will have a substantial impact on fair trial rights and ultimately the legitimacy of such prosecutions.

The Australian Criminal Code provides an interesting way of interpreting the notion of policy so as to ameliorate some of these concerns. To attribute the crime to the corporate culture, the authority to commit an offence should have been given by a high managerial agent of the body corporate. If not, the employee, agent or officer of the body corporate who committed the offence should have believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the company would have authorised or permitted the commission of the offence.[230]

Turning now to the AU concept of knowledge, Article 46C states 'corporate knowledge of the commission of an offence may be established by evidence that the actual or constructive knowledge of the relevant information was possessed within the corporation'. While the Statute requires the corporation to be aware of the crime, this knowledge does not have to be centralized and can be 'divided between corporate personnel'.[231] This last characteristic of the knowledge seems to capture the reality of modern corporate decision-making, which tends to be more horizontal and decentralized. One aspect needs to be

[227] A. Reggio, 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading with the Enemy" of Mankind', 5 *International Criminal Law Review* (2005) 623, at 654.
[228] Art. 46B (2) AUSt.
[229] Art. 46B (3) AUSt.
[230] Division 12.3 (4) Australian Criminal Code.
[231] Art. 46C (4) and (5), AUSt.

further considered: the recipient of the information. Article 46C does not define who should have the information: whether the concepts of 'corporation' and 'corporate personnel' may equate to a mere employee or must be senior officials. Another important question concerns whether it is enough if only one person possesses the required information. The Statute has left these essential points unanswered.

The Australian experience offers some insight into these issues. As outlined in the Criminal Code, a high managerial agent, and not merely any employee in the company, should possess knowledge – except if the latter reported the commission of the crime to a higher ranked agent or the information is widely known among the employees.[232]

Apart from these issues, Article 46C fails to define the physical element of corporate criminal liability. It seems to only require that the conduct reflected the corporation's policy in order for it to be attributable to the company. However, it fails to explain whose action within the corporation may be attributable to the company (employees, agents, board of directors etc.) and the conditions for the attribution of responsibility (whether the particular actor acted in the course of their employment duties, etc.,). This vagueness may be contrasted with Division 12.2 of the Australian Criminal Code, which provides for a degree of specificity on these critical issues: in sum, the physical element of an offence committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, can be attributed to the body corporate.

3. Accomplice Corporate Liability

As a general proposition, apart from principal liability, companies may also be involved in international crimes as accomplices. Generally speaking, a company may contribute to a crime as an accomplice in three different ways. First, the company may act as a *direct accomplice* when it assists the perpetrators in the commission of the crime (e.g. assistance in the transportation of trafficked hazardous waste, financial contribution, or providing (raw or military) material or arms that will or are likely to be used for the commission a crime); as a *beneficial accomplice* when the company benefits from the crimes committed by the perpetrators (e.g. buying diamond, oil or any product whose

[232] Division 12.3 (2) Australian Criminal Code.

production or extraction involved the commission of a crime)[233]; and finally, companies may act as a *silent accomplice* when they fail to 'raise systematic or continuous human rights abuses with the appropriate authorities'[234] (e.g. doing business with a government that has unconstitutionally taken power or with a group involved in drug trafficking). This last category will not be further considered since this complicity has more in common with moral rather than legal culpability. Such complicity does not generally engage criminal liability since the company is not involved in any manner in the commission of the crime.[235]

A comprehensive discussion of each form of accomplice liability as they might relate to corporations is outside the confines of this Chapter. However, as discussed, *actus reus* and *mens rea* requirements vary according to the particular mode of liability. In 2006, the International Commission of Jurists asked eight experts to explore when companies and their officials could be held legally responsible on the basis of accomplice liability. They concluded that aiding and abetting was the form of accomplice liability most relevant to the question of corporate conduct.[236] As outlined above, this chapter seeks to open the discussion and identify preliminary concerns with regard to the various modes of liability in the AU Statute. Therefore, we will briefly discuss this vital accessory mode of liability and some of the problems that may arise in relation to holding corporations to account as accomplices on the basis of Article 46 C.

As discussed, customary international law requires that the aider and abettor made at least a substantial contribution to the principal's act. The act of assistance must have had a substantial effect on the perpetration of the crime e.g., in the case of a company that provides weapons or logistics that enable the perpetrator to commit the crime. This type of action appears relatively straightforward but in practice has not proven to be so. In reality the term 'substantial contribution' is a 'very indeterminate concept' and the

[233] See A. Clapham and S. Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses, Symposium: Holding Multinational Corporations Responsible under International Law', 24 *Hastings International & Comparative Law Review* (2001), 339.

[234] See A. Clapham and S. Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses, Symposium: Holding Multinational Corporations Responsible Under International Law', 24 *Hastings International & Comparative Law Review* (2001), 339.

[235] A. Reggio, 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading with the Enemy" of Mankind', 5 *International Criminal Law Review* (2005) 623, at 694.

[236] International Commission of Jurist, 'Corporate Complicity and Legal Accountability. Volume 2 Criminal Law and International Crimes, (2008), at 36.

identification of the 'relevant proximate causes (of the crimes) among the many causes will depend upon several aspects, including policy decisions'.[237]

This intermingling of causes increases the more the accused's assistance is remote from the crimes. In contradiction to the specificity and certainty that is essential to ensuring respect for the principle of individual culpability, the accused risks being held liable on the basis of the effect of his assistance – namely on what use the principal makes of the aid given – rather than on the basis of his own acts and control. Therefore, convictions may rest on how much the principal used the accused's assistance, which may be entirely beyond the aider's control. The aider will be criminally liable if the perpetrator made significant use of his assistance – no matter how general and removed the assistance was from the criminality, even if the aider took all reasonable steps to prevent the aid being used in furtherance of criminality or intended it to promote only the lawful activities of the principal.

Any new AU Court interpreting Article 46C will need to address these thorny issues, not least of which will be whether, in cases where the aider and abettor is remote from the crimes, the 'specific direction' assessment (discussed above[238]) is an appropriate means of ensuring respect for the principle of individual culpability. As discussed above, according to many experienced commentators and courts, including the present authors, this element is required in cases of remote assistance to enable general assistance to the perpetrator and assistance that is directed specifically at the commission of the crime to be properly distinguished in the confines of complex trial processes. Accordingly, the *actus reus* of aiding and abetting may require sufficient proximity and the *direct linkage* between the aid provided and the relevant crimes.[239]

As discussed in this chapter, this debate touches on whether knowledge that the acts contribute to the commission of the crimes is the only mental element required to establish aiding and abetting. For example, if the AU Court adopts the ICTY and ICTR interpretation (when interpreting Article 46C), then a company officer that knows that the products he sells are likely to be used by the buyer to commit a war crime will be held liable as an aider and abettor, even if he did not intend to commit the crimes. On the other hand,

[237] A. Reggio, 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading with the Enemy" of Mankind', 5 *International Criminal Law Review* (2005) 623, at 671.

[238] The element of specific direction requires the assistance to be specifically directed towards the crime. In such circumstances, it is necessary to establish a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators.

[239] Judgment, *Perišić* (IT-02–81-A), Appeals Chamber, 28 February 2013, § 44.

the ICC's mental element for aiding and abetting appears to require (at least something close to) intent *and* knowledge.[240] Mere awareness that the accused's assistance will be used for the commission of the crime will not be sufficient.[241] Adoption of the ICC's approach will therefore place additional demands upon the Prosecution and make a conviction less likely. On the other hand, as the following domestic cases discussed below show, the application of the knowledge threshold to Article 46C would ensure a more all-encompassing liability approach but not necessarily one that stays on the right side of the principle of culpability.

The Dutch case of *van Anraat* is of particular relevance. Although the accused was the businessman and not the company, the findings of the Court provides an interesting insight into these issues and potential manifestations of corporate criminal liability. Van Anraat was charged with complicity in war crimes. He was accused of selling thiodiglycol (TDG) to Saddam Hussein's regime – a chemical used to produce mustard gas. Van Anraat claimed that his chemicals were intended for the textile industry. While no findings about the purpose of facilitating the use of chemical weapons against civilians were found,[242] the Court, applying the 'knowledge standard' only, held that van Anraat 'knew that the TDG which was supplied by him would serve for the production of poison/mustard gas in Iraq and that efforts were made to conceal that purpose'.[243] Had the Dutch Court applied the ICC's intent and knowledge standard, van Anraat would certainly not have been convicted.

In contrast, in the *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*[244] and *Aziz v. Alcolac* cases,[245] US courts have required both purpose and knowledge. In the *Talisman* case, a Canadian company was charged with aiding and abetting the Government of Sudan to advance human rights abuses that facilitated the development of Sudanese oil concessions by

[240] S. Carsten, *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), at 23.3.3.

[241] S. Carsten, *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), at 23.3.3.

[242] N. Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals', 8 *Journal of International Criminal Justice* (2010) 873, at 884.

[243] Court of Appeal of The Hague, *Van Anraat*, Case No. BA6734, Appeal Judgment of 09 May 2007, at 11.12.

[244] *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, (Docket No. 07–0016-cv) US. Court of Appeals for the Second Circuit, 2 October 2009, available at: http://ccrjustice.org/files/07-0016-cv_opn.pdf.

[245] *Aziz* v. *Alcolac*, (Docket No. 10–1908) US. Court of Appeals for the Fourth Circuit, 19 September 2011, available online at: www.ca4.uscourts.gov/opinions/Published/101908.P.pdf.

Talisman affiliates. The lower court held that it could not be established that Talisman acted with the intention to assist the violation of international human rights. On appeal, the Court relied on the elements of aiding and abetting under international law, as defined in Article 25(3)(c) of the Rome Statute, and concluded that 'applying international law, we hold that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone'.[246] Accordingly, the knowledge standard might have caused the court to reach a different conclusion.[247] As noted by Finnin, 'reliance on Article 25(3)(c) [instead of customary international law as defined by the ad hocs] is having a real and immediate impact on the scope of corporate liability for aiding and abetting international crimes'.[248]

In sum, the AU judges will be required to grapple with these difficult and oft argued issues and craft innovative answers to questions that will arise in the application of Article 46C. As this brief sojourn through the immediate issues shows, there is no certainty concerning the precise *actus reus* and *mens rea* elements and creative and thoughtful decisions are required if Article 46C is to live up to its exciting potential. Given the scale of the challenges, and the experience at the ICC and ad hocs to date, it is difficult to be too optimistic: Article 46C may well prove, at least for the early years of any AU Court, to be a triumph of good intention and hope over fairness and utility.

2. CONCLUSION

As discussed throughout this Chapter, the AU drafters have taken an extravagant approach to their enumeration of modes of liability. In an attempt to avoid accountability gaps, the AU Statute attempts to do too much and what emerges is a degree of imprecision and duplication that creates a high risk of unhelpful complexity and confusion. International courts need to learn a number of salutary lessons. In particular, as experience has shown, effective and efficient criminal adjudication of international crimes (or complex trials more generally) require clear, precise and distinct modes of liability. Anxious prosecutors will always use whatever is at their disposal, whether it makes for an efficient or fair process. Providing them with modes of liability beyond

[246] *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, (Docket No. 07–0016-cv) US. Court of Appeals for the Second Circuit, 2 October 2009, at 41, available online at: http://ccrjustice.org/files/07-0016-cv_opn.pdf.

[247] N. Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals', 8 *Journal of International Criminal Justice* (2010) 873, at 885.

[248] S. Finnin and N. Milaninia, 'Putting Purpose in Context', (2014), available online at: http://jamesgstewart.com/putting-purpose-in-context/

those that are strictly necessary may seem like a useful "belts and braces' approach, but as experience has shown, it unlikely to assist with these essential objectives.

In this regard, Article 28N would undoubtedly benefit from a paired down approach informed by close attention to years of experience at the ad hocs and some from the ICC. Whilst the historic introduction of the concept of corporate criminal liability into international justice by way of Article 46C represents and exciting innovation at the international level, there is not much, if anything, to be gained by many of the other (additional) proposed modes of liability. Conversely, if efficient adjudication and judicial economy and consistency are worthy goals achievable through concrete and careful judicial process orientated steps, in many instances, there is much to be lost.

However, as noted above, much will also depend upon the skills and determination of the judges of the new AU Court. Inevitably, they must grapple with the challenge of interpreting their respective modes of liability in light of the objectives and principles of international criminal justice. One thing is for certain; the drafters have left them with a formidable task.

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Article 46C

Corporate Criminal Liability at the African Criminal Court

JOANNA KYRIAKAKIS

1. INTRODUCTION

The proposed international criminal section of the African Court of Justice and Human and Peoples' Rights, or what will be referred to as the African Criminal Court (ACC),[1] involves a number of progressive features. Among them is the Court's proposed adjudicative authority over corporations. According to Article 46C of the ACC's Statute (the Statute), annexed to the *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (the Malabo Protocol),[2] and entitled 'Corporate Criminal Liability', 'the Court shall have jurisdiction over legal persons, with the exception of States.'

Most international criminal courts[3] have to date had *jurisdiction personae* limited to natural persons only.[4] What Article 46C will involve (should it

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[1] Following the style adopted by others in this compendium, the use of the term 'African Criminal Court' or 'the ACC' is used to distinguish the African Court of Justice and Human and Peoples' Rights' criminal jurisdiction from its other competencies.

[2] (adopted 27 June 2014).

[3] The term 'international criminal court' is used in a broad sense to denote any court or tribunal, other than a purely domestic court, that exercises criminal jurisdiction over international and/or domestic crimes.

[4] See, e.g., Art. 25 of the *Rome Statute of the International Criminal Court* (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute); Art. 6 of the *Statute of the International Tribunal for the Former Yugoslavia*, UNSC Res 827 (25 May 1993) UN Doc S/RES/827; Art. 5 of the *Statute of the International Tribunal for Rwanda*, UNSC Res 995 (8 November 1994) UN Doc S/RES/955. While it is often said that all international criminal courts to date have been limited to prosecutions of natural persons, the instruments establishing the International Military Tribunal and the American Military Tribunal at

come into operation) will therefore mean treading new ground. As a result, there are inevitably ambiguities surrounding how the provision will work. It may also elicit controversy, particularly given its potential to apply to corporations doing business in Africa but emanating from states that are not party to the ACC.[5] None of this need surprise, nor deter, practitioners, however it creates new challenges the Court will need to resolve, all the while creating new possibilities.

The inclusion of Article 46C in the ACC is not entirely unexpected. Globally there is an increasing convergence towards corporate criminal liability in domestic systems. This change improves the legal and political landscape upon which Article 46C will operate. Fewer states recognized corporate criminal liability when a similar provision was rejected at the Rome Conference of the International Criminal Court (the ICC). Traditionally, there was a divide between common and civil law jurisdictions, with the latter less likely to recognize corporate criminal responsibility. However, this has narrowed significantly in recent years with the uptake of corporate criminal liability schemes across a number of civil law countries.[6] In Africa, there are a number of a states that provide for corporate criminal responsibility.[7] Nonetheless,

Nuremberg can be interpreted to allow the prosecution of corporations, and at least one legal contemporary proposed doing so: J. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said', 109 *Colum L Rev* (2009) 1094, at 1115, 1149–57, 1176–8, 1198–1200 and 1239 (on the proposal to indict corporations) and 7–1248 (reprinting, *Memorandum from A.L. Pomerantz, Feasibility and Propriety of Indicting I.G. Farben and Krupp as Corporate Entities* (27 August 1946)). See also, N. Bernaz, 'Corporate Criminal Liability under International law: The *New TV S.A.L* and *Akhbar Beirut S.A.L.* Cases at the Special Tribunal for Lebanon', 13 *JICJ* (2015) 313, at 330 (on the implications of recent decisions of the Special Tribunal for Lebanon regarding its jurisdiction over corporations).

5 According to Art. 46E*bis* of the ACC Statute, the ACC can exercise jurisdiction over nationals of a state that is not a party to the Court where the conduct is committed on the territory of a state party, where the victim is a national of a state party, or where the conduct in question threatens a vital interest of a state party.

6 J. Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge', 56(3) *NILR* (2009) 333, at 336–348; M. Pieth and R. Ivory, 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview', in M. Pieth and R. Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer, 2011) 3–60.

7 These include and are not limited to: Botswana (Section 24 of the *Penal Code 1964*); Ethiopia (Art. 34 of the *Criminal Code 2004*); Ghana (Section 192 of the *Criminal Procedure Code 1960*); Kenya (Section 23 of the *Penal Code 1930*); Malawi (*Nyasaland Transport Company Limited v R* 1961–63 ALR Mal 328 and Section 24 of the *Penal Code*); Nigeria (Sections 65–6 of the *Companies and Allied Matters Act 1990*); South Africa (Section 332 of the *Criminal Procedure Act 1977*); Zambia (Section 26(3) of the *Penal Code Act 1950*); Zimbabwe (Section 277 of the *Criminal Law [Codification and Reform] Act 2004*). Some of these provisions do not establish corporate criminal responsibility but are premised upon its existence pursuant to other statutory or common law sources.

differences in national models for corporate criminal liability remain and some civil law states continue to reject the concept of corporate criminal capacity entirely, considering it antithetical to the individual-ethical concept of guilt that underpins their criminal law.[8] Further, the breadth of crimes over which the ACC will have jurisdiction straddles the traditionally discrete categories of international and transnational crimes.[9] The trajectories of collective state efforts to address these two broad crime categories, and the way these efforts interplay with the question of corporate liability, have traditionally been distinct. These factors may tend to complicate matters of legitimacy and enforcement as they relate to Article 46C.

In light of these probable sources of tension, the purpose of this chapter is to undertake a close reading of Article 46C, with a view to elucidating the scope of the Court's proposed jurisdiction over legal persons and the challenges the Court may face in exercising such jurisdiction. It seeks to highlight strengths, weaknesses and uncertainties given current drafting and the contemporary legal landscape. This includes considering the entities contemplated by Article 46C, the principles for attributing criminal liability to legal persons that it adopts, the breadth of corporate sanctions available, enforcement challenges that may arise, and the challenge of complementarity given the remaining differences in corporate criminal liability models in domestic legal systems. Throughout, the question of how the broader range of crimes over which the ACC will have jurisdiction might interplay with Article 46C is considered.

In the main, this chapter does not address the question of the *desirability* of corporate criminal liability at the ACC. Indeed, an implication of the African Union's adoption of Article 46C is that the hurdle of desirability has been overcome in the African context. This also reflects what appears to be a relatively solid consensus among African civil society groups on the need for

[8] In Egypt, for example, only natural persons can be criminally liable, on the basis that free will and awareness can only exist in human beings: M. Omara, *Criminal Liability of Companies – Egypt* (2008), available at www.lexmundi.com/Document.asp?DocID=1063. This position is sometimes reflected in the principle of *societas delinquere non potest* (a legal entity cannot be blameworthy). For an overview of this philosophical position, see T. Weigend, '*Societas delinquere non potest*? A German Perspective', 6 *JICJ* (2008) 927.

[9] The term 'international crimes' or 'atrocity crimes' is used to denote the crimes of genocide, crimes against humanity, war crimes and aggression that have been the traditional categories of crimes over which international criminal courts have had jurisdiction. The term 'transnational crimes' is used to denote other crimes with actual or potential trans-border effects: Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 5.

civil and criminal liability frameworks to address the impunity with which corporations continue to operate in many African jurisdictions.[10] Instead, the analysis in this chapter takes as its starting point that the development is, in theory, a welcome one. In 2005, Wells and Elias argued that the 'debate is perhaps no longer whether to have corporate liability but what form it should take.'[11] To be sure, there is ample literature on the 'why' of corporate liability elsewhere.[12] Instead, the focus here is upon the *form* of corporate criminal responsibility adopted by the Statute, in order to provide some guidance to stakeholders engaging with the ACC. However, before turning to Article 46C specifically, the first section of the chapter provides a snapshot of international legal efforts to address the role of legal persons involved in international and transnational crime to date. The purpose of Section 1 is to demonstrate not only the historical context within which Article 46C arises, but also how parallel legal developments have converged towards a legal environment increasingly receptive to an international criminal court with jurisdiction over corporations.

2. TOWARDS AN INTERNATIONAL CRIMINAL COURT WITH COMPETENCE OVER CORPORATIONS

The ACC is not the first time the idea of an international criminal court with competence over corporations has been seriously considered. From as early as the first UN Committee towards the establishment of a permanent international criminal court in 1951, members considered whether it should provide for corporate criminal liability given that corporate penal responsibility was known to some states.[13] This interest was unsurprising given that just a few years earlier the role of German business in Nazi atrocities of World War II had been of keen interest to Allied states when planning and executing their

[10] See, e.g., the 'Declaration of the African Coalition for Corporate Accountability (ACCA)' (November 2013), which has been endorsed by 89 organizations from 28 countries across the continent. Available at https://the-acca.org/declaration/.

[11] C. Wells and J. Elias, 'Catching the Conscience of the King: Corporate Players on the International Stage', in P. Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 141, 160.

[12] For an excellent review of the three major debates regarding corporate criminal liability (corporate criminal liability as a concept; criminal versus civil liability; and corporate versus individual liability of corporate officers) evaluated in the context of international crime, see James Stewart, 'A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity', 16 (2) *New Crim L Rev*. (2013) 261.

[13] UNGA 'Report of the Committee on International Criminal Jurisdiction' (1952) UN Doc A/2136 [86]–[90].

post-war peace and justice programmes.[14] The issue of extended court competence was revisited during meetings of the second UN Committee of 1953, with Australia arguing that the 'criminal responsibility of corporations was not excluded either by doctrine or by jurisprudence.'[15] The principal concern pressing against the proposal was the lack of penal responsibility for corporations in some states (the comparative law challenge), together with the wisdom of a conservative approach and the benefit to brevity of decision making by setting the issue of corporate responsibility aside.[16] A similar comparative law challenge was again a key issue when the proposal was debated during the Rome Diplomatic Conference in 1998, particularly given the ICC's intended complementarity to domestic justice systems.[17] The concern at Rome was how the ICC would account for those states that do not provide for corporate criminal liability when determining the admissibility of a case against a corporate defendant involving such states, as well as how such states would enforce corporate criminal sanctions ordered by the ICC.[18] Despite this, and other, challenges, a Working Group developed sophisticated draft articles on juridical persons during the Rome meetings.[19] Due to a lack of time to resolve outstanding state concerns, the relevant articles were omitted.[20]

[14] K. Priemel, 'Tales of Totalitarianism: Conflicting Narratives in the Industrialist Cases at Nuremberg', in K. Priemel and A. Stiller (eds), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives and Historiography* (Berghahn Books 2012) 163–167. This was principally achieved through zonal military trials of individual industrialists that had headed notable German industrial concerns. For a discussion of those trials, see Bush (n 4); M. Lippman, 'War Crimes Trials of German Industrialists: The "Other Schindlers"', 9 *Temp Int'l & Comp L J* (1995) 173.

[15] UNGA 'Report of the 1953 Committee on International Criminal Jurisdiction' (1953) UN Doc A/2645 [85].

[16] UNGA 'Report of the Committee on International Criminal Jurisdiction' (1952) UN Doc A/2136 [85]; UNGA 'Report of the 1953 Committee on International Criminal Jurisdiction' (1953) UN Doc A/2645 [85].

[17] For an excellent summary of the debates at Rome regarding the legal persons' proposal, see A. Clapham, 'The Question of Jurisdiction under International Criminal Law Over Legal Persons: Lessons from the Rome Conference', in M. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law 2000).

[18] For an analysis of this critique and possible responses to it, see: J. Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare', 19(1) *Crim LF* (2008) 115; Kyriakakis (n 6).

[19] 'Working Paper on Article 23, Paragraphs 5 and 6', UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (3 July 1998) UN Doc. A/Conf.183/C.1/WGGP/L.5/Rev.2.

[20] 'Summary records of the meetings of the Committee of the Whole, 26th Meeting', UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (8 July 1998) U.N. Doc A/CONF.183/C.1/SR.26 [10]. See also, Per Saland, 'International Criminal Law Principles' in Roy Lee (ed), *The*

The final iteration of the draft ICC corporate liability provision is attached as Appendix A, to assist in comparative analysis.

There are other contexts, too, in which an international criminal court with competence over legal persons has been mooted. In 1981, an Ad Hoc Working Group of Experts on Southern Africa proposed an international penal tribunal for the suppression and punishment of the crime of apartheid with competence over legal entities.[21] The Draft Statute for the tribunal was intended to implement the Apartheid Convention, which anticipated such an institution.[22] The Apartheid Convention acknowledges (at Articles I and X) the capacity of organizations and institutions to commit the crime of apartheid, although it goes on to describe international criminal responsibility as that of the members of such organizations and institutions.[23] The view of the Group of Experts was that the proposed tribunal competence over corporations derived from the stipulation within the Apartheid Convention that apartheid is a crime under international law, together with established norms of criminal responsibility. They opined that while international criminal law contemplates individual criminal responsibility, such norms allow for the 'quasi-criminal responsibility' of corporate entities for which 'fines and punitive damages are appropriate remedies.'[24] Notably, the expectation of an international penal tribunal to address apartheid was one of the reasons that a court in the nature of the ACC did not proceed many years earlier, when something of its ilk was being considered in the 1970s.[25]

Likewise, in 1991, a group of experts submitted a draft statute for an international criminal court to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders with similar extended jurisdiction.[26]

International Criminal Court. The Making of the Rome Statute – Issues, Negotiations, Results (Kluwer Law International 1999) 199.

[21] 'Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid' (19 January 1981) UN Doc E/CN.4/1426, Draft Convention Art. 4–6.

[22] Art. V of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (opened for 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (Apartheid Convention).

[23] Art. I, X and III of the Apartheid Convention.

[24] 'Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid' (19 January 1981) UN Doc E/CN.4/1426 [58]–[60].

[25] A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 24 (3) *EJIL* (2013) 933, at 936–7. Reflecting on the failure of such a court to materialize, Abass states: 'The impact of this "dupe", so to speak, had on Africans was significant, but it underscored the fact that not every crime committed in Africa would be of prosecutorial interest to the rest of humanity': 937.

[26] UNGA 'Draft Statute International Criminal Tribunal' (31 July 1990) UN Do. A/CONF.44/ NGO ISISC, Art. XIV, reprinted in (1991) 15 Nova L Rev 373.

Most recently, the Appeals Panel of the Special Tribunal for Lebanon (STL) found that legal persons (in those cases, TV and print news corporations) come within the Tribunal's jurisdiction for crimes against the administration of the Tribunal.[27] Importantly, this is in the nature of contempt jurisdiction, which is inherent in the authority of a criminal tribunal, and does not correspond to the same type of material jurisdiction as we see in the ACC. Nonetheless, and as Bernaz notes, given the effective silence (or ambivalence) discernible within international criminal law sources on the existence of corporate criminal responsibility under international law and given that the STL corporate contempt decisions are the first time an international tribunal has addressed the possibility of holding a corporation criminally liable, they are 'of utmost symbolic importance, even if [their] scope is rather narrow.'[28] This is not least given the kind of argumentation undertaken by the Appeals Panel to justify its finding of capacity over corporations, which included considering the status of corporate criminal liability as a general principle of international law and the need for competence over corporations in order to render the Tribunal's contempt powers effective.

There have been repeated calls since the Rome Conference that the idea of ICC competence over corporations be revisited. The reasons animating such calls vary but, much like the development of corporate criminal liability domestically, the drivers are often pragmatic rather than doctrinal, with an emphasis on the most efficacious ways of dealing with the reality of corporate crime.[29] Today, this pragmatism can focus upon gaps in governance, such as the dynamics of globalization that render transnational corporations peculiarly impervious to human rights accountability, particularly for harms related to business activities in the global South and in conflict zones. There is ample reporting on the role of corporations in a number of contemporary conflicts in Africa, which have in turn been linked to the need for international criminal courts to be directed towards the complicity of such (predominantly Northern) actors in otherwise apparently localized conflicts.[30] Various panels of experts established by the UN Security Council in relation to resource related

[27] *New TV S.A.L (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings)* (Case No STL-14–05/PT/AP/AR126.1, 2 Oct 2014); *Akhbar Beirut S.A.L. (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings)* (Case No STL-14–06/PT/AP/AR126.1, 23 Jan 2015).

[28] Bernaz (n 4) 321.

[29] Stewart (n 12) 261.

[30] See, e.g., M.J. Ezeudu, 'Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Canvassing the Potential Role of the International Criminal Court', 11 *AHRLJ* (2011) 23; I. Eberechi, 'Armed Conflicts in Africa and Western Complicity: A Disincentive for African Union's Cooperation with the ICC', 3 *Afr J Leg Stud.* (2009) 53; C. Jalloh, 'Special Court for Sierra Leone: Achieving Justice', 32(3) *MJIL* (2011) 395, at 424

conflicts such as those in Angola, Sierra Leone, Liberia and the Democratic Republic of the Congo have demonstrated the diverse ways in which transnational business practices have fuelled those conflicts while facilitating a flow of economic benefit to foreign actors, with effective impunity.[31] Involvement ranges from exploitation of natural resources controlled by rebel groups, smuggling natural resources, breaching UN arms embargoes, and purchasing conflict resources as part of consumer good supply chains.[32] Long before these modern examples, there are the gross violations that date back to King Leopold's search for resources in the Congo, famously catalogued as the first major atrocity crimes linked to the plunder of that state.[33] The impunity dynamics include accountability challenges associated with complex corporate structures that transcend national borders and the economic imperatives that undermine the governance capacities of individual states competing for foreign direct investment.[34] In cases involving atrocity, there are in fact overlapping sources of impunity, as there are also those that inhere to international crimes.[35] These dynamics negatively impact some parts of the world

(on the failure of the SCSL to prosecute foreign businessmen and profiteers who financed and benefited from the war).

[31] See, e.g., 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo' (16 October 2002) UN Doc S/2002/1146; 'Final Report of the Monitoring Mechanism on Angola Sanctions' (21 December 200) UN Doc S/2000/1225; 'Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone' (20 December 2000) UN Doc S/2000/1195.

[32] For an excellent overview of the dynamics of resource-related armed conflicts and the actors implicated in such wars, see Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2016) 1–30.

[33] For a powerful account of this history, see Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terrorism and Heroism in Colonial Africa* (Mariner Books 1998).

[34] UNGA, 'Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises' (7 April 2008) UN Doc A/HRC/8/5, in particular [11]–[16], [34]–[36], [47]–[49] (describing the dynamics of the current 'governance gap' in respect of corporate related human rights abuses). Another issue is the rise of private military companies and accountability therein.

[35] Atrocity crimes tend to be under-enforced within a wholly state based justice framework because many of the crimes can occur only with the participation of the state, resulting in unwillingness to prosecute. Other states also have reasons to refrain from intervening. Alternatively, the territorial state may be unable to act because its justice system is weak or even collapsed due to conflict: Antonio Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in Cesare Romano and others (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004) 4–6. See also Ezeudu (n 30) 48–49 (noting that this is true whether the offender is a natural or legal person).

more than others and may help explain why a regional response has been more forthcoming than an international one.

The influence of critical scholarship attuned to the power relations underpinning international law and focused upon the lived experiences of peoples of the Third World, such as Third World Approaches to International Law (TWAIL), has also been felt. This literature challenges atrocity law to acknowledge the ways in which 'violence has been displaced in part from the first to the Third World' through an international economic order that favours the North.[36] While there are limits to how a criminal justice response can do this, TWAIL scholars suggest that one means is by broadening systems of accountability to inquire into the role of foreign economic actors in promoting and exacerbating local conflicts.[37] Similar ideas are becoming mainstreamed into international criminal law discourse. As international criminal lawyers adopt insights from political science on the ways in which many modern conflicts are rooted in competition over resources and in economic underdevelopment, calls for a new generation of international criminal law addressing economic actors and economic crimes are being made.[38] From this perspective, the degree to which international criminal practice has ignored property crimes, such as pillaging, and the role of corporate accomplices, is problematic.[39] It is thus unsurprising that it is at this moment and in the context of a regional court that will deal with crimes afflicting Africa that the idea of extended court jurisdiction to include corporate defendants (and a wider range of crimes) has been revived.

The trajectory of international action in respect of transnational and economic crimes has been, however, different to that related to atrocity crimes. Rather than move towards international adjudicative mechanisms, states have addressed non-atrocity crimes with cross border qualities principally through agreements that seek to progress, harmonize and coordinate state criminal justice responses within their own territories. These efforts have also not ignored the liability of entities. Particularly since the 1990's, a range of

[36] A. Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 78 *Chinese JIL* (2003) 77, at 89.

[37] *Ibid*, 90–2; C. Nielsen, 'From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law', 14 *Auckland U L Rev* (2008) 81, at 98–9.

[38] See, e.g., L. van den Herik and D. Dam-De Jong, 'Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict', 15 *Crim LF* (2011) 237; Eberechi (n 30).

[39] J. Kyriakakis, 'Justice after War: Economic Actors, Economic Crimes, and the Moral Imperative for Accountability after War', in L. May and A. Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 113–20 (for a discussion on the way in which these issues are marginalized in international criminal law theory and practice).

regional and international instruments addressing crimes as diverse as bribery,[40] terrorism,[41] corruption,[42] the environment,[43] human trafficking,[44] and the sexual exploitation of children,[45] among others, (transnational crime agreements) address the liability of legal persons.[46] While specific models differ, the general approach is to require states to introduce laws domestically, and in some instances with extraterritorial effect, outlawing certain behaviours when undertaken by natural or legal persons. To address differences in legal cultures, these instruments give scope to states to use non-criminal measures, such as administrative sanctions, in respect of legal persons, provided sanctions are effective, proportionate and dissuasive so as to reflect the seriousness of the offences in question.

Transnational crime agreements have played a crucial role in the growing convergence towards corporate criminal liability across domestic legal systems. Prior to the 1990s, many states within the civil law tradition opposed the

[40] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (opened for signature 17 December 1997, entered into force 15 February 1999) 37 ILM 1, arts 2, 3(2) and (4).

[41] International Convention for the Suppression of the Financing of Terrorism (opened for signature 9 December 1999, entered into force 10 April 2002) 39 ILM 270, arts 5 and 7; Council Framework Decision of 13 June 2002 on Combating Terrorism [2002] OJ L 164/3, arts 7, 8 and 9.

[42] United Nations Convention against Corruption (opened for signature 31 October 2003, entered into force 14 December 2005) arts 26 and 42; African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006) art 11; Joint Action of 22 December 1998 adopted by the Council on the Basis of Article K.3 of the Treaty on European Union, on Corruption in the Private Sector [1998] OJ L 358/2, arts 1, 5, 6 and 7; Criminal Law Convention on Corruption (opened for signature 27 January 1999, entered into force 1 July 2002) CETS no 173, arts 1(d), 17, 18, and 19(2); Inter-American Convention against Corruption of 19 March 1996 (opened for signature 29 March 1996, entered into force 3 June 1997) art VIII.

[43] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (opened for signature 22 March 1989, entered into force 5 May 1992) 28 ILM 649, arts 2(14) and 9; Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998) arts 1(16) and 9; Council Framework Decision of 27 January 2003 on Protection of the Environment through Criminal Law [2003] OJ L 29/55, arts 6, 7 and 8.

[44] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) art 10; Council Framework Decision of 19 July 2002 on Trafficking in Human Beings [2002] OJ L 203/1, arts 4, 5 and 6.

[45] Council Framework Decision of 22 December 2003 on Combating the Sexual Exploitation of Children and Child Pornography [2004] OJ L 13/44, arts 1(d), 6, 7 and 8.

[46] For further examples see, Marc Engelhart, 'Corporate Criminal Liability from a Comparative Perspective' in Dominik Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 54–5.

concept of corporate criminal capacity. The picture has since changed dramatically, with even formerly 'restrictive' systems introducing laws that enable corporate prosecutions.[47] For example, as at 2013, only Greece, Germany and Latvia remain without some kind of corporate criminal liability in Europe.[48] In Germany, there exists a system of administrative penalties, elements of which have been compared to corporate criminal liability[49] and there is an open debate as to whether a true criminal sanction against companies is needed.[50] This phenomenon of convergence has altered the legal and political landscape since the Rome debates, which is now more amendable to a development like Article 46C than ever before. It does not, however, eradicate the challenges of a diverse comparative law landscape for an international court cutting across such diversity. There remain differences across national corporate criminal liability models, which can include the entities and crimes contemplated by domestic schemes, the principles for attributing the physical and mental elements of crimes to a legal entity, and the sanctions available. How this plurality may interact with Article 46C is considered further in Sections 3 and 4.

There is a genuine question as to whether the historically distinct approaches to the criminalization of international and transnational crimes respectively (where one tends towards international adjudicative mechanisms and the other towards harmonized state responses) is grounded in qualitative differences between the wrongs in question or whether it is a symptom of historical-political realities. In terms of corporate liability, it is likely that different types of crimes may implicate different kinds of organizational structures and behaviours, and thus invite different criminal justice responses, though such differences are not necessarily split across the two broader crime categories. Further, it is not self-evident that it is only in respect of atrocity crimes that the capacity and willingness of the territorial state to act may be compromised and the international community share an interest in the direct enforcement of repressive measures. This seems to be reflected in points of interplay between the two legal movements that belie a neat divide between appropriate responses.

For example, in 1989, when movement towards a permanent international criminal court had stalled for decades, it was the efforts of Trinidad and Tobago at the General Assembly regarding the possibility of an international

[47] *Ibid* at 56–7.
[48] *Ibid* at 57.
[49] Kyriakakis, (n 18) 343–4.
[50] Engelhart (n 46) 57.

criminal court with jurisdiction over drug trafficking offences that revived the initiative.[51] At the Rome Conference years later, Thailand indicated that the question of ICC competence over drug offences would influence its position on the question of the liabilities of organizations.[52] The 1991 draft statute for a permanent international criminal court, noted earlier, envisaged a court dealing with over 22 categories of crimes spanning both international and transnational crime categories, on the basis that these are crimes over which states have an inability 'unilaterally to control and suppress'.[53] In its 2005 Final Report, the Truth and Reconciliation Commission of Liberia recommended an 'Extraordinary Criminal Court for Liberia' with jurisdiction over legal entities and over economic crimes in light of the crucial role of economic actors and economic activities in the Liberian armed conflict.[54] The Commission defined economic crimes to include contributions by business entities to human rights and humanitarian abuses for profit, as well as economic crimes such as money laundering, bribery, tax evasion, environmental harms, and illegal natural resource extraction, to name a few.[55]

Demonstrating cross-pollination in the opposite direction is the recent 'Crimes against Humanity Initiative' where legal experts produced a draft convention on the prevention and punishment of crimes against humanity hoped to encourage state action.[56] The text proposes that states provide for the liability of legal persons within domestic law but allows scope as to the form of corporate liability in terms modelled on the transnational crime agreements.[57] The matter has now been taken up by the International Law Commission, which is considering the issue of the criminal responsibility of legal persons in any convention directed towards improving state performance on crimes

[51] M Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court', 10 *Harv Hum Rts J* (1997) 11, at 55–56.

[52] 'Committee of the Whole, Summary Record of the First Meeting' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (20 November 1998) UN Doc A.CONF.183/C.1/SR.1 [49].

[53] 'Draft Statute International Criminal Tribunal' (n 26) 380.

[54] Truth and Reconciliation Commission of Liberia, 'Volume 2: Consolidated Final Report' (30 June 2009) 426–59 (Annex 2: Draft Statute: Extraordinary Criminal Court, 426–59, Art. 14 (11) and 15(2)). For the Commission's findings on economic crimes in general see, Truth and Reconciliation Commission of Liberia, 'Volume 3, Title III: Economic Crimes and the Conflict, Exploitation and Abuse' (2009).

[55] Truth and Reconciliation Commission of Liberia, 'Volume 3, Title III: Economic Crimes and the Conflict, Exploitation and Abuse' (2009) 2–6.

[56] 'Crimes against Humanity Initiative' (*Whitney R Harris World Law Institute*, 2015) http://law.wustl.edu/harris/crimesagainsthumanity/.

[57] Crimes Against Humanity Initiative, 'Proposed International Convention on the Prevention and Punishment of Crimes against Humanity' (August 2010), art 8(6).

against humanity.[58] In general it can be said that international criminal justice is moving towards a de-centralized approach, where complementarity is intended to activate and complement domestic efforts.

The combinations of these discrete but interconnected threads of legal developments demonstrate how routinely the liability of legal persons has arisen as a matter of importance in international dialogues related to serious crimes in recent years. Furthermore, they demonstrate the growing convergence and cross-pollination of efforts directed at international and transnational crimes. Article 46C, as well as the wider substantive jurisdiction of the ACC, does not appear unannounced. An international criminal court with jurisdiction over legal persons may well be an idea whose time has come.[59] The challenge of an overburdened institution does, however, loom large. While timely, can the ACC manage the breadth of crimes and of actors with which it will be tasked? A preliminary response to this question is that the Court will need to develop policies to guide and justify situation and case selections. A similar challenge is faced by the ICC that, while tasked with core international crimes by natural persons only, must also practice radical selectivity in terms of what is pursued.[60] The challenge to be faced by the ACC may well be different in scale, but it will not be unique in kind. The benefits of corporate prosecutions, including in financial terms such as the potential for meaningful reparations, may well outweigh the costs of the added burden to the Court.

3. ARTICLE 46C: CORPORATE CRIMINAL LIABILITY AT THE ACC

With this context in mind, this section turns to the substance of Article 46C, discussing the legal entities over which the ACC would enjoy jurisdiction, the

[58] Sean Murphy, Special Rapporteur for Crimes against Humanity, 'Second Report on Crimes against Humanity' (21 January 2016) UN Doc A/CN.4/690 [41]–[44]; ILC, 'Statement of the Chairman of the Drafting Committee, Mr. Pavel Šturma' 68th Session (9 June 2016) 16 (on the intent of the Drafting Committee to consider shortly the three options proposed by the Special Rapporteur on how the Convention may address that issue).

[59] See, e.g., K. Tiedemann, 'Corporate Criminal Liability as a Third Track', in D. Brodowski and Others (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 18 (quoting Victor Hugo's words: 'Nothing else has the force of an idea the time of which has come', in reflecting on the idea of corporate criminal liability as a common 'third track' of national criminal justice systems).

[60] See, e.g., M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', 33 *Mich J Intl L* (2012) 265 (advocating expressivism as the best basis for determining selectivity issues at an international criminal court).

principles of attribution adopted, sanctions that may be applied against legal persons, and how complementarity might operate.

The general part of criminal statutes that provide for the liability of legal persons serve to translate substantive crimes and modes of liability provisions, generally defined in terms reflective of the human person, into terms enabling attribution of the wrong to the legal person. Serious crimes and the modes by which they can be committed generally involve a combination of physical actions and subjective mental states such as intent, recklessness or knowledge. The principal function of Article 46C is to set out how those kinds of human qualities can be attributed to legal persons; otherwise referred to as the principles of attribution. It states:

Article 46C

Corporate Criminal Liability

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.
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.

A. *The Entities and Crimes Contemplated*

A first question that arises is which entities are contemplated by Article 46C. Article 46C (1) provides that 'the Court shall have jurisdiction over legal persons, with the exception of States'. In addition, Article 1 states that the term 'person' as it appears in the Statute 'means a natural or legal person'. The term 'legal person' is not defined. Despite this broad language, it is argued below that Article 46C grants the ACC jurisdiction over a limited range of legal entities, namely those incorporated under domestic law. However, no further limitation is evident on a plain reading of the text.

Generally speaking, the term legal person is understood to denote organizations with some formal legal status, in terms of enjoying some of the rights and responsibilities of legal personality.[61] A dominant form of legal person is the corporation; limited liability companies given a legal status distinct to shareholders through incorporation. However, there are other entities that may also have distinct legal personality under national laws including unincorporated associations, trusts, trade unions, sporting clubs, partnerships and non-governmental or religious organizations. The legal status of particular entities varies from state to state.[62] From the international perspective, legal persons can also denote not only states but also some international organizations and belligerent groups.[63]

The way the issue of entities was addressed in the ICC draft articles was to define the preferred term 'juridical persons' narrowly as 'a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of the State as a non-profit organization.'[64] By way of contrast, transnational crime agreements tend to leave terms such as legal person or legal entity un-defined. The difference in these two approaches might be explained on a few grounds. First, there is the state interest in controlling an international court's jurisdiction, which would otherwise be left to judicial interpretation. Clapham notes that a crucial concern at Rome was to ensure states would be excluded, both collectively, individually and in their composite parts, as well as the concern to protect the humanitarian efforts of non-profit organizations from 'unscrupulous States'.[65] Second, the nature of the crimes may also play a role. The transnational crime agreements that address the liability of legal persons deal with crimes such as bribery, corruption, the transport of hazardous waste, terrorism, and organized crime. The goals of criminalization in these areas may be frustrated if a narrow definition were adopted, given the variety of entities that can be vehicles for such crimes.

[61] UNODC 'Liability of Legal Persons, article 10 of the United Nations Convention against Transnational Organized Crime, Background Paper by the Secretariat' (6 June 2014) UN Doc CTOC/COP/WG.2/2014/3, [15]. It should be noted, however, that the term is not universally understood in this kind of restrictive fashion: Engelhart (n 46) 59.

[62] UNODC 'Liability of Legal Persons, article 10 of the United Nations Convention against Transnational Organized Crime, Background Paper by the Secretariat' (6 June 2014) UN Doc CTOC/COP/WG.2/2014/3, [16]-[17].

[63] J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 115–21.

[64] See Appendix A.

[65] Clapham (n 17) 156.

Turning to the ACC, apart from sub-section (1), the title and remaining provisions of Article 46C refer repeatedly to the corporation ('corporation', 'corporate intention', 'corporate knowledge'). This suggests that the concept of legal person in the Statute is, in fact, limited to incorporated entities; artificial entities that are granted a legal existence separate from that of the individual members through some domestic process of incorporation.[66] The question of incorporation would be a matter of fact based upon the national laws where incorporation is said to have occurred. There are implications that flow from this interpretation. First, if correct, this would preclude ACC jurisdiction over belligerent groups or criminal organizations *per se*, such as terrorist groups, as it is unlikely they would be registered under any national law. However, as Clapham has argued in the ICC context, it is likely such entities would operate through registered legal persons and in any event, it is not clear how one could indict organizations that do not exist in law.[67] Second, it might be argued that to 'speak of corporations . . . would limit the scope to incorporated organizations in the *economic field*.'[68] However, in many countries the term 'corporate' is not necessarily so limited. For example, in Australia, 'incorporation' includes incorporated associations, trade unions, and building societies.[69] Without qualifying terms related to the purposes of the entity, it is submitted that a narrow interpretation limited to incorporated *businesses*, is unduly limiting.

There is also the question as to whether the African Criminal Court will have competence over state owned and controlled corporations. This is a considerable issue given that in many countries, government owned corporations play a crucial role in various sectors, such as utilities, infrastructure, natural resources, postal services, telecommunications, transport, and financial services. Furthermore, there is today a significant degree of foreign

[66] According to Art. 31(1) of the Vienna Convention on the Laws of Treaties (adopted 22 May 1969, entered into force 17 January 1980) 1155 UNTS 331: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. There is also the principle of interpreting criminal statutes, that in cases of ambiguity the matter should be resolved in favor of the defendant.

[67] Clapham (n 17) 156–7. Having said this, the notion of criminal organizations that is adopted in some criminal justice contexts demonstrates how such an approach can operate: see, e.g., Shane Darcy, *Collective Responsibility and Accountability under International Law* (Transnational Publishers 2007) ch V.

[68] Engelhart (n 46) 59 (emphasis added).

[69] See, e.g., in the Australian context: Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press 2002) 65–7.

investment by state owned transnational corporations.[70] The ACC Statute expressly excludes states from the jurisdiction of the Court but it is silent as to the status of public entities.

From a comparative perspective, the question of whether public entities are responsible within domestic corporate criminal liability schemes differs across national legal systems. In some states, governments, their organs and agencies may enjoy a limited degree of immunity from prosecution, which may extend to non-state actors that are 'highly integrated into national or international political processes'.[71] Engelhart notes that, comparatively speaking, in the main a mixed approach to this issue is adopted, meaning that public entities can be held criminally responsible only in so much as they are not exercising state authority[72] (or 'functions of constitutional relevance' as is the determinant in some states).[73] In other words, they are treated comparably to other legal persons where they are acting in a comparably private capacity, such as participating in the marketplace. This offers one possible interpretation of Article 46C, that the Court is limited to corporations engaging in commercial activity. However, this approach involves reading into the Statute a limitation that is not present on a plain reading of the text. On its plain terms, Art 46C grants the ACC jurisdiction over legal entities incorporated in domestic law whether they are public or private in nature and irrespective of the degree of state control over the corporation's activities. This conclusion is reached on a few grounds.

First, and by way of direct contrast to the draft ICC provision on legal persons, Article 46C excludes only states. States are, as a general rule, treated as legally distinct from corporations, on the basis that international law recognizes the doctrine of corporate separation with the exception of lifting the veil in cases of fraud and evasion.[74]

Second, it is true that in transnational corporate litigation contexts, there are a number of distinct, but related, legal doctrines that serve to limit either the jurisdiction or the willingness of foreign courts to adjudicating matters that implicate the official actions of foreign states. These doctrines can have

[70] See, e.g., United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014, Investing in the SDGs: An Action Plan* (United Nations 2014) 20.

[71] Pieth and Ivory (n 6) 17. See generally 14–17.

[72] Engelhart (n 46) 59.

[73] See, e.g., C. de Maglie, '*Soceitas Delinquere Potest?* The Italian Solution' in M. Pieth and R. Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer 2011) 255, 261 (on the Italian and French approach to this issue).

[74] *Barcelona Traction, Light and Power Co Ltd Case (Belgium* v. *Spain)* [1970] ICJ Rep 3, [39]–[49] and [56]–[58].

implications for cases involving state majority-owned corporations or against corporations concerning abuses committed by government partners on joint venture developments.[75] One of these is the doctrine of sovereign immunity, which provides a jurisdictional immunity to sovereigns deriving from international law, including conduct undertaken through majority-owned separate legal entities, but with the exception of activity characterized as commercial in kind.[76] The second is foreign court deference to acts of state, where foreign courts abstain from hearing claims relating to a foreign sovereign's official acts within its own territory. This deference is animated by domestic concerns as to comity, separation of powers, and foreign relations.[77]

However, neither of these doctrines should be taken to limit the jurisdiction of the ACC. Taking sovereign immunity, in the context of international courts, states can agree to relinquish their immunities through ratification.[78] The ACC Statute contemplates immunities only for heads of state and senior state officials during terms of office (Art 46A*bis*), which by their nature seem to preclude application to corporations. If this is incorrect and Article 46A*bis* immunities could feasibly apply to corporate entities, Article 46C should not be interpreted in a way that expands immunities in the case of corporate defendants beyond those envisaged for natural persons. What is open to adjudication when responsibility is atomized to the individual level should not become protected when undertaken through the guise of incorporation. Act of state doctrines can also be set aside as they do not have purchase in the context of an international court given they are animated by concerns peculiar to the reach of foreign *domestic* courts. Furthermore, even in such contexts, common law courts have found the act of state doctrine is less likely to apply when a state is accused of behaviour that is widely condemned under

[75] See, e.g., S. Joseph, *Corporations and Transnational Human Rights Litigation* (Hart 2004) 40–4, 121; M. Bühler, 'The Emperor's New Clothes: Defabricating the Myth of "Act of State" in Anglo-Canadian Law' in C. Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001) 343–71.

[76] R. Wai, 'The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism' in C. Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001) 213–45. See also, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur' (10 June 2010) UN Doc A/CN.4/631 [71]–[77] (on the relationship between act of state doctrines and principles of sovereign immunity).

[77] S. Zia-Zarifi, 'Suing Multinational Corporations in the U.S. for Violating International Law', 4 *UCLA J. Intl L & For. Aff.* (1999) 81, at 128–40 (on the US context).

[78] Cryer et al (n 9) 557–9 (discussed in the context of the ICC).

international law (such as those the subject of ACC jurisdiction) on the basis that such conduct cannot be characterized as official state acts.[79]

Finally, international rules of state responsibility for internationally wrongful acts (with the exception of what is taken to constitute the state itself) set out in the International Law Commission's *2001 Articles on Responsibilities of States for Internationally Wrongful Acts*,[80] do not preclude the concurrent criminal responsibility that might also exist at the level of the individual (or the corporate person), the function of each site of responsibility being distinct.[81] In short, Article 46C can be said to grant the ACC jurisdiction over legal entities incorporated in domestic law whether they are public or private in nature and irrespective of the degree of state control over the corporation's activities.

Before moving to the model of attribution set out under Article 46C, also important is the range of crimes that the Statute contemplates can be attributed to a corporation under Article 46C. In short, the absence of an exclusion clause means that there is no limit as to the crimes within the ACC Statute that will apply to corporations. This approach is common in states that fully embrace corporate criminal capacity; to provide a uniform provision on corporate criminal responsibility applicable to all crimes within their penal codes, notwithstanding the diversity of conduct such crimes engage.[82] It reflects the progressive view that corporations are, in theory, capable of committing any wrong, rather than precluding *mens rea* offences or limiting liability to crimes 'typically associated with the economic, environmental, or social impact of the modern (multinational) corporation'.[83] This is true even of crimes of specific intent, such as genocide, with historical examples that demonstrate the potential for corporations to knowingly participate in genocidal programmes. For example, in the 1946 *Trial of Bruno Tesch and Two Others* before the British Military Court, two co-accused were convicted and executed for their business of supplying the poison gas, Zyklon B, to the SS for

[79] *Banco Nacional de Cuba v Sabbatino* 376 US 398 (SCt 1964) 428; *Kadic v Karadzic* 70 F 3d 232 (2d Cir 1995) 250 (from the US context).

[80] 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', *Report of the International Law Commission on the Work of Its Fifty-Third Session* (3 August 2001) UN Doc A/56/10.

[81] See, e.g., A. Clapham, 'Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court', in P. Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press 2003) 30, at 31–50.

[82] This is known as the 'all crimes' approach: Pieth and Ivory (n 6) 20.

[83] *Ibid* 18 and generally 17–21.

use in concentration camps with knowledge that the gas was being used to exterminate human beings.[84] Having said this, the ACC may identify certain ACC crimes that cannot be committed by corporations and in particular the leadership clause of the crime of aggression may render corporate prosecutions incongruous.[85]

B. *Attribution Principles: How the Corporation Acts and Attracts Blame*

As mentioned, attribution principles serve to translate how the elements of substantive crimes and of particular modes of participation in crimes can be attributed to a legal person. Such principles are necessary given that corporations can only act through human beings and that primary criminal law principles are generally defined in terms reflective of a human actor. To understand the attribution model adopted in the ACC Statute, it is useful to first review the main models that currently exist.

1. Models of Attribution

Generally speaking, models for the attribution of criminal liability to legal persons are either 'derivative' or 'organizational'. Derivative models base the liability of the entity entirely upon the liability of a specific individual or individuals, rather than identifying the fault located within the organization itself. Vicarious liability is an example of derivative liability, where the legal person is automatically criminally responsible for the wrongful conduct of any employee, officer or agent, if that conduct was committed within the scope of their employment.[86] Scope of employment is not precluded due to the act being criminal,[87] though some states do require the act to be at least in part

[84] United Nations War Crimes Commission (UNWCC), 1 *Law Reports of Trials of War Criminals* (1947), 93. While the case dealt with individual criminal responsibility, the findings of the Tribunal could likewise support corporate criminal responsibility. For further examples of possible scenarios of corporate involvement in genocide, see Michael J Kelly, *Prosecuting Corporations for Genocide* (Oxford University Press 2016) ch 4.

[85] ACC Statute, Art. 28M of the Statute (crime of aggression).

[86] For an outline of the principles of vicarious liability in the common law tradition, see Clough and Mulhern (n 69) 79–88. It should be noted that vicarious liability is also a principle of attribution for civil liability, however it is used here to refer to its contours in the criminal law.

[87] *Ibid* 86–7; C. Ntsanyu Nana, 'Corporate Criminal Liability in South Africa: The Need to Look Beyond Vicarious Liability', 55(1) *J Afr L* (2011) 86, at 99 (noting that vicarious liability is often rationalized on the basis that it is necessary where a 'statute would be rendered nugatory if liability was not imposed on the company').

intended to benefit the entity.[88] In other words, vicarious liability involves the determination that a specific individual or individuals committed the crime, liability for which is then transposed to the sufficiently related entity.

Vicarious liability has the benefit of relative simplicity and is often employed to render legislation enforceable where it otherwise would tend to fail if personal liability were required.[89] However, it has been criticized for its over-inclusivity, particularly when applied beyond strict liability and regulatory crimes, on the basis that it does not necessarily reflect any fault on the part of the organization, which may well have taken steps to avoid wrongdoing by corporate officers.[90] An effective means of avoiding corporate harms and encouraging best practice is through recognizing due diligence in corporate responsibility schemes. Due diligence is, in essence, the opposite of negligence. It allows an organization to avoid responsibility by showing that it took all reasonable steps to ensure compliance with the relevant law. This might be through adequate corporate management, control, and supervision, or through adequate systems for conveying relevant information to relevant persons. As corporate fault flows automatically from the relationship of the entity to the offending individual in vicarious liability models, there is no capacity for the corporation to point to organizational efforts to avoid such behaviours as a means of avoiding liability. This may undermine the normative messaging of a verdict of corporate fault and can de-incentivize due diligence efforts, as they may have little bearing on responsibility.[91] The United States, which adopts the vicarious liability model of corporate criminal liability even for serious crimes, mitigates the problem of over-inclusivity through prosecutorial discretion and detailed sentencing guidelines that bring into focus compliance efforts on the part of the organization.[92]

Another form of derivative liability is the identification model. A restricted form of vicarious liability, this approach likewise links the liability of the

[88] This is the approach, for example, of federal US criminal law: see, e.g., Allens Arthur Robinson, '"Corporate Culture" as a Basis for the Criminal Liability of Corporations', (February 2008) 29–30; and in South African law: see, e.g., Nana (n 87) 93–8.

[89] Clough and Mulhern (n 69) 80.

[90] See, e.g., Nana (n 87) 98–103 (criticizing the use of vicarious liability for corporate criminal liability in South African on this basis); Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press 2001) 152–4 (summarizing the debate over vicarious liability and noting that similar critiques can be extended to the identification model).

[91] Though it should be noted that due diligence does have some bearing on vicarious liability schemes even if not explicitly provided for, as the diligent organization minimizes risks of harms flowing from corporate activity in the first instance and thus in theory reduces situations in which it might be strictly liable for harm.

[92] Allens Arthur Robinson (n 88) 30–3.

organization to a specific individual's wrongful conduct, however only persons of sufficient standing within the organization are considered to represent it and to thus be capable of fixing it with criminal responsibility. While precise national approaches vary, this model of corporate criminal responsibility is the most commonly adopted in respect of *mens rea* crimes.[93] Similarly, while many transnational crime agreements requiring corporate liability do not suggest a specific method of attribution, those that do tend towards the identification model. For example, the *International Convention for the Suppression of the Financing of Terrorism* (1999) provides that state parties 'shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity', committed Convention offences.[94] Likewise, a number of European instruments adopt a model where corporate liability emerges via offences by persons with a leading position within the legal person, or through offences made possible by such persons' failure to supervise or control others.[95] This latterly feature, basing corporate liability on a lack of adequate supervision or control by persons in leading positions in the company, has been described as a form of 'expanded identification' that incorporates an element of organizational due diligence.[96] The draft ICC articles adopted a particularly restrictive 'identification' approach, requiring that the individual offender not only be 'in a position of control' of the juridical entity, but also acting on behalf of the legal person and with its explicit consent.[97]

A difficulty with the identification approach is determining the point at which an individual can be said to constitute the 'directing mind and will' of the company. States take different approaches to the issue. Further, it can encourage organizations to be structured so as to insulate senior management, hence 'the company', from liability 'by delegating the management of criminogenic activities to lower level managers'.[98] It has also been widely critiqued as inadequate in the context of large complex corporate structures where

[93] *Ibid* 64.

[94] International Convention for the Suppression of the Financing of Terrorism (opened for signature 9 December 1999, entered into force 10 April 2002) 39 ILM 270, Art. 5.

[95] See, e.g., Criminal Law Convention on Corruption (opened for signature 27 January 1999, entered into force 1 July 2002) CETS no 173, Art. 18; Second Protocol to the EU Convention on the Protection of the European Communities' Financial Interests (adopted 19 July 1997) OJ C 221 of 19.7.1997, Art. 3.

[96] Allens Arthur Robinson (n 88) 4, 7–8, 65–6.

[97] See Appendix A. For a discussion on how these requirements may be broader than they appear at first glance, see Clapham (n 17) 153–5.

[98] Nana (n 87) 100.

decision making and action is diffuse. As a result, it fails to secure convictions in such circumstances, even where corporate fault seems to be strongly suggested.[99] It also suffers the same paradoxical problems of both over-inclusivity and under-inclusivity that plague any vicarious liability model. Over-inclusivity is described above. Under-inclusivity flows from the fact that the entity's liability still depends upon the wrongdoing of a single individual.[100] Notably, the impetus for many modern corporate criminal liability schemes is dealing with the problem of being unable to identify physical persons responsible for an offence.[101]

Modern corporate criminal liability statutes now adopt variants of the conceptually distinct 'organizational' approach to corporate criminal responsibility. This approach has emerged in direct response to the problems associated with derivative models of attribution and to reflect the growing influence of realist schools of thought regarding the ontology of corporate behaviour. Such schools posit that the fault of an organization is distinct from the acts of any particular individuals therein and is instead something that 'inheres in the organization itself'.[102] In such a model, the fault of the corporation does not lie in the decisions of a single organ or individual within the corporation, but within the 'policies, standing orders, regulations and institutionalized practices of corporations … [that are] … authoritative, not because any individual devised them, but because they have emerged from the decision making process recognized as authoritative within the corporation'.[103] The organizational model has yet to be subject to significant criticisms apart from its possible conceptual complexity, albeit that this may be due to being, as yet, largely untested.[104]

2. Article 46C: An Organizational Model

With this overview in mind, the approach adopted in the ACC Statute can be better understood. Before examining Article 46C in detail, a few preliminary

[99] E. Colvin, 'Corporate Personality and Criminal Liability', 6(1) *Crim LF* (1995) 1, at 15–18. For critiques of the identification model see J. Coffee, 'Corporate Criminal Liability: An Introduction and Comparative Survey', in A. Eser, G. Heine and B. Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (Freiburg im Breisgau 1999) 16–18; Nico Jorg and Stewart Field, 'Corporate Manslaughter and Liability: Should we be going Dutch?' (1991) Crim LR 158–62.

[100] *Ibid.*

[101] See, e.g., Allens Arthur Robinson (n 88) 34 (on the impetus for the Swiss corporate criminal liability laws).

[102] Colvin (n 99) 22. See generally 23–5 on the basic elements of the realist view.

[103] Jorg and Field (n 99) 159.

[104] Allens Arthur Robinson (n 88) 69.

comments. Article 46C appears to be derived from, or at least influenced by, an approach developed by Professor Eric Colvin in a law article from 1995, as the drafting is strikingly similar.[105] As a result, reference is made to that 1995 article to aid interpretation of Article 46C. Colvin's recommendations were developed after a critical review of the Australian federal corporate criminal liability laws,[106] which are often held up as a well-devised and progressive example of the organizational approach. Colvin's proposal does not correspond to any specific state's model. It is thus unique and also elegantly simple, but there is some uncertainty as to its scope. There is no reason why the ACC model of corporate criminal liability needn't be *sui generis*. It might necessarily be so given the uniqueness of the project. Certainly, the proposed ICC model was peculiar to it. Simplicity also has its advantages as it may both maximize scope for the Court to develop jurisprudence best suited to the cases it confronts and to accommodate domestic variants operating concurrently. On the other hand, the less specificity of the provision, the more it is open to the criticism of unpredictability. Lack of specificity and the resulting unpredictability of application are of greater concern in the criminal law context. The reason is the added significance of due process rights for criminal defendants flowing from the unique stigmatic implications of a finding of criminal guilt and the nature of criminal punishment, all of which is reflected in the fundamental criminal law principle *nullum crimen sine lege* (no crime without law). It is also noteworthy that Colvin's drafting was not adopted in its entirety in the original draft of Article 46C and was also modified, presumably following consultations and negotiations over the earlier draft. The result is that Article 46C may no longer fully reflect the rationales that justified the drafting recommended in the first instance.

Article 46C adopts an organizational model for corporate responsibility. This is because it does not rely upon the attribution of the conduct and state of mind of specific individuals to the corporation but rather it situates corporate culpability within the corporate policies and corporate knowledge that enabled the offence. It does so by specifying how the distinct mental states of intent and knowledge can be attributed to the legal person without deriving those from the mindset or knowledge of specific individuals within the

[105] Colvin (n 99) 40–1. This is suggested by the fact that Art. 46C doesn't appear to reflect a particular state's approach, as well as that, in its original draft form it closely mirrors Colvin's recommended model. The earlier drafting of Art. 46C can be found in: AU, '*Draft* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (15 May 2012) AU Doc Exp/Min/IV/Rev.7.

[106] Criminal Code Act (Cth) (Aus), Part 2.5, sections 12.1–12.4. Colvin also considered similar laws in Canada.

company. Instead, such fault lies within the decision-making *processes* of the entity itself.

Beginning with the attribution of intent; paragraph (2) provides that the corporation is taken to have intended an offence where 'it was the policy of the corporation to do the act which constitutes the offence'. A first question is what is meant by policy and in particular what kind of evidence the Court would be entitled to consider in determining such policies. On its own, some may interpret paragraph 2 as limiting the evidence to which the Court can have recourse in determining intent to the corporation's *formal* policies. If this were the case it would be problematic, as formal corporate policies may denote one position while corporate attitudes, unwritten rules, or previous practice and courses of conduct, *de facto* authorize something quite different. To protect against this kind of criminogenic risk, for example, Australian federal corporate criminal liability provisions define 'corporate culture' as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'.[107] Limiting corporate intent to formal policies is insufficient.

Given its basis in the Colvin model, paragraph (3) of Article 46C is arguably intended to extend what can be considered by the ACC in determining a corporation's policy to include a wider range of evidence strongly suggestive of the company's internal culture. As Colvin describes it, 'intent is the rationale that presents the best explanation of the corporation's policies, rules, and practices considered as a whole.'[108] This is expressed in paragraph (3) as the power of the Court to attribute a policy to a corporation 'where it provides the most reasonable explanation of the conduct of that corporation.' It is intended to convey that a Court is entitled to infer that corporate members understood something to be 'an implied directive', and hence policy, of the corporation, where 'organizational practices and failures were so bad that they made more sense if viewed as embodying a determination to avoid the regulations, rather than as a product of inadvertent negligence or even recklessness.'[109] The challenge is that this reading is not self-evident from the drafting of paragraph (3). A risk is that it might instead be read to reduce the burden of proof regarding corporate intent to the balance of probabilities, which is not the intent behind the original design.

It is also here worth noting a difference between Article 46C and Colvin's drafting in respect of attributing intent, which may or may not be significant.

[107] Criminal Code Act (Cth) (Aus), subsection 12.3 (6).
[108] Colvin (n 99) 33–4.
[109] *Ibid* 38–9.

Article 46C requires a finding that the corporate policy was 'to do the act which constituted the offence.' By contrast, the Colvin model speaks to a policy of non-compliance with the relevant provision. This change of language may make proof of corporate intent more difficult, particularly if the term 'act' is interpreted narrowly to refer to the specific actions of a specific individual perpetrator, rather than to a broader lack of compliance directive. However, reading the provision this restrictively would tend to re-train corporate liability upon that of an individual which is contrary to the underlying philosophy of the organizational approach, and so it is likely the changes in language were not intended to be so limiting. Again, on this issue and by way of contrast, the Australian corporate crime provisions allow a finding of responsibility where the crime was enabled through a corporation's culture that directed, encouraged, tolerated or led to non-compliance or, alternatively, where the corporation failed to maintain a culture of compliance.[110] A narrow reading of 'policy to do the act' may lead to under-criminalization where an organization cannot be shown to have actively sought the specific underlying act constituting the wrong but permitted, acquiesced, or tolerated, precisely that kind of wrongdoing. When interpreting these provisions, the ACC should therefore take care not to inadvertently encourage official but unrepresentative policies to be used to shield responsibility, nor to exclude egregiously poor compliance environments as sufficient to satisfy corporate intent.

In summary, the ACC might consider taking a more liberal rather than formal approach to policy, as paragraph 3 appears to allow, by going beyond corporate written policies, in order to better account for the informal day to day policies of the corporation as manifested in the conduct of its officers. Furthermore, it should not adopt an overly literal reading of 'policy *to do* the act' and thus fail to capture corporate environments where non-compliance with the relevant norm is tolerated and condoned, if not explicitly directed. To do otherwise might create loopholes that companies could strategically exploit in order to avoid criminal responsibility.

Corporate knowledge is then addressed in paragraphs (4) and (5). They provide that where knowledge is an element of an offence, such knowledge can be attributed to the corporation 'by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.' This in turn can be satisfied through the aggregation of such knowledge across corporate personnel. Aggregation of knowledge can be a legitimate means of locating fault within an organizational model of culpability, as it links to the

[110] Criminal Code Act (Cth) (Aus), subsections 12.3 (1), (2)(c) and (2)(d).

broader theme of internal structures and systems that will ensure compliance. Aggregated knowledge models operate on the basis that an organization may 'know' a fact or situation even where no single individual embodies completely such knowledge and that organizations have the capacity to establish information sharing systems that will ensure compliance with law. In other words, the principle that the knowledge of personnel will be aggregated and attributed to the corporation can encourage best information management practices that are valuable in ensuring good corporate citizenship. As Kelly has argued, claims that a company was too big to have shared in knowledge held by individuals diffusely across the corporate structure so as to undercut any entity responsibility are disingenuous 'in the modern age, when technology can ensure that large multinational corporations know very well what's going on within their structures.'[111] Like concepts of corporate culture, aggregated knowledge is another example of how due diligence principles are often embedded in organizational models.

Having said this, the way the principle of aggregating knowledge is adopted in Article 46C might be criticized on a few bases. It is worth here reflecting on the original drafting proposed by Colvin in respect of the attribution of knowledge. It was as follows:

> 3. (a) If knowledge is a required fault element of an offense, that fault element may be established by proof that the relevant knowledge was possessed by a corporation.
>
> (b) Knowledge may be attributed to a corporation where it was possessed within the corporation and the culture of the corporation caused or encouraged knowing noncompliance with the relevant provision.[112]

Colvin explains the rationale behind this drafting as follows:

> What justifies invoking the idea of collective knowledge is that not only is the knowledge possessed but also the corporate culture positively favored the commission of the offense with that knowledge.[113]

This foundational rationale seems to be undermined by the current drafting of Article 46C which dilutes corporate culpability in two ways. First, the Statute allows an aggregation of not only actual but also constructive knowledge. The choice to widen the kind of knowledge that can be attributed to a corporation might be defended in that it tends to further incentivize good corporate

[111] Kelly (n 84) 80–1.
[112] Colvin (n 99) 41. It's worth noting that the original draft Art. 46C, while different, showed greater fidelity to Colvin's recommended wording.
[113] *Ibid* 39.

management by making the corporation responsible for failures among personnel to inquire where they ought. Moreover, it may reflect an expectation that corporate liability is more likely to be in the form of complicity, for which constructive knowledge is sufficient under customary international law.[114] Notwithstanding, it sets up a uniformly different standard for corporate, relative to individual, fault in terms of the degree of knowledge needed generally to satisfy guilt. The level of knowledge required for international criminal law offences and modes of liability in most cases is actual knowledge, with a few instances where knowledge would be expected. A uniform lower standard of knowledge in the case of corporate responsibility relative to individual responsibility, rather than one determined by the substantive crime and its mode of commission, may undermine the normative force of a finding of corporate criminal responsibility.

Second, Article 46C removes the requirement that the corporation must also be shown to have caused or encouraged non-compliance, in light of such knowledge, although this might be remedied by the requirements for attributing corporate intent. In general, there is a risk that paragraphs (4) and (5) may criminalize a company that is not aware of wrongdoing at a level relevant to avoiding the kind of harm suffered, irrespective of reasonable oversight systems. Risks of over-criminalization could be mitigated through the Court separately considering due diligence issues at the sentencing stage. This might be permitted by the concept of 'circumstances of the convicted person' under Article 43A, although the explicit power to consider this issue may be preferable. Furthermore, the exercise of prosecutorial discretion could weed out inappropriately tenuous corporate prosecutions.

It is also worth noting that Article 46C is silent as to the principles by which the physical elements and the specific fault element of recklessness can be attributed to the corporation. In respect of recklessness, the omission of principles for attributing this mental state to a corporation might reflect the view that international crimes require actual or deemed intent and not recklessness.[115] If this is true across the substantive crimes and modes of

[114] For a discussion of the elements of complicity under international criminal law and how these are likely to interact with corporate culpability see, International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes, *Corporate Complicity & Legal Accountability*, vol. 2 (ICJ 2008) 21–4.

[115] This seems to be broadly correct, although command responsibility, for example, can be based in recklessness. Under the Rome Statute, most, if not all, offences require actual or deemed intent. For a discussion of the concept of *mens rea* in international criminal law see, J. Van der Vyver, 'The International Criminal Court and the Concept of Mens Rea in International Criminal Law', 12 *U Miami Int'l & Comp L Rev* (2004) 57.

liability contemplated under the ACC Statute, the mental elements relevant to international crimes are fully addressed in Article 46C.

The situation in terms of attributing physical elements is a bit more complex. In general, organizational models tend to articulate how a physical offender must be related to the defendant corporation in order for their conduct to bear on the determination of the criminal responsibility of the corporation itself.[116] In the Australian model, for example, the physical element is attributed to the corporation where it was committed by an employee, agent or officer acting in the actual or apparent scope of their employment.[117] In other words, a vicarious liability model is adopted for the physical element only. Having said this, a common exception is where the liability of the legal person is established through a failure to take reasonable care (negligence crimes) that is causatively linked to the harm, in which case the lack of care *is* what constitutes the corporation's 'act'.[118] Swiss and Finnish models go further and allow for corporate responsibility where anonymous guilt constitutes the corporate wrong. This is where the way in which the corporation is organized precludes identification of the offender.[119] Colvin has argued that attribution of the physical element of an offence is not required in his model on the basis that the fact that the corporation's criminogenic culture has made a positive contribution to the offence supplies the requisite link to relevant conduct.[120] This causative link is not explicit in Article 46C, however arguably it is supplied through the requirements that the corporate policy was to do the act (intent) and that the corporation possessed all of the relevant knowledge via its 'corporate personnel' (knowledge).

An open question is whether the concept of 'corporate personnel' (as mentioned in paragraph (5) and referring to how corporate knowledge is ascertained) is limited to employees or whether it includes agents, contractors or even corporate subsidiaries. If the corporation's culpability lies in its criminogenic culture, then in theory any crime enabled through that culture would be sufficiently tied to the corporation to render it culpable regardless of the physical actors also implicated. Indeed, the point of this model appears to be that the nature of the actors undertaking the various aspects of the physical commission of the crime and the legal quality of their relationship to the corporation is less relevant to the corporation's liability than the corporation's

[116] Allens Arthur Robinson (n 88) 72–3.
[117] Criminal Code Act (Cth) (Aus), section 12.2.
[118] Allens Arthur Robinson (n 88) 72.
[119] Art. 102(1) of the Swiss Penal Code; Chapter 9, Section 1 of the Penal Code of Finland (relevant translated extracts available in Allens Arthur Robinson (n 88) Appendices 5 and 6).
[120] Colvin (n 99) 41.

relationship to the crime per se in the form of knowing and intending its commission. Whether a person related to the corporation is an agent, contractor or employee is a matter of legal form tending to reflect a more or less temporary or task related relationship with the corporation, which may have little to do with the specific activities they are engaged in on behalf of the corporation, how closely those tasks relate to the corporation's core business, and the degree of control exercised by the corporation over how such activities are undertaken. Likewise, while corporate subsidiaries are legally distinct from their parent, this may say little about the real degree of parent control over the subsidiaries' activities. The wider the net is cast, the more amenable the model will be to corporate prosecutions, particularly in transnational settings where business is often transacted through local subsidiaries and contract chains and where parent company control can be and is often exercised. But at the same time, and particularly given the permissive grounds for attributing knowledge to the corporation, the wider the net the further determinations may move from genuine situations of corporate misfeasance. To address this problem, if it is seen as such, prosecutorial discretion may again have a role to play. For example, a guiding consideration may be that the actor in question should be authorized (for example, contractually) by the corporation to perform a function that benefits or advances its interests.

Finally, it is important to note that corporate criminal liability in the ACC Statute is not predicated upon the liability or conviction of a natural person. The ACC Statute is thus consistent with most models of corporate criminal responsibility in this regard, derivative and organizational.[121] It is also an improvement upon the ICC draft model that appended corporate liability to that of an individual person. This development is crucially important; as wrongs that occur in corporate settings can mean that no individual can or necessarily should be liable for the same wrong, even where such person can be identified.[122] Moreover, the wrong of the corporation and any individual offenders therein may be qualitatively different. But likewise, and importantly, paragraph (6) clarifies that corporate responsibility is in no sense a shield, should individual responsibility also be appropriate. With crimes as serious as those with which the ACC will be concerned and given the goals of international criminal justice, should evidence disclose that a particular individual or individuals within the corporation fully embodies an offence; such person(s) should be individually called to account. As a starting point, where

[121] Allens Arthur Robinson (n 88) 73.
[122] B. Fisse and J. Braithwaite, 'The Allocation of Responsibility for International Crime: Individualism, Collectivism, and Accountability', 11 *Syd LR* (1988) 468.

individuals in positions of senior management in a corporation or those at a middle management level responsible for corporate policy direction are implicated in ACC crimes, it is reasonable to anticipate that individual criminal responsibility would be pursued alongside any corporate criminal responsibility. This recognizes the distinct purposes and effects of individual and corporate criminal liability. As a subsidiary question, it should be a matter for the Prosecutor and the Court as to if, and how, any corporate and individual prosecutions relating to the same conduct should be joined, determined on a case by case basis. The ACC may wish to develop Rules of Procedure that provide some direction in that regard, recognizing that the interests of an individual defendant may conflict with those of a corporation being prosecuted for related conduct.

The choice to adopt a progressive organizational model for the ACC is understandable and defensible. It makes sense for a modern corporate criminal responsibility scheme to reflect the recent lessons and experiences gained through past efforts around national corporate prosecutions for intent crimes. It has been argued, in the context of proposals for the ICC, that the identification model may be more palatable to a wider range of states given it is reflected in some transnational crime agreements, is the more common national model, and can be accommodated more readily even in states that adopt a vicarious liability approach, given it is simply a limited derivative liability model.[123] This may well be true, although it is important not to overstate similarities across national schemes even when apparently in keeping with the same broad approach. But it can likewise be seen as a backward step for a Court that is likely to influence national legislative progress to adopt an approach increasingly criticized as outdated, particularly in the context of large and complex corporate settings. Any model should be capable of successful application where evidence of corporate blameworthiness is justifiable. It should aim to neither over- nor under-criminalize the behaviour of legal persons, considering how the resources available to corporations empowers them to take serious measures to curb criminogenic tendencies but also bearing in mind the need to uphold the normative sway of criminal law. The challenge for the ACC will be to balance these two imperatives. To an extent, the amenability of the current model to that balancing act can only be tested through the doing.

[123] L. Verrydt, 'Corporate Involvement in International Crimes: An Analysis of the Hypothetical Extension of the International Criminal Court's Mandate to Include Legal Persons', in D. Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 286–92.

C. *Corporate Sanctions*

According to Article 43A, available sanctions against a convicted legal person will be limited to pecuniary fines and the forfeiture of 'any property, proceeds or any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State'. In addition, Article 45 provides that convicted persons can be ordered to make reparations to victims, in terms of restitution, compensation and rehabilitation. Finally, Article 46M provides that the ACC can order money and property collected through fines and confiscation to be transferred to a Trust Fund for legal aid and assistance to the benefit of victims. These measures reflect the most common forms of sanctions recognized across domestic legal systems that provide for corporate criminal liability. By keeping sanctions limited in this way, the Statute may simplify the mutual assistance situation for the ACC, as seeking inter-state cooperation to enforce such measures is less controversial than if the Statute allowed a wider range of options.

But the Statute is otherwise quite conservative in regard to corporate sanctions. Effective and appropriate sanctions in respect of legal persons can differ depending on the circumstances of the crime and of the entity. Pluralizing sanction options can provide a court with discretion to adopt measures best directed to the circumstances at hand. The Council of Europe (COE), for example, in its Recommendation No. R (88) on the Liability of Enterprises for Offences, took the view that a wide range of corporate criminal sanctions should be introduced by states, on the basis that 'it is doubtful … whether pecuniary sanctions – be they criminal or quasi-criminal – are sufficiently effective to produce the desired deterrent effect.'[124] Sanctions alternative or additional to financial penalties and forfeiture can serve to demonstrate the moral condemnation attendant on a finding of entity guilt for serious crimes. It can also provide a court with the capacity to intervene directly with the operation of the corporation in ways likely to engendered behavioural changes or to meaningfully punish, though secondary effects for related third parties need to be managed. Proposals for the ICC were more ambitious in that regard and included dissolution (a form of corporate death penalty); prohibitions for a period of time or in respect of certain activities; and closure of

[124] Council of Europe, *Liability of enterprises for offences. Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and Explanatory Memorandum* (COE 1990) [28].

corporate premises used in the commission of a crime.[125] The COE, in its list of suggested sanctions added prohibition from doing business with public authorities, exclusion from fiscal advantages and subsidies, prohibition upon advertising goods or services, annulment of licenses, removal of managers, appointment of provisional caretaker management, closure or winding up, and publication of the decision to impose a sanction or measure.[126] While this broader range of sanctions appear to be explicitly precluded by Article 43,[127] it is also possible that some of these non-pecuniary measures may have in any event been more difficult to sell as they are often the only attraction offered to corporates in risky environments that tend to be in poorer parts of the world, including some contexts in Africa.

Despite the limited nature of corporate sanctions within the ACC Statute, those that do exist may add significant value to the work of the ACC in terms of the recovery of monies and assets for the purpose of reparation, both specific and general. Schabas notes that '[m]ost defendants before international criminal tribunals have claimed indigence'.[128] The risk of indigence is, through common sense, lower in respect of corporate defendants. McGregor argues, in his work on pillaging in the Democratic Republic of the Congo, that even if international courts exercise jurisdiction over corporate directors and officers, the 'international community is allowing corporations to walk away with billions of dollars in profits' obtained from the pillaging of natural resources.[129] However, the potential of asset recovery through corporate sanctions will depend significantly upon prosecutorial strategy and the cooperation of states. States parties are obliged to comply with any requests or orders of the Court in identifying, tracing, freezing, and seizing proceeds, property and assets for the purpose of eventual forfeiture,[130] as well as with the execution of any final

[125] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (14 April 1998) UN Doc A/CONF.183/2/Add.1, Art. 76.

[126] Council of Europe, *Liability of enterprises for offences. Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and Explanatory Memorandum* (COE 1990) arts 6 and 7.

[127] Specifically, Art. 43A(2) of the ACC Statute states: 'For the avoidance of doubt, the penalties imposed by the Court **shall be limited to** prison sentences and/ or pecuniary fines' (emphasis added).

[128] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 810.

[129] M. McGregor, 'Ending Corporate Impunity: How to *Really* Curb the Pillaging of Natural Resources', 42 *Case W Res J Int'l L* (2009) 469, at 490. He goes on to explain how there are few alternative means for victims of pillaging to recover lost resources: at 492–3.

[130] ACC Statute, Art. 46L (Co-operation and Judicial Assistance).

judgment.[131] Mindful use of interim powers and state party cooperation is crucial given the risks of corporate movement of assets. For example, there is the risk that local 'shell' subsidiaries in the place of an offence may have limited assets or be folded with their assets removed to another jurisdiction. The benefit of an international court in this respect is the ability to follow such assets across territorial borders and seek the assistance of states parties to access corporate assets wherever they are located across their collective territories.[132] However, the experience of the ICC to date in securing cooperation and assistance from states constitutes a cautionary tale. The challenge, of course, becomes greater where the assets are moved, or the corporate defendant itself is domiciled, in a third-party state. This may certainly arise in the work of the Court, given that the majority of transnational corporations continue to emanate from the global North.[133] In such situations, third states will need to be prevailed upon to cooperate and establishing agreements to have judgments of the ACC recognized will be needed.

Finally, it is worth noting that the enforcement of fines and forfeiture measures must be undertaken 'without prejudice to the rights of bona fide third parties'.[134] It is sometimes suggested, as a critique of corporate criminal responsibility, that sanctions against corporations harm innocent third parties, such as shareholders and employees. To be fair, if this were a legitimate critique, it would preclude all forms of corporate penalty, criminal or otherwise. While the Court should always be mindful of the secondary effects of any judgment, shareholders (to take one example) should not be considered 'bona fide third parties' nor are they necessary innocent ones. As Colvin notes, shareholders reap the benefit of corporate operations and it is 'therefore not unreasonable to make them bear some of the social costs' of corporate misfeasance.[135] He also goes on to note that the argument of shareholder innocence is even less compelling where an organizational model of liability is adopted, as it is a lack of compliance efforts within the corporation that

[131] ACC Statute, Art. 46*Jbis* (Enforcement of fines and forfeiture measures).

[132] Making a similar point in defense of ICC competence over corporations, see: Jordan Sundell, 'Ill-Gotten Gains: The Case for International Corporate Criminal Liability' 20:2 *Minnesota J Int'l L* (2011) 648, 673.

[133] There is a notable geographical distribution of corporate headquarter states. They are predominantly developed states, many being Western European, though this is beginning to change: B. Roach, 'A Primer on Multinational Corporations', in A. D. Chandler Jr and B. Mazlish (eds), *Leviathans: Multinational Corporations and the New Global History* (Cambridge University Press 2005) 24–8.

[134] ACC Statute, Art. 46*Jbis* (Enforcement of fines and forfeiture measures) and 46L (Co-operation and Judicial Assistance).

[135] Colvin (n 99) 29.

grounds its culpability. Concerned shareholders are not entirely disempowered in that regard, and can press for protective action to be taken or can sell shares if they are dissatisfied with corporate behaviour.[136] Likewise, any rises in prices resulting from corporate penalties[137] are arguably the transmission of the real cost of the goods or services in question to consumers. Moreover, the problem of innocent party impacts is a reality of any punishment, corporate or individual. One need only consider the material and emotional costs to the families, friends and dependents of an incarcerated person to see that this is so. On the other hand, the potential impact on workers is a more complicated issue, given the potential for many to be innocent of the corporation's misconduct. There is, for example, the risk that a corporate fine may be 'socialized' by the corporation in the form of laying off workers or reducing employment conditions[138] or that a fine is so heavy that it affects the corporation's ability to comply with contractual terms agreed with other actors that are innocent bystanders and have nothing to do with its bad (criminal) conduct. These interests most likely cannot be fully accommodated under any corporate punishment scheme. However, the Court could and should think seriously about who can and should be accommodated as 'bona fide third parties' when deciding corporate penalties, using its discretion to avoid situations that will cause severe and sufficiently direct costs on identifiable bona fide third-party interests.

D. *The Challenge of Complementarity*

As mentioned earlier, a challenge for states in deciding whether to adopt corporate criminal liability at the ICC was how the Court could operate in a manner genuinely complementary to domestic systems, given the plurality of national approaches to the issue of corporate crime. According to Article 46H, the ACC is intended to act in a similarly complementary fashion to national justice systems (and presumably to the ICC). The same challenge as to how the ACC will address national desire to deal with a corporate offender they are also contemplating is thus likewise raised. Corporate liability provides a source of tension, both legal and philosophical, between states that do not recognize corporate criminal capacity and the ACC though, as noted earlier, fewer states

[136] *Ibid.*

[137] G. Baars, '"It's Not Me, It's the Corporation": The Value of Corporate Accountability in the Global Political Economy', 4(1) *London Rev Int'l L* (2016) 127, at 152 (noting this is one of a number of ways in which corporations can externalize financial penalties).

[138] *Ibid.*

than ever maintain this absolute position. While the philosophical tension is removed, a question also arises regarding prosecutorial efforts by states where the model of corporate criminal responsibility differs from that of the Court. In short, is the ACC precluded from deferring to national measures in respect of corporate defendants (and hence operating complementarily thereto) if such measures are non-criminal in nature or if the national model of attribution narrows the implications for corporate responsibility?

Before considering this question, it is important to bear in mind that the ACC Statute (like the ICC Statute) does not oblige states to modify their substantive criminal law to reflect its elements of crimes and of criminal responsibility. States may choose to do so, to maximize capacity to take carriage of a given case. In this sense, no doubt the ACC Statute (like the ICC Statute before it) may well catalyze domestic legislating, which is part of its very goal to further the creation of a robust legal environment in Africa. Despite this, the way the complementarity challenge is sometimes discussed in the literature as it pertains to the corporation's proposal seems to presume that substantive criminal law uniformity across states is both a precondition and a requirement of a functioning complementary international criminal institution. That this is not correct is demonstrated plainly by the fact that the ICC Statute came into operation despite the divergence of national systems on numerous principles of criminal law.[139] The control of crime theories that are currently applied at the ICC to determine individual criminal responsibility, which are known to very few domestic legal systems,[140] and even the joint criminal enterprise principles that came before them, likewise put paid to the suggestion that criminal law principles at an international court are only legitimate and functional where they reflect majority global practice. Indeed, the unique modes of liability that have developed in international criminal law have done so not only on the basis of national practices, but also to deal with the unique qualities of blameworthy participation in atrocity. Having said this, the question of how international criminal law deals with the plurality of

[139] For a discussion of the challenges that arose during drafting negotiations at Rome due to differences between states on substantive principles of criminal law, see Saland (n 20).

[140] For detailed analysis of this form of liability and its origins and application at the ICC, see the selection of papers in the 'Special Symposium', 9 *JICJ* (2011) 85–226; N. Jain, 'The Control Theory of Perpetration in International Criminal Law', 12(1) *Chicago J Int'l L* (2011) 159–200; F. Jessberger and J. Geneuss, 'On the Application of a Theory of Indirect Perpetration in Al Bashir', 6(5) *JICJ* (2008) 853; H. Olasolo, *The Criminal Responsibility of Political and Military Leaders as Principles to International Crimes* (Hart 2009) 116–34 and 302–30; H.G. van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility', 7(2) *JICJ* (2009) 307; J. David Ohlin, E. Van Sliedregt and T. Weigend, 'Assessing the Control Theory', 26 *LJIL* (2013) 725.

national approaches to criminalization is a real one, and perhaps it is more pronounced in respect of corporate prosecutions than otherwise (though, from a legal rather than political perspective, of this I am not convinced).

As it stands, and without modifying the ACC Statute, it is likely that Article 46H precludes the ACC from deferring to national measures in respect of a corporate actor that fall short of a criminal process. This is strongly suggested by the use of the terms 'prosecution' and 'tried' therein. This means that states that do not have corporate criminal liability schemes in whatever form would be precluded from taking carriage of a case involving a legal person and this may have implications for willingness to engage with the Court. A way to modify this situation, and potentially increase the political palatability of the ACC to some states, might be to adopt a derivative of the transnational crime agreements and explicitly allow the ACC to defer to non-criminal national efforts if certain conditions are met. To be defensible, this option would need to predicate deference upon local non-criminal proceedings meeting certain conditions, such as sufficiently individuated processes and exposure to sufficiently severe penalties, so that they are an effective and proportionate response given the nature of the wrong.[141] The Statute might go even further, as does the OECD Bribery Convention, and allow such deference to national non-criminal schemes only where the jurisdiction in question does not recognize the principle of corporate criminal liability. This option could be actioned through relatively straightforward modifications to the ACC Statute, and in particular to Article 46H.

There are various policy factors that alternatively push towards or away from this reform option. First, there is the potential that recognition of non-criminal processes may minimize the message of wrongdoing and blameworthiness that is delivered via the non-criminal trial and punishment of the corporate defendant. Having said this, it has been argued that social messaging related to legal practices are particular to a relevant legal community rather than universal, in which case it is the local legal culture that is significant and ought to determine responsibility practices.[142] Second, while recognizing non-criminal local mechanisms tends against the trend towards a primary

[141] Indeed, Larissa van den Herik has noted that, provided certain conditions are met, the question of whether a process constitutes a 'criminal charge' is not always determined in international law solely according to the domestic qualification: 'Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counter Arguments and Consequences', in C. Stahn and L. van den Herik, *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 362.

[142] The challenge, in turn, with this proposition is the question of who is the intended audience for the purpose of social messaging in cases involving international and transnational crimes.

requirement of corporate criminal liability emerging under public international law,[143] it may have the pragmatic benefit of moving us collectively closer to a legal environment of corporate accountability across the globe, however locally characterized.[144] Third, there may be some potential implications of this kind of reform for individual prosecutions: whether similar deference to non-criminal measures in admissibility decisions related to individual defendants (for example, recognizing credible truth commissions) would be demanded by a principled approach. However, there may be a solid rationale for differentiating the treatment of natural and legal persons on this issue.

What about national variant models for corporate criminal responsibility? As it stands, Article 46H seems to empower the ACC to defer to national criminal justice efforts irrespective of the national model of attribution adopted. At the ICC, the pertinent issue in deciding the adequacy of domestic efforts involves the interpretation of a number of concepts, such as what constitutes action in respect of the same 'case', and interpretations surrounding the content and breadth of the unwillingness and inability provisions. These ideas are undergoing evolution. The ACC would need to develop its interpretations of these concepts, and apply them in logically consistent ways to cases involving both legal and natural persons, ideally synergistically with the ICC. Having said this, it seems prudent for the ACC to do so in a way that enables the widest possible deference to differences in national approaches to corporate criminal responsibility in order to ensure the spirit of complementarity is maintained.

A final question that may arise is whether there is any necessary relationship between admissibility determinations regarding related corporate and individual prosecutions. In other words, could the ACC refuse to admit a case against an individual defendant on the basis that an interested state was taking sufficient action with regard to that person, while simultaneously admitting a corporate prosecution for related conduct for want of sufficient state action, or vice versa? The correct answer in my view would be yes, with the question of admissibility for each defendant being considered individually, irrespective that their charges may relate to the same underlying conduct. At the ICC, case admissibility determinations rest upon the question of whether the relevant state is acting with regard to the same person and the same conduct.[145] If the

[143] See, e.g., the comments of Mark Pieth in the context of review of the OECD Convention on Bribery, quoted in Allens Arthur Robinson (n 88) 8.

[144] For others advocating a similar solution for similar reasons, see Ezeudu (n 30) 52–3; van den Herik (n 141) 361–2.

[145] See *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision on the Admissibility of the Case), ICC Pre-Trial Chamber I, 31 May 2003.

same interpretation of complementarity is adopted at the ACC, this would mean that admissibility determinations for each separate defendant, corporate and individual, would be a distinct question for the court. This, too, would again reflect that corporate and individual prosecutions for related conduct are distinct inquiries, involving distinct processes, questions and concerns.

4. ENFORCEMENT CHALLENGES

This section of the chapter provides some final, brief, thoughts regarding issues of enforcement. As with any criminal justice system, without appropriate investigative and procedural powers, any model of liability will be ineffective. There are challenges involved in prosecuting serious crimes of an international or transnational kind that will require mutual legal assistance involving one or more states. While corporate prosecutions can be more complex, the difficulties likely to be faced are in many respects the same as for those faced generally by any international criminal court. Having said this, there are some challenges that are peculiar to the effort to bring corporations to account or that can be more pronounced due to the corporate character of the defendant. For example, specific procedural arrangements will be needed to enable corporate prosecutions. These include provision as to who must be served to qualify for proper service, and who is entitled to represent the legal person in proceedings. These are matters properly addressed in the Court's Rules.[146]

As discussed above in the context of enforcing sanctions, corporations implicated in Statute offences may be transnational in character and this creates specific complexities. In many cases, a legal person may be incorporated in one jurisdiction and act through subsidiaries or other related entities incorporated in another jurisdiction. It may therefore be necessary to consider whether and when one corporation can be liable for its role in the offence of another corporation.[147] This can be particularly important where a local subsidiary directly implicated in an offence has limited assets or where it may be made a scapegoat for an offence that is more properly located in the culture and behaviours of the parent corporation. The Statute does not address this question directly however a few options are available when prosecutors are

[146] ACC Statute, Art. 19*bis* (4).

[147] For a discussion of considerations when deciding which entity to prosecute when dealing with a transnational corporate group and the practical and legal issues that can arise, see J. Gobert and M. Punch, *Rethinking Corporate Crime* (Butterworths Lexis Nexis 2003) ch 5; J. Clough, 'Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses', 33(3) *Brook J Int'l L* (2008) 899.

deciding the prosecutorial strategy in any given case. For example, it may be possible to pursue a parent company as an accessory to the offence of a subsidiary or for conspiring to commit the offence in accordance with Article 28N. This might be difficult to prove. An alternative is to argue the responsibility of a parent company where it can be shown that it exercised a requisite level of control over an offending subsidiary company such that the fault lies with it. This may be possible to argue under Article 46C in that the policy of the parent company as to the wrongful act of a subsidiary or related entity under its control may be sufficient to satisfy that provision. In other words, to demonstrate that the parent corporation's policies and actions were sufficiently connected to the crime to warrant its direct responsibility.

The transnationality of corporations and corporate groups also raises challenges of mutual legal assistance in accessing witnesses and documentary evidence, compelling attendance or document disclosure, and enforcing orders across states. As mentioned above, the Statute requires cooperation by states parties. This gives the Court a legal basis to access corporate documents, personnel, property, and assets that are located within the collective territories of those states. More difficult is where assistance is required from states that are not parties to the Court. It may be necessary for the ACC to enter into agreements with third-party states to enable investigation and enforcement in corporate prosecutions, as with any of its work. Article 46L(3) provides explicitly for this, stating that the Court 'shall be entitled to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose.'

A complexity that might be encountered in such efforts is with jurisdictions that do not recognize corporate criminal responsibility or where models of corporate criminal responsibility are markedly different and more limited than that provided for under Article 46C. It is difficult to see how this can be avoided, aside from focusing on the corporation's presence in jurisdiction. Perhaps, the limited corporate sanctions available to the ACC may soften the challenges in reaching mutual agreements regarding enforcement of orders. Furthermore, adopting an approach to corporate admissibility determinations that provides as great a deference to domestic alternatives for dealing with the same corporate defendant as is defensible may also serve to maximize good relations between the ACC and states. Separately, third-party states that consider the ACC's corporate responsibility scheme an impermissible legal over-reach into global or external economic affairs, may dispute the legitimacy of efforts to enforce the Statute against corporate nationals. That being said, a number of factors press against the weight of such political critiques. These include the codified and

consent-based nature of the ACC's corporate criminal liability scheme, the limitation of the Court's jurisdiction to territorial, nationality, or protective grounds, and the serious nature of the crimes in question.

A related challenge is the problem that a corporation cannot be extradited (though business executives can be when individually prosecuted).[148] According to Article 46A an accused has the right to be tried in his or her presence. This should be read to include corporate accused, given the intent of the Statute seems to be the consistent treatment of natural and legal persons to the degree that is logical, the serious nature of the crimes in question, and the lack of any specific, defendant rights provisions directed to legal persons. This is despite the presence of gendered language in Article 46A. In the case of a corporate prosecution, this equates to the entitlement for the corporation to have hearings conducting in the presence of a chosen representative. As noted, such representative cannot be compelled through extradition processes to appear and speak on behalf of the company. However, there are ways in which to ensure, so far as possible, such representatives are duly appointed and appear in ACC processes.

First, Rules of Procedure and Evidence will need to clarify how a corporation may appoint a representative and the kind of documentation that will function as proof of such appointment. Such Rules may also stipulate penalties where a corporation fails to duly appoint a representative or to appear when indicted, constituting as that would an act of contempt, so as to further incentivizing corporate defence participation. Notably, such contempt penalties would give rise to the need to ensure enforcement cooperation by states, against corporate assets located in their jurisdictions. Second, it should be noted that it is entirely feasible that corporations, local or foreign, may simply submit to ACC proceedings. As Clough has noted, it may well be in the interests of corporations to submit to foreign proceedings where there are significant business interests that might be jeopardized by failing to do so, a factor that seems to have influenced corporate cooperation with US Foreign Corrupt Practices Act proceedings.[149] For example, a company may well be concerned to protect its reputation against allegations of serious violations against international law. Short of access to the corporation within a state party territory or willing submission, a couple of other suggestions have been mooted. The first is that leading individuals within the foreign corporation sufficiently implicated in the offence might be indicted alongside the company. Through their personal extradition and proceedings, the Court may gain

[148] Gobert and Punch (n 147) 157; Clough (n 147) 922.
[149] Clough (n 147) 923.

access to documents pertinent to corporate proceedings and a representative to appear as the company.[150] The problem, however, is that despite being personally charged, this would not compel such persons to appear as the company in respect of the corporate charges.[151] The ICC model to some extent avoids this problem by appending corporate prosecutions to those of the individual, though the pay-off noted above is the substantially reduced utility of a corporate responsibility scheme limited in this way. An alternative is to allow a trial to proceed in absentia, should the corporation fail to produce a representative.[152] Proceeding against an accused in absentia, even for serious crimes, is allowed in some jurisdiction in such circumstances, although the challenge of enforcing the verdict against the person and their assets beyond the territory of states parties remains.[153] To further protect defence rights, protections may be built into any such trial in absentia scheme, for example allowing for retrial should a corporate representative be subsequently appointed.

This brief survey of the procedural challenges of corporate prosecutions, as well as the earlier discussion of conceptual challenges in substantive law, gives a sense of the complexity that faces the Court in pursuing the goal of corporate accountability. This should not deter it, as the rewards of a stronger compliance environment for corporate conduct in Africa could be significant. It does demonstrate that, ideally, the ACC would be sufficiently resourced such that it might create specialized corporate crime branches within its various organs that can focus energies on the particularities of corporate prosecutions and forge links with national and international institutions that operate in this space.[154]

5. CONCLUSION

Article 46C on the criminal liability of corporations is a significant step in the direction of justice. Corporations can facilitate the crimes of natural persons as well as commit offences in their own right. The criminal liability of corporations for transnational and international crimes is an emerging general principle of public international law. Enabling corporate prosecutions at the ACC reflects empirical evidence of corporate involvement in serious crimes

[150] Gobert and Punch (n 147) 157.
[151] Clough (n 147) 922.
[152] *Ibid* 922–3
[153] *Ibid* 923.
[154] One example would be the Nigerian Corporate Affairs Commission: Chijioke Okoli, 'Criminal Liability of Corporations in Nigeria: A Current Perspective' [1994] 38(1) *JAL* 35, 39–40 (describing the functions of this body).

affecting the African continent and the growing appreciation of the distinctive nature of corporate criminality relative to that of individuals therein. This development may well strengthen the prospects of meaningful reparative and restitutive sanctions that can be used to repair victim communities. It also addresses the moral outrage that exists where corporations benefit financially from involvement in serious crime. The political neutrality of the ACC as an independent international institution also speaks in its favour.[155] As Deya notes, Africa has long pioneered in the international law arena, with 'the rest of the international community "catching up" later'.[156] The prospect of an international criminal court with jurisdiction over legal persons, long debated and much deferred, may well come to fruition under African leadership.

[155] Sundell (n 132) 660–1 and 672–3; Ezeudu (n 30) 51.
[156] D. Deya, 'Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes', *OpenSpace on Int'l Crim Justice* (2012) 22, at 26.

APPENDIX A

Working Paper on Article 23, Paragraphs 5 and 6 A/Conf.183/C.1/WGGP/L.5/Rev.2 3 July 1998 (Footnotes Omitted)

5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute.

Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if:

(a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
(b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and
(c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and
(d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, "juridical person" means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of the State as a non-profit organization.

6. The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical

person jointly or separately. The natural person and the juridical person may be jointly tried.

If convicted, the juridical person may incur the penalties referred to in article 76. These penalties shall be enforced in accordance with the provisions of article 99.

28

Administering International Criminal Justice through the African Court

Opportunities and Challenges in International Law

CHILE EBOE-OSUJI

1. INTERNATIONAL LAW AND REGIONAL ARRANGEMENTS

As you may know or recall, in 2014, during their Summit in Malabo, the African Union (AU) adopted a protocol for the stated purpose of conferring criminal jurisdiction upon the African Court of Justice and Human Rights (AC or African Court).

In reflecting upon the opportunities and challenges in international law that lie for the African Court, as an instrument of international criminal justice, a primary normative question of law concerns the attitude of international law towards such a regional arrangement. That is to say: Does international law stand against criminal jurisdiction for the African Court – perhaps out of a perceived need to protect the ICC?

The short and simple answer to that question is: No. International law does not stand against criminal jurisdiction for the African Court – certainly not out of any need to protect the ICC. In fact, no provision in the Rome Statute forbids criminal jurisdiction for a regional court like the AC. Nor, should it.

Notably, the UN Charter recognises regional arrangements – and even positively encourages them. In that regard, article 52 of the UN Charter provides as follows:

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific

settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

And quite significantly, in relation to the administration of international justice, the following may be noted. Having established the ICJ, the UN provided as follows in article 95 of the Charter: 'Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future'.

So, it is that the European Court of Justice, the African Court of Justice and Human Rights, Ecowas Court of Justice, the East African Court of Justice, the Caribbean Court of Justice, etc, can exist despite the ICJ. And, if they can exist alongside the ICJ, there is very little reason to worry that the mere existence of the ICC is a reason in law against giving criminal jurisdiction to the AC.

It may thus be said with some confidence that international law – certainly in light of the precedents in the UN Charter – is positively disposed towards apparently competing regional arrangements, as long as existing arrangements are not deliberately undermined in bad faith.

2. ADMINISTERING INTERNATIONAL JUSTICE THROUGH THE AFRICAN COURT: OPPORTUNITIES

Having addressed the question of the normative attitude of international law towards regional arrangements, of which the AC (exercising criminal jurisdiction) is certainly a part, we will next consider the substantive question whether the world is – in whole or in part – improved by conferring criminal jurisdiction upon the AC.

Other things being equal – and I stress that caveat, 'other things being equal' – there is potentially immense value in conferring criminal jurisdiction upon the AC.

A. *Non-ICC Crimes*

We see this value in its clearest relief in relation to crimes on which the Rome Statute is silent.

There are 14 crimes proscribed in the AC amended Protocol,[1] as compared to four crimes (including aggression) recognised in the Rome Statute. Ten (10) of the AC crimes are crimes that the Rome Statute does not deal with. They include:

- Piracy (the oldest international crime)
- Mercenary activities
- Treasonous usurpation of political power
- Corruption

Upon a fair, objective view, it may be that some of these additional crimes speak to especial concerns that African leaders are entitled to have. Take corruption or kleptocracy, for example, some may say that the human toll of corruption can be just as devastating in the long run as the ravages of armed conflict. The point is adequately made in the following words of UN Secretary General Kofi Annan, in a foreword he wrote in 2004 to a publication on the UN Convention against Corruption, he went even further, saying:

> Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.
>
> This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment.

[1] The 14 crimes are as follows:

(1) ***Genocide***
(2) ***Crimes Against Humanity***
(3) ***War Crimes***
(4) The Crime of Unconstitutional Change of Government (this proscribes the commission or ordering of certain acts aimed at illegally accessing or maintaining power)
(5) Piracy
(6) Terrorism
(7) Mercenarism (prohibiting the recruitment, use, financing or training of mercenaries)
(8) Corruption (in both the public and private sector)
(9) Money Laundering
(10) Trafficking in Persons
(11) Trafficking in Drugs
(12) Trafficking in Hazardous Wastes
(13) Illicit Exploitation of Natural Resources
(14) ***The Crime of Aggression***

> Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.[2]

African States are thus, without doubt, entitled to take collective regional action against corruption and other troubling crimes – in the face of the silence of the Rome Statute on those crimes.

It is also notable that the AC dispensation recognises the attribution of criminal responsibility to corporations [article 46C].

The foregoing thus shows us how it is that the value of criminal jurisdiction for the AC is seen most clearly from the perspective of the crimes over which the ICC currently lacks jurisdiction

B. *ICC Crimes*

But, even for crimes under the Rome Statute, there is much value in giving the AC jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression.

The point may be appreciated from the perspective of extension of the notion of complementarity – that being the hallmark of ICC's jurisdiction. Conferring criminal jurisdiction to the AC over Rome Statute crimes involves an extended notion of complementarity in more ways than one. First, it involves 'intermediation of complementarity'. This is by the recognition of another adjudicatory forum between the current polarities of national jurisdictions and that of the ICC: all with the viewing to ensuring accountability – with ICC remaining a court of last resort in any event. Second, it also connects rather well with the idea of 'positive complementarity' – an ICC-OTP idea – that enables national jurisdictions to try residual cases that the ICC cannot try, in view of limited capacity and resources.

There is thus nothing wrong with systematically building capacity at the regional level to try ICC crimes as well. It fully complements the OTP's vision of seeing national jurisdictions positively enabled to try the crimes that the ICC is unable to try.

From the foregoing considerations then, there is no doubt at all in my mind that the world – from the particular perspective of Africa – is improved immensely by conferring criminal jurisdiction upon the African Court. Provided there is no obstacle to the role of the ICC as a court of last resort, in relation to those AC crimes over which the ICC also has jurisdiction. The idea being that where either the national jurisdiction or the AC is unable or

[2] United Nations, Office of Drugs and Crime, *United Nations Convention against Corruption* (2004) p iii.

unwilling to investigate or prosecute, the situation will by default remain admissible at the ICC.

3. AUTOMATIC DEFERRAL AS A MAJOR CHALLENGE

Having settled the question of the value of conferring criminal jurisdiction to the AC, we now turn to the challenges presented. I recall the lecture topic: 'Administering International Criminal through the African Court – Opportunities and Challenges in International Law'. The question now is whether we have reason to worry. Should we worry that the rosy vision of the opportunity of administering international criminal justice through the AC stands in danger of being undermined? The direct answer is: Yes, indeed. There is a great big reason to worry.

A normative reason for that worry lies in the automatic deferral that the AU has prescribed for serving Heads of States and senior state officials as an integral part of the AU's conferment of criminal jurisdiction upon the AC.

A. *The Troubling Provision: Deferral v. Immunity*

The troubling provision appears in article 46A*bis* of the amended AC Statute. It provides as follows: 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.'

Notably, article 46A*bis* is not presented in the manner of bare-faced immunity for the officials concerned. Indeed, article 46B(2) eschews such immunity on its face, by providing as follows: 'Subject to the provisions of Article 46A*bis*, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment.'

Strictly speaking, then, article 46A*bis* does not prevent investigation or prosecution. It only defers them automatically until the suspect has left office.

B. Article 46A*bis*: Anti-Crime Prevention

But, this automatic deferral of investigation or prosecution (of a very broad category of serving officials) is directly significant to the question of the potential value of the AC as an instrument of transnational criminal justice – and crime prevention. This is because the automatic deferral has immense potential to give unwitting cover to potential beneficiaries of the deferral possibly giving them an incentive to either attain power or to retain it in any way that they can in order to delay or escape criminal proceedings.

And that presents a particular paradox even to the AU's own purpose of criminalising treasonous usurpation of political power. That is to say, there is the curious scenario where anyone who accesses power through treasonous means will be protected by article 46A*bis* – giving him refuge to engage in further violations of the sub-regional norm against treasonous maintenance of power until he chooses to leave or is ousted. It is thus immediately clear that article 46A*bis* constitutes a serious contradiction to an important regional norm of the AU – as it potentially does to all of AU's efforts in proscribing all the crimes contemplated in the Malabo Protocol, to the extent that such crimes can be committed by a Head of State inclined to commit them.

C. The Flawed Premise of Article 46A*bis*

What is especially worrisome about the normative circumstances of article 46A*bis* is the false premise that apparently underlies it. That premise is encapsulated in the following AU position statement made by a leading African statesman in 2013 – one year before the adoption of article 46A*bis*: 'Our position is that certain Articles of the Rome Statute are of grave concern to Africa. In particular, Article 27 which denies immunity to all persons without regard to customary international law, conventions and established norms, must be amended.'[3]

It helps to recall that article 27 of the Rome Statute (as referred to) is the provision that forbids official position immunity, even for Heads of States. It provides:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The quote from the leading AU statesman, complaining against article 27, has two important elements of interest. The first element is in the coded text 'certain articles of the Rome Statute are of grave concern to Africa.' It engages

[3] See text of President Jonathan's speech at the 11–12 October 2013 Extraordinary Session of the African Union Assembly.

the question as to what it is about the provisions of the Rome Statute that should be 'of grave concern to Africa'?

In the temporal context of the statement, it is not difficult to think of the complaints often heard from certain quarters to the effect that: the ICC is an instrument of western imperialism and neo-colonialism and is being used as such to target African leaders.

The second element of the leading AU statesman's speech engages the suggestion that international law (either by treaty or by custom) normally or normatively affords immunity to State officials, while in office.

Taken together, the two elements present the composite idea that by denying immunity to even Heads of States and senior states officials – while in power – article 27 of the Rome Statute is a mischievous, legally aberrant provision, which makes it easy for the ICC to be used as an instrument of neo-colonialism, for the illicit purpose of targeting African Heads of State and senior state officials.

There is no doubt that article 46A*bis* was motivated by that premise. Seen in that light, article 46A*bis* thus becomes a corrective that supposedly shows how the Rome Statute must be amended, with a particular view to taming the aberration appearing in article 27, in order to comport it to international law. But, it is a mistaken premise.

D. *Article 27 of the Rome Statute as a Codification of the Third Nuremberg Principle*

In order to appreciate why it is a mistaken premise, it is necessary to consider that a major event in the history of customary international law, as regards not only individual criminal responsibility but also the rejection of immunity for State officials including Heads of State, was the UN's approval of the principles of law distilled from both the Nuremberg Charter and the judgment of the Nuremberg Tribunal.

In resolution 95(I) adopted on 11 December 1946, the UN General Assembly affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal. And the UN General Assembly tasked the International Law Commission to formulate the Nuremberg Principles '*as a matter of primary importance*'.

During their second session in 1950, the ILC submitted to the UN General Assembly the Commission's report covering the work of that session. Included in the report were the Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, including commentaries.

The third of the Nuremberg Principles appears as follows: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'

The development did not have African leaders in mind or sight. It had Nuremberg in mind and hindsight. From then on, every international law basic document establishing an international criminal tribunal – from the ICTY,[4] to the ICTR,[5] to the SCSL,[6] to the ICC[7] – has repeatedly restated the Third Nuremberg Principle. The repetition thus firmly established the exclusion of the plea of official position immunity including for Heads of State – as a norm of customary international law, concerning cases before international criminal courts.

As observed earlier, the Third Nuremberg Principle did not have African leaders in mind when it was formulated in 1950.

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E. A Distinction: Foreign Immunity in National Courts: *Par in Parem Non Habet Imperium*

But, in excluding official position immunity, the focus of the Third Nuremberg Principle is prosecution before international courts exercising criminal jurisdiction. That is the generally accepted understanding.

Conversely, it is not generally accepted that the Third Nuremberg Principle operates in relation to national courts. For, in that regard, customary

[4] See Art. 7(2) ICTYSt.: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[5] See Art. 6(2) ICTRSt.: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[6] See Statute of the Special Court for Sierra Leone, Art. 6(2): 'The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[7] See Art. 27 of the Rome Statute: '1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

international law does indeed recognise immunity for foreign sovereigns in criminal proceedings before national courts.

The immunity that foreign sovereigns enjoy before national courts follows from the principle of sovereign equality of States – a cardinal principle of international law – notably expressed in article 2(1) of the UN Charter: 'The Organisation is based on the principle of the sovereign equality of all its Members.' And the principle of sovereign equality of States anchors the idea that among equals none has dominion: *par in parem non habet imperium*. In my view, the doctrine of sovereign equality of States is the only rational basis for foreign sovereign immunity before national courts. There is no other basis for it.

The doctrine of sovereign immunity before national courts operates to exclude prosecution even for international crimes.[8] Hence, the full value of the Third Nuremberg Principle is to preclude immunity before international courts exercising criminal jurisdiction.

**

But how come it was a Nuremberg Principle? It was so because the principle appeared in article 7 of the Nuremberg Charter of 1945, which provided as follows: 'The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.' Article 6 of the Charter of the Tokyo Tribunal contained a similar provision. So, too, did the Control Council Law No 10 (CCL No 10).[9] It was thus that the Nuremberg Tribunal tried Grand Admiral Dönitz – who had succeeded Hitler as the Head of State of Germany. Similarly at the Tokyo Tribunal, Prime Minister Hideki Tojo was tried. Dönitz was convicted and sentenced to ten years jail term. Tojo was convicted and hanged. They weren't African leaders.

F. *The Provenance of the Third Nuremberg Principle*

But, was article 7 of the Nuremberg Charter an accident? No, it was not. It resulted, rather, from a deliberate policy decision taken at the London Conference of 1945, to bar the plea of immunity during the Nuremberg trials.

[8] See ICJ judgments in both the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, International Court of Justice, 14 February 2002, ICJ Reports (2002) 3; and the *Jurisdictional Immunity of the State (Germany* v. *Italy)*, International Court of Justice, 3 February 2012, ICJ Reports (2012) 99.

[9] Art. II(4)(a) of the Control Council Law No 10 also prohibited official position immunity in proceedings before national or occupation courts exercising jurisdiction in Germany, pursuant to article 6 of the London Agreement of 8 August 1945.

Notably, Justice Robert Jackson (the US representative to the London Conference) played a leading role in championing the norm stated in article 7 of the Nuremberg Charter. He argued fervently for it. And he sought its approval from President Truman in a report that he made to Truman in June 1945. In the report, Jackson repudiated 'the obsolete doctrine that a head of state is immune from legal liability.' And, he continued as follows:

> There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still "under God and the law".[10]

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Mind you, he was writing all of this to his own Head of State – President Truman. And quite significantly, Truman accepted the propositions as the American position. And these are the makings of customary international law in 1945, culminating in the exclusion of immunity for Heads of State and State officials, as eventually articulated in article 7 of the Nuremberg Charter [also article 6 of Tokyo Charter and article II(4)(a) of CCL No 10].

That is the immediate provenance of the norm that is now known colloquially as the Third Nuremberg Principle – which got eventually codified in article 27 of the Rome Statute (adopted in 1998) for purposes of the ICC. The development of the norm had nothing at all to do with any plot to prosecute African leaders at the ICC. Rather, the norm enabled the prosecution of the leaders of the most powerful States in Europe and Asia during World War II.

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And, it is worth repeating for emphasis that the norm does not then become part of a plot to target African leaders, merely because that old norm has now been restated in article 27 of the Rome Statute. I called it 'that old norm' not merely because it was firmly established 71 years ago in the Charters of the Nuremberg and the Tokyo tribunals. Of course, by all accounts, a norm that is 71 years old is ripe enough to qualify as an 'old norm' indeed.

[10] Justice Jackson's Report to the President on Atrocities and War Crimes on 7 June 1945. Available online at http://avalon.law.yale.edu/imt/imt_jack01.asp

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Notably, still, the repudiation of immunity of Heads of States from the jurisdiction of international criminal tribunals is traceable to the Versailles Treaty of 1919 – making it almost 100 years old – 97 years old to be precise. We see it reflected in article 227 of the Versailles Treaty, according to which the States Parties 'publicly arraign[ed] William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.' That agreement also anticipated the creation of a 'special tribunal . . . to try the accused . . .'

And, mark this. Article 227 of the Versailles Treaty similarly was not an accident. In fact, at the drafting stage, Robert Lansing, the American Secretary of State had vigorously objected to the provision, when it was being discussed within the Versailles Treaty's Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. In addition to being the US Secretary of State, Lansing was both the Chairman of the Commission, as well as the head of the US delegation to the Commission. But his objection was emphatically opposed and roundly rejected by the majority of the Commission, spearheaded by Great Britain. Notably, in their report, the Commission expressed themselves as follows:

> It is quite clear from the information now before the Commission that there are grave charges which must be brought and investigated by a court against a number of persons. In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.

That marked the international community's earliest contemplation of an international criminal court. It also marked the international community's earliest statement of the idea of individual criminal responsibility for violation of international law. And it also marked the earliest repudiation of immunity for Heads of State for purposes of the jurisdiction of an international criminal tribunal. That was almost 100 years ago – almost 80 years ahead of the adoption of the Rome Statute in 1998. It had nothing at all to do with the

need to prosecute African leaders. The norm was conceived out of the need to prosecute the most powerful European leader during World War I.

4. ACCOMMODATING EXTRAORDINARY DUTIES OF STATE AT THE HIGHEST NATIONAL LEVEL

It may be possible to consider that the concern of article 46A*bis* of the amended AC Statute is to prevent disruption to the daily or regular functioning of a national government: if a State's senior officials are exposed to criminal prosecution. But, the remedy to that mischief could have been achieved with the insertion into the amended AC Statute of a provision similar to rule 134*quater* of the Rules of Procedure and Evidence of the ICC. Rule 134*quater* of the Rules provides that an accused who (on the one hand) is summonsed to appear at trial and who (on the other hand) is mandated to fulfil extraordinary public duties at the highest national level may waive the right to be present at trial, and be excused from continuous presence at trial – if he is represented by counsel.

This judicial determination may be made if alternative measures are inadequate, if it is in the interests of justice and if the rights of the accused are fully ensured.

Rule 134*quater* is a 'special procedural rule' designed for the benefit of persons mandated to fulfil extraordinary duties at the highest national level. But it contemplates neither immunity from the jurisdiction of the Court nor automatic deferral of a case. To the contrary, its aim is to ensure that accused persons mandated to fulfil extraordinary duties at the highest national level will remain within the jurisdiction of the Court, with their trials conducted with minimum interruption as a result of the legitimate demands of their public office. Clearly excusal from presence at trial and deferral of investigation or prosecution are different matters.

5. CONCLUSION

There is immense value in conferring criminal jurisdiction to the AC – both as regards crimes within the Rome Statute and more so as regards crimes over which the ICC has no jurisdiction. It is much to be regretted, however, that such immense value is severely undermined by the regime of automatic deferral of cases against Heads of States and other senior State officials. The challenge will be to find ways of maximizing the opportunity presented, while minimizing the challenges.

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Article 46A *Bis*

Beyond the Rhetoric

DIRE TLADI

1. INTRODUCTION

Article 46A *bis* of the Malabo Protocol has, without a doubt, attracted more attention than any other provision in the protocol. For many, Article 46A *bis* is the defining feature of the Malabo Protocol. The debates around Article 46A *bis* have centred on both legal and policy issues. In particular, the debates have focused on the consistency of Article 46A *bis* with customary international law and the fight against impunity.

Much of the debate has tended to reflect the hero-villain trend that has been so characteristic of International Criminal Court (ICC)–African Union (AU) debates relating to immunities of heads of state in recent years.[1] As with other debates in which the self is portrayed as a hero and the other as a villain, much of the positions on both sides of the divide ignore the nuances of what is a complex area of law. In the jockeying for positions, the line between doctrinal positions and normative policy assertions become blurred. Sometimes they disappear altogether. The doctrinal question whether the recognition and application of immunities of certain officials before international courts is consistent with modern international law is very often answered by the normative policy postulation that AU should not have included the immunities provision in the Amendment Protocol. Conversely, the normative

This chapter is an updated version of an article that appeared as 'The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff' (2015) 13 *Journal of International Criminal Justice* 3.

[1] See D. Tladi, 'When Elephants Collide It Is the Grass That Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic' 7 *African Journal of Legal Studies* (2014) 381, at 381 where the author described debates on the ICC as being 'characterised by an ideological chasm that has pitted villains against protagonists – with both sides casting the other villains intent on wanton destruction and themselves as protagonists fighting the good fight'.

postulation questioning the wisdom of prosecuting heads of state is met by a reference to a provision in the Rome Statute, namely Article 27. Added to the mix is very often an empirical assertion, either that a position will result in impunity or will lead to the destabilisation of a country or region. Further complicating the discourse is the resort by commentators to the political rationale or objective behind the Amendment Protocol (Malabo Protocol) i.e. some commentators have asserted that the Amendment Protocol, and the immunity provision in particular, was a response to the prosecutions by the ICC of African heads of state.

In this chapter, I assess the merits of some of the arguments that have been advanced both in support of and against Article 46A *bis*. I begin, in the next section, by providing the context for the debate, namely the importance of the immunities question in the AU and ICC tension. The following section will then identify the various propositions underlying the arguments for and against Article 46A *bis*. I then evaluate these propositions on the basis of the rules of international law before offering some concluding remarks.

2. SETTING THE CONTEXT: ICC–AU TENSION AND THE CENTRALITY OF IMMUNITIES

Central to the ICC–AU tension has been the issue of 'targeting' of Africans, i.e. the fact that all the cases currently before the ICC are against Africans. In truth, however, the tension between the ICC and AU arises not because only Africans have been indicted but because African heads of State have been indicted. All the decisions against ICC-related decisions by the AU have concerned situations in which an African head of State has been indicted – Darfur, Libya and Kenya.[2] The real complaint of the AU against ICC is therefore, the indictment of African heads of State. In legal language, this complaint finds expression in the debate on immunities.

[2] See, e.g., Decision on the Progress Report of the Commission on the Implementation of the Previous Decisions on the International Criminal Court, Assembly/AU/Dec.547 (XXIV), January 2015, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), (Assembly/AU/Dec.245(XIII)) July 2009; Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) (Assembly/AU/Dec.296)(XV), July 2010; Decision on the Implementation of the Decisions on the International Criminal Court, (Assembly/AU/Dec/334(XVI), January 2011; Decision on the Implementation of the Assembly Decisions on the International Criminal Court, (Assembly/AU/Dec.366 (XVII), July 2011.

Discussions on immunities in international law are dominated by two central themes. The first theme relates to the importance of immunity for international law and international relations.[3] The International Court of Justice (hereinafter the 'ICJ') has, for example, declared that the rule of international law relating to immunities 'derives from the principle of sovereign equality of States, which ... is one of the fundamental principles of the international legal order'.[4] The second theme concerns a gradual shift in paradigm and the emergence of a new vision of international law challenging the dominant state-centred and sovereignty based paradigm. This competing vision of international law is characterised by an emphasis on values, where sovereignty no longer trumps other values.[5] This shift in paradigm is consistent with a restricted view of immunities and an emphasis on accountability.[6] This shift which has been recognised in the literature is also reflected in judicial practice.[7] Explaining the expansion of grounds of jurisdiction, Judges Buergenthal, Higgins and Kooijmans referred to 'the emergence of values which enjoy an ever-increasing recognition in international society'.[8] However, it is

[3] See *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, International Court of Justice, 3 February 2012, ICJ Reports 2012, 99 at para 56 where the Court states that 'the rule of State immunity occupies an important place in international law and international relations'. See also separate opinion of Judge *ad hoc* Bula Bula in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice, 14 February 2002, 2002 ICJ Reports 3 at paras 31 and 41.

[4] See *Jurisdictional Immunities of the State case*, supra note 3 at para. 56. See also separate opinion of Judge Bennouna in *Jurisdictional Immunities of the State case* who, at para 4, describes the theme as follows: 'starting from an absolute concept of sovereignty, States had inferred an equally absolute concept of immunity, which allowed one State to claim immunity from the jurisdiction of another's courts under all circumstances.'

[5] See generally J. Dugard 'The Future of International Law: A Human Rights Perspective – With Some Comments on the Leiden School of International Law' 20 *Leiden Journal of International of International Law* 4 (2007) 729, at 731. See also E. Jouannet 'Universalism and Imperialism: The True-False Paradox of International Law' 18 *European Journal of International Law* 3 (2007) 379 at 379; P.M. Dupuy 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi', 16 *European Journal of International Law* 1, (2005) 131, at 135. See for discussion D. Tladi 'South African Lawyers, Values and New International Law: The Road to Perdition is Paved with the Pursuit of Laudable Goals' 33 *South African Yearbook of International Law* (2008) 167, at 169–72.

[6] See, e.g., dissenting opinion of Judge Yusuf in the *Jurisdictional Immunities of the State case*, supra note 3, who states, at para 21, that the scope of immunity 'has been contracting over the past century, in light of the evolution of international law from a State-centred legal system to one which also protects the rights of human beings vis-à-vis the State'.

[7] See especially the dissenting opinion of van den Wyngaert in the *Arrest Warrant case*, supra note note 4, at paras 23–8.

[8] See Ibid. at para 73 Joint Separate opinion of Higgins, Kooijmans and Buergenthal.

important to understand that while there is a gradual shift, it cannot be said that international law has lost its state-centric nature. Jouannet describes the current state of the law as, 'a more multiform and complex law, characterised by greater solidarity, which still flirts with this idea of sovereignty while at the same time seeking to surpass it in favour of a common good'.[9]

In the context of immunities, these sentiments about the current state of international law are echoed by the joint separate opinion of Judges Buergenthal, Higgins and Kooijmans:

> These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind . . . on the other, there is the interest of the community of States to allow them to act freely on the inter-State level . . . Reflecting these concerns, what is regarded as permissible jurisdiction and what is regarded as the law on immunity are in constant evolution.[10]

This tussle between the traditional and emerging international law and their respective influence on the law of immunities is central also to the understanding of the debate surrounding Article 46A *bis*. Thus, some see Article 46A *bis* as antithetical to the modern vision of international law while others see it as reflecting existing rules of international law.

3. IMMUNITY BEFORE THE AFRICAN COURT: UNPACKING THE CASE FOR AND AGAINST

A. *Scope of Immunity in the Amendment Protocol*

Before addressing some of the issues that have been raised concerning the immunity provision in the Amendment Protocol, it is useful to set out the provision and attempt to identify its scope. Article 46A *bis* of the Amendment Protocol provides as follows: 'No charges shall be commenced or continued against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'.

As a preliminary point, and irrespective of doctrinal and normative issues, the text of Article 46A *bis* is ambiguous and not well drafted. Firstly, what is meant by 'or anybody . . . entitled to act in such capacity', a phrase which first appeared in the decisions of the AU Extraordinary Summit of October

[9] Jouannet, supra note 5 at 387.

[10] See *Arrest Warrant case*, supra note 4 at para 75 of the joint separate opinion of Judges Buergenthal, Higgins and Kooijmans.

2014,[11] is not at all clear. One possible reading is that phrase refers to any number of persons including potentially all ministers and even all members of parliament in some states.[12] This very broad interpretation is inherently relative and would result in different rules being applicable to officials from different states since whether a person enjoyed immunity before the African Court would depend on the constitutional system of each State. At its narrowest, however, the provision could be limited to the deputy Head of State or Government.[13] This latter, more narrow interpretation, is more objective and is more consistent with the objective of the decision in which the phrase first appeared i.e. to prevent the prosecution of Kenya's head of State and his deputy. For the purpose of the analysis below, the more narrow meaning of the phrase is assumed although the broader interpretation cannot be ruled out.

The second ambiguity relates to whether Article 46A *bis* aims at providing two different regimes of immunity i.e. immunity *ratione personae* and immunity *ratione materiae*, or only one.[14] Moreover, if the aim is to establish only one regime, it would be unclear whether the regime would be immunity *ratione materiae* or immunity *ratione personae*. An ordinary meaning of Article 46A *bis* appears to support two separate categories.[15] The first category, approximating immunity *ratione personae*, would be applicable to 'Heads of State or Government' and 'anybody acting or entitled to act in such capacity.' The

[11] Para 10 (j) AU Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013).

[12] Section 90 of the Constitution of the Republic of South Africa, 1996, provides that the Deputy President, a Minister designated by the President, a Minister designated by other members of the cabinet, the Speaker of Parliament until the parliament designates one of its members, may act as head of state.

[13] Under section 147(3) of the Constitution of Kenya, only the Deputy President may hold the office of the acting President in the absence of the President. See also Article II section 6 of the Constitution of the United States.

[14] At its 65th Session, in the context of its work on Immunity of State Officials from Foreign Criminal Jurisdiction, the International Law Commission (ILC) adopted Draft Articles 3 and 4 on immunity *ratione personae* as covering all acts, whether in private or official capacity, performed by Heads of State, Heads of Government and Ministers for Foreign Affairs. See chapter 5 of the *Report of the International Law Commission on the Work of Its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-Eighth Session, Supplement 10* UN Doc. A/68/10. At its 66th Session, in the context of its work on Immunity of State Officials from Foreign Criminal Jurisdiction, the ILC adopted Draft Article 5 on immunity *ratione materiae* as applicable to state officials acting as such. See chapter 9 of the *Report of the International Law Commission on the Work of its Sixty-Sixth Session (5 May to 6 June and 7 July to 8 August 2014), General Assembly Official Records Sixty-Ninth Session, Supplement 10* UN Doc. A/69/10.

[15] The general rule on interpretation of treaties, in Article 31(1) of the Vienna Convention on the Law of Treaties, requires the terms of a treaty to be given their ordinary meaning in context and in the light of the treaty's object and purpose.

second category, approximating immunity *ratione materiae*, applies to 'other senior officials based on their functions'. The phrase, 'based on their functions' in Article 46A *bis*, appears to only qualify 'other senior officials' and not 'Heads of State or Government, or anybody acting or entitled to act in such capacity.' An interpretation of Article 46A *bis* as establishing two categories of immunities would also be consistent with applicable principles of international law.[16] Assuming this interpretation were the more correct interpretation, it would mean that, contrary to the conclusions of the ILC and the decision of the International Court of Justice in the *Arrest Warrant case*, immunity *ratione personae* under the Statute of the African Court would not be extended to Ministers for Foreign Affairs.[17] Other senior officials, including Ministers for Foreign Affairs, would then be entitled to immunity *ratione materiae* for functions performed in their official capacity.

An alternative interpretation of Article 46A *bis* is that it establishes only immunity *ratione personae*. Under such an interpretation, 'based on their functions' does not qualify the extent of immunity but rather forms part of the description of the senior officials. In other words, senior officials, defined in terms of their functions, enjoy the immunity of Heads of State or Governments and other anyone acting or entitled in that capacity. Indeed 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*.[18] This interpretation is supported mainly by the fact that

[16] Under the Vienna rules of interpretation, in particular Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 'relevant rules of international law applicable in the relations between the parties' are to be taken into account in the interpretation of treaties. On the notion of two categories of immunities under international law, see the work of the ILC cited, supra note 14.

[17] See *Arrest Warrant case*, supra note 4 at para 54 where the International Court of Justice held that Minister for Foreign Affairs, enjoy immunity *ratione personae*. Whether the Ministers for Foreign Affairs should enjoy immunity *ratione personae* was a matter of intense debate during the ILC's consideration of the topic. Although the ILC decided to includes Ministers for Foreign Affairs, at para 5 of the Commentary to Draft Article 3, the ILC states as follows: 'On the one hand, some members of the Commission pointed out that the Court's judgment [in the *Arrest Warrant case* was not sufficient grounds for concluding that a customary rule existed, as it did not contain a thorough analysis of the practice and that several judges expressed opinions that differed from the majority view. One member of the Commission who considered that the Court's judgment does not that there is a customary rule nevertheless said that, in view of the fact that Court's judgement in that case had not been opposed by States, the absence of a customary rule does not prevent the Commission from including [Minister for Foreign] among the persons enjoying immunity *ratione personae*.'

[18] In the *Arrest Warrant case*, supra note 4 at para 53, the Court states that to determine the extent of the immunities of Ministers for Foreign Affairs it 'must first consider the nature of the functions exercised by a Minister for Foreign Affairs.'

in its earlier decisions leading to the adoption of Article 46A *bis*, the AU has never made a distinction between the immunities of heads of state and those of other senior state officials.[19] Moreover, such an interpretation would resolve the inconsistency between the first interpretation and the decision of the International Court of Justice in *Arrest Warrant case* identified above. Although the Article 46A *bis* could be read as establishing two categories of immunities, namely immunity *ratione materiae* and immunity *ratione personae*, on a balance it appears that this second alternative is likely what was meant by the AU. It is unnecessary to resolve this interpretative ambiguity, save to recognise these two possible readings of the provisions. Under the second interpretation, in which only one type of immunity is recognized, other officials whose functions do not exhibit the characteristics identified by the Court in the *Arrest Warrant case* as indicating immunity *ratione personae* would not have immunity before the African Court's criminal law section.

B. *Arguments on the Immunity Provisions in the Amendment Protocol*

As a normative proposition, arguments against the immunity provisions in the Amendment Protocol are numerous and include arguments based on the fight against impunity. However, as a doctrinal question, arguments against the immunity provisions in the Amendment Protocol have tended to revolve around its consistency with international law and the Rome Statute in particular. Jemima Njeri Kariri, for example, puts forward primarily normative arguments against the immunity provision. She observes, for example, that the immunity provision is a 'setback to advancing democracy and the rule of law' and provides a 'protective veil that denies justice to victims and is detrimental to accountability'.[20] These are all normative arguments that suggest that the AU *should not* have included the immunity provision. Although not focused on the legal doctrinal question about the place of immunity in international (and domestic) law, Njeri Kariri postulates, as a legal position, that 'the immunity provision flouts international law and is contrary to the national laws of African states like Kenya and South Africa.'[21]

The doctrinal argument, questioning the legal basis of an immunity provision in the Amendment Protocol can be illustrated by a reference to Chacha

[19] See, e.g., Para 9 of the *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1 (Oct 2013).

[20] J. N. Kariri 'Can the New African Court Truly Deliver Justice for Serious Crimes?' 8 July 2014 *ISS Today*, available at www.issafrica.org (last accessed 19 July 2015).

[21] Ibid.

Bhoke Murungu's observations on the African Court.[22] Murungu asserts, citing Article 27 of the Rome Statute, that 'immunity of state officials is no longer a valid defence for the commission of international crimes'.[23] This position is also one that appears to have been advanced by the ICC in its decisions in the *Malawi* and *Chad* non-cooperation cases.[24] More to the point, Murungu asks whether extending the jurisdiction of the African Court to cover Rome Statute crimes (along with Article 46A *bis*) 'has a legal basis under the ICC Statute'.[25] The Rome Statute, he asserts, 'does not expressly allow or even imply that regional courts … be conferred with jurisdiction' over Rome Statute crimes.[26] On the basis of his analysis, he concludes that 'it is difficult to establish a clear legal basis' for extending the jurisdiction of the African court in the Rome Statute.[27] Indeed, Murungu suggests that the very process of establishing the criminal section of the African Court was 'contrary to the provisions of the ICC Statute' in relation to cooperation.[28] Murungu's critique of the extension of the jurisdiction of the African Court is based on the issues of immunity of African Heads of State raised by the AU. He states, for example, that the only purpose behind the expansion of the jurisdiction of the Court is the AU's attempts to 'protect some of its leaders'.[29]

The arguments of Murungu are reflective of the whispers in the corridors of ICC meetings, even if not always captured in the literature. This argument can be reduced to three related propositions. First, customary international law does not provide for immunity of officials before international courts. Second, the provision of immunity in Article 46A *bis* is inconsistent with international law or, at best, goes against the trend of practice. Finally, the argument postulates that Article 46A *bis* undermines the Rome Statute. These legal propositions about immunity for Rome Statute crimes are very often based on normative statements about the effect of immunity on the fight

[22] C. B. Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' 9 *Journal of International Criminal Justice* (2011) 1067.

[23] Ibid. at 1077.

[24] See, e.g., paras 18 and 36 of the *Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir* (ICC-02/05–01/09), Pre-Trial Chamber I, 12 December 2011; *Décision Rendue en Application de l'article 87(7) de la Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de cooperation délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmed Al Bashir, Al Bashir (*ICC-02/05–01/09), Pre-Trial Chamber I, 12 December 2011.

[25] See Murungu, supra note 22, at 1077.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid.

against impunity. The granting of immunity is said to be contrary to the AU commitment of protecting the sanctity of life and condemning and rejecting impunity.[30] Steven Lamony of the Coalition for the ICC is quoted as saying 'Africa should be moving forward in the fight against impunity, not regressing'.[31] Similarly Netsanet Belay of Amnesty International has said that the decision 'undermines the integrity of the African Court'.[32]

The AU itself has defended the need for immunities both on normative and doctrinal grounds. According to the AU, under customary international law, 'Heads of State and other senior state officials are granted immunities during their tenure of office'.[33] As a doctrinal proposition, the AU has maintained that 'immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals'.[34] Providing for immunities of Heads of State and other officials in the Amendment Protocol is, therefore, from the AU's perspective, acting in furtherance of international law.

The AU does not dispute the legality of arrangements such as those in Article 27 of the Rome Statute, which provides that neither immunity nor other special procedural rules attaching to the official capacity of a person constitute a bar for the ICC exercising jurisdiction of a person.[35] The AU, instead, approaches Article 27 as a treaty rule applicable only to State Parties and that for non-State Parties, the rules of customary international law relating to immunities remain intact. In response to the decisions of the ICC on non-

[30] International Justice Resource Centre 'African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights Statute' available at www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/ July 2 2014, (accessed 10 August 2014).

[31] Ibid.

[32] Ibid.

[33] See Para 9 of the *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1, Oct 2013.

[34] See Press Release 02/2012 on the 'Decision of Pre-Trial Chamber 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.

[35] Article 27(1) of the Rome Statute that the 'Statute shall apply equally to all persons without distinction any distinction based on official capacity. In particular, official capacity as a Head of State or Government, member of a Government … shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.' Article 27(2) provides that '[I]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such a person.'

cooperation by Malawi and Chad, the AU issued a press release which stated, in part, that, 'immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty. A treaty may not deprive non-Party States of rights which they ordinarily possess'.[36]

This position essentially presents Article 27 of the Rome Statute, and similar provisions in the statutes of international tribunals, as being exceptions to the rules of customary international law relating to immunities and applying only as between parties to the constitutive treaties. The immunities provision in the Amendment Protocol are, from this perspective, seen not only as acceptable but as reflecting customary international law. This has been the legal basis of the AU's call for non-cooperation with the ICC's request for the arrest and surrender of Al-Bashir.[37] According to the AU, Article 27 leaves intact customary international law on immunities and the waiver of immunities implied by Article 27 applies only between States Parties to the Rome Statute. Thus, while there may be a duty on States Parties to the Rome Statute to cooperate in the arrest and surrender of a head of a State Party, no such a duty exists in relation to the arrest and surrender of a head of non-State Party.[38] To the extent that there is such a duty under the Rome Statute, compliance with it results in a breach of international law obligations under customary international law thus engaging the responsibility of the cooperating State. While this aspect of immunity is not directly relevant to the debate on Article 46A *bis*, it does serve to illustrate the AU's understanding of immunities under customary international law and, more to the point, the perceived exceptionality of Article 27 of the Rome Statute.

Both the positions supporting the immunities provision and the position opposing the provision are based on doctrinal assumptions about the rules of general international law relating to immunities. I turn now to evaluate these doctrinal assumptions.

[36] See Press Release 20/2012, supra note 34.

[37] In its first decision on non-cooperation with respect to Omar Al Bashir, for example, the AU Summit requests the Commission and African states to engage in a process to clarify 'the Immunities of officials whose States are not party to the [Rome] Statute.' See para 8 of the *AU Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec. 245(XIII) Rev. 1. See especially para 6 of the *AU Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)*, Assembly/AU/Dec.397 (XVIII) in which the AU Assembly reaffirms 'its understanding that Article 98(1) was included in the Rome Statute . . .out of a recognition that the Statute is not capable of removing an immunity which international law grants to officials of States that are not parties to the Rome Statute.'

[38] See Press Release 20/2012, supra note 34.

4. EVALUATING THE DOCTRINAL ARGUMENT CONCERNING THE IMMUNITY PROVISION

I begin with an assessment of the AU position. First, it should go without saying that the duty to cooperate under the Rome Statute cannot deprive non-States Parties of their rights on immunities under customary international law. Treaties create rights and obligations only as between parties to the treaty and the rights of non-parties cannot be affected by the treaty.[39] Whether this means, as is argued by the AU, that there is no duty to cooperate in the arrest and surrender of Al-Bashir is dependent on other legal questions, such as the effect of a Security Council referral of a situation to the ICC and the interpretation of Article 98, which fall beyond the scope of the enquiry here.[40]

While the assertion that the rights relating to immunities under customary international law of a non-State Party cannot be affected by the duty to cooperate under the Rome Statute cannot be disputed, what does require closer scrutiny is the assertion that under customary international law heads of State (and other officials entitled to immunity *ratione personae)* enjoy immunity before international courts and tribunals. This assertion seems to ignore the dictum by the International Court of Justice in the *Arrest Warrant case* where the Court stated that, notwithstanding the customary international law rules on immunity of officials from foreign criminal jurisdiction, a state official may still prosecuted before an international court under certain circumstances.[41] But there is another far more fundamental problem with the AU's postulation. The immunity of states officials, whether *ratione personae* or *ratione materiae*, under customary international law means, in essence, the immunity of state officials from the jurisdiction of courts of *foreign states*. This immunity is an

[39] See generally Article 34 of the Vienna Convention on the Law of Treaties.

[40] This aspect of the immunities debate has been considered in various articles. See, e.g. D. Akande 'The Legal Nature of the Security Council Referrals to the ICC and its Impact on Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333; P. Gaeta 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315. See also D. Tladi 'The ICC Decisions in Chad and Malawi: On Cooperation, Immunities, and Article 98' 11 *Journal of International Criminal Justice* (2013) 199. See for the author's more recent contributions on the subject: D. Tladi 'The Duty on South Africa to Arrest and Surrender President Al Bashir under South African and International Law: A Perspective from International Law' 13 *Journal of International Criminal Justice* (2015) 1027, especially at 1033–5 and 1043–4; D. Tladi 'Immunity in the Era of 'Criminalisation': The African Union, the ICC and International Law' 58 *Japanese Yearbook of International Law* 2015) 17, especially at 31–9.

[41] *Arrest Warrant case*, supra note 4, at para 61.

extension of the immunity of the state from the jurisdiction of other states based on the principle of sovereign equality of states.[42] International tribunals, like the ICC and the African Court, are not foreign states. The rationale for immunity of states and its officials, sovereign equality of states, does not apply to the exercise of jurisdiction of international courts and tribunals since, thought created by states, they are not themselves states. Moreover, since the immunity of officials from the jurisdiction of the courts of *foreign states* can be shown to exist in the practice of states accepted as law, to extend this immunity to also international courts and tribunals would require evidence of practice of states accepted as law, which does not exist.[43] Quite the contrary, if anything, given the history of international criminal law described in, for example, the ICC decisions in *Malawi* and *Chad*, there appears to be practice in the other direction.[44] Therefore, the argument from the AU that the insertion of Article 46A *bis* is not only consistent with but is reflective of, customary international law is doctrinally flawed.

Does the fact that the AU proposition concerning immunity before international courts is incorrect, mean that the counter-proposition, i.e. customary international law rejects immunity, is correct? This was essentially the argument advanced by the ICC in *Malawi* and *Chad*.[45] The experience with the Nuremberg Tribunals, the Tokyo Tribunals, the International Criminal Tribunal for the former Yugoslavia, the International Criminal for Rwanda, the Special Court for Sierra Leone and the Lebanon Tribunals constitutes practice evincing a denial immunity. However, to transform the empirical fact, practice in the language of law, to a rule of customary international law requires that the practice be accompanied by a sense of obligation i.e. the practice is required by law.[46] No evidence of such an acceptance of law is present in relation to immunity of state officials before international courts and tribunals and none is presented by the ICC in *Malawi* and *Chad*. Indeed, in the debate over the arrest and surrender of Al-Bashir, those arguing that there was indeed a duty to arrest have advanced as a legal reason, not the fact

[42] See, e.g., para 6 of the commentary to Draft Article 4 of the ILC's Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, supra note 14.

[43] In this regard, the ICJ in the *Arrest Warrant Case*, supra note 4 at paras 58 and 59, where the Court makes it clear that the rules relating jurisdiction of national courts, including immunities applicable before them, should be distinguished from the same relating to international courts.

[44] *Malawi Decision*, supra note 24 at para 23 *et seq*.

[45] Ibid.

[46] See generally the Report of the ILC at Sixty-Sixth Session (Chapter 10), supra note 14 at para 169.

that the court was an international court but rather because the situation was referred to the court by the Security Council, which, the argument goes, has the power to override customary international law.[47]

Proponents of the view that there is a rule under customary international law denying immunity before international courts and tribunals may point to the *Arrest Warrant case*.[48] In the *Arrest Warrant case*, the International Court of Justice famously made the following observations: 'immunities enjoyed under international law by an [official] do not represent a bar to criminal prosecution in certain instances. . . . Fourthly, an [official enjoying immunity in national courts] may be subject to criminal proceedings before certain international criminal courts, [sic] where they have jurisdiction'.[49]

The quoted extract, however, does not suggest anything about the status of immunities before international courts under customary international law. The ICJ was not laying down a rule of international law but referring to *possible* avenues that may be followed for the prosecution of officials with immunity *if certain conditions were met*. The first avenue provided by the ICJ, for example, refers to the possibility of a person being tried before the courts of their own state.[50] Yet this can only happen if the national court in question has jurisdiction and the official in question has no immunity under domestic law. Similarly, an international court or tribunal can only try an individual if there is no jurisdictional bar, including immunity, to trying the individual. Whether or not the international court or tribunal will have jurisdiction and whether or not there is bar to the exercise of such jurisdiction will be dependent on the constitutive instrument establishing such as a court or tribunal.[51] The argument that customary international law denies immunity before international courts is, therefore, unconvincing. At any rate, as a matter of customary international law, it is difficult to see how a rule of customary international law can form when the AU, representing more than a quarter of states, reject the said rule.

That there is no legal rule under customary international law denying immunity to state officials does not, of course, mean that a state official can plead immunity before a tribunal having jurisdiction which, by its constitutive instrument, has removed immunity such as Article 27 of the Rome Statute.[52]

[47] See, e.g., Akande, supra note 40. See contra, Tladi, supra note 40.
[48] *Malawi decision*, supra note 24, at para 34.
[49] *Arrest Warrant case*, supra note 4, at para 61.
[50] Ibid.
[51] See Ibid. where the ICJ refers to the constitutive instruments establishing the ICC, the ICTY and the ICTR.
[52] Ibid.

By the same token, however, the exclusion of immunity in a treaty establishing an international court or tribunal does not affect the relationship between a non-State party to the treaty and State parties. Thus, the fact that a state is party to the Rome Statute does not imply that such a State is no longer obliged to respect the immunity of an official from a State that is not a Party to the Rome Statute. Indeed, even if the assertion that customary international law excludes immunities in respect of proceedings before international courts were correct – and I have argued that it isn't – this would apply only as between the state officials and the international court or tribunal concerned and would not by itself affect the relationship between states *inter se*.[53]

If neither the AU argument that customary international law requires international courts to respect immunity, nor the argument advanced by, *inter alia*, the ICC that customary international law denies immunity before international courts is correct, then how is Article 46A *bis* of the Amendment Protocol to be understood from the perspective of customary international law? If customary international law neither requires nor rejects immunity before international courts and tribunals, then as a matter of law, the AU is free to include or exclude immunities as a bar to prosecution as it deems fit. Whether this is desirable or not is a different question. Thus, Article 46A *bis* is neither reflective of nor inconsistent with customary international law. The question may well be asked whether, under a treaty that is silent on immunities, state officials are entitled to claim immunities. Subject to the normal rules of interpretation, a court, national or international, having jurisdiction is entitled to exercise that jurisdiction unless there is a rule of international law prohibiting such exercise. This is not the same as saying, however, that there is a rule of international law excluding immunity.

A related question is whether Article 46A *bis* of the Amendment Protocol undermines the fight against impunity. The argument on which this is based appears to be that the extension of the African Court's jurisdiction to international crimes while also expressly including immunity will shield perpetrators from the reaches of justice. However, this argument does not follow. The effect of the extension of the African Court's jurisdiction is, *potentially*, to expand the reach of international criminal justice. It does not, as the argument may suggest, reduce this reach. Assuming African States that are not party to the Rome Statute become party to the expanded African court, then the reach

[53] In the context of the Rome Statute, this distinction is explained in Tladi, supra note 40, at 211 noting that Article 27 'applies to defences, substantive or jurisdictional, that an individual *may raise before the ICC*. It does not, in any way, address the relationship between states nor does it address the relationship between the ICC and states parties.' (emphasis in the original).

of international courts to potential situations and perpetrators becomes enlarged. On the other hand, regardless of the number of States that fall within the jurisdiction of the expanded African court, the reach of the ICC will remain unaffected.

The idea that Article 46A *bis* of the Amendment Protocol affects the reach of international criminal justice can only be based on a misconstruction of the relationship between the AU Court and the ICC. Under Article 46A *bis* the African Court will not have the competence to try the persons having immunity, but this will not prevent the ICC from exercising jurisdiction against such persons if it has jurisdiction. Under the principle of complementarity, the ICC is of course barred from proceedings with trials where a court with competence is willing and able to exercise jurisdiction.[54] This procedural bar, however, applies only to State prosecution and/or investigations and does not extend to the exercise of jurisdiction by regional courts. Although an amendment to the Rome Statute, to recognise the competence of regional courts for the purposes of complementarity has been transmitted to the Secretary-General by Kenya,[55] this amendment is unlikely to be adopted by the Assembly of States Parties. At any rate, until such a time as an amendment has been passed, from the perspective of the ICC, Article 46A *bis* should be a non-issue.

5. CONCLUSION

The expansion of the jurisdiction of the AU Court to include also international crimes has raised much controversy in international criminal justice circles – both diplomatic and academic. Even more controversial has been the decision by the AU to make provision for immunities of certain officials before the AU Court in the form Article 46A *bis*. In the back and forth of arguments for and against Article 46A *bis*, normative policy argument, empirical statements and doctrinal arguments have been lumped together in a way that can result in confusion. This confusion has aided in the perpetuation of the hero-villain trend in which supporters of the ICC see themselves as heroes and the AU as villains and the supporters of the AU see themselves as heroes and the ICC as villains.

[54] See Articles 17, 18 and 19 of the Rome St.

[55] See *ICC Working Group on Amendments Informal Compilation of Proposals to Amend the Rome Statute* (on file with the author). It should be noted, that the Kenyan proposal only seeks to amend to the Preambular paragraph relating to complementarity and does not address the substantive provisions in Articles 17, 18 and 19. As currently drafted, it is therefore unlikely to be sufficient to establish a complementarity role for the African Court.

In the eagerness to put on the white hat and fight the evil 'other', basic principles of international law are conveniently covered in a heap of rhetoric and slightly bent doctrine. Much of the confusion created by the debate arises from the failure by commentators to make a distinction between the law relating to immunity and the wisdom (or desirability) of Article 46A *bis*. Supporters of Article 46A *bis* present it as salvaging international law and reclaiming the foundational international principle of sovereignty by preserving immunity. What is ignored in this narrative is that international law rules on immunity apply to the exercise of jurisdiction by domestic courts over officials of a foreign state and that customary international law neither requires immunity before international courts nor prevents it. Opponents of Article 46A *bis*, on the other hand, present it as doing harm to the fight against impunity by protecting officials from the reach of international courts. What is ignored is that the expansion of the jurisdiction of the African court does not, in any way, affect the jurisdiction of other courts, including the ICC, and can in no way prevent the exercise of jurisdiction by those courts of individuals who may be immune from prosecution before the African Court by virtue of Article 46A *bis*.

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Defences to Criminal Liability

SARA WHARTON

1. INTRODUCTION

Defences to criminal liability have played a very limited role in the existing jurisprudence of the contemporary international criminal courts and tribunals.[1] In fact, they have been described as 'an oft-forgotten aspect of international criminal law'.[2] This is likely due in part to the fact that the existing international criminal courts and tribunals prosecute only a small number of potential perpetrators. The selectivity exercised by the prosecutor limits the cases pursued to those individuals who are most responsible and against whom the prosecutors have the strongest case. This likely excludes those cases where there may be a strong defence which would exclude criminal culpability.[3] It has also been suggested that the lack of attention may also be due to 'a lack of sympathy' for the accused.[4] However, all criminal trials, including for the gravest international or transnational crimes, must be conducted in full

[1] This chapter will use the broad term 'defences' rather than the civil law division between justification or excuses, or the language adopted at the International Criminal Court of 'grounds for excluding criminal responsibility', to refer to all substantive defences other than simply putting the Prosecutor's burden of proof to the test. For other sources on defences in international criminal law see: G.J.A. Knoops, *Defenses in Contemporary International Criminal Law*, (2nd edn., Leiden: Martinus Nijhoff, 2008); A. Cassese, *International Criminal Law*, (2nd edn., Oxford: Oxford University Press, 2008) at 255–301; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (3rd edn. Cambridge: Cambridge University Press, 2014) at 398–418; I. Bantekas, *International Criminal Law*, (4th ed. Oxford: Hart Publishing, 2010) at 99–121; Y. Dinstein, 'International Criminal Courts and Tribunals, Defences', *Max Planck Encyclopedia of Public International Law* available online: http://opil.ouplaw.com/home/EPIL.

[2] Cryer *et al.*, ibid., at 398.

[3] Ibid.

[4] Ibid.

accordance with general principles of criminal law including all accepted grounds for excluding criminal responsibility.

The *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (the Malabo Protocol) does not include a provision defining which defences will be applicable before the African Court of Justice and Human Rights (the African Court). This is not unusual. Other contemporary international criminal institutions are similarly predominantly silent on the question of defences, including the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[5] This silence, of course, does not infer the irrelevance of defences. As noted by the ICTY Trial Chamber, defences 'form part of the general principles of criminal law which the International Tribunal must take into account in deciding the case before it.'[6] The Court will, therefore, need to turn to customary international law and to general principles of law to determine and to define applicable defences.[7] The Court will also have to consider whether it will permit resort to domestic laws of African or other states as a possible default when no customary international law or general principle can be found.

It is beyond the scope of this chapter to conduct a comparative analysis of domestic laws to determine which general principles and regional norms prevail. This is a task that the African Court itself will have to undertake on a case-by-case basis as arguments about defences are brought before it. Nonetheless, caution should be exercised if such borrowing is found necessary. For one thing, even in the continent of Africa, there may be different understandings of defences to liability based on the underlying origins of the municipal legal system in question. For example, the approach to particular defences might differ between and among common law or civil law jurisdictions and others that might be more appropriately considered mixed jurisdictions. This chapter has the more limited task of examining the existing body of international criminal law to see what guidance the African Court may take with respect to which defences have been recognized and which have been explicitly rejected, how recognized defences have been defined, and what questions have arisen or may arise with respect to these defences.

[5] These statutes do explicitly exclude the defence of superior orders as a ground of excluding criminal responsibility (as discussed below).

[6] Judgment, *Prosecutor v. Dario Kordić and Mario Čerkez*, (IT-95–14/2-T), Trial Chamber, 26 February 2001, para. 449 ('*Kordić and Čerkez* Trial Judgment').

[7] In line with the sources of international law delineated in Article 38(1)(b) and (c) of the *Statute of the International Court of Justice*, annexed to the *Charter of the United Nations*, San Francisco, 24 October 1945.

As the African Court starts to exercise its criminal jurisdiction, in addition to the recognition and definition of defences, the court will also need to consider and define the evidentiary and procedural rules that will be applicable.[8] For example, what, if any, burden lies on the accused to establish certain defences? What disclosure obligations does the defence have should it seek to raise such a defence? Some of these issues would be better suited for resolution in the rules of procedure and evidence of the future court.

Turning to the existing body of international criminal law, a starting point is to look historically to the report of the United Nations War Crimes Commission (UNWCC) which collected judicial decisions of numerous war crimes trials conducted after World War II by multiple countries with the aim of 'deriv[ing] from the records in the possession of the Commission all material containing any guidance for the building up of a jurisprudence of war crimes law'.[9] This report gives some guidance as to which defences were raised, which defences were clearly rejected, and where there is still some uncertainty in the law.[10] According to the UNWCC, three defences commonly put forth together by the defendants in the post–World War II trials were the pleas of superior orders, duress, and military necessity.[11] In addition to these three defences, other pleas of defence considered by the UNWCC included, *inter alia*: self-defence, legitimate reprisals, mistake of law and mistake of fact, and pleas relating to the mental capacity of the accused including limited mental capacity and drunkenness. All of these defences will be considered below.

Defences were also considered by the International Law Commission ('ILC') in its work on the Draft Code of Crimes against the Peace and Security

[8] The Court may take some guidance from the *Rules of Procedure and Evidence* of the International Criminal Court, in particular Rules 79 and 80 which address issues procedure and of disclosure by the defence in relation to raising grounds excluding criminal responsibility. *Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, (ICC-ASP/1/13 and Corr.1), First session, New York, 3–10 September 2002, part II.A. ('ICC *Rules*').

[9] This report excludes the major trials conducted by the International Military Tribunal (Nuremberg Trial) and the International Military Tribunal for the Far East (Tokyo Trial) but does include the subsequent proceedings conducted in Nuremberg by the U.S. pursuant to Control Council Law No. 10 amongst other national war crimes trials. United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XV – Digest of Laws and Cases (London: His Majesty's Stationery, 1949) at xvii ('UNWCC, Digest of Laws and Cases').

[10] See, e.g., UNWCC, Digest of Laws and Cases, ibid., at 155–88.

[11] Ibid., at 155–6.

of Mankind.[12] However, in its commentary on its 1991 draft Code, the Commission noted that 'in the opinion of some members, defences could never be invoked in connection with certain categories of crimes, such as crimes against humanity'.[13] Rejecting that approach, Special Rapporteur Doudou Thiam proposed a new Article 14 which would recognize the defences of self-defence, coercion or state of necessity.[14] In its final 1996 Draft Code of Crimes, the ILC returned to a generally worded Article 14, leaving it up to the competent international criminal jurisdiction to determine which defences are applicable 'in accordance with the general principles of law, in the light of the character of each crime'.[15] Defences discussed by the ILC in its commentary on this broadly worded provision included: self-defence, superior orders, duress or coercion, military necessity, and mistake of fact.[16]

The ILC's work on the Draft Code of Crimes and the establishment of an international criminal jurisdiction was subsequently taken up by the Ad Hoc Committee on the Establishment of an International Criminal Court. In 1995, a Working Group of this Ad Hoc Committee prepared guidelines for consideration of questions of general rules of criminal law, including defences.[17] The Ad Hoc Committee's Report included 'Guidelines for consideration of the question of general principles of criminal law' which contemplated a number of potential defences which should be considered upon further drafting.

[12] See, e.g., D. Thiam, Special Rapporteur, *Fourth report on the Draft Code of Offences against the Peace and Security of Mankind*, UN Doc. A/CN.4/398, 11 March 1986, in *Yearbook of the International Law Commission 1986*, Vol. II, Part One (New York: United Nations, 1988), UN Doc. A/CN.4/SER.A/1986/Add.1 (Part 1), at paras 185–254 ('Fourth report on the draft Code').

[13] 'Report of the Commission to the General Assembly on the Work of its Forty-Third Session,' in *Yearbook of the International Law Commission 1991*, vol. II, Part Two, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), (UN: New York and Geneva, 1994) at 101.

[14] D. Thiam, Special Rapporteur, 'Twelfth Report on the Draft Code of Crimes against the Peace and Security of Mankind' in *Yearbook of the International Law Commission 1994*, Volume II, Part One, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 1) (UN: New York and Geneva, 2001) 97 at 110 ('Twelfth report on the draft Code').

[15] 'Report of the International Law Commission on the work of its forty-eighth session (6 May – 26 July 1996)', Document A/51/10 in *Yearbook of the International Law Commission 1996*, Volume II, Part II, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), (New York and Geneva: United Nations, 1998) at 39.

[16] The ILC draft also considered a minimum age as a defence. The ILC discussed these defences, primarily with reference to the United Nations War Crimes Commission report. 'Report of the International Law Commission on the work of its forty-eighth session', ibid., at 40–41.

[17] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', General Assembly Official Records, 50th sess., Supp. No. 22 (A/50/22) (1995) at 2 ('Report of the Ad Hoc Committee'). See also A. Eser, 'Article 31 – Grounds for excluding criminal responsibility' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (2nd edn. Munich: C.H. Beck, 2008) 863, at 866.

These Guidelines categorized defences into three groups: (a) Negation of liability, including: error of law, error of fact, diminished mental capacity to stand trial, and diminished mental capacity regarding liability; (b) Excuses and justifications, including: self-defence, defence of others, defence of property, necessity, lesser of evils, duress/coercion/*force majeure*, superior orders, and law enforcement/other authority to maintain order and (c) Defences under public international law/depending on jurisdiction, including: military necessity, reprisals, and Article 51 of the *Charter* of the United Nations.[18]

Some of the defences discussed in the course of drafting the statute of the ICC were ultimately included in Articles 31–33 of the *Rome Statute of the International Criminal Court* (*Rome Statute*). This is the first codification of defences for an international criminal tribunal or court. To date, these defences to liability constitute the most complete (though not exhaustive) statement of this aspect of general principles of law in an international instrument. With 123 states parties to the *Rome Statute*, many from Africa, these provisions provide a good starting point for the African Court, in particular because these provisions reflect some hard fought compromises in relation to some of the divergent approaches reflected amongst the different national legal systems. This Chapter will also look to the limited jurisprudence of the contemporary international criminal courts and tribunals on defences.

While historically some may have been hesitant to accept the application of defences to the most serious crimes, basic principles of criminal culpability are relevant to all criminal offences, including domestic crimes, international crimes, and transnational crimes. Despite the silence on the issue in the Malabo Protocol, defences cannot be ignored.

2. SOURCES OF LAW

Article 31 of the Malabo Protocol defines the applicable law before the African Court. Pursuant to this Article, the Court may turn to a wide range of relevant sources. General principles of law, referred to in Article 31(1)(d) of this instrument, is of particular importance in discerning applicable defences given the absence of codification on this issue in the Malabo Protocol. However, it is difficult to discern a general principle in relation to some questions relating to defences due to the different approaches taken in the various legal systems of the world. Accordingly, the question of how these lacunae are to be filled arises. Article 31(1)(f) permits the Court to turn to

[18] 'Report of the Ad Hoc Committee' ibid., Annex I, at 59–60.

'[a]ny other law relevant to the determination of the case.' This arguably opens the door to consideration of domestic law.

The approach of resorting to national laws to fill lacunae in international law was contemplated by Judge Cassese at the ICTY.[19] In drafting the statute for the International Criminal Court (ICC), there was debate surrounding the question of resorting to national law.[20] Some expressed concern because resorting to national law would lead to 'inequality of treatment of accused' and 'inconsistent jurisprudence,' whereas others accepted the reality that there was not yet a complete body of international criminal law and accepted that national law could be relevant, but only as a last resort.[21] As a practical matter,

[19] '[A]ssuming that no clear legal regulation of the matter were available in international law, arguably the Appeals Chamber majority should have drawn upon the law applicable in the former Yugoslavia.' Separate and Dissenting Opinion of Judge Cassese, *Prosecutor v. Dražen Erdemović*, (IT-96–22) Appeals Chamber, 7 October 1997, para. 49 ('*Erdemović* Appeal, Opinion of Judge Cassese').

[20] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), General Assembly Official Records, 51st Sess., Supp. No. 22 (UN Doc. A/51/22), para. 187 ('1996 Report of the Preparatory Committee, Vol. I'). This approach was contemplated in the drafting history of the *Rome Statute* specifically with respect to defences. The draft statute forwarded by the Preparatory Committee to the Rome Conference included an Article 34, which left open the window for 'other grounds for excluding criminal responsibility':

> Article 34(1) At trial the Court may consider a ground for excluding criminal responsibility not specifically enumerated in this part if the ground: (a) is recognized [in general principles of criminal law common to civilized nations] [in the State with the most significant contacts to the crime] with respect to the type of conduct charged; and (b) Deals with a principle clearly beyond the scope for excluding criminal responsibility enumerated in this part and is not otherwise inconsistent with those or any other provisions of the Statute.

'Report of the Preparatory Committee on the Establishment of an International Criminal Court', 14 April 1998, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Official Records, Volume III, UN Doc. A/CONF.183/13 (Vol. III) (New York: United Nations, 2002) at 25 ('1998 Report of the Preparatory Committee').

[21] 1996 Report of the Preparatory Committee, Vol I., ibid., para. 187. Article 21 as adopted in the *Rome Statute* includes as a final default source of law, 'general principles of law derived by the Courts from national laws of legal systems of the world *including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime*, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.' *Rome Statute of the International Criminal Court*, A/CONF.183/9 of 17 July 1998, Art. 21(1)(c) ('*Rome Statute*'). This provision is a compromise achieved in Rome. M. M. deGuzman, 'Article 21 – applicable Law' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (2nd edn., Munich: C.H. Beck, 2008) 701 at 702.

the domestic law of a state which would otherwise have had jurisdiction may be a sensible source to turn to if no general principle can be discerned. This may also be justified as a question of fairness to the accused who would be expected to be aware of these laws.

3. GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY IN ARTICLE 31 OF THE *ROME STATUTE*

In contrast to the silence seen in the statutes of the ad hoc international criminal tribunals, the *Rome Statute* is noteworthy for its codification of defences. It was felt at preliminary stages leading up to the adoption of the *Rome Statute* that the applicable law for the Court should include defences in order to increase the 'precision and certainty in criminal proceedings'.[22] However, one commentator noted that Article 31 was one of the most difficult provisions on the general principles of criminal law to negotiate due to the many and sometimes fundamental differences on the law of defences among national legal systems.[23]

Therefore, in considering which defences the African Court may recognize, Article 31 of the *Rome Statute* is a helpful place to start. It includes in subsection (1) a non-exhaustive list of 'grounds for excluding criminal responsibility' (defences). Subsection (3) of the same Article explicitly re-affirms that this list of defences is non-exhaustive and the Court may recognize other defences in accordance with the relevant sources of law articulated in Article 21 including customary international law and general principles of law. This section of the chapter will consider the four defences explicitly enumerated in Article 31(1) of the *Rome Statute*, namely: mental disease or defect; intoxication; defence of person or property; and duress.

A. *Mental Disease or Defect*

The defence of mental disease or defect is explicitly included in the *Rome Statute* and has been recognized by the ICTY Appeals Chamber. Despite the fact that that this defence has been and is likely to remain rare in the case of international criminal tribunals, it's inclusion reflects the fact that it is a 'well-established principle of national criminal justice systems that incapacity or

[22] Report of the Ad Hoc Committee, supra note 17, at 10.

[23] P. Saland, 'International Criminal Law Principles' in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 189, at 206.

legal insanity serves as a categorical exclusion of criminal responsibility'.[24] An individual who lacks the capacity to appreciate the wrongfulness of his or her conduct at the time when the crime was committed cannot be held criminally blameworthy for such conduct. This defence is a legally distinct question from the question of the accused's fitness to stand trial. Cassese points to the case of *Stenger and Crusius* before the Leipzig Supreme Court in 1921 as an historical example of a case in which such a defence was applied.[25] Nonetheless, it has been noted that, generally, this defence did not get much attention in international criminal law until relatively recently.[26]

Given its general acceptance in national jurisdictions, it may have been anticipated that mental disease or defect would have been one of the least controversial defences leading up to Rome. However, there were still questions raised in the drafting of the *Rome Statute* about whether such a defence should be included and, if so, whether it should be applicable to all of the crimes within the Court's jurisdiction.[27] Nonetheless, the defence of mental disease or defect was ultimately included in Article 31(1)(a) of the *Rome Statute* which states that an individual will not be criminally culpable for conducted committed when: 'The person suffers from a mental disease or defect that destroys the person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirement of law'. This provision has been described as 'a fairly uncontroversial formulation of the defence.'[28] The defence articulated in the *Rome Statute* is made out if (a) the accused suffers from a mental disease or defect, and (b) that mental disease or defect either destroys the person's capacity to appreciate the unlawfulness or nature of his or her conduct or, alternatively, destroys the person's capacity to control his or her conduct to conform to the requirement of law.[29] The threshold articulated in Article 31(1)(a) is high, requiring that

[24] Eser, supra note 18, at 873.

[25] Cassese, *International Criminal Law*, supra note 1, at 263–4.

[26] P. Krug, 'The Emerging Mental Incapacity Defence in International Criminal Law: Some Initial Questions of Implementation', 94 *American Journal of International Law* (2000) 317, at 319.

[27] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court,' in Volume II, General Assembly Official Records, 51st sess., Supp. No. 22A, A/51/22 (New York: United Nations, 1996) at 97 ('1996 Report of the Preparatory Committee, Vol. II').

[28] Cryer *et al.*, supra note 1, at 401.

[29] This defence derives from the 'M'Naghten Rules' from common law. Knoops, supra note 1, at 109–10; W. A. Schabas, *An Introduction to the International Criminal Court*, (4th ed. Cambridge: Cambridge University Press, 2011) at 240. However, with respect to the language, 'mental disease or defect', Eser notes this formulation 'is directly taken from sec. 4.01. U.S.

the mental disease or defect *destroys* the person's capacity.[30] This high threshold is understandable given that, if successfully established, it constitutes a complete defence from criminal responsibility for the most serious crimes. However, it has been suggested by Stanley Yeo that requiring *destruction* of capacity sets too high a threshold.[31]

The ICTY Appeals Chamber also recognized the existence of the defence of lack of mental capacity in the *Čelebići* case (although it was not applied to any accused in that case).[32] According to the Appeals Chamber, an accused would be entitled to an acquittal if, 'at the time of the offence [the accused] was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong.'[33] The ICTY Trial Chamber also recognized a presumption of sanity for all individuals charged with criminal acts.[34] Accordingly, the ICTY Trial Chamber suggested that the onus lies on the accused to rebut this presumption on a balance of probabilities.[35] This approach may make it harder for the accused to succeed on this defence but is not an unreasonable approach given the fact that, as the ICTY Trial Chamber points out, 'the facts [. . .] are those peculiarly within [the accused's] knowledge and should be established by him.'[36] It has been pointed out, however, that the ICC will likely take a different approach given the guarantee provided for in the *Rome Statute* that the accused has the right '[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.'[37] Whether any onus of rebuttal may be placed on accused individuals before the African Court must be considered in relation to the Court's fair trial guarantees. The *Malabo Protocol* includes no explicit equivalent to this *Rome Statute* protection in its list of fair trial guarantees in Article 46A. However, the Court

Model Penal Code which supplements the cognitive focus of the (in)famous M'Naghten test with a volitional element.' Eser, supra note 18, at 874.

30 Cryer *et al.*, supra note 1, at 401; Eser, supra note 18, at 875.

31 '[T]his word has the effect of unjustly denying the defence to persons who may have had the capacity to appreciate the nature or wrongness of their conduct or to control it but who, on the occasion in question, lacked such appreciation or control as a result of a mental disease or defect.' S. Yeo, 'The Insanity Defence in the Criminal Laws of the Commonwealth of Nations' 242 *Singapore Journal of Legal Studies* (2008) 241, at 259 ('The Insanity Defence').

32 Judgment, *Prosecutor v. Delalić et al.* ('*Čelebići case*') (IT-96–21-A), Appeals Chamber, 20 February 2001, para. 582 ('*Čelebići* Appeal Judgment').

33 Ibid., at para. 582.

34 Judgment, *Prosecutor v. Delalić et al.* (IT-96–21-T), Trial Chamber, 16 November 1998, at para. 1157 ('*Čelebići* Trial Judgment').

35 Ibid., at para. 1158 & 1160.

36 Ibid., at para. 1158.

37 *Rome St.*, supra note 21, Art. 67(1)(i). See Krug, supra note 26, at 325.

will have to determine how any potential substantive burden of proof on the defence is reconciled with the fundamental presumption of innocence included in Article 46A(3).

Another issue that the African Court will have to turn its head to is the question of what procedural rules will be required to facilitate this defence. For instance, given the need for psychiatric expertise in assessing this defence, the Court will need to determine the necessary rules of procedure and evidence including those relating to the admission of expert testimony and the availability and role of court appointed experts.[38]

Finally, the Court will also need to consider what happens if an accused successfully establishes this defence. Generally, rather than resulting in an outright acquittal, a successful assertion of a mental disorder defence results in a special disposition that the accused is 'not criminally responsible'.[39] This raises the question of what recourse the Court has if an individual is found to have successfully made out the mental disorder defence but requires treatment or poses a threat to the safety of others. This question was raised in the process of drafting this provision of the *Rome Statute* but no clear rule was set out therein. This omission has been critiqued by commentators.[40] A sensible solution posed by one commentator is that, in such a case, the ICC would enter into an agreement with a state party for the provision of medical services to such an individual.[41] The African Court could take a similar course if the situation arose.

As noted above, the defence of mental disease or defect is a legally distinct question from the question of the accused's fitness to stand trial. Both questions relate to the accused's lack of capacity. However, fitness to stand trial is concerned with the accused's capacity at the start of and throughout a trial and says nothing about their criminal culpability, whereas the defence of mental disease and defect concerns the accused's criminal responsibility at the time of the commission of the offence. There are a number of examples throughout the history of trials for international crimes of individuals who have been found unfit to stand trial.[42] Thus, the African Court must ensure that it adopts adequate rules and procedures ensuring that proceedings are stayed against

[38] Krug, ibid., at 322–8.
[39] Schabas, supra note 29, at 240.
[40] Krug, supra note 26, at 333–4; Cryer *et al.*, supra note 1, at 402.
[41] Cryer *et al.*, ibid.
[42] In the trial of the major war criminals at Nuremberg by the International Military Tribunal, proceedings were postponed with respect to one of the accused, Gustav Krupp von Bohlen, because he was unfit to stand trial. International Military Tribunal, *The United States of America et al. v. Göring et al*, Order, in *Trial of the Major War Criminals before the*

those who are lack the capacity to stand trial. The African Court may look to the ICC for guidance. The *Rome Statute* and the ICC's *Rules of Procedure and Evidence* require a Trial Chamber to satisfy itself that the accused understands the nature of the charges against him or her before it can proceed and requires that a Trial Chamber adjourn trial proceedings if an accused is found unfit to stand trial.[43] The ICC's *Rules of Procedure and Evidence* allow for a medical, psychiatric or psychological examination of the accused to be ordered as necessary and provide for periodic review of any finding of unfit to stand trial.[44]

1. Diminished Mental Capacity

While mental disease or defect which amounts to *lack* of mental capacity has been accepted as a full defence in international criminal law, the defence of diminished mental capacity, recognized in some domestic jurisdictions, has been rejected.[45] However, diminished mental capacity has been recognized as a factor which may be relevant to mitigation of sentence.[46]

Originating in the nineteenth century, the defence of diminished mental capacity was incorporated in the English *Homicide Act* 1957 as a partial defence to murder which, if established, would reduce the conviction to manslaughter.[47] Such defence was available when the accused 'was suffering from such abnormality of mind (as defined) as substantially impaired his mental responsibility for his acts or omissions in doing so or being a party to the killing.'[48] This English statute provided a model for similar legislation in some other common law countries.[49] The purpose of the defence was to prevent those who suffered from mental impairment, but who did not satisfy the high threshold of the full defence of mental disorder, from being

International Military Tribunal, vol. I, (published at Nuremberg, Germany, 1947) at 143. Ieng Thirith, one of the accused charged in Case 002 at the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), was declared unfit to stand trial due to dementia. ECCC website: www.eccc.gov.kh/en/case/topic/2. At the ICTY, Dražen Erdemović was initially declared unable to stand trial due to serious post-traumatic stress disorder, however he was subsequently found fit to enter a guilty plea. Sentencing Judgment, *Prosecutor v. Dražen Erdemović* (IT-96–22-T), Trial Chamber, 29 November 1995, para. 5 ('*Erdemović* First Sentencing Judgment').

43 *Rome St.*, supra note 21, Art. 64(8)(a); and ICC *Rules*, supra note 8, Rule 135(4).

44 See ICC *Rules*, supra note 8, at Rule 135.

45 *Čelebići* Appeal Judgment, supra note 32, at para. 839.

46 Ibid.

47 Ibid., at para. 585.

48 Ibid.

49 Ibid, at para. 586.

convicted of murder which was accompanied by harsh mandatory sentencing amounting at the time to 'either death or penal servitude for life.'[50]

In the '*Čelebići* case' at the ICTY, one of the accused sought to raise the defence of diminished mental capacity. While the Tribunal's Statute is silent on the availability of such a defence, the accused pointed to a sub-Rule of the ICTY's *Rules of Procedure and Evidence* which refers to specific disclosure and notification obligations on an accused who seeks to raise 'any special defence, including that of diminished or lack of mental responsibility'.[51] However, the Appeals Chamber of the ICTY concluded that new defences could not be adopted through the *Rules*.[52] Accordingly, were such a defence to be applicable before the Tribunal, it must be found within the sources of international law.[53] Finding no reference to such a defence in treaty or in customary international law, the Appeals Chamber turned to a consideration of general principles of law.[54] The Appeals Chamber ultimately concluded that diminished mental responsibility is not a complete defence resulting in an acquittal.[55]

The ICTY Appeals Chamber also rejected the appellant's submission that the *Rome Statute* of the ICC contemplated such a defence.[56] The Appeals Chamber observed that, while the *Rome Statute* of the ICC includes a full defence when the accused's capacity is destroyed by a mental disease or defect, '[t]his is not the same as any partial defence of diminished mental responsibility, as it requires the *destruction* of (and not merely the *impairment* to) the defendant's capacity, and it leads to an acquittal.'[57]

The Appeals Chamber of the ICTY did, however, conclude that there is a general principle of law that 'the defendant's diminished mental responsibility is relevant to the sentence to be imposed.'[58] This approach is also reflected in Rule 145(2)(a)(i) of the ICC's *Rules of Procedure and Evidence*

[50] Ibid.

[51] *Čelebići* Trial Judgment, supra note 34, at para. 1156; *Čelebići* Appeal Judgment, supra note 32, at para. 582. At the time of the case, the Tribunal refers to sub-Rule 67(A)(ii)(b). However, this can now be found at Rule 67(B)(i)(b), ICTY, *Rules of Procedure and Evidence*, IT/32/Rev.50, 8 July 2015.

[52] *Čelebići* Appeal Judgment, ibid., at para. 583.

[53] Ibid.

[54] Ibid.

[55] Ibid, at para. 590.

[56] Ibid, at para. 584

[57] Ibid, at para. 587.

[58] Ibid, at para. 590. In the *Čelebići* case, the Trial Chamber rejected the application of diminished responsibility in relation to the accused in question. *Čelebići* Trial Judgment, supra note 34, at para. 1186.

which contemplates that 'circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity', may be taken into account as a mitigating factor in sentencing.[59] Thus, diminished mental capacity has been recognized as a mitigating factor to be taken into account on sentencing but has been rejected as a complete defence in international criminal law. A similar approach which would have explicitly recognized diminished mental capacity as mitigation on sentencing was considered in the drafting history leading up to the *Rome Statute* but was not, ultimately, included.[60] However, at the same time, Article 76 of the *Rome Statute* on sentencing leaves a large amount of discretion to the Trial Chamber to determine the appropriate sentence which would, of course, include consideration of any relevant aggravating or mitigating factors. The *Malabo Protocol* contains similarly broad language, specifying that: 'In imposing the sentences and/or penalties, the Court should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.'[61]

The ICTY Appeals Chamber's reasoning for rejecting the defence of diminished mental capacity is persuasive. In particular, the Appeals Chamber noted that the rationale earlier referenced for the recognition of such a defence in English law did not apply to the Tribunal, in particular because there is no mandatory sentencing and because there is no 'appropriate lesser offence available under the Tribunal's Statute for which the sentence would be lower and which could be substituted for any of the offences it has to try.'[62] Accordingly, the African Court should follow the approach articulated by of the ICTY and consider the general principle that diminished mental capacity of an accused that does not amount to the defence of mental disease or defect is relevant to sentencing as a potential mitigating factor.

B. *Intoxication*

The availability of the defence of intoxication in international law is a more controversial issue. Intoxication is a challenging defence even in those domestic jurisdictions which do recognize it in some form. The perceived

[59] ICC *Rules*, supra note 8, at Rule 145(2)(a)(i),. See also Eser, supra note 18, at 875.

[60] Preparatory Committee on the Establishment of an International Criminal Court, Working Group on General Principles of Criminal Law and Penalties, 'Working Paper Submitted by Argentina, Canada, France, Germany, Mexico, Portugal and the United States of America', 21 February 1997, A/AC.249/1997/WG.2/DP.3, footnote 3.

[61] Art. 43A(4).

[62] *Čelebići* Trial Judgment, supra note 34, at para. 590.

culpability in voluntarily becoming intoxicated and then committing a serious crime, combined with the concern that intoxication is too often present in the commission of many serious offences like sexual assault, suggests that the defence of intoxication should be limited. A similar concern has been raised in relation to the prevalence of intoxication and the commission of international crimes including in Rwanda where it has been suggested that '[m]any of the participants in Rwanda's genocide were drunk'.[63] On the international level, this debate is further complicated because some countries not only reject intoxication as a defence but treat it as an aggravating factor in the commission of a crime.[64]

Early discussion of defences in the drafting history of the ICC indicate that there was support for the view that the intoxication defence was not relevant to the types of crimes within the jurisdiction of the Court.[65] 'There was no great substantive disagreement on permitting involuntary intoxication as a ground for excluding criminal responsibility. But voluntary intoxication presented big problems.'[66] Thus, some proposals would have excluded this defence in all cases of *voluntary* intoxication, whereas other proposals suggested that the defence of intoxication be recognized but only when the person is 'unable to formulate the mental element of the crime.'[67] Schabas has echoed this concern and suggested that voluntary intoxication is 'virtually inconsistent' with the nature of the crimes within the jurisdiction of the ICC, in particular in light of the fact that the Court was designed to prosecute 'a relatively small number of leaders, organizers and planners'.[68] The same argument could potentially be made with respect to the *Malabo Protocol* although there is a much broader range of crimes within the jurisdiction of this instrument and there is no explicit indication the African Court would only prosecute senior leaders who planned and organized crimes. Furthermore, despite these concerns, a very limited form of intoxication defence was in the end included in the *Rome Statute*.

[63] Cryer *et al.*, supra note 1, at 402.
[64] Eser, supra note 18, at 877.
[65] The Preparatory Committee on the Establishment of an International Criminal Court noted that 'it was . . . generally felt that only defences relevant to the types of crimes under the statute would be included. Accordingly, it was suggested, for example, that intoxication and insanity did not have to be included in the statute.' 1996 Report of the Preparatory Committee, Vol. I, supra note 20, at para. 204. See also Eser, supra note 18, at 876.
[66] Saland, supra note 23, at 207.
[67] 1996 Report of the Preparatory Committee, Vol. II, supra note 27, at 98.
[68] Schabas, supra note 29, at 240–1.

The important distinction between voluntary and involuntary intoxication has also been noted by the ICTY. In one ICTY case, an accused attempted to raise intoxication as a mitigating factor in sentencing.[69] The Trial Chamber rejected the argument, observing that '[w]hile a state of intoxication could constitute a mitigating circumstance if forced or coerced, the Trial Chamber cannot accept [the] contention that an *intentionally* procured diminished mental state could result in a mitigated sentence.'[70] The Trial Chamber suggested instead that voluntary intoxication was an *aggravating* factor, 'particularly in contexts where violence is the norm and weapons are carried'.[71] The Appeals Chamber affirmed that intoxication was not a mitigating factor when the accused becomes voluntarily intoxicated.[72]

Despite the challenges involved in drafting, a limited intoxication defence was included in the *Rome Statute*. Article 31(1)(b) of the *Rome Statute* holds that a person will not be criminally responsible if, at the time:

> The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

As noted by Per Saland, chair of the working group on the general principles of criminal law at Rome, the provision adopted 'tries to position itself in the middle by making the exception as broad as possible without totally excluding voluntary intoxication as a ground for excluding criminal responsibility'.[73]

It is evident from the language of Article 31(1)(b) that it contemplates only a restrictive intoxication defence. The defence, as set out in the *Rome Statute*, applies only if the intoxication 'destroys that person's capacity'. Accordingly, it is not sufficient to demonstrate that an accused's capacity is simply *impaired*.[74]

[69] Judgment, *Prosecutor v. Kvočka et al.* (IT-98–30/1-T), Trial Chamber, 2 November 2001, para. 691 ('*Kvočka* Trial Judgment'). See Cassese, *International Criminal Law*, supra note 1, at 266–7.

[70] *Kvočka* Trial Judgment, ibid, at para. 706. [Emphasis added]

[71] Ibid. However, Žigić's intoxication was not applied as an aggravating factor in that case because it was not raised by the Prosecutor.

[72] Judgment, *Prosecutor v. Kvočka et al.* (IT-98–30/1-A), Appeals Chamber, 28 February 2005, para. 707, with reference to two other prior ICTY Sentencing Judgments, thus concluding that '[t]he jurisprudence of this Tribunal is clear' on that issue.

[73] Saland, supra note 23, at 207. See also Eser, supra note 18, at 876–7.

[74] See Cryer *et al.*, supra note 1, at 403.

This is an extremely high threshold and will exclude the vast majority of individuals who commit crimes while intoxicated. Furthermore, the defence is circumscribed in situations of voluntary intoxication by excluding situations in which the person voluntarily becomes intoxicated 'under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court'. Thus, the fault of intentionally becoming intoxicated in such situations precludes the availability of the defence of intoxication. This has been described as 'a recklessness test'.[75]

Given the contradictory approach taken with respect to the impact of intoxication on an accused's criminal responsibility among the legal systems of the world, there is 'really no way of reconciling these differences'.[76] Furthermore, intoxication is a controversial defence even in those jurisdictions in which it is recognized. The justification for permitting such a defence is, generally, that it is unjust to hold an individual criminally responsible if they lack *mens rea*.[77] A high threshold should be required in relation to any defence of intoxication permitted before the African Court in light of the serious nature of all of the crimes contained within the jurisdiction of the Court, particular in relation to *voluntary* intoxication. Thus, the approach taken in the *Rome Statute*, while described by Saland as not fully satisfying anyone, may provide guidance to the Court on this issue.[78]

C. *Defence of Person or Property*

Defence of the person, including self-defence and defence of others, is one of the most universally accepted criminal defences.[79] Defence of property, particularly in relation to an allegation of serious international or transnational crimes, is more controversial.[80] The question of whether defence of property should be included in the ICC's statute as a ground for excluding criminal responsibility proved to be one of the most difficult issues in negotiations on

[75] Ibid.
[76] Saland, supra note 23, at 207.
[77] See, e.g., Knoops, supra note 1, at 116.
[78] Ibid.
[79] Self-defence has been described as 'a paradigmatic justification of conduct.' Cryer *et al.*, supra note 1, at 404.
[80] As Yeo observes, 'legal convention accords a higher value to the human body or bodily integrity than to property.' Stanley Yeo, 'Anglo-African Perspectives on Self-Defence' 17 *African Journal of International Law and Comparative Law* (2009) 118, at 119.

this subject.[81] The provision finally agreed to is included in Article 31(1)(c) of the *Rome Statute*. This provision states that an accused will not be criminally responsible if, at the relevant time:

> The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or protected property. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

Thus, the *Rome Statute* includes the defence of the person (both self-defence and defence of others) and, in more limited terms, defence of property.

It is important to clarify that, of course, self-defence here refers to the defence of the person, which is a legally distinct issue from self-defence of the state under Article 51 of the UN *Charter*. The fact that an individual is acting as a part of an operation which constitutes a part of a state's actions in self-defence is not in itself a defence to the perpetration of international crimes. Furthermore, as explicitly stated in Article 31(1)(c) of the *Rome Statute*, '[t]he fact that the person was involved in a defensive operation conducted by forces' is not a ground excluding criminal responsibility in international law. Thus, for the purposes of this section, self-defence refers only to individual defence of the person.

1. Defence of the Person

Self-defence or the defence of others is a generally accepted ground for excluding criminal responsibility. For example, in its commentary on its final draft Code of Crimes, the ILC recognized the 'classic defence' of self-defence.[82] Cassese notes that Article 31(1)(c) of the *Rome Statute*, at least as it applies to defence of persons, reflects customary international law.[83] In addition to its codification in the *Rome Statute*, self-defence has been recognized as an accepted defence by the UNWCC, the ILC and the ICTY.

The UNWCC recognized that the defence of self-defence was applicable to war crimes and pointed to one trial before a United States Military Court

[81] Saland, supra note 23, at 207.
[82] 'Report of the International Law Commission on the work of its forty-eighth session', supra note 15, at 40.
[83] Cassese, *International Criminal Law*, supra note 1, at 261.

where the plea of self-defence was successful.[84] The ILC similarly observed that self-defence 'could relieve an accused of criminal responsibility for the use of force against another human being resulting in death or serious injury if this force was necessary to avoid an immediate threat of his own death or serious injury caused by that other human being'.[85] The ILC pointed in particular to the *Convention on the Safety of United Nations and Associated Personnel* as an example of the implicit recognition of self-defence in international law.[86]

One ICTY Trial Chamber recognized self-defence as a rule of customary international law.[87] It defined self-defence as 'providing a defence to a person who acts to defend or protect himself or his property (or another person or person's property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack.'[88]

With reference to the text of Article 31(1)(c) of the *Rome Statute* and the definition suggested by the ICTY, the parameters of self-defence must be considered. First, to which threats can a person legitimate respond in self-defence? Secondly, what conditions govern the accused's response to that threat?[89] Finally, does the accused's prior fault preclude them from relying on self-defence?

What parameters govern the threat which gives rise to the right of an individual to act in self-defence? Not much guidance can be derived on this issue from the broad definition of self-defence put forth by the ICTY which simply says that a person may act 'to defend or protect himself or his property (or another person or person's property) against *attack*'. On the other hand, Article 31(1)(c) of the *Rome Statute* gives us more guidance, requiring that an

[84] UNWCC, Digest of Laws and Cases, supra note 9, at 177. See also 'Report of the International Law Commission on the work of its forty-eighth session', supra note 15, at 40; Cassese, ibid., at 260.

[85] 'Report of the International Law Commission on the work of its forty-eighth session', ibid., at 40.

[86] Ibid. See *Convention on the Safety of United Nations and Associated Personnel*, 9 December 1994, 2051 UNTS 363, Art. 21.

[87] *Kordić and Čerkez* Trial Judgment, supra note 6, at paras 449 & 451. See Cryer *et al.*, supra note 1, at 404.

[88] *Kordić and Čerkez* Trial Judgment, ibid., at paras 449 & 451.

[89] Yeo segregates his analysis on self-defence to consider these two over-arching questions which provides a useful way of analysing the parameters of the law. Yeo, 'Anglo-African Perspectives on Self-Defence', supra note 80. Yeo's work in this paper compares the *Rome Statute* provision in self-defence to the criminal law in five African countries which are former British colonies, including: Botswana, Ghana, Nigeria (the Southern Nigerian Criminal Code), Sudan and Kenya

accused be acting in response to an 'imminent and unlawful use of force.'[90] This seems to track the attitude towards this defence in many domestic jurisdictions.

Another question that arises is whether the law is only concerned with the accused's perception of the threat or whether that threat must be 'objectively demonstrable' (or some combination of a subjective and objective assessment). Yeo suggests that, '[o]n a strict reading of Article 31(1)(c) of the ICC Statute, the threat must have been real, that is, it must have existed as an objectively demonstrable fact.'[91] However, failing to find this approach in any of the other domestic laws that he studied, Yeo suggests that the best approach is to adopt a hybrid subjective/objective test based on the 'accused's reasonable belief'.[92] Yeo suggests further that personal characteristics of the individual, such as their 'age, sex, physical disabilities, religious beliefs, ethnicity, vulnerability (but excluding psychiatric conditions)' should be considered when applying this test.[93]

Second, what is required with respect to the accused's response to such an 'imminent and unlawful use of force' in order for self-defence to be available? Pursuant to Article 31(1)(c) of the *Rome Statute*, the individual must act 'reasonably' and 'in a manner proportionate to the degree of danger'.[94] On the other hand, the ICTY states that the individual's acts must be 'reasonable, *necessary*, and proportionate.' While it may be beneficial to articulate a requirement that the act be necessary as distinct from the requirement of reasonableness, 'a response which was unnecessary would also be unreasonable.'[95] Cassese refers to the requirement of self-defence that 'there is *no other way of preventing or stopping the offence*.'[96] This raises the question of whether one *must* retreat before acting in self-defence.[97] One British Military Court

[90] Eser notes that, 'there is common agreement that a use of force is imminent if it is immediately antecedent, presently exercised or still enduring. Thus, a defender neither has to wait until a danger has become present, nor is it allowed to use pre-emptive or even preventive means to circumvent a use of force, nor is it permitted to retaliate against an already passed attack.' Eser, supra note 18, at 880–1.

[91] Yeo, supra note 80, at 123.

[92] Ibid., at 125.

[93] Ibid.

[94] Yeo characterizes the *Rome Statute* provision as requiring the reasonableness and proportionality of the accused's acts to be assessed on a 'robustly objective test' but suggests again that a hybrid test is to be preferred. Such a test takes account relevant individual characteristics of the accused, which focuses on 'the accused's belief based on reasonable ground, that the response was necessary, reasonable and proportionate'. Ibid., at 132–3.

[95] Ibid., at 127.

[96] Cassese, *International Criminal Law*, supra note 1, at 259.

[97] Yeo, 'Anglo-African Perspectives on Self-Defence', supra note 80, at 129–30.

said in a post–World War II war crimes trial that: 'The law permits a man to save his own life by dispatching that of another, but it must be in the last resort. He is expected to retreat to the uttermost before turning and killing his assailant.'[98] Whereas English common law traditionally obliged individuals to retreat, the law has evolved such that 'the opportunity to retreat is simply a factor to be taken into account when deciding the general question as to whether the accused's response was reasonably necessary.'[99] Furthermore, debates in domestic law about whether an individual bears a duty to retreat before using force become more complicated in the context of war crimes trials where the very nature of the conflict involves the causing of death of opposing forces. Thus, a more flexible rule emphasizing the reasonableness and proportionality of the act are better suited to take into consideration all of the circumstances of the case.

One final question is whether the accused is precluded from relying on self-defence if some prior fault for the situation lies upon them, for example, 'where the accused had assaulted or provoked an assault from another'.[100] Cassese suggests that an individual can only rely on self-defence if 'the unlawful conduct of the other *has not been caused by the person acting in self-defence*.'[101] The text of the draft statute forwarded by the Preparatory Committee to the Rome Conference included a bracketed phrase which would limit the applicability of self-defence such that a person would only be entitled to such a defence 'provided that he or she did not put himself or herself voluntarily into a position causing the situation to which that ground for excluding criminal responsibility would apply'.[102] However, this language does not ultimately appear in the final version of Article 31(1)(c) of the *Rome Statute*. A review of relevant domestic jurisdictions would be prudent to determine whether a general principle of law can be discerned with respect to this potential exclusionary rule.

2. Defence of Property

Whereas Article 31(1)(c)'s codification of defence of person may reflect customary international law, the defence of property is more controversial.

[98] UNWCC, Digest of Laws and Cases, supra note 9, at 177.
[99] Yeo, 'Anglo-African Perspectives on Self-Defence', supra note 80, at 129. See also Andrew J. Ashworth, 'United Kingdom' in Kevin Jon Heller and Markus D. Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford: Stanford University Press, 2011) 531, at 542.
[100] Stanley Yeo, 'Anglo-African Perspectives on Self-Defence', supra note 80, at 130.
[101] Cassese, *International Criminal Law*, supra note 1, at 259.
[102] 1998 Report of the Preparatory Committee, Vol. III, supra note 20, at 34.

As stated above, this proved to be one of the most difficult issues to resolve in the negotiations on defences in Rome and was described as 'the real cliff-hanger' for the working group that was drafting the provision.[103]

The approach taken in Article 31(1)(c) limits defence of property to two situations. First, acts may be taken in defence in relation to 'property which is essential for the survival of the person or another person'. The inclusion of this category of property seems more justifiable given that a threat to property essential to the survival of persons indirectly amounts to a threat to those persons.[104] Thus, it has been described as 'merely a special case of the general and uncontroversial protection of a person's life.'[105] However, the second category is far more controversial. It permits acts to be taken in defence of 'property which is essential for accomplishing a military mission.'

The defence of property is limited in Article 31(1)(c) of the *Rome Statute* solely to the category of war crimes. It is therefore not permitted in relation to charges of genocide, crimes against humanity, or aggression. This was added despite the fact that 'the starting point was that the general principles of criminal law would be generally applicable to all crimes within the jurisdiction of the Court.'[106] While war crimes are also treated differently in relation to the availability of the defence of superior orders in the *Rome Statute* (as discussed above), this restriction in relation to defence of property is the only situation in which any of the Article 31 grounds for excluding responsibility is excluded from some of the crimes within the court's jurisdiction.

Including defence of property in Article 31 of the *Rome Statute* has been highly criticized for its departure from the position of customary international law.[107] Thus, the African Court may choose not to follow this approach. If defence of property is permitted, it should be more circumscribed than defence of persons in light of the serious nature of the crimes included in the subject matter jurisdiction of the Court. Furthermore, it is necessary to recall that all acts in defence of essential property must be both reasonable and proportionate.[108]

[103] Saland, supra note 23, at 208.
[104] Ibid.
[105] Eser, supra note 18, at 881.
[106] Saland, supra note 23, at 208.
[107] Cassese, *International Criminal Law*, supra note 1, at 261. See also Antonio Cassese, 'The Statute of the International Criminal Court', supra note 37, 144 at 154–5; Eser, supra note 18, at 881.
[108] *Rome Statute*, supra note 21, at Art. 31(1)(c). There may also be civil (tort law) implications of this defence, however, this lies beyond the scope of this chapter.

D. *Duress and Necessity*

1. Duress

One defence which has received judicial consideration in the existing war crimes jurisprudence is the defence of duress. However, the jurisprudence does little to resolve some of the most challenging questions about the limits of the law of duress. Can duress be raised as a defence to a charge of murder? Does the nature of genocide or crimes against humanity alter our assessment of the applicability of the defence of duress? What if the individual faces the choice of killing civilians or being killed alongside them? The tension in the international criminal jurisprudence derives from the diverging approaches taken by national jurisdictions on these questions. This makes it difficult to discern a clear general principle on the law of duress.[109] Additionally, there is still tension within some national jurisdictions as courts grapple with some of these most difficult questions about law and morality and proportionality analyses involving human lives.

Throughout the history of international criminal law, duress has also been referred to as necessity, extreme necessity, compulsion, force and compulsion, coercion, and coercion and compulsory duress.[110] As defined by the

[109] The post–World War II decisions, which are relied upon in the more recent jurisprudence for guidance, relied themselves on these divergent national rules. See, e.g., , Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Prosecutor v. Dražen Erdemović* (IT-96–22) Appeals Chamber, 7 October 1997, para. 54 ('*Erdemović* Appeal, Opinion of Judge McDonald and Judge Vohrah').

[110] See, e.g., UNWCC, Digest of Laws and Cases, supra note 9 at 170; 'Report of the International Law Commission on the work of its thirty-eighth session (5 May–11 July 1986),' Document A/41/10 in *Yearbook of the International Law Commission 1986*, Volume II, Part II (United Nations: New York, 1987), UN Doc. A/CN.4/SER.A/1986/Add.1 (Part 2) at 51; Sentencing Judgment, *Prosecutor v. Dražen Erdemović* (IT-96–22-T), Trial Chamber, 26 November 1996, para. 16; Opinion of Judge Cassese, *Erdemović* Appeal, supra note 19, at para. 14. Reports of the International Law Commission on the Draft Code of Offences against the Peace and Security of Mankind also refer to the defence of *force majeure*, however, it notes that 'the concept [of *force majeure*], at least in certain legal systems is more closely related to the general theory of civil liability and, if it arises in criminal law, it does so in connection with unintentional offences such as homicide by negligence, resulting from example from a traffic accident.' Thiam, 'Fourth report on the draft Code', supra note 12, at para. 201. Cassese comments that '[i]t is doubtful whether *force majeure* is admissible (the existence of an irresistible force or an unforeseen external event beyond the control of a belligerent which makes it absolutely and materially impossible for the belligerent to comply with a rule of humanitarian law: for instance, non-compliance with some rules on the treatment of prisoners of war on account of an earthquake, or, of a famine not caused by the belligerent); this excuse, if admissible, should, however, be strictly construed to avoid abuse by combatants.' Cassese, *International Criminal Law*, supra note 1, at 258.

UNWCC, the plea of duress amounts to '[t]he argument that, in committing the acts complained of, the accused acted under an immediate threat to himself'.[111] In the words of ILC Special Rapporteur on the Draft Code of Offences against the Peace and Security of Mankind, Doudou Thiam: 'Coercion involves the threat of an imminent peril from which it is impossible to escape except by committing the offence.'[112] In this chapter, duress and necessity will be distinguished. The term duress will be used to refer to cases in which such threat emanates from another person or persons and necessity will be used in relation to situations in which such threat results from 'objective circumstances'.[113]

Historically, the question of duress was often bound up in law and in fact with the defence of superior orders.[114] In the International Military Tribunal's discussion of the exclusion of the defence of superior orders in Article 8 of the Nuremberg Charter, it noted: 'The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether *moral choice* was in fact possible.'[115] This approach which links superior orders and duress was followed in Principle IV of the Nürnberg Principles and in the ILC's first draft code of offences against peace and security in 1954.[116] However, it is clear that the questions of superior orders

[111] UNWCC, Digest of Laws and Cases, supra note 9, at 156.

[112] Thiam, 'Fourth report on the draft Code', supra note 12, at para. 191.

[113] See Cassese, *International Criminal Law*, supra note ,1 at 280.

[114] *Erdemović* Appeal, Opinion of Judge Cassese, supra note 19, at para. 15: 'in the case-law, duress is commonly raised in conjunction with superior orders. However, there is no necessary connection between the two.' The ICTY Trial Chamber in the *Erdemović* case appears to have conflated the two issues to some degree when it seemed to suggest that proof of the existence of a superior order was a requirement to establish the defence of duress. *Erdemović* First Sentencing Judgment, supra note 42, at para. 19. However, this was overruled by the Appeals Chamber. *Erdemović* Appeal, Opinion of Judge McDonald and Judge Vohrah, supra note 109, para. 35.

[115] Trial of the Major War Criminals before the International Military Tribunal, *Göring et al.*, Judgment (Nuremberg, 1947), at 224. (Emphasis added) As described in one book, 'one of the most plausible explanations of the way in which the Nuremberg IMT dealt with its provision on superior orders is that it laid down a test for duress.' Cryer *et al.*, supra note 1, at 407.

[116] Thiam, 'Fourth report on the draft Code', supra note 12, at paras 218–26. Principle IV of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal states that: 'The fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law, *provided a moral choice was in fact possible to him*.' (emphasis added) *Yearbook of the International Law Commission 1950*, Volume II (New York: United Nations, 1957), UN Doc. A/CN.4/SER.A/1950/add.1, at 375. A variation on this appears in the ILC's 1954 draft code of offences against the peace and security of mankind which reads: 'The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law *if, in the circumstances*

and the defence of duress must be analysed separately.[117] While they may arise factually in the same circumstances, these are two distinct legal questions which must be conceptually separated and analysed individually.[118]

The UNWCC considered the plea of duress in its summary of the post–World War II War Crimes Trials. It recognized that duress had been accepted in certain cases as a complete defence.[119] For example, duress was recognized in the three cases under Control Council Law No. 10 involving the prosecution of German industrialists charged with using forced labour.[120] As summarized by the Commission: 'In the *Flick*, *I.G. Farben* and *Krupp Trials*, the plea put forward was that the accused were obliged to meet the industrial production quotas laid down by the German Government and that in order to do so it was necessary to use forced labour supplied by the State, because no other labour was available, and that had they refused to do so they would have suffered dire consequences.'[121] The defence was in fact successful for many of the accused in the *Flick* case.[122]

The UNWCC also referred to a handful of other post–World War II cases which appeared more hesitant to allow the defence of duress, in particular in relation to cases involving allegations of killing innocent persons. For example, in *Fuerstein et al.*, a British Military Court stated: 'You are not entitled, even if you wished to save your own life, to take the life of another.'[123] In *Hölzer et al.*, the Judge Advocate of a Canadian Military Court stated: 'There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person cannot be justified.'[124] On the other hand, the United States Military Tribunal acting under Control Council Law No. 10 in the *Einsatzgruppen Trial*

at the time, it was possible for him not to comply with that order.' (emphasis added) *Draft Code of Offences against the Peace and Security of Mankind 1954* (United Nations, 2005), available online at: legal.un.org/ilc.texts/instruments/English/draft_articles/7_3_1954.pdf. See also Bantekas, supra note 1, at 106.

[117] See also Cassese, *International Criminal Law*, supra note 1, at 284–5.

[118] See also *Erdemović* Appeal, Opinion of Judge McDonald and Judge Vohrah, supra note 109, at para. 35.

[119] UNWCC, Digest of Laws and Cases, supra note 9, at 156.

[120] See, e.g., Separate and Dissenting Opinion of Judge Li, *Prosecutor v. Dražen Erdemović* (IT-96–22), Appeals Chamber, 7 October 1997, at para. 6 ('*Erdemović* Appeal, Opinion of Judge Li'). These cases refer to 'necessity' but appear to apply the defence of duress (excusing unlawful conduct which was compelled by 'dire consequences'). See also J. D. Ohlin, 'The Bounds of Necessity' 6 *Journal of International Criminal Justice* (2008) 289 at 293–4.

[121] UNWCC, Digest of Laws and Cases, supra note 9, at 171.

[122] Ibid., at 172.

[123] Ibid., at 173.

[124] Ibid.

expressed the contrary view: 'Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever. Nor need the peril be that imminent in order to escape punishment.'[125] Thus, while duress was recognized as a complete defence (and not merely as a mitigation of sentence) in the German industrialist cases in relation to charges of forced labour, we are left with an unclear picture about whether duress can be invoked as a complete defence in cases of war crimes or crimes against humanity involving the taking of lives.

Despite the limited jurisprudence from the ad hoc Tribunals on defences, duress was considered extensively by the ICTY in the case of *Prosecutor v. Dražen Erdemović*. However, as a result of the silence in the Tribunal's Statute on defences, the diverging perspectives on duress in national law, and the lack of consensus in the post–World War II war crimes jurisprudence, the judges of the ICTY also diverged in their views and in their reasoning with respect to the applicability of the defence of duress. A bare majority of the ICTY Appeals Chamber concluded that duress is not a complete defence in relation to charges of war crimes and crimes against humanity involving killing innocent persons and can only be a mitigating factor in such cases.[126] However, it has been observed that 'the existing doctrine is still far from being solidified, given that the *Erdemović* case was decided by a mere 3–2 vote and the dissenting opinion of Judge Cassese has had as much influence as the majority opinion.'[127]

The accused in that case, Dražen Erdemović, was a 23-year-old member of the Bosnian Serb army who, with other members of his unit, formed part of a firing squad that killed approximately 1200 unarmed civilian men after of the fall of Srebrenica.[128] Erdemović estimated that he himself probably

[125] Ibid., at 174. However, the statements in the *Fuerstein* and in the *Einsatzgruppen* cases have both been characterized as mere *obiter dictum*. See *Erdemović* Appeal, Opinion of Judge Cassese, supra note 19, at para. 25; *Erdemović* Appeal, Opinion of Judge Li, supra note 120, at para. 10.

[126] *Erdemović* Appeal, Opinion of Judge McDonald and Judge Vohrah, supra note 109, at para. 88. This conclusion as supported by Judge Li in his Separate and Dissenting Opinion, *Erdemović* Appeal, Decision of Judge Li, ibid., at para. 12.

[127] Ohlin, supra note 120, at 291.

[128] *Erdemović* First Sentencing Judgment, supra note 42, at paras 2–3, 76–8 & 95; Judgment, *Prosecutor v. Dražen Erdemović* (IT-96–22-A), Appeals Chamber, 7 October 1997, at para. 1 ('*Erdemović* Appeal Judgment').

killed around seventy people.[129] In his submission of his guilty plea, Erdemović stated:

> Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you're sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my wife and son who then had nine months, and I could not refuse because then they would have killed me'.[130]

The Trial Chamber, accordingly, considered the defence of duress but concluded that it could not exonerate the accused.[131] The Trial Chamber's reasoning, in part, suggested that duress could not be raised in relation to crimes against humanity due to the fact that such an act could not satisfy the proportionality requirement because 'the life of the accused and that of the victim are not fully equivalent.'[132]

This judgment was then subjected to an appeal which resulted in four separate appellate decisions being authored, demonstrating significant disagreement on the law on the defence of duress.[133] Three of the five appellate judges concluded that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. In their attempt to discern general a principle of law, the judges observed that there was a 'clear dichotomy in the practice of the main legal systems of the world'.[134] In general, civil law

[129] *Erdemović* First Sentencing Judgment, ibid., para. 78.

[130] Ibid, at para. 10.

[131] Ibid, at para. 20.

[132] Ibid, at para. 19. The Trial Chamber does not explicitly refer to proportionality but emphasises that 'the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole.' Judge Stephen of the Appellate Chamber frames these Trial Chamber statements as a question of proportionality which appears to be an accurate characterisation of the issue. Separate and Dissenting Opinion of Judge Stephen, *Prosecutor v. Dražen Erdemović* (IT-96–22-A), Appeals Chamber, 7 October 1997, at para. 13. ('*Erdemović* Appeal, Opinion of Judge Stephen'). It is worth noting, however, that the characterization of crimes against humanity as a crime against 'the whole of humankind' as relied upon by the Trial Chamber is disputed. See, e.g., *Erdemović* Appeal, Opinion of Judge Li, supra note 120, at para. 26.

[133] *Erdemović* Appeal Judgment, supra note 128. Judges McDonald and Vohrah wrote jointly and, together with Judge Li who submitted an individual opinion, constituted a majority on the question of the availability of the defence of duress (or lack thereof).

[134] *Erdemović* Appeal, Opinion of Judge McDonald and Judge Vohrah, supra note 109, at para. 32. Judge McDonald and Vohrah's assessment of general principles of law included a survey of domestic law with reference to 15 civil law jurisdictions, 7 common law countries, and 5 other countries, totaling 27 countries (including 3 AU countries: Nigeria, Somalia and Ethiopia), at para. 63.

jurisdictions recognized duress as a possible defence to all crimes whereas common law jurisdictions rejected its availability for the crime of murder.[135] Thus, Judges McDonald and Vohrah, in their joint decision concluded that there was a general principle of law 'that an accused person is less blameworthy and less deserving of the full punishment when he performs certain prohibited acts under duress.'[136] However, they concluded that there is no general agreement about whether duress is a complete defence to crimes involving killing.[137]

Discerning no customary international law or general principle with respect to the availability of the defence of duress to the killing of innocent people, the Majority judges turned to a normative analysis evaluating the availability of the defence of duress in the particular context of applying the defence at the ad hoc Tribunal.[138] The judges emphasized the egregious nature of the crimes within the jurisdiction of the Tribunal, the vulnerability of civilians in times of armed conflict, and the increased likelihood of situations of persons being forced to commit atrocities under duress in times of conflict as opposed to in times of peace.[139] The judgment of Judges McDonald and Vohrah also emphasized the fact that the accused was a soldier in the Bosnian Serb army.[140] Pointing to certain domestic criminal codes which suggested that duress may not be available to soldiers participating in an armed conflict, they

[135] Ibid, at para. 49.

[136] Ibid, at para. 66. Judge Li simply concluded that 'no general principle of law recognized by civilized nations can be deduced'. *Erdemović* Appeal, Opinion of Judge Li, supra note 120, at para. 3.

[137] *Erdemović* Appeal, Opinion of Judge McDonald and Judge Vohrah, supra note 109, at para. 69. Judge Li concluded in his separate opinion supporting the majority: 'From a study of these decisions the following principles can be obtained: as a general rule, duress can be a complete defence... To this general rule there is an important exception: if the act was a heinous crime, for instance, the killing of innocent civilians or prisoners of war, duress cannot be a complete defence, but can only be a ground of mitigation of punishment if justice requires.' *Erdemović* Appeal, Opinion of Judge Li, supra note 120, at para. 5. Judges McDonald and Vohrah also surveyed the post–World War II war crimes cases considered by the UNWCC and concluded that these authorities supported the exclusion of cases involving the killing of innocent persons from the scope of the defence of duress.' While recognizing that the *Einsatzgruppen* case did suggest that duress was an available defence to the killing of innocent persons, they ultimately concluded that 'the *Einsatzgruppen* decision is in discord with the preponderant view of international authorities.' At paras 52 & 44.

[138] *Erdemović* Appeal, Opinion of Judge McDonald and Judge Vohrah, ibid, at paras 72 & 75. Judge Cassese critiqued the Majority judges' approach, turning to 'policy considerations' to determine the question as inappropriate and 'extraneous to the task of our Tribunal.' *Erdemović* Appeal, Opinion of Judge Cassese, supra note 19, at para. 11.

[139] *Erdemović* Appeal, Opinion of Judge McDonald and Judge Vohrah, ibid., at paras 75–6. See also *Erdemović* Appeal, Opinion of Judge Li, supra note 120, at para. 8.

[140] *Erdemović* Appeal, Opinion of Judge McDonald and Judge Vohrah, ibid., at para. 32.

stated that 'soldiers or combatants are expected to exercise fortitude and a greater deal of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight.'[141] Thus, they concluded that duress may be a mitigating factor in sentencing but could not be relied upon by a soldier charged with war crimes and crimes against humanity involving killing innocent persons.[142]

Judges Cassese and Stephens dissented from this view in individual separate and dissenting opinions.[143] They both concluded that duress may constitute a complete defence under international criminal law without exceptions, provided that the strict requirements of the defence are established.[144] They noted that the difficult questions surrounding the defence of duress in relation to offences involving killing would be dealt with in the proportionality assessment, suggesting that this proportionality requirement may not be met in relation to most cases involving killing.[145] However, they emphasized the unique situation in which the victims would likely have been killed regardless. '[W]here it is *not* a case of a direct choice between the life of the person acting under duress and the life of the victim – in situations, in other words, where there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does – then duress may succeed as a defence.'[146] The majority, on the other hand, rejected this 'utilitarian' argument, asserting instead 'an absolute moral postulate' refusing to exclude responsibility for the killing of innocent persons.[147]

In *Erdemović*, a majority of the ICTY Appeals Chamber declined to recognize duress as a complete defence to war crimes or crimes against humanity involving killing. However, two strong dissenting opinions leave the status of international law on this issue unclear. The difficulty in

[141] Ibid., at paras 69 & 84. This point was made with reference to German Law and the Penal Code of the former Socialist Federal Republic of Yugoslavia.

[142] Ibid., at paras 85 & 88.

[143] *Erdemović* Appeal Judgment, supra note 128, at para. 19.

[144] *Erdemović* Appeal, Opinion of Judge Cassese, supra note 19, at paras 12 & 44; *Erdemović* Appeal, Opinion of Judge Stephen, supra note 132, at paras 66–7. They also agreed that, when not accepted as a defence, it could be a mitigating factor on sentencing. See, e.g., *Erdemović* Appeal, Judge Cassese, supra note 19, at para. 12.

[145] *Erdemović* Appeal, Opinion of Judge Cassese, ibid., at para. 12.

[146] Ibid., at paras 12 & 42. See also *Erdemović* Appeal, Opinion of Judge Stephen, supra note 132, at para. 19.

[147] *Erdemović* Appeal, Opinion of Judge McDonald and Judge Vohrah, supra note 109, at paras 79–93. See also *Erdemović* Appeal, Opinion of Judge Li, supra note 120, at para. 11.

discerning a general principle of law on this question is a result of the diverging approaches taken in domestic systems, in particular as between civil law and common law systems. However, the law within domestic systems on these difficult questions may also continue to evolve.[148] Thus, the African Court of Justice will have to give careful consideration to this question. It should, however, consider the fact that the *Rome Statute*, a treaty with 123 states parties of which, at present, 34 countries are from Africa, does not explicitly exclude any crimes from duress.

Article 31(1)(d) of the *Rome Statute* recognizes the defence of duress as a ground for excluding criminal responsibility at the ICC.

Article 31 Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

   . . .

   (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has not been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
   (i) Made by other persons or
   (ii) Constituted by other circumstances beyond that person's control.

Whereas earlier drafts of the text enumerated necessity in a subparagraph (e), separate from duress, the provision adopted in Rome includes both the

[148] At least one common law jurisdiction has recently accepted that duress may be a defence to murder. In Canada, s.17 of the *Criminal Code* of Canada contains a codified version of the defence of duress which explicitly excludes murder amongst many other offences. *Criminal Code*, R.S.C., 1985, c. C-46. This provision is cited by Judges McDonald and Vohrah in *Erdemović. Erdemović* Appeal, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ibid., at para. 60. However, a common law defence of duress operates in Canada alongside the codified version (which applies to all those who are parties to the offence but do not *commit* the offence). Recently, in 2015, the Ontario Court of Appeal confirmed that the common law defence of duress in Canada is available for murder. *R. v. Aravena*, [2015] O.J. No. 1910. While the exclusion in the codified version of defence was not at issue in this case, the Ontario Court of Appeal remarked that 'the exception must be found unconstitutional.' (At para. 86). It can thus be expected that once the appropriate case comes before the courts, the exclusion of murder from the defence of duress in Canada will be overturned in full.

defence of duress and the defence of necessity (in the form of 'duress of circumstances') in the same subsection.[149]

Whether crimes involving killing should be excluded outright or whether this consideration should be left to be evaluated as part of the proportionality assessment was one of the more difficult issues debated in drafting.[150] Ultimately, the latter approach was adopted and Article 31(1)(d) does not exclude any offences outright, even offences involving killing.

What then are the elements of the defence of duress? As summarized by the UNWCC in its review of duress in the post–World War II cases, 'duress may prove a defence if (a) the act charged was done to avoid an immediate danger both serious and irreparable, (b) there was no other adequate means of escape, (c) the remedy was not disproportionate to the evil'.[151] This formulation will be discussed below in comparison with the text of the *Rome Statute*, Article 31(1)(d).

The first element requires that one acts in response to an outside threat. This is articulated in Article 31(1)(d) of the *Rome Statute* as requiring that the duress resulted from a threat 'against that person or another person' which is 'made by other persons'. Thus, the threat may have been to the accused or to *another person*.[152] No special relationship is required between the two individuals when the accused acts to avoid a threat to another person.[153] The *Rome Statute* requires that the threat be 'of imminent death or of continuing or imminent serious bodily harm against the person or another person'.[154] While the scope of crimes that fall within the jurisdiction of the African Court is of course much broader than that of the ICC, they are also all very serious and, therefore, a similarly high threshold may be warranted.[155]

Article 31(1)(d) also requires that the duress *caused* the commission of the crime. Thus, it has been suggested that an accused cannot avail themselves of

[149] 1998 Report of the Preparatory Committee, supra note 20, at 35.
[150] Saland, supra note 23, at 208.
[151] UNWCC, Digest of Laws and Cases, supra note 9, at 174.
[152] In Rome, 'there were isolated calls for allowing this ground to be applied also in cases of threats against property' but this was ultimately rejected in favour of the high threshold ultimately adopted in the *Rome Statute*. Saland, supra note 23, at 208. Yeo argues that 'it would be entirely in keeping with [the current provision] to extend the defence to persons who were confronted with the destruction of property which is essential to their survival' which would also be in line with the provision on self-defence in Article 31(1)(c). Stanley Yeo, 'Compulsion and Necessity in African Criminal Law' 53 *Journal of African Law* (2009) 90, at 97.
[153] Eser, supra note 18, at 885.
[154] Supra note 21, Art. 32(1)(d).
[155] It has been suggested that the high threshold set out in the *Rome Statute* 'is understandable given the very serious nature of the crimes falling within the jurisdiction of the International Criminal Court'. Stanley Yeo, 'Revisiting Necessity' 56 *Crim. L. Q.* (2010) 13, at 40.

the defence of duress if the person would have committed the crime regardless of the threat.[156] The relevant question is whether a 'reasonable person in comparable circumstances' would have been driven to commit the criminal conduct.[157] It has been suggested that relevant individual characteristics of the accused should be considered in how the person could be expected to reasonably react in such circumstances.[158] This approach has been used to support the argument that a solider should be able to resist more danger and can, accordingly, be held to a higher standard than other people.[159]

There are also limitations on the way in which an individual can respond to such a threat in order to avail themselves of the defence of duress. First, the accused acting under duress must act *necessarily*. This is reflected in the requirement articulated by the UNWCC that 'there was no other adequate means of escape'.[160] Furthermore, it also requires that the act was reasonable and/or proportionate. Whereas the majority of legal authorities refer to the requirement of proportionality in the accused's response to the threats, Article 31(1)(d) emphasizes that the accused must have acted *reasonably*.[161] This criterion can be seen to incorporate the requirement of proportionality because an accused cannot be found to have acted reasonably if their acts were disproportionate to the harm threatened.[162] This assessment of reasonableness and proportionality is where the most challenging questions surrounding the defence of duress arise, in particular in relation to crimes involving the taking of lives. The *Rome Statute* includes one additional requirement which is that 'the person does not intend to cause a great harm than the one sought to be avoided'.[163] This additional requirement came about as a result of a compromise at the drafting in Rome but has been criticized as unnecessary and 'difficult to apply'.[164]

[156] Cryer *et al.*, supra note 1, at 408.
[157] Eser, supra note 18, at 886.
[158] Yeo, 'Revisiting Necessity', supra note 155, at 44; Yeo, 'Compulsion and Necessity in African Criminal Law', supra note 152, at 96; Eser, ibid., at 886.
[159] Eser, ibid. It is suggested that the test in such a case is 'best formulated as what would be considered necessary and reasonable by a service member of the experience and rank of the defendant.' Cryer *et al.*, supra note 1, at 408.
[160] See also Yeo, 'Compulsion and Necessity in African Criminal Law', supra note 152, at 100; Cassese, *International Criminal Law*, supra note 1, at 281.
[161] For references to proportionality, see UNWCC, Digest of Laws and Cases, supra note 9, at 147; Thiam, 'Twelfth report on the draft Code', supra note 14, at 111; *Erdemović* Appeal, Opinion of Judge Cassese, supra note 19, at para. 16.
[162] Eser, supra note 18, at 886–7.
[163] Supra note 21, Art. 31(1)(d).
[164] Yeo, 'Compulsion and Necessity in African Criminal Law', supra note 152, at 102.

It has also been suggested that a fourth element of an 'absence of prior fault' exists for duress. This means that the accused is precluded from relying on the defence of duress if the accused was culpable in creating the circumstances which gave rise to the threat under which they ultimately acted.[165] It has been suggested that this requirement is part of customary international law 'and is consistent with national practice'.[166] It has, accordingly, been suggested that 'duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law.'[167] If accepted, this approach would not include conscripted armed forces. Furthermore, careful consideration should be given to the question of whether an individual joined *freely*, given that there are many coercive circumstances in times of armed conflict which may cause people to join armed groups.[168] Furthermore, it would only apply to groups '*institutionally intent*' upon violating international law.[169] Thus, the mere fact of joining an armed group participating in an armed conflict does not meet this threshold. Given the fact that the African Court includes jurisdiction over transnational crimes as well as core international crimes, this limitation on the applicability of duress may be considered in relation to those who *freely and knowingly* join organized criminal groups.[170]

The defence of duress has been recognized in international criminal law and is codified in the *Rome Statute*. It may continue to be raised by accused in defence to charges of serious international and transnational crimes. There

[165] This requirement is not explicitly referred to in the duress portion of Article 31(d) of the *Rome Statute*. However, the necessity portion of Art. 31(d) does refer to 'circumstances *beyond that person's control*'. Stanley Yeo, 'Compulsion and Necessity in African Criminal Law', ibid., at 105–7; Yeo, 'Revisiting Necessity', supra note 155, at 46. See also: *Erdemović* Appeal, Opinion of Judge Cassese, supra note 19, at para. 16; Thiam, 'Twelfth report on the draft Code of Crimes', supra note 14, at 111; Cassese, *International Criminal Law*, supra note 1, at 284.

[166] Cryer *et al.*, supra note 1, at 408, with reference to Judges Cassese and Stephen's decisions in *Erdemović*.

[167] *Erdemović* Appeal, Opinion of Judge Cassese, supra note 19, at para. 17.

[168] For instance, in the *Erdemović* case, the accused testified that he tried to avoid the war on many occasions but that he finally joined the Bosnian Serb army at least in part 'based on his need for money to feed himself and his wife.' *Erdemović* First Sentencing Judgment, supra note 42, at para. 79.

[169] *Erdemović* Appeal, Opinion ofJudge Cassese, supra note 19, at para. 17.

[170] This approach is also taken in some domestic regimes. See, e.g., the *Criminal Code* of Canada, s.17 which states that a person may only be excused for acting under duress 'if the person is not a party to a conspiracy or association whereby the person is subject to compulsion'. *Criminal Code*, R.S.C., 1985, c. C-46.

remain uncertainties with respect to the boundaries of and potential exclusions from the defence of duress. However, even if no crime is explicitly excluded from the purview of duress, the strict requirements of the defence should limit its application and abuse.

2. Necessity

Throughout most of the drafting history of the *Rome Statute*, the defences of duress and necessity were listed as separate grounds for excluding criminal responsibility.[171] However, in the final stages of drafting in Rome, duress and necessity were combined in one provision.[172] While Article 31(1)(d)(i) includes the traditional defence of duress, subsection (ii), which refers to an accused who acts under duress '[c]onstituted by other circumstances beyond that person's control,' reflects one formulation of the defence of necessity.[173] In other words, necessity is recognized in the form of the 'duress of circumstances'.[174]

Necessity is a less commonly recognized and less well defined concept than duress.[175] However, it has been observed that '[t]he current trend is for the law to recognize a defence of necessity, the basic argument being that, insofar as criminal responsibility is concerned, there is no distinction between a person who committed an offence as a result of a threat by a human agent, and one who did so under a threat caused by natural circumstances.'[176]

Necessity can be conceptualized in two different ways, as an excuse and as a justification.[177] Necessity as a justification includes a situation where an accused acts and causes harm, but does so in order to avoid a greater harm. 'Justified necessity usually appeals to some version of choice of evils . . . If the outcome "sought to be avoided" by the defendant is sufficiently grave compared to the defendant's act, then the act is justified by virtue of the necessity

[171] Eser, supra note 18, at 883–4.
[172] Eser, ibid.; Yeo, Revisiting Necessity', supra note 155, at 39.
[173] Yeo, 'Revisiting Necessity', ibid.
[174] Eser, supra note 18, at 884.
[175] Stanley Yeo conducted a comparative analysis focusing on four African criminal laws, South Africa, Gambia, Southern Nigeria, and Sudan, selected for their diversity of origin and 'because their laws are representative of those of many other African nations. In this study, Yeo observed that 'while all the criminal laws of the nations selected for this study recognize a defence of compulsion, only some recognize the defence of necessity. This is consistent with the development of these defences in other parts of the world as well as under international criminal law.' Yeo, 'Compulsion and Necessity in African Criminal Law', supra note 152, at 91.
[176] Ibid.
[177] See also Cassese, *International Criminal Law*, supra note 1, at 255–6 for a general discussion of the distinction between justifications and excuses.

of the situation.'[178] Necessity as an excuse resembles the defence of duress when the accused is compelled to commit an act which is criminal to avoid a serious threat emerging from external circumstances.[179] In some national jurisdictions, both versions of the defence are recognized; whereas others recognize only one version and not the other.[180]

In addition to combining the defences of duress and necessity in Article 31 (1)(d), it has been suggested that this provision also combines elements of justification (the 'choice of a lesser evil') with elements of excuse (the absence of 'moral choice').[181] While some commentators approve of the combination of these defences in one paragraph, Article 31(1)(d) has been criticized by others for 'simply lump[ing] everything together in a muddle'.[182] Similarly, some commentators have suggested that it is necessary to distinguish between the two different forms of necessity (as a justification versus an excuse).[183] However, others suggest that this distinction is not necessary and 'the best approach is to develop a single formulation of necessity, which incorporates features of excuse and justification.'[184] Yeo, who advocates for the latter approach, emphasizes that 'the essential issue is whether the defendant's actions were, in the circumstances, blameworthy and deserving of condemnation and punishment.'[185]

As discussed above, Article 31(1)(d) combines duress and necessity and, therefore, the elements of necessity under the *Rome Statute* are the same as those discussed above with respect to duress. However, there is one noteworthy difference. Article 31(1)(d)(ii) specifies that the defence of necessity is only available if the duress arises from 'circumstances *beyond that person's control*'. By contrast, no similar limitation is articulated in relation to duress under subsection (i). However, as discussed above, it has been suggested that the requirement of absence of prior fault should be applied to both duress and necessity.

[178] Ohlin, supra note 120, at 292. See also Thiam, 'Fourth report on the draft Code', supra note 12, at para. 194.
[179] See Ohlin, ibid., at 292.
[180] Ibid., referencing the German Penal Code which codifies both versions and to the U.S. Model Penal Code which includes justified; Yeo, 'Revisiting Necessity', supra note 155, at 14–5, citing the Supreme Court of Canada's recognition of necessity as an excuse but rejecting it as a justification in *R. v. Perka*, [1984] 2 SCR 232.
[181] Eser, supra note 18, at 883–4; Ohlin, supra note 120, at 293.
[182] Ohlin, ibid. See also Eser, ibid. On the other hand, Cassese says that the *Rome Statute* 'rightly lumps necessity and duress together'. Cassese, *International Criminal Law*, supra note 1, at 289.
[183] Ohlin, ibid.
[184] Yeo, 'Revisiting Necessity', supra note 155, at 16.
[185] Ibid., at 17.

Similar to the defence of duress, the question of whether any defences, such as murder, should be excluded from the application of the defence of necessity is often considered.[186] In the context of the defence of necessity, the scholarly debate often focuses on whether or not it may be a defence to the crime of torture.[187] While it is hopefully broadly accepted now that torture can never be justified, the question remains whether an individual could raise the defence of necessity as an excuse.[188] This has led some to suggest that necessity should be ruled out as a possible defence for torture.[189] The *Rome Statute* takes the approach of not explicitly excluding any crime and relies on the requirements that the act must be necessary and reasonable to restrict the defence.

The ICTY found that the defence of necessity existed in customary international law.[190] The Tribunal contemplated that necessity may be a defence of justification to the war crime of plunder involving appropriation of property in time of famine if the following cumulative conditions are met: '(i) there must be a real and imminent threat of severe and irreparable harm to life existence, (ii) the acts of plunder must have been the only means to avoid the aforesaid harm, (iii) the acts of plunder were not disproportionate and (iv) the situation was not voluntarily brought about by the perpetrator himself.'[191] The ICC in *Katanga* contemplated the possibility that circumstances comparable to famine may amount to necessity under article 31(1)(d) of the *Rome Statute* but did not find that such extreme circumstances were made out on the facts of that case.[192] In the ICTY case *Prosecutor v. Naser Orić*, the Trial Chamber did conclude that the defence of necessity was available in relation

[186] See, e.g., Yeo, 'Revisiting Necessity', ibid.; Yeo, 'Compulsion and Necessity in African Criminal Law', supra note 152, at 104–5.

[187] See, e.g., Ohlin, supra note 120; Paola Gaeta, 'May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?' 2 *Journal of International Criminal Justice* (2004) 785.

[188] Ohlin emphasises that the focus of the analysis in this context should be on necessity as an excuse. Ibid.

[189] See, e.g., Gaeta, 'May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?', supra note 187, at 793. However, Gaeta suggests that, factually, necessity would not be successful as a defence for the paradigmatic hypothetical 'ticking time bomb' torture scenario because such an act of torture could never be necessary and reasonable. (At 791–2).

[190] Oral decision pursuant to Rule 98*bis*, *Prosecutor v. Naser Orić* (IT-03–68-T), Trial Chamber, 8 June 2005, Transcript at p. 9027, lines 10–13 ('*Orić* decision').

[191] Judgment, *Prosecutor v. Hadžihasanović and Kubura* (IT-01–47-T), Trial Chamber, 15 March 2006, at paras 53 & 56. No such claim was, however, made on the facts in this case (see paras 1854–1993). See also *Orić* decision, ibid. at page 9027, lines 6–20.

[192] Judgment pursuant to article 74 of the Statute, *Prosecutor v. Katanga* (ICC-01/04–01/07–3436-tENG), Trial Chamber, 7 March 2014, paras 955–6 ('*Katanga* Trial Judgment').

to charges of plunder involving the theft of cattle in the situation of a city under siege and a starving population.[193]

In another ICTY case, the accused, the commander or prison warden of a detention facility, attempted to raise the defence of necessity in response to convictions for war crimes relating to the mistreatment of civilian detainees.[194] On appeal, the convicted prison warden argued that the conduct was justified by necessity because more people were injured and killed outside of the facility due to the armed conflict than inside the prison. He suggested that the defence of necessity 'excludes the perpetrator's unlawful actions since such actions are motivated by the intent to avoid a worse violation.'[195] The Appeals Chamber rejected the argument as misplaced on the facts of the case.[196]

In the Special Court for Sierra Leone's ('SCSL') CDF Trial, one trial judge concluded the defence of necessity was available to the accused who were fighting on behalf of the democratically ousted government which had been ousted by a coup 'on the grounds that the preservation of democratic rule is a vital interest worth protecting at all cost in the face of rebellion, anarchy and tyranny'.[197] However, this was unsurprisingly rejected by the other two trial judges.[198]

The version of necessity codified in the *Rome Statute* is the more restrictive excuse of necessity, in the sense of an accused acting under compulsion from 'duress of circumstances'.[199] The African Court could follow this lead and take a similarly restrictive approach. Additionally, even if no crimes are explicitly excluded, the requirements that the act be necessary, reasonable and proportionate would likely prevent the success of the defence in all but the most

[193] *Orić* decision, supra note 190, at pp. 9029–31.
[194] Judgment, *The Prosecutor v. Zlatko Aleksovski* (IT-95–14/T), Trial Chamber, 25 June 1999, paras 5, 20–4, 27, 34, 93, 221–9.
[195] Judgment, *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber, (IT-95–14/1-A) 24 March 2000, paras 39–40 ('*Aleksovski* Appeal Judgment').
[196] Accordingly, the Appeals Chamber in that case concluded that it was 'unnecessary to dwell on whether necessity constitutes a defence under international law [and] whether it is the same as the defence of duress.' *Aleksovski* Appeal Judgment, ibid., at para. 52–6.
[197] Judgment, *Prosecutor v. Fofana and Kondewa*, (SCSL-04–14-T), Trial Chamber I, 2 August 2007, Annex C – Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson, para. 69 ('CDF Trial Judgment – Dissenting Opinion of Justice Thompson'). See also paras 68–88.
[198] Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa,, *Prosecutor v. Fofana and Kondewa* (SCSL-04–14-T), Trial Chamber I, 9 October 2007, paras 70–81 ('CDF Sentencing Judgment').
[199] However, it has been suggested that necessity as a justification could be recognized under Article 31(3). Ohlin, supra note 120, at 293.

exceptional cases. This is demonstrated by the limited relevance of the defence thus far in the international criminal law jurisprudence.

E. *Mistake of Fact and Mistake of Law*

In addition to the grounds for excluding criminal responsibility included in the *Rome Statute* as discussed above, Article 32 of the *Rome Statute* also includes the following provision on the defences of mistake of fact and mistake of law:

> **Article 32**
>
> 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
> 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Mistakes of fact or mistake of law were often raised by the accused tried pursuant to the Nuremberg Charter and Control Council Law No. 10, despite these instruments' silence on these defences.[200] In this post–World War II jurisprudence, mistake of fact was accepted as a defence but exculpatory arguments about mistake of law were generally rejected.[201]

The defence of mistake of fact is uncontroversial because a mistake about the nature of any material fact would preclude a finding of the required *mens rea*. For example, if an individual attacked a building believing it with good reason to be a legitimate military objective, they would lack the *mens rea* for the war crime of attacking a civilian object, even if the accused's belief as to the nature of the building was mistaken and it was in fact a civilian object. Thus, the UNWCC observed that 'mistake of facts ... may constitute a defence in war crimes trials just as it may in trials before municipal courts.'[202] This is sometimes referred to as a failure of proof defence.

[200] Otto Triffterer, 'Article 32 – Mistake of fact or mistake of law' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (2nd edn. Munich: C. H. Beck, 2008) 895, at 897 ('Article 32').
[201] Ibid.
[202] UNWCC, Digest of Laws and Cases, supra note 9, at 184.

It was questioned during the drafting whether it was actually necessary to include these defences in the Rome Statute at all.[203] To the extent that these defences amount to a negation of the mental element, they do not need to be explicitly enumerated because, if established, the mental element for the crime would be absent and an accused would clearly not be criminally culpable. Thus, the first paragraph of Article 32, which recognizes mistake of fact 'only if it negates the mental element required by the crime,' has been described as merely stating what is otherwise 'self-evident' and amounting to no more than 'a pure clarification of a generally accepted principle of criminal law'.[204]

While mistake of fact is readily accepted, the defence of mistake of law is more controversial.[205] While it is generally a rule of national jurisdictions that ignorance of the law is no excuse to criminal responsibility, some have argued that individuals may not be expected to be as knowledgeable about *international* law as they are about their national laws.[206] Thus, it is suggested that a defence of mistake of law, in the sense of a mistaken belief that something is lawful when it is not, may be more justifiable in relation to prosecutions for international crimes.[207] This argument, however, is generally limited to the confines of war crimes because other international crimes including crimes against humanity and genocide are obviously unlawful and no person can reasonably be under a mistaken belief in their legality.[208] The same would hold true for many war crimes as well.[209] Furthermore, international humanitarian law places obligations on states to educate their armed forces about the law of armed conflict thus reducing the persuasiveness of this argument.[210]

[203] Triffterer, 'Article 32', supra note 200, at 899–900; Saland, supra note 23, at 210; 1996 Report of the Preparatory Committee, Vol. I, supra note 20, at para. 205.

[204] Triffterer, ibid., at 900.

[205] Eser says that mistake of law is 'worldwide [a] highly controversial ground for excluding criminal responsibility.' Eser, supra note 18, at 868.

[206] UNWCC, Digest of Laws and Cases, supra note 9, at 182; Dinstein, supra note 1, paras 11–13.

[207] Special Rapporteur D. Thiam, 'Fourth report on the draft Code of Offences against the Peace and Security of Mankind,' Document A/CN.4/398 (11 March 1998) in *Yearbook of the International Law Commission 1986*, Volume II, Part I (New York: United Nations, 1998), UN Doc. A/CN.4/SER.A/1986/Add.1 (Part 1), at paras 207–8.

[208] Thiam, 'Fourth report on the draft Code', supra note 12, at paras 209 & 211; Dinstein, supra note 1, at paras 11–13.

[209] Thiam, 'Fourth report on the draft Code', ibid., atparas 209 & 211; Dinstein, ibid., at paras 11–13.

[210] For example, all four 1949 Geneva Conventions include obligations on states to disseminate the Conventions, in particular to military personnel. For example, Article 144 of *Geneva Convention IV* states: 'The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programs of military and, if

Ignorance of the law is not, however, recognized as a defence in Article 32(2) of the *Rome Statute*. This provision explicitly states that '[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility.' Accordingly, it is unlikely that it would be generally accepted today that ignorance of the law, even of international law, would constitute a defence to serious international or transnational crimes.[211]

The version of mistake of law that is included in the *Rome Statute* is quite limited.[212] Article 32(2) only recognises the defence of mistake of law, outside of the defence of superior orders pursuant to Article 33 of the *Rome Statute*, in the limited circumstances in which 'it negates the mental element required by such a crime'. This limited defence only applies when there is a 'wrongful *legal evaluation*' or a 'mistake of legal element'.[213] Thus, as described by Heller, the defence of mistake of law as defined in the *Rome Statute* amounts to an argument that the accused 'was mistaken concerning *the definition of a legal element in a crime* such that he cannot be said to have acted 'knowingly' with regard to that element.'[214] This can arise in particular in relation to war crimes which often involve reference to international humanitarian law to legally evaluate some of the material elements of the war crimes proscribed by the *Rome Statute*.[215]

As an example of a crime with a legal element, Heller points to the crime against humanity of 'Imprisonment or other severe deprivation of physical liberty *in violation of fundamental rules of international law*.'[216] Another example pointed to by commentators is the war crime of using weapons or

possible, civilian instruction, so that the principles thereof may become known to the entire population. Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specifically instructed as to its provision.' Supra note 270. Such an obligation has long been a part of international humanitarian law. For example, 1907 *Hague Convention IV* obligates states, in its initial provision, to 'issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.' 1907 'Hague Convention IV Respecting the Laws and Customs of War on Land', Art. 1, in Roberts and Guelff (eds.), *Documents on the Laws of War*, (3rd ed. Oxford: Oxford University Press, 2000) 69 at 70.

[211] See for example, Cassese, *International Criminal Law*, supra note 1, at 294.

[212] See Triffterer, 'Article 32', supra note 200, at 900–3 and 906–7.

[213] Ibid at 908. Kevin Jon Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis' 6 *Journal of International Criminal Justice* (2008) 419–45.

[214] Heller, ibid., at 423.

[215] For example, Heller defines a 'legal element' as 'an element whose definition depends on a legal source other than the Rome Statute itself'. Ibid., at 422.

[216] *Rome Statute*, supra note 21, at Art. 7(1)(e) [emphasis added]. See Heller, ibid., at 422. See also Triffterer, 'Article 32', supra note 100, at 902.

methods of warfare which cause superfluous injury or are inherently indiscriminate 'provided that such weapons, projectiles and material and methods of warfare *are the subject of a comprehensive prohibition*' pursuant to Article 8 (2)(b)(xx) of the *Rome Statute*.[217]

The potential scope of the more restrictive version of mistake of law adopted in the *Rome Statute* is disputed amongst scholars. It has been suggested by some that this narrowly defined defence of mistake of law will have limited relevance with respect to international crimes. This view is based on the argument that it has generally been accepted that the mental element of most international crimes requires only awareness of the existence of the material facts and not a legal evaluation of the facts. For example, according to the *Elements of Crimes*, for prosecutions of war crimes pursuant to the *Rome Statute*, '[t]here is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international'.[218] Accordingly, the final element of each war crime requires only that '[t]he perpetrator was aware of the factual circumstances that established the existence of an armed conflict.'[219] This approach limits the potential scope of the mistake of law defence because no legal analysis is required. Heller, on the other hand, argues that Article 32(2) has broader application than is generally recognized.[220] Ultimately, the potential scope of this defence depends on the degree to which the Court accepts these 'factual awareness elements' as being consistent with the mental element requirements defined in Article 30 of the *Rome Statute*.[221] If accepted, these factual awareness elements, in particular in relation to the contextual elements of international

[217] Triffterer, ibid., at 907. Heller summarizes some of the other war crimes that have been referred to in the scholarship as potentially open to a legitimate claim of mistake of legal element. Heller, ibid., at 425.

[218] Art. 8 – War Crimes – Introduction. *Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, First Session, New York, 3–10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B.

[219] Ibid. Similarly, for every war crime pursuant to Art. 8(2)(a) of the *Rome Statute*, which are Grave breaches of the Geneva Conventions, the *Elements of Crimes* specify that all that is required is that '[t]he perpetrator was aware of the factual circumstances that established that protected status' and, therefore, are not required to be aware of the legal evaluation of such protected status.

[220] Heller, supra note 213, at 421 & 430. [Emphasis added]

[221] Heller suggests that these 'factual awareness elements' are inconsistent with Arts 30 and 32(2) and, therefore, that mistake of legal element has a potentially very broad impact. Ibid., at 433–4. The Court has, however, accepted the 'factual awareness element' with respect to the contextual element for war crimes which only requires an awareness of the 'factual circumstances that established the existence of an armed conflict' and not any legal evaluation thereof, thus limiting the potential scope of Article 32(2). See, e.g., Judgment pursuant to

crimes, will seriously reduce the practical availability of claims of mistake, in particular given the widespread and large scale nature of international crimes and the visible nature of their perpetration which would make it unlikely that an individual would have a legitimate claim that they were unaware of such facts.[222]

Pursuant to the approach taken in the *Rome Statute*, a mistake, whether it be a mistake of fact or a mistake of law on the occasion in which a legal evaluation of a situation is a material element, can amount to a defence by negating *mens rea*. However, it has been pointed out that the word *mistake* may be misleading in that it suggests a 'false perception of reality', whereas an individual who is ignorant as to the reality may similarly lack the *mens rea*.[223] Thus, 'error and mistake as well as lack of knowledge and awareness' can give rise to a mistake of fact or mistake of legal element defence.[224]

It has, however, been suggested that it would not be a defence to a crime requiring discriminatory intent (for example, genocide or persecution as a crime against humanity) for an accused to say that they were mistaken in their belief of the characteristics of a particular victim. 'A person who mistakes the religion or race of a victim may not invoke this error as a defence, since the motive for his act was, in any case, of a racial or religious nature.'[225] Similarly, Bantekas submits that mistake should not apply if an accused intends to kill one individual, but mistakes another person for that individual, since the act was still committed with the *mens rea* of murder.[226] Along this line of reasoning, an accused may not avail themselves of a mistake of fact defence for a charge of crimes involving illicit narcotics if they were mistaken about the *particular* substance that they were trafficking (*i.e.* if they thought that they were trafficking one illicit substance but were mistaken and it turned out to be a different illicit substance). In such a case, the act would not have been lawful regardless of the mistake.[227]

Article 74 of the Statute, *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04–01/06–2842), Trial Chamber I, 14 March 2012, at paras 1016 & 1018 ('*Lubanga* Trial Judgment').

[222] Based on this argument, Triffterer suggests that the defences of mistake will be of 'limited practical importance' for core international crimes. Triffterer, 'Article 32', supra note 200, at 909.

[223] Ibid., at 903.

[224] Ibid., at 903 & 906.

[225] Thiam, 'Fourth report on the draft Code', supra note 12, at para. 214.

[226] Bantekas, supra note 1, at 115–6.

[227] According to Triffterer, early drafts for an international criminal court by the Association Internationale de Droit Pénal (AIDP) and the International Law Association (ILA) considered the defence of mistake when 'there was a negation of 'the mental element required by the crime charged *provided that said mistake is not inconsistent with the nature of the crime or its*

Even without any explicit reference to the defence of mistake in the Malabo Protocol, mistakes of both fact and law (in the narrow sense of a mistake with respect to a material element which requires a legal characterization) will be a relevant exculpatory factor when it negates the mental element of the crime. The breadth of the mistake of law defence, in particular, will depend on how exactly the mental elements of the crimes are defined. On the other hand, it seems to be less accepted that a mistake of law, in the sense of ignorance of the unlawfulness of the conduct, is a defence, even for international crimes.

F. *Exclusion of the Superior Orders Defence*

While the *Mabalo Protocol* does not include an enumerated list of the defences it will recognize, Article 46B on Individual Criminal Responsibility is significant because it explicitly *excludes* the defence of superior orders. Pursuant to Article 46B(4): 'The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Court determines that justice so requires.'[228] This exclusion of the defence of superior orders reflects a return to the position adopted at Nuremberg and followed by the ad hoc international criminal tribunals.[229] It has been suggested by some that the exclusion of the defence of superior orders for international crimes amounts to customary international law.[230]

According to the UNWCC writing after World War II: 'The plea of superior orders has been raised by the Defence in war crimes trials more

elements, and provided that the circumstances he reasonably believed to be true would have been lawful'.' [Emphasis added] Triffterer, 'Article 32', supra note 200, at 898.

[228] *Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, as at Thursday 15 May 2014, STC/Legal/Min/7(I) Rev.1, p.35, Article 46B(4).

[229] For further discussion of the defence of superior orders, see: Paula Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' 10 *European Journal of International Law* (1999) 172; Otto Triffterer, 'Article 33 – Superior Orders and prescription of law' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (2nd edn. Munich: C.H. Beck, 2008) 915 ('Article 33'); Andreas Zimmermann, 'Superior Orders' in Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford: Oxford University Press, 2002) at 957–74; Jeanne L. Bakker, 'The Defence of Obedience to Superior Orders: The Mens Rea Requirement' 17 *Am. J. Crim. L.* (1989–1990) 55; Hilaire McCoubrey, 'From Nuremberg to Rome: Restoring the Defence of Superior Orders' 50 *ICLQ* (2001) 386.

[230] Cassese, *International Criminal Law*, supra note 1, at 258 & 270. Other commentators are less convinced that this position represents customary international law. See, e.g., Zimmermann, ibid. at 965; McCoubrey, ibid., at 390–1.

frequently than any other.'[231] Historically, in many states, the fact that an individual acted pursuant to a superior order could be relied upon to exclude criminal responsibility for the acts carried out.[232] Responsibility would lie, instead, upon the commander who issued the unlawful order (known as the principle of *respondeat superior*).[233] In the few trials that followed World War I, however, an individual was precluded from relying upon the defence of superior orders if the order was manifestly unlawful or the accused was aware of the unlawfulness of the order.[234]

The defence of superior orders was rejected in Article 8 of the *Charter of the International Military Tribunal* ('Nuremberg Charter').[235] This approach was followed in the *Charter of the Military Tribunal for the Far East* (the Tokyo Charter) and in Control Council Law No. 10.[236] At most, the plea of superior orders may have been considered in sentencing as a mitigating factor.[237] The Nuremberg approach was followed, in substantively similar terms, in the statutes of the ICTY (Article 7(4)),[238] the ICTR (Article 6(4)),[239] the SCSL (Article 6(4)),[240] and the Extraordinary Chambers of the Courts of Cambodia (Article 29).[241]

[231] UNWCC, Digest of Laws and Cases, supra note 9, at 157.

[232] Cassese, *International Criminal Law*, supra note 1, at 269.

[233] Ibid.

[234] See, e.g., *Judgment in the Case of Lieutenants Dithmar and Boldt (Hospital Ship 'Llandovery Castle')*, German War Trials, Supreme Court at Leipzig, 16 July 1921, reprinted in 16 *Am. J. Int'l L.* (1922) 708. See also Gaeta, 'The Defence of Superior Orders', supra note 23, at 175.

[235] *Charter of the International Military Tribunal*, Annexed to the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, reprinted in 39 *Am. J. Int'l L.* 257 (Supp. 1945).

[236] *Charter of the International Military Tribunal for the Far East*, Bevans, C. (ed), *Treaties and Other International Agreements of the United States of America 1776–1949*, Vol. 4, p.21, 26 April 1946; Article 6; *Control Council Law No. 10*, 20 December 1945; *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946; *Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No. 10*, Volume 1, p.xvii, Art. 4(b).

[237] UNWCC, Digest of Laws and Cases, supra note 9 at 155.

[238] *Statute of the International Criminal Tribunal for the former Yugoslavia*, Annexed to the *Report of the Secretary-General pursuant to paragraph 2 of Security Council 808 (1993)*, UN Doc. S/25704, adopted on 25 May 1993 ('ICTY Statute').

[239] *Statute of the International Criminal Tribunal for Rwanda* (as amended), 31 January 2010, available online at: http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf ('ICTR Statute').

[240] *Statute of the Special Court for Sierra Leone* (as amended), annexed to the *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (16 January 2002).

[241] *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, with inclusions of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

On the other hand, Article 33(1) of the *Rome Statute* recognizes the defence of superior orders if: '(a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful and (c) The order was not manifestly unlawful.'[242] This approach reflects a departure from the more robust prohibition on the reliance on the superior orders defence in the Nuremberg Charter and the ad hoc international criminal tribunals and has been criticized accordingly.[243] However, in practice it opens up only a very small door to the defence of superior orders and it is unlikely in practice to be applicable in many (or, perhaps, in any) prosecutions before the ICC. This is the case for a number of reasons.

First, pursuant to subsection (2) of Article 33, all acts of genocide or crimes against humanity are manifestly unlawful. Therefore, an individual is precluded from relying on the defence of superior orders for all charges of crimes against humanity and genocide. Thus, the scope of the superior orders defence is restricted to charges of war crimes.[244] Second, many of the war crimes included in the *Rome Statute*, such as torture, rape or other forms of sexual violence, amongst many others, would be manifestly unlawful like crimes against humanity and genocide.[245] Finally, the *Rome Statute*'s departure from the Nuremberg prohibition on superior orders is not likely to result

[242] *Rome Statute*, supra note 21, Art. 33(1).

[243] Gaeta, 'The Defence of Superior Orders', supra note 229, at 190; Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' 10 *EJIL* (1999) 144 at 156–157.

[244] The crime of aggression is not explicitly listed as inherently manifestly unlawful pursuant to Art. 33(2) of the *Rome Statute*. However, if the ICC does at some future point in time secure jurisdiction over the crime of aggression, the defence of superior orders is not likely to be relevant to charges of aggression given the leadership clause in Art. 8 *bis* (1) of the *Rome Statute*'s definition of aggression, which states that: 'For the purposes of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, *by a person in a position effectively to direct the political or military action of a State*, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the *Charter* of the United Nations.' (emphasis added) Therefore, prosecutions for the crime of aggression are limited to those most senior leaders, and not subordinates who could allege that they were acting pursuant to orders.

[245] Some commentators have suggested the possibility that all war crimes are manifestly unlawful. See, e.g., Gaeta, 'The Defence of Superior Orders', supra note 23, at 185–186 & 190–191. However, the better definitions interpret manifestly unlawful as meaning that 'the illegality was "obvious to a person of ordinary understanding"'. Zimmerman, supra note 229, at 970 citing a 1942 unpublished memorandum by Lauterpacht. Thus, 'manifest' means 'obvious' and there are a number of war crimes where the illegality might not be obvious if, for example, an individual is acting under mistaken information about the nature of an object of attack. Thus, war crimes which may not be 'manifestly' unlawful could include prohibitions against attacking certain objects with certain protections (such as the prohibition against attacking

in many acquittals because, due to limited resources, the Prosecutor of the ICC has often focused investigations and prosecutions on senior leaders including sitting and former heads of state and senior commanders of non-state armed groups. Therefore, it is more likely that those individuals giving the orders will be prosecuted rather than those acting pursuant to orders.

Despite the fact that the approach taken in Article 33 of the *Rome Statute* is unlikely to change the outcome of many cases in practice, the African Court's complete exclusion of the defence of superior orders reflects a return to the position of the Nuremberg Charter (which also excluded a plea of official capacity) and the majority of the other international criminal courts and tribunals. Given the African Court's broad subject matter jurisdiction and the fact that the African Court may not be so limited in only prosecuting those most senior leaders, this return to the Nuremberg approach will likely be welcomed given that the defence of superior orders has been described as 'highly controversial'.[246] Other defences, including mistake of fact and duress which may factually arise in circumstances where an accused is acting under the orders of a superior, should be recognized by the court.[247] These defences will adequately ensure that criminal responsibility of individuals acting pursuant to superior orders only attaches to those with the requisite degree of fault.

G. *Other Potential Defences Relating to War Crimes*

The final subsection of Article 31 of the *Rome Statute* makes it clear that the explicit inclusion of certain defences, such as mental disease or defect, intoxication, defence of persons and property, and duress, is not exhaustive. Article 31(3) states that: 'At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such ground is derived from applicable law as set forth in article 21.'[248] This provision was included because the drafters felt that 'the Rome Statute could

civilian objects) where the knowledge about whether or not the object is entitled to such protection may potentially lie only with those higher up the chain of command.

[246] Eser, supra note 18, at 868. Gaeta has also described the defence of superior orders as 'one of the most widely debated and controversial defences in international criminal law.' Gaeta, 'The Defence of Superior Orders', supra note 229, at 173.

[247] Triffterer, 'Article 33', supra note 229, at 920.

[248] The sources of applicable law referred to in Art. 21 of the *Rome Statute*, beyond the Statute, Elements of Crimes and Rules of Procedure of the Court itself, include: 'applicable treaties and rules of international law, including the established principles of the international law of armed conflict' and 'general principles of law derived from the Court from national laws of legal systems of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime'.

not possibly foresee all situations and that respect for the rights of the indicted made it necessary to have such a "window"'.[249] In particular, this 'window' replaced a draft article on defences under public international law, subsequently changed to 'possible grounds for excluding criminal responsibility referring to war crimes.'[250] This provision existed as a 'place-holder', without any attached text to it, throughout the process of negotiations.[251] This draft article on defences applicable to war crimes contemplated the inclusion of military necessity, reprisals and, possibly, self-defence under Article 51 of the UN Charter.[252] However, this draft provision was ultimately omitted from the final text of the *Rome Statute* because political agreement on definitions of these defences was considered 'almost impossible'.[253]

While Article 51 self-defence and its relationship to the crime of aggression are beyond the scope of this chapter, as is a detailed examination of the rules of international humanitarian law, this section of the chapter will briefly consider potential defences which have been discussed in the international criminal jurisdiction in relation to war crimes, including: military necessity, reprisals, *tu quoque*, and defensive operations. Some of these defences may still have limited applicability to certain war crimes. However, others have been explicitly rejected by the courts and are inapplicable today.

1. Military Necessity

The UNWCC observed that the plea of military necessity was often raised during the post–World War II war crimes trials alongside the pleas of superior orders and of duress.[254] Both the ICC and the ICTY have adopted the definition of military necessity from article 14 of the Lieber Code of 1863 which states that 'Military necessity [. . .] consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war'.[255]

[249] Saland, supra note 23, at 209.
[250] Saland, ibid,. See 1996 Report of the Preparatory Committee, Vol. II, supra note 27, at 27; 1998 Report of the Preparatory Committee, supra note 20, at 35.
[251] Saland, ibid. See 1996 Report of the Preparatory Committee, Vol. II, ibid.; 1998 Report of the Preparatory Committee, ibid.
[252] Saland, ibid. See 'Report of the Ad Hoc Committee', supra note 17, Annex 1 at 59–60; 1996 Report of the Preparatory Committee, Vol. II, ibid.
[253] Saland, ibid.
[254] UNWCC, Digest of Laws and Cases, supra note 9 at 156.
[255] Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (1863) ('Lieber Code'). See *Katanga* Trial Judgment, supra note 204, at para. 894; Judgment, *Prosecutor v. Kordić and Čerkez*, (IT-95–14/2-A), Appeals Chamber, 17 December 2004, para. 686.

As stated by the UNWCC, the position generally taken by the post–World War II tribunals was that '[m]ilitary necessity or expediency do not justify a violation of positive rules' and, accordingly, military necessity was only relevant when the applicable laws of armed conflict explicitly stated so.[256] In other words, military necessity may not be invoked as a defence as such and, therefore, is only relevant when explicitly contemplated within the definition of the war crime itself.[257] The ICC has taken this approach and in one case declared that military necessity can 'in no circumstances' be a defence to the prohibition against targeting attacks against civilians.[258]

In the Malabo Protocol, reference to the concept of military necessity can be found in three provisions of Article 28D on war crimes relating to appropriation or destruction of property, in particular: the grave breach of the Geneva Conventions of 'Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' (28(D)(a)(iv)) and the war crime of 'Destroying or seizing the enemy's property unless such destruction or seizure may be imperatively demanded by the necessities of war' (28D(b)(xiv) and 28D(e)(xii)). Thus, the concept of military necessity is relevant to determining whether these particular war crimes have been established but does not serve as a general defence to other crimes within the jurisdiction of the Malabo Protocol.

2. *Tu Quoque*

The defence of *tu quoque*, 'namely the defence of one Party to an armed conflict, or member thereof, to an allegation of the commission of atrocities, that the other Party has committed similar atrocities', has been consistently rejected in contemporary international criminal law.[259] This was made clear

[256] UNWCC, Digest of Laws and Cases, supra note 9, at 175. See also: United States Military Tribunal, Nuremberg, *Trial of Wilhelm List and Others* ('The Hostages Trial') in *Law Reports of Trials of War Criminals*, Vol. VIII (London: His Majesty's Stationery Office, 1949) at 66–9; United States Military Tribunal, Nuremberg, *Trial of Wilhelm von Leeb and Thirteen Others* ('The German High Command Trial') in *Law Reports of Trials of War Criminals*, Vol. XII (London: His Majesty's Stationery office, 1949) at 47–8 & 93–4. See also ILC, 'Report of the Commission to the General Assembly on the work of its forty-eighth session', supra note 15, at 41 (reporting on the Draft Code of Crimes against the Peace and Security of Mankind).

[257] See also Cryer *et al*, supra note 1, at 418; Bantekas, supra note 1, at 113.

[258] *Katanga* Trial Judgment, supra note 192, at para. 800.

[259] Decision on Evidence of Good Character of the Accused and the Defence of *Tu Quoque*, *Prosecutor v. Kupreškić et al.* (IT-95–16), Trial Chamber, 17 February 1999 ('*Kupreškić* Decision'). See also Bantekas, supra note 1 at 121.

by the Trial Chamber of the ICTY in the *Kupreškić* case.[260] The Trial Chamber emphasized 'the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-derogable character.'[261] Accordingly, it concluded that 'the *tu quoque* defence has no place in contemporary international humanitarian law.'[262] The rejection of this defence was affirmed by the ICTY Appeals Chamber in the *Martić* case.[263] If African states wish to continue to apply the best practices of prior tribunals, this prospective defence might be one of the more prudent ones to omit.

3. Reprisals

As defined by the ICTY: 'In the law of armed conflict, belligerent reprisals are acts resorted to by one belligerent which would otherwise be unlawful, but which are rendered lawful by the fact that they are taken in response to a violation of that law committed by the other belligerent. Reprisals are therefore drastic and exceptional measures employed by one belligerent for the sole purpose of seeking compliance with the law of armed conflict by the opposite party.'[264] The question of reprisals as a legitimate defence was considered and left open throughout most of the drafting history of the *Rome Statute*.[265] While not ultimately explicitly included in the final draft, the question may still arise through the 'window' left open in Article 31(3). Reprisals are only recognized under very strict conditions and there is a long list of prohibited objects of reprisals.[266]

The ICTY Trial Chamber in *Martić* delineated the cumulative conditions under which reprisals may be considered lawful, noting that such conditions

[260] *Kupreškić* Decision, ibid. See also Judgment, *Prosecutor v. Kupreškić et al.* (IT-95–16-T), Trial Chamber, 14 January 2000, ('*Kupreškić* Trial Judgment'), at para. 125 and 510–520.

[261] *Kupreškić* Trial Judgment, ibid., at para. 511.

[262] Ibid.

[263] Judgment, *Prosecutor v. Milan Martić* (IT-95–11-A), Appeals Chamber, 8 October 2008, ('*Martić* Appeal Judgment'), para. 111.

[264] Judgment, *Prosecutor v. Milan Martić* (IT-95–11-T), Trial Chamber I, 12 June 2007, para. 465 ('*Martić* Trial Judgment'). See also ICRC, Commentary on Art. 46 of *Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016), available online: www.icrc.org, para. 2729; Thiam, 'Fourth report on the draft Code', supra note 12, at para. 241; 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),' Annex to Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, 27 May 1994, S/1994/674, at para. 64.

[265] Saland, supra note 23, at 209. 1996 Report of the Preparatory Committee, Vol. II, supra note 27, at 103; 'Report of the Ad Hoc Committee', supra note 17, at 2.

[266] See also Cryer *et al.*, supra note 1, at 417–8.

are 'well-established under customary law'.[267] These conditions were further summarized by the Trial Chamber in *Kupreškić*:

> [E]ven when considered lawful, reprisals are restricted by; (a) the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary's crimes); (b) the obligation to take special precautions before implementing them (they may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders); (c) the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare but also that they must stop as soon as that unlawful act has been discontinued) and; (d) 'elementary considerations of humanity'. . .[268]

The first treaty to protect certain persons from being the object of reprisal is the 1929 *Convention Relative to the Treatment of Prisoners of War*.[269] All four 1949 Geneva Conventions contains prohibitions on reprisals against persons and property protected therein.[270] These prohibitions are considered customary international law and would thus ordinarily be available in the context of international armed conflict.[271] Extensive prohibitions against reprisals were

[267] *Martić* Trial Judgment, supra note 264, at paras 465–7. The ICTY in that case rejected Martić's argument that the shelling of Zagreb was a lawful reprisal. *Martić* Trial Judgment, at para. 468; *Martić* Appeal Judgment, supra note 263, at paras 263–7. See also Commentary on Article 46 of *Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016), available online at: www.icrc.org, para. 2732.

[268] *Kupreškić* Trial Judgment, supra note 260, at para. 535. See also *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution* 780 (1992), Annex to Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, 27 May 1994, S/1994/674, at para. 64; ICRC, Customary International Humanitarian Law, Rule 145, available online: www.icrc.org/customary-ihl/eng/docs/v1_rul_rule145.

[269] *Convention Relative to the Treatment of Prisoners of War*. Geneva, 27 July 1929, Art. 2. See Commentary on Art. 46 of *Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016), available online: www.icrc.org, at para. 2735.

[270] *Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, at Art. 46 (Geneva Convention I); *Geneva Convention Relative to the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, at Art. 47 (Geneva Convention II); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, at Art. 13 (Geneva Convention III); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, at Art. 33 (Geneva Convention IV).

[271] ICRC, Customary International Humanitarian Law, Rule 146, available online www.icrc.org/customary-ihl/eng/docs/v1_rul_rule146.

contained in Additional Protocol I to the Geneva Conventions of 1977 which prohibits reprisals against: wounded, sick, shipwrecked, and medical personnel; the civilian population or individual civilians; civilian objects; historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; objects indispensable to the survival of the civilian population; the natural environment; works or installations containing dangerous forces (dams, dykes and nuclear electrical generating stations).[272] However, not all of these prohibitions in Additional Protocol I may yet be recognized as customary international law.[273]

While Additional Protocol II to the Geneva Conventions does not contain any provisions restricting reprisals, it has been suggested that this was because some states felt that reprisals had never been recognised in *non-international armed conflicts* and they did not want to open the door to such potential recognition.[274] Thus, the ICRC asserts that as a matter of customary international law, '[p]arties to non-international armed conflicts do not have the right to resort to belligerent reprisals' and, further, that any other 'countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited.'[275] Similarly, the ICTY suggests that the prohibition against direct reprisals against civilians is to be inferred from the fundamental guarantees provided for in Article 4 of Additional Protocol II.[276] In the *Mbarushimana* case, Pre-Trial Chamber I of the ICC affirmed generally that directing reprisals against the civilian population or individual civilians is prohibited.[277]

Reprisals have not been widely used since World War II and are not considered to be particularly effective as a means of enforcing the other party to abide by the law.[278] Reprisals derive from a time when there were limited other forms of deterrence for violations of international humanitarian law.

[272] *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict*, 8 June 1977, 1125 U.N.T.S. 3, at Arts 20 & 51–6. See also Commentary of 1987 on Additional Protocol I, available online: www.icrc.org.

[273] Cryer *et al.*, supra note 1, at 417.

[274] ICRC, Customary International Humanitarian Law, Rule 148, available online www.icrc.org/customary-ihl/eng/docs/v1_rul_rule148.

[275] Ibid.

[276] Decision, *Prosecutor v. Milan Martić* (IT-95–11-R61) Trial Chamber, 8 March 1996, ('*Martić* Rule 61 Decision'), para. 16.

[277] Decision on the Confirmation of Charges, *Prosecutor v. Callixte Mbarushimana* (ICC-01/04–01/10–465-Red), Pre-Trial Chamber I, 16 December 2001, at para. 143.

[278] Commentary on Art. 46 of *Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016), available online at: www.icrc.org, at para 2739. For discussion of reprisals in the post–World War II cases, see UNWCC, Digest of Laws and Cases, supra note 9, at 178–9.

Given the recent proliferation of institutions for prosecutions of war crimes, the original purpose behind reprisals is arguably less relevant today. Thus, the ICTY has suggested that reprisals can 'no longer be justified' as a mechanism necessary for enforcing the laws of armed conflict.[279] However, there is no indication that states are willing to close the door on the long-standing doctrine of reprisals. Regardless, pleas of reprisal as a defence have rarely been successful and are unlikely to be successful in most future cases given the very strict conditions that must be met and the long list of prohibited targets which may not be subjects of reprisals.

(A) DEFENSIVE OPERATIONS The extent to which self-defence under Article 51 of the UN Charter and customary international law is relevant to determining whether or not an act of aggression has been committed is beyond the scope of this chapter. With respect to all other crimes within the scope of the Protocol, including war crimes, the fact that an individual committed those crimes while their troops were conducting a *defensive* military operation is not a defence for individual criminal responsibility. This is explicitly recognized in Article 31(1)(c) of the *Rome Statute* which explicitly states at the end of the paragraph on self-defence, defence of others and defence of property: 'The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.'

This final phrase of Article 31(1)(c) was relied upon by an ICTY Trial Chamber in the *Kordić and Čerkez* case.[280] The two accused, senior Bosnian Croat military and political figures, were charged with war crimes and crimes against humanity in relation to a campaign of persecution and ethnic cleansing and serious violations of international humanitarian law against the Bosnian Muslim population in the conflict in Central Bosnia in the early 1990s.[281] In response to many of the charges, the defence argued that the accused and the Bosnian Croats operating in the area were operating in self-defence. The ICTY, with reference to this final sentence of Article 31(1)(c) of the *Rome Statute*, concluded that 'military operations in self-defence do not provide a justification for serious violations of international humanitarian law.'[282] The ICTY Appeals Chamber affirmed this in the *Martić* case, rejecting the defence's argument that 'the shelling of Zagreb was a lawful

[279] *Kupreškić* Trial Judgment, supra note 260, at para. 530.
[280] *Kordić and Čerkez* Trial Judgment, supra note 6.
[281] Ibid., at paras 4–6.
[282] Ibid., at para. 452.

military action conducted in self-defence.'[283] The Appeals Chamber reiterated that 'whether an attack was ordered as pre-emptive, defensive or offensive is from a legal point of view irrelevant [. . .]. The issue at hand is whether the way in which the military action was carried out was criminal or not.'[284]

Similarly, other potential 'justifications' for the overall military operation have been rejected as defences. Surprisingly, in the SCSL's 'CDF Trial', one trial judge would have acquitted both accused of war crimes including murder, cruel treatment, pillage, and enlisting children under the age of 15 into armed forces on the basis of the argument that necessity and the doctrine of *salus civis supreme lex est* ('the safety of the state is the supreme law') formed defences for the accused.[285] The availability of these defences, in Justice Thompson's reasoning, was based on the argument that the Civil Defence Forces (of which the accused were leaders) were fighting to reinstate the democratically elected government which was ousted by a coup.[286] This approach was clearly rejected by the two other trial judges.[287] In another SCSL case, Justice Thompson also opined that the fact that the accused were conducting a 'just war', *i.e.* 'the right to rebel against a corrupt and oppressive civilian government,' could constitute a ground for excluding criminal responsibility.[288] The Appeals Chamber rejected this approach, observing that 'International humanitarian law specifically removes a party's political motive and the "justness" of a party's cause from consideration.'[289] Furthermore, the Appeals Chamber reiterated that 'rules of international humanitarian law apply equally to both sides of the conflict, irrespective of who is the "aggressor"'.[290]

H. *Other Possible Defences?*

While Article 31(3) appeared to have been drafted primarily in response to the omission of the draft provision on defences for war crimes, it is not on its face

[283] *Martić* Appeal Judgment, supra note 263.
[284] Ibid., at para. 268.
[285] CDF Trial Judgment – Dissenting Opinion of Judge Thompson, supra note 197, at paras 62–97.
[286] Ibid., at para. 68.
[287] CDF Sentencing Judgment, supra note 198, at paras 70–81.
[288] Judgment, *Prosecutor v. Sesay, Kallon and Gbao* ('RUF Case') (SCSL-04–15-T), Trial Chamber I, 2 March 2009, Separate Concurring Opinion of Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, at paras 73–82. However, Justice Bankole Thompson did not find that the doctrine was not applicable in the facts of the case of the Revolutionary United Front.
[289] Judgment, *Prosecutor v. Fofana and Kondewa* (SCSL-04–14-A), Appeals Chamber, 28 May 2008, at para 530 ('CDF Appeal Judgment').
[290] Ibid., at para. 247.

restricted in scope to this category of potential defences. It should be recalled that this provision was included because it was felt by the drafters that 'the Rome Statute could not possibly foresee all situations and that respect for the rights of the indicted made it necessary to have such a 'window'.'[291] Similarly, it is possible that other defences derived from national criminal laws may be plead as the jurisprudence at the African Court develops.

One issue worth considering is whether consent is a defence to certain crimes in international criminal law. In particular, this may be relevant to crimes involving the recruitment of child soldiers and to sexual violence crimes, in particular rape.[292] Other defences such as procedural bars to prosecution should also be considered.

1. Consent and Recruitment of Child Soldiers

Both the ICC and the SCSL, the two courts which have convicted individuals for crimes involving the enlistment, conscription, and use of child soldiers, have explicitly rejected that consent is a defence to the recruitment of a child under the age of 15.[293] In reaching this conclusion, the ICC Trial Chamber relied on testimony from an expert witness who submitted that 'from a psychological point of view children cannot give "informed" consent when joining an armed group, because they have limited understanding of their voices; they do not control or fully comprehend the structures and forces they are dealing with; and they have inadequate knowledge and understanding of the short- and long-term consequences of their actions.'[294] Similarly, the SCSL stated that 'where a child under the age of 15 years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence.'[295] Interestingly, in contrast to the *Rome Statute* which includes war crimes of conscripting, enlisting and using children under *fifteen* years of age, the *Malabo Protocol* raises this age limit and criminalizes 'conscripting or enlisting children *under the age of eighteen years* [...] or using them to participate actively in hostilities.'[296] This increase in age is reflective of the provisions of the *Optional Protocol to the Convention on the Rights of the*

[291] Saland, supra note 23, at 209.
[292] Cryer *et al*, supra note 1, at 416–17.
[293] *Lubanga* Trial Judgment, supra note 21, at para. 617; SCSL, CDF Appeal Judgment, supra note 289, at para. 140.
[294] *Lubanga* Trial Judgment, ibid., at para. 610.
[295] CDF Appeal Judgment, supra note 289, at para. 140.
[296] Art. 28D(b)(xxvii) and Art. 28D(e)(vii).

Child.[297] However, Mark Drumbl's recent book presents a more complex picture of the realities of child soldiers and challenges the failure to acknowledge the agency of children, which might militate in favour of a less paternalistic approach to the notion of consent.[298] This argument deserves further consideration in the context of the cultural norms on the African continent, in particular with respect to adolescents as they approach the higher age limit included in the *Malabo Protocol*.

2. Rape and Consent

Consent may also be framed as a potential 'defence' to allegations of rape. Rape is included as a crime against humanity in Article 28C(1)(e) of the *Protocol*, as a war crime in Article 28D (b)(xxiii) and (e)(vi), and as an act of genocide in Article 28B(f) of the *Protocol*. Rape is not defined in the *Protocol*. The ICTY Appeals Chamber defined rape as: 'sexual penetration … where such sexual penetration occurs without the consent of the victim.'[299] However, the Appeals Chamber noted that 'the circumstances … that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.'[300] The Elements of Crimes of the *Rome Statute* define the crime against humanity of rape as penetration when: 'The invasion was committed by force, or by threat or force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.' Thus, the absence of consent is not an element of rape and, accordingly, cannot be raised in defence.

3. Alibi

The Rules of Procedure and Evidence of the ICTY and ICTR both reference a particular procedural obligation on the accused to notify the Prosecutor

[297] Art. 1 of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, 2173 U.N.T.S. 222, 25 May 2000 (New York), provides that 'States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.' Whereas, Art. 38(2) of the *Convention on the Rights of the Child*, 1577 U.N.T.S., 20 November 1989 (New York), only provides that 'States Parties shall take all feasible measures to ensure that persons who have not attained the age of *fifteen* years do not take a direct part in hostilities.' [Emphasis added]

[298] M. A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford: Oxford University Press, 2012).

[299] Judgment, *Prosecutor v. Kunarac et al.* (IT-96–23&IT-96–23/1-A), 12 June 2002, at paras 127–8.

[300] Ibid., at para. 130.

should it seek to raise 'the defence of alibi.'[301] The ICC Rules of Procedure place a similar disclosure obligation on the accused but do not refer to alibi explicitly as a 'defence'.[302] This language used by the ICC better reflects the fact that alibi is not a true defence but, rather, merely amounts to a factual challenge to the Prosecution's assertion that this particular accused perpetrated the given crime. The ICTY Appeals Chamber itself criticized the wording of that Tribunal's Rules of Procedure and Evidence, as it stated: 'It is a common misuse of the word to describe an alibi as a 'defence'. If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a *defence* in its true sense at all.'[303] Thus, while it may be incumbent upon the African Court to consider a similar disclosure obligation upon the accused when drafting its own rules of procedure and evidence, nothing further need be discussed about an argument of alibi here.

4. *Non Bis In Idem*

Article 46I of the Malabo Protocol includes the principle *Non bis in idem* ('not twice in the same'). Also referred to as the prohibition against 'double jeopardy' in some domestic jurisdictions, this principle prevents an individuals from being tried more than once for the same conduct.[304] It represents a general principle of law and can be found in the statutes of other international courts including in Article 20 of the *Rome Statute* and Article 10 of the ICTY Statute as well as in human rights instruments.[305] This prohibition, as defined in the Malabo Protocol, can be broken down into two components. First, no individual who has been convicted or acquitted by the African Court can be re-tried for the same conduct at the African Court. Secondly, no individual who has been tried by any other court can be prosecuted for the same conduct for the African Court provided that the initial trial was genuine. This could

[301] ICTY Rules of Procedure and Evidence, supra note 51, at Rule 67(B)(i)(a); ICTR Rules of Procedure and Evidence, Adopted on 29 June 1995, as amended, Rule 67(A)(ii)(a);

[302] The ICC Rules and Procedure refer to such an obligation if the defence intends to 'Raise the existence of an alibi.' Supra note 8, at Rule 79(1)(a).

[303] *Čelebić* Appeals Judgment, supra note 32, at para. 581. [Emphasis original]

[304] Immi Tallgren and Astrid Reisinger Coracini, 'Article 20' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (2nd edn., Munich: C.H. Beck, 2008) 669, at 670. This chapter of the *Commentary* provides a helpful general overview and comprehensive discussion of the principle of *ne bis in idem*.

[305] For discussion of this provision in international human rights law see Tallgren and Coracini, ibid., at 674–7.

include a trial before a national court or before another international court such as the ICC. In particular, paragraph 2 of the provision states:

> Except in exceptional circumstances, no person who has been tried by another court for conduct proscribed under Article 28A of this Statute shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court:
>
> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

In essence, if a trial has been completed before any other court, the judgment of that other court is a bar to prosecution at the African Court except in the case of a sham proceeding, in particular a proceeding designed to shield the accused from genuine prosecution. The inclusion of the phrase, 'except in exceptional circumstances', at the start of this provision (which is a departure from Article 20 of the *Rome Statute* on which this provision appears to be based) is an unfortunately vague addition. In the interest of fairness to the accused, such exceptional circumstances should be limited to the particular exceptions set out within the paragraph itself (*i.e.* non-genuine proceedings). Finally, it is important to note that this provision protects an individual being tried twice for the same 'conduct.' Thus, it is not necessary that the particular crime charged be the same.

5. Youth

Article 46D of the Malabo Protocol limits the personal jurisdiction of the African Court to exclude individuals who committed crimes while under the age of eighteen. This age limit for prosecutions aligns with the approach taken in Article 26 of the *Rome Statute* of the ICC. The drafting history of the *Rome Statute* demonstrates that it was difficult for states to agree on the age of criminal responsibility which ranged in domestic jurisdictions from 7 to 21.[306] Thus, it is helpful that the Malabo Protocol explicitly defines the age limit for prosecutions before the African Court. The Malabo Protocol also follows the approach of the *Rome Statute* which frames the issue as a jurisdictional exclusion. This approach was adopted in Rome because '[i]t

[306] Saland, supra note 23, at 201.

could then be argued that the provision in no way prejudiced whatever age of responsibility existed in the national system, and it could not be seen as condoning offenses by minors.'[307] Nonetheless, as Eser observes, this can be considered a ground for excluding criminal responsibility because 'the essential reason behind this [provision] is the lack of criminal responsibility under a certain age'.[308]

6. Statutes of Limitations

The final paragraph of Article 28A, which enumerates all of the crimes within the jurisdiction of the African Court, declares that no statute of limitations shall apply to any of these crimes.[309] This provision follows the approach taken in Article 29 of the *Rome Statute*. It has been suggested that such a provision is unnecessary because silence, *i.e.* the absence of any specified time limitations on cases, would have reached the same result.[310] However, as Schabas observes in his commentary on the equivalent provision in the *Rome Statute*, such a provision 'operates as an answer to any argument from a State Party whereby extradition might be refused because of a statutory limitation in its own domestic penal code.'[311] Furthermore, it is a helpful clarification to specify that there is no statute of limitations to any of the crimes within the jurisdiction of the Court since the subject matter jurisdiction of the Court extends far beyond the core crimes included in the ICC's jurisdiction or are referred to in the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*.[312]

4. CONCLUSION

The Malabo Protocol's predominant silence on the issue of defences is unfortunate. Questions of defences to criminal responsibility will certainly be a challenging legal issue faced by the African Court. The limited

[307] Ibid.
[308] Eser, supra note 18, at 868.
[309] Art. 28A(3).
[310] William A. Schabas, 'Article 29' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (2nd edn., Munich: C.H. Beck, 2008) 845 at 846, 847.
[311] Ibid., at 848.
[312] 754 U.N.T.S. 73, 26 November 1968, New York. There are only 55 States Party to this Convention, but some courts have found the prohibition on statutory limitations for some international crimes to form part of customary international law. Schabas, supra note 310, at 846; Cryer *et al.*, supra note 1, at 83–4.

jurisprudence from earlier international criminal tribunals demonstrates how difficult it can be to discern general principles of law when diverging approaches are taken amongst the different major legal systems of the world. Furthermore, general principles of law simply that – principles – and, thus, lack the specificity to answer all questions on the definition of certain defences.

Nonetheless, the Court will have to identify and define which defences are applicable. In doing so, the Court will face a number of issues. First, the Court will have to consider what sources of law it will consider. In particular, will the Court turn to domestic law as a default if no general principle of law can be found? The Court will also, of course, face substantive issues with respect to the recognition and definition of certain defences. Will intoxication be accepted as a defence to serious crimes within the Court's jurisdiction? Are any crimes excluded from the application of the defence of duress or necessity? Is defence of property recognized as a ground for excluding criminal responsibility in light of the seriousness of the crimes within the Court's jurisdiction? Finally, the Court will also face many procedural and evidentiary issues. The Court will have to determine whether any burden lies on the accused to establish certain defences. Additionally, evidentiary and procedural rules relating to defences should be considered when Rules of Procedure and Evidence are drafted including rules relating to disclosure obligations on accused in raising such defences.

Despite the absence of a comprehensive provision in the Malabo Protocol, defences cannot be ignored. Defences form a necessary and integral part of any criminal law, no matter how serious the offences within the jurisdiction of the Court. Fortunately, there is a growing body of resources upon which the African Court can draw to determine which defences have been recognized in international criminal law or, conversely, which defences have been explicitly rejected. Significantly, the Court can turn to the first codification of defences in international criminal law in the *Rome Statute* for guidance. The difficulty involved in negotiating this provision of the *Rome Statute* yet again demonstrates the divergence amongst domestic jurisdictions on many questions relating to defences. Thus, the fact that compromises were reached and a provision was adopted will prove helpful for the African Court, particularly in light of the fact that Rome Statute has been ratified or acceded to by 123 states including many African countries. Further guidance may also be provided by the jurisprudence of the ICTY as well as the work of the UNWCC and the ILC. Ultimately, the Court will have to determine which defences are applicable and how they are defined as the arguments are put before it by accused, with reference, in particular,

to customary international law and general principles of law. The Court may also want to consider the extent, if any, to which national laws may be resorted to in order to fill any lacuna in the law. Here the role of African state practice in accepting, or rejecting particular defences, would be helpful to consider. However, should the opportunity present itself to revisit and amend the Malabo Protocol, including a comprehensive provision on defences should be near the top of the agenda.

31

Sentencing and Penalties

MARK A. DRUMBL

The underlying Protocol on the Statute of the African Court of Justice and Human Rights (Statute) – adopted on July 1, 2008, in Sharm El-Sheikh, Egypt – is silent when it comes to sentencing and penalties for international crimes. The content of the sanctioning regime, therefore, lies in the Malabo Protocol adopted on June 27, 2014, in particular Article 43A of the Statute as amended by the Malabo Protocol. Article 43A addresses sentencing and penalties in the context of the African Court of Justice and Human Rights' international criminal jurisdiction (the International Criminal Law Section). For purposes of brevity and convenience, from here on this chapter uses the term "Court" to refer to the International Criminal Law Section of the African Court of Justice and Human Rights. One further terminological aspect: all references in this chapter to "Articles" mean those articles in the Statute as amended by the Malabo Protocol.

Article 43A resembles the sentencing provisions of the enabling instruments of the two *ad hoc* tribunals (ICTY and ICTR), SCSL, STL, Mechanism (MICT), and the ICC. Article 43A also differs, however, in important regards from its companions in these other instruments.

This chapter proceeds in four steps. First, it unpacks key elements of Article 43A and other provisions in the Malabo Protocol that touch upon matters of sentencing and penalties. Second, this chapter distills instructive elements of the antecedent sentencing practice of international and internationalized courts. The purpose of this exercise is to guide the Court if and when it sentences (assuming that the Court would take this prior practice into account). Any recent practice at the international level involves sentencing individual defendants (natural persons) for core international crimes (genocide, crimes against humanity, and war crimes). While the Court's jurisdiction includes such crimes and defendants, it also transcends them in

two important ways: (a) by adding transnational crimes (what Charles Jalloh describes as "ICC+") and (b) by contemplating corporations ("legal persons") as potential defendants. Any guidance offered by antecedent practice would therefore thin out in these two scenarios; the Court would have to break new ground. The Court thereby has an opportunity to leave an African footprint on the development of international law or, in the least, develop an African version of continental international law.[1] This discussion pivots to the third of this chapter's four steps, namely, setting out the penological aspirations of sentencing in the case of mass crimes and querying how the Court might design and, eventually, attain such goals. Fourth, this chapter considers the enforcement of sentences following conviction. This section inquires as to what the Court might glean from prior international experiences when it comes to determining the location where the sentence is to be served, the availability of early release, appropriate conditions of confinement, and modalities of rehabilitation. A brief conclusion ensues.

This chapter does not assess the politics behind the push to create the Court; nor whether its creation is politically or financially feasible; nor the politics of the African Union generally or that of its individual members; nor the relationships between the Court and the ICC and/or the Security Council.[2] Rather, this chapter unpacks the substantive aspects of sentencing and penalties in the Malabo Protocol with a view to guiding the Court, in the event it ever became established and operational, in its work. This chapter's value lies with assisting the Court, if created, to mete out appropriate sentences and penalties and, in turn, to suggest that the Court seize this moment to engage more deeply with one of the most

[1] I derive this phrase from "comparative international law," that is, the observation that, as national courts play an increasing role in applying international law, they serve both as law enforcers and law creators, thereby leading to pluralism at the national level in terms of the content of international rules. *See* A. Roberts, "Comparative International Law?: The Role of National Courts in Creating and Enforcing International Law", 60 *International and Comparative Law Quarterly* (2011) 57.

[2] For a flavor of these debates, *see* A. Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges", 24 *European Journal of International Law* (2013) 933, at 936 (noting that the Court's "added value [. . .] is extremely doubtful") and 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 (noting that despite the potential political motivations behind the establishment of the Court, nothing in international law prevents the AU from creating the Court and, moreover, that essentializing these motivations belies the reality that African countries are not homogeneous in terms of their thinking).

poorly mapped areas of international criminal law, that is, the penology of mass atrocity.

1. ANATOMY OF ARTICLE 43A

Article 43A's core features are:

- The Court can impose "sentences and/or penalties" for "persons" convicted of "international crimes" under the Statute (Article 43A(1)).
- The term "persons" in Article 43A assumptively refers both to "legal persons" and to "natural persons." The phrases "legal persons" and "natural persons" derive explicitly from Article 46C(6) (on corporate criminal liability), which specifies that: "The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes." The Court's jurisdiction over "legal persons" expressly excludes states, however.[3] The *ad hocs*, SCSL, and the ICC cannot sentence legal persons: they retain jurisdiction only over natural persons. The STL has – somewhat controversially – ruled that it has jurisdiction to try legal persons on charges of contempt.[4] Although Article 46C offers some instruction regarding the determination of corporate intent and knowledge, it fails to provide any specifics with regard to sentencing of corporate actors. Hence, the Court's judges are left largely unguided as to how to approach corporate sentencing.
- The death penalty is impermissible (Article 43A(1)).
- The Court can impose only "prison sentences" and/or "pecuniary fines" (Article 43A(2)). Hence, it is doubtful that community service, apologies,

[3] Art. 46C(1).

[4] In January 2014, an STL judge found that a Lebanese media company could be tried for contempt for the disclosure of the identities of protected witnesses. *See* The Case against Akhbar Beirut S. A. L. and Ibrahim Mohamed Al Amin, STL-14–06/I/CJ/, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, January 31, 2014. In July 2014, a different judge at the STL concluded that he did not have jurisdiction over the company even in the case of contempt. The STL Appeals Chamber ultimately affirmed that legal persons (television and print news corporations) could be liable before the STL for crimes of contempt; the Appeals Chamber based itself in an inclusive interpretation of the term "persons" as appearing within the STL's Rules of Procedure and Evidence. Akhbar Beirut S.A.L. (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings) (Case No. STL-14–06/PT/AP/AR126.1, January 23, 2015). To be clear, contempt is not an international crime, nor even a transnational crime; hence, the STL's aforementioned jurisprudence might be distinguishable. The STL has not issued a sentence or penalty in this case.

or alternative/restorative sanctions could be awarded in the case of natural persons. In cases of legal persons, remedies such as dissolution or winding-up, referred to by Joanna Kyriakakis as a "form of corporate death penalty,"[5] are not expressly mentioned. It may be possible, however, that a "pecuniary fine" could be sufficiently onerous to bankrupt a corporation as a legal person.

- Sentences and/or penalties "shall be pronounced in public and, wherever possible, in the presence of the accused" (Article 43A(3)). It is not entirely clear whether presence is also required for corporations or whether they could be tried in absentia.
- The Malabo Protocol provides no minimum sentences; no sentencing grid; no specified maximum sentence for any crime; nor does it gesture toward any specified range of fines. Hence, as is the case at the *ad hocs* and the ICC, in principle prison terms could range from one-day to life. The judges have considerable discretion.[6] The Statute of the SCSL excludes life imprisonment, but the SCSL's practice to impose some sentences in the fifty-year range basically substitutes for life. The STL Statute permits sentences to range from life to "a specified number of years."[7] The East Timor Special Panels could punish through a fixed term of imprisonment, capped at 25 years for a single crime.
- In determining the length of prison sentence and the quantum of pecuniary fines, the Court should take into account such factors as "the gravity of the offense" and "the individual circumstances" of the convicted person (Article 43A(4)). This language is standard among international and internationalized tribunals.
- In addition to sentences and/or penalties, the Court may "order the forfeiture of any property, proceeds or any asset acquired unlawfully or

[5] See Chapter 27 in the present volume.

[6] Art. 46I(3) does require the Court, in considering the penalty, to "take into account the extent to which any penalty imposed by another Court on the same person for the same act already has been served." This clause pertains to *ne bis in idem*.

[7] STL Statute Art. 24 (penalties) reads as follows:

(1) The Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years. In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon.

(2) In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

by criminal conduct, and their return to their rightful owner or to an appropriate Member state."[8] In the case of legal persons, where the amount of forfeited property is considerable in relation to corporate holdings, the result could be compelled dissolution/winding-down. The Court might additionally have to determine whether equity owners, directors, or corporate officials could be liable in their personal capacity for the fines or forfeitures awarded against the corporation. Any such move would presumably necessitate a turn to ascertaining general principles of corporate law and perhaps also the approach that international juridical institutions (for example, the International Court of Justice) have taken in this regard. These principles, to be sure, suggest considerable reticence to lift the corporate veil.

- Comparable to the Rome Statute, but unlike the case with the enabling instruments of the *ad hocs* and the STL, Article 43A does not refer to any obligation to look at national sentencing practices. This silence may paradoxically inhibit the Court from identifying and turning to continental/regional practices when it comes to punishing crimes of concern to Africans; or, on the other hand, judges might come to note the silence but not equate it with a prohibition.[9]
- The jurisdiction of the Court excludes minors (Article 46D, defined as persons under the age of 18), thereby foreclosing the need for a special juvenile sentencing regime such as the one that had been established (but never deployed) for the SCSL.
- The Court may make an "order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." Natural persons who have been convicted by other international penal institutions are largely indigent; hence, cause does not arise for optimism that any such orders, if made by the Court, would yield tangible results. That said, the fact that the Court can enter such orders against legal persons might enhance the viability of actual compensation to victims.

[8] Art. 43A(5), *see also* Art. 46J*bis*, discussed *infra*, which provides specifics for State Parties on the enforcement of fines and forfeiture measures.

[9] Note on this aspect the preamble to the Malabo Protocol, which acknowledges "the pivotal role" the Court "can play" to "promote justice and human and peoples' rights as an aspect of their efforts to promote the objectives of the political and socio-economic integration and development of the Continent with a view to realizing the ultimate objective of a United States of Africa."

2. SENTENCING AND PENALTIES: METHODOLOGICAL GUIDANCE FROM ELSEWHERE

The *ad hoc* tribunals, SCSL, and ICC have developed a sentencing practice when it comes to natural persons charged with "core" international crimes. They have done so despite their institutional independence *inter se*, differences among their various mandates and directives, the formal absence of the doctrine of *stare decisis*, and notwithstanding the recognized need to individualize the penalty. Perhaps because of these important limitations, however, international criminal courts and tribunals affirm that previous sentencing practices – whether internally to the institution or as among institutions – provide only limited assistance. These institutions nonetheless cite extensively to each other's jurisprudence. Ample cross-references may occur despite solid proof that the affirmed principle in fact constitutes a general principle of law.

While the Court is assuredly in no way obliged or even encouraged to consider the practices of other institutions, the fact remains that Article 43A shares certain framework elements with the sentencing provisions of these other institutions. On the one hand, then, the Court's judges may not wish to entirely reinvent the wheel. The Court may wish to consult prior practice and thereby join this broader dialog. On the other hand, the Court's jurisdiction sharply departs from that of other international institutions, notably, in that it may assess corporate criminal liability and can prosecute transnational crimes.[10] Some of the transnational crimes, although classified as within the Court's international criminal jurisdiction, are novel entrants to the *corpus* of international law, for example, unconstitutional change of government, mercenarism, and illicit exploitation of natural resources.[11] Nor are the "core" crimes that lie within the Court's jurisdiction mirror images of the "core" crimes proscribed by other international criminal tribunals. For example, the Court's jurisdiction over child soldiering war crimes extends the protected age to eighteen, rather than fifteen as is the case at the SCSL, ICC, and under *lex lata* custom. The Malabo Protocol's modes of responsibility (Article 28N of the Statute), moreover, also depart textually from those available at other

[10] These crimes are of great concern to Africa and, in the case of corporate liability, involve entities responsible for pilfering resources and fueling violent conflicts. Nmehielle, supra note 2, at 30–1.

[11] Questions arise whether unconstitutional change of government is even a pre-existing crime at all within a framework of liberal criminal law, which prompts the broader question as to how to sentence a person convicted for such conduct.

international criminal tribunals. Hence, judges on the Court may elect to ignore (or distinguish) the work of other institutions and opt instead to begin *tabula rasa*. The Court, furthermore, may simply see itself as regional rather than international in character. This self-perception might dissuade it from considering the work of all international institutions, or perhaps to consider only the work of institutions with an unequivocal African connection (*i.e.* the ICTR and SCSL).

Still, it seems overall improbable that the Court will abstain from previous international experiences when it comes to sentencing in cases of international crimes, in particular, in light of how the Court's sentencing law partly derives from that found elsewhere internationally. Ostensibly, the fact that the Malabo Protocol's drafters elected language that corresponds with prior practice suggests some intent that the judges would have recourse to consult such practice. Any such consultation could advance important goals tethered to legitimacy, predictability, and credibility.

The Court's *sui generis* jurisdiction over corporations presumably explains why it is empowered under Article 43A to award "penalties" (defined as "pecuniary fines"). It is also important to underscore that the Court's jurisdiction to "order the forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member state" (which in part in tracks the language found in the *ad hoc* tribunals)[12] is in addition to the jurisdiction to award "pecuniary fines."[13] Nevertheless, the Malabo Protocol does not limit the Court to award pecuniary fines only against legal persons. Textually, the Court is in no way precluded from ordering them against natural persons (the use of "and/or" language intimates these are not mutually exclusive). That said, as mentioned earlier, the experiences of the international criminal tribunals suggest that convicts overwhelmingly are indigent.

State parties to the amended Statute could develop sentencing guidelines on their own accord. Or the elucidation of any such guidelines could be left to the Court's judges either formally (by promulgating some sort of understanding) or informally in judgments through a process of *bricolage*. Either way, some precision beyond the content of the Malabo Protocol would help advance the crucial requirement of *nulla poena sine lege*. The lack of

[12] Unlike the ICTY and ICTR Statute, Art. 43A(5) permits the return of the forfeited property, proceeds, or asset to "an appropriate Member state."

[13] As with the ICC, but different from the SCSL and the *ad hocs*, the Malabo Protocol creates a separate compensation and reparations procedure for victims (Art. 45 and 46M). The interplay of these with Art. 43A(5) will have to be mapped out over time both *de jure* and *de facto*.

reference to national sentencing practices in the Malabo Protocol intimates that there is no need for the Court to consider general principles of sentencing law among the African states parties. That said, initiating such a review would undoubtedly be of considerable value. This review could involve general practices in African states in matters of ordinary criminal law. References to national sentencing practices have animated the practice of the ICTY and ICTR. Their Statutes provide that, in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia or Rwanda respectively. That said, judges have been clear that this does not create an obligation to conform to the relevant national sentencing practice.

Or this possible review could be more specific, for example, by examining national initiatives in cases of mass crimes. On this latter note, developments in Uganda could be instructive. On the one hand, the Ugandan government has enacted an extensive amnesty regime for fighters of the Lord's Resistance Army who have surrendered. On the other hand, and concurrently, the specially created International Crimes Division of the Ugandan High Court is tasked with the prosecution of serious crimes, including international crimes, arising out of the lengthy conflict between the Ugandan government and the Lord's Resistance Army. In 2011, the jurisdiction of this Division was expanded beyond core international crimes to include crimes such as terrorism and trafficking. Penalties for the crimes within the Division's jurisdiction range from a minimum sentence of 14 years' imprisonment *per* offense to a maximum of life imprisonment.[14] Uganda's Supreme Court has determined the national amnesty law to be legal.[15] In 2015, it held that this law does not contravene Uganda's international obligations because it abstains from granting a blanket amnesty for all crimes. It held that amnesties cannot be granted for grave crimes as recognized under international law, specifically, crimes committed against innocent communities or civilians. The Supreme Court determined that such crimes, in fact, fall outside the scope of the amnesty legislation itself, which only covers crimes that are committed in furtherance or cause of the war or armed rebellion. The deployment of a minimum sentence under Ugandan national law departs from the enabling instruments of international or internationalized tribunals (with the exception of the Extraordinary Chambers in the Courts of Cambodia, which have a five-year minimum). In terms of other national practices in cases of atrocity

[14] Ugandan Geneva Conventions Act Cap 363 (1964); Ugandan International Criminal Court Act, Act No 11/2010 (2010), sections 7(3), 8(3), and 9(3).

[15] *Uganda v. Thomas Kwoyelo*, Constitutional Appeal No. 1 of 2012 (April 8, 2015).

crimes, the Court might consider the Rwandan experience. In Rwanda, hundreds of thousands of defendants have been sentenced domestically in cases of genocide and crimes against humanity. Rwandan legislators opted for a detailed sentencing grid for both the specialized chambers of national courts and for the neo-traditional *gacaca* proceedings. This grid paired the severity of the sentence with the charges and categorization of the convict. While not eliminating it entirely, this grid cabined the scope of discretion of the sentencing authorities. Suspended sentences, dégradation *civique* (the removal of certain civic rights), and community service (*travaux d'intérêt général*, or TIG) were actively contemplated as sanctions, especially in cases where a defendant pleads guilty. Participation in political resocialization programs also was required.

As with their counterparts at the *ad hocs*, SCSL, MICT, STL, and ICC, the judges of the Court retain broad discretion in imposing sentence. Article 43A (4) sculpts the exercise of this discretion. It does so in a fashion that corresponds to the enabling instruments of these other institutions. Article 43A directs judges to "take into account such factors as the gravity of the offence and the individual circumstances of the convicted person." This methodology has led to a two-step approach in the jurisprudence of other institutions: first, assessment of the gravity of the offense and, second, assessment of the individual circumstances.

At the ICTR, for example, the gravity of the offenses is "the deciding factor in the determination of the sentence;"[16] gravity has also been described as "the primary consideration for imposing a sentence."[17] When it comes to gravity, the sentencing jurisprudence to date suggests an absence of any formal hierarchy of crimes. In other words, genocide is not *ipso facto* a more serious crime than war crimes. When it comes to determining the gravity of the offense, the ICTR has weighed the numbers of victims, the way in which the accused participated, personal involvement, and the nature of the victims.[18]

It is at the second step – namely, "the individual circumstances" – that aggravating and mitigating factors are to be considered. These, too, fall within the discretion of the judges both in terms of deciding whether they arise and, if so, what weight to attribute to them. Whereas factors in mitigation need to be

[16] *Prosecutor v. Nyiramasuhuko et al.* (ICTR-98–42-T), Judgment and Sentence, 24 June 2011, ¶ 6189.

[17] *Setako v. The Prosecutor*, ICTR Appeals Chamber, Case No. ICTR-04–81-A (September 28, 2011) at ¶ 280.

[18] *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01–63-T (ICTR Trial Chamber III, November 12, 2008) ¶ 388 (discussing within the context of gravity that "principal perpetration generally warrants a higher sentence than aiding and abetting").

established only on the balance of probabilities, aggravating factors need to be proven beyond a reasonable doubt.

The following aggravating circumstances have arisen in the jurisprudence of the *ad hoc* tribunals, the SCSL, and the ICC: the breadth of the crimes (*e.g.*, numbers of victims) and the suffering inflicted; the youth of the victims or their general vulnerability; the nature, degree, and form of the perpetrator's involvement (active role, principal perpetrator, secondary/indirect involvement, or aider and abettor)[19]; premeditation and discriminatory intent; abuse of a leadership position or a position of stature; promoting an environment of impunity; depraved motivations, zeal, great effort, and enthusiasm in committing the crimes; and deportment of the accused during trial.

Preserving differentiations between elements of the crime, factors that pertain to gravity, and individualizing factors can be quite tricky.[20] Yet respect for the due process rights of the defendant, and the principle of legality, require that considerations not bleed from one category into the other and thereby become "double counted." Malabo Protocol Article 46A enshrines the rights of the accused and presumably would act as a buffer to this sort of "double counting." Vigilance is particularly important when it comes to disaggregating the factors that influence determinations of gravity from factors taken in aggravation. One potentially tricky variable in this regard is leadership position, which may serve as a basis for conviction (on command responsibility), as a factor to be considered in gravity, and as an aggravating circumstance in cases where an exercise of leadership is abused.

[19] This factor remains quite controversial. In its 2013 decision in *Taylor*, the SCSL Appeals Chamber resisted the submission that aiding and abetting generally triggers a lower sentence. The SCSL Appeals Chamber found no textual support for this proposition in the SCSL Statute; it warned that such a presumption would depart from the obligation to individualize punishment, to consider the defendant's actual conduct, and to respect the defendant's due process rights. *Prosecutor v. Taylor*, Case No. SCSL-03–01-A (Appeals Judgment, Spec. Ct. Sierra Leone, September 26, 2013) ¶¶ 663–70. *But see contra* on nature of involvement *Prosecutor v. Ntagerura*, Case No. ICTR-99–46-T, ¶ 813 (ICTR Trial Chamber, February 25, 2004) (systematizing ICTR sentencing patterns of fifteen years to life for principal perpetrators, and lower sentences for secondary or indirect forms of participation); *Prosecutor v. Ndahimana*, Case No. ICTR-01–68-A ¶¶ 252 (ICTR Appeals Chamber, December 16, 2013) (noting that a conviction for participating in a joint criminal enterprise, as opposed to aiding and abetting, suggests an increase in overall culpability in cases where the underlying crime is the same).

[20] *De jure*, the ICTR insists that "[a]ny particular circumstance that is included as an element of the crime for which an accused is convicted will not be considered as an aggravating factor." *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01–63-T (ICTR Trial Chamber III, November 12, 2008) ¶ 389. In practice (*de facto*), however, this compartmentalization may be difficult to attain.

Commonly referenced mitigating factors include: whether and when the accused pled guilty and/or admitted guilt; substantial cooperation by the offender with the prosecution; the remote or tangential nature of the convict's involvement in the crime; voluntary surrender; remorse; the youth, advanced age, health, and other personal circumstances of the offender (including whether married and with children); the extent to which the offender was subject to duress, orders, or coercion; good character; the chaos of constant armed conflict; that the offender did not have a previous criminal record for ordinary common crimes; expressions of remorse; assistance to victims; and activities to end conflict and remedy its effects. Human rights violations, moreover, endured by the offender during pre-trial or trial proceedings may also count in mitigation. ICC Trial Chamber I, for example, highlighted Lubanga's notable and consistent cooperation and determined that he "was respectful and cooperative throughout the proceedings, notwithstanding some particularly onerous circumstances."[21] In *Katanga*, ICC Trial Chamber II accorded some weight to the convict's young age at the time of the offenses (24 years) and his family situation (including his six children).[22] The Special Court for Sierra Leone has, however, insisted that mitigation should not be granted based on the perceived "just cause" for which a convict may have fought.

Pleading guilty is a particularly significant mitigating factor in the international case-law. It is unclear how this will play out at the Court (*quaere* whether there is even a specified procedure for pleading guilty). Article 46B(2) expressly precludes the "official position of any accused person" from mitigating punishment; Article 46B(4), much like its companions in the *ad hoc* Statutes, recognizes that acting "pursuant to the order of a Government or of a superior . . . may be considered in mitigation of punishment if the Court determines that justice so requires."

At times in the international jurisprudence, a factor may be referenced in mitigation, and established on a preponderance of the evidence, but then not be assigned any weight. Hence, wide latitude emerges when it comes to identifying a mitigating circumstance and, then, deciding whatever value it may carry. The MICT has noted that "the existence of mitigating factors does not automatically imply a reduction of sentence or preclude the imposition of

[21] *Prosecutor v. Lubanga* (ICC-01/04–01/06), Decision on Sentence Pursuant to Art. 76 of the Statute, 10 July 2012, ¶¶ 91, 97.

[22] *Situation en République démocratique du Congo, affaire Le Procureur c. Germain Katanga*, No. ICC-01/04–01/07, Décision relative à la peine (Art. 76 du Statut), Chambre de première instance II, (23 mai 2014) ¶ 144.

a particular sentence."[23] Mitigating factors, to be clear, only attenuate the punishment: they do not diminish the gravity of the crime. Mitigating factors, moreover (and unlike aggravating factors), do not need to be linked specifically to the impugned conduct or directly related to the offense. The absence of a possible aggravating factor, finally, does not constitute a circumstance to consider in mitigation.

Article 78(2) of the Rome Statute provides that "[i]n imposing a sentence of imprisonment, the [ICC] shall deduct the time, if any, previously spent in detention [...]." This reflects the general practice at contemporary international criminal tribunals, which means that any time spent in custody awaiting trial and in trial will be removed from the sentence. This text does not appear in the Malabo Protocol. Hence, the Court would have to clarify whether it would adhere to this general norm or not. It would seem implausible not to do so, in particular, because trials for extraordinary international crimes can as a general matter prove to be rather lengthy.

Another nebulous aspect for the Court will be how to sentence in those situations that fall within Article 46C(6).[24] When natural persons and legal persons are both found liable, would the dual liability mitigate punishment for one or the other or, perhaps, serve as an aggravating factor (or be neutral in this regard)? Once again, principles of transparency and legality would be enhanced with *ex ante* clarity.

What is the quantum of sentence issued by other international and internationalized tribunals? The SCSL has sentenced its nine convicts with comparative severity: an average term of nearly 39 years and a maximum term of 52 years.[25] The ICC's 3 sentences thus far are 14, 12, and 9 years (a fourth sentence of 18 years was overturned on appeal owing to the acquittal of the accused Bemba). Professor Barbora Holá has conducted extensive empirical analysis of the ICTY and ICTR sentencing practices. She determines that the ICTY has issued a modest number of life sentences (approximately 6 percent of the total): its fixed-terms sentences range from 2 years to 40 years (as of the time of writing); among term sentences the median sentence is 15 years and the mean sentence is a touch over 15 years. The ICTR has finalized

[23] *Ngirabatware v. The Prosecutor*, MICT Appeals Chamber, Case No. MICT-12–29-A (December 18, 2014) ¶ 265.

[24] "The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes." The one-way nature of the preclusion of the exclusion of responsibility is telling, and suggests a reflexive move towards the responsibility of natural persons as the first-best vision of justice.

[25] A. Smeulers, B. Holá, and T. van den Berg, "Sixty-Five Years of International Criminal Justice: The Facts and Figures," 13 *International Criminal Law Review* (2013) 7, at 22.

59 sentences, 17 of which are life sentences. Among the determinate sentences, according to Hola, the median is 25 years and the mean is 24.67 years. The range among determinate sentences at the ICTR is 6 to 47 years.[26] In *Nchamihigo*, an ICTR Trial Chamber held that:

> [A] sentence of life imprisonment is generally reserved for those who planned or ordered atrocities and those who participated in the crimes with especial zeal or sadism. Offenders receiving the most severe sentences also tend to be senior authorities.[27]

The Appeals Chamber in *Nchamihigo* (a defendant who had been a deputy prosecutor, so importantly not a senior authority within the government) ultimately reversed some of the convictions and substituted a term sentence of forty years. Life sentences, however, have been routinely imposed against senior government authorities, along with persons of stature who did not hold government positions (such as a tea factory director and high-level official in the *Interahamwe* military).

When it comes to corporate defendants, the Malabo Protocol makes no mention of sanctions such as satisfaction, apology, suspension of registration/incorporation, requirement to abide by internationalized standards, adverse publicity, positive action programming, trusteeship, transparency, or local investment of profits. A broader range of sanctions for legal persons could nonetheless assist in purposes of moral denunciation and also cultivate a more robust sense of citizenship and reciprocal obligation for corporate entities.

In cases where an accused is convicted on multiple charges, the ICTY and ICTR Rules of Procedure and Evidence allow the Trial Chambers the option to impose either a single sentence reflecting the totality of the criminal conduct or a sentence in respect of each conviction with a declaration regarding whether these sentences are to be served consecutively or concurrently.[28] Barbora Holá notes that, in the case of the *ad hoc* tribunals, defendants are mostly convicted on multiple counts but only one global sentence is issued.[29] Procedurally, in the early years of the *ad hoc* tribunals separate sentencing

[26] Mark A Drumbl, 'And Where the Offence Is, Let the Great Axe Fall': Sentencing under International Criminal Law, in Kastner ed. *International Criminal Law in Context* (Routledge, 2018) pp 297–316, at 309 (citing the research of Barbora Holá, with permission, and available from the author).

[27] *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01–63-T (ICTR Trial Chamber III, November 12, 2008) ¶ 388.

[28] Rule 87(C). *See also Prosecutor v. Delalić* (IT-96–21), ICTY, Judgment, 20 February 2011, ¶ 771.

[29] B. Holá, "Sentencing of International Crimes at the ICTY and ICTR", 4 *Amsterdam Law Forum* (2012) 3, at p. 9.

hearings were held; the Rules, however, were soon amended to unify the trial and sentencing hearing process.[30] Parties are entitled to present evidence related to sentencing in the course of the trial but, as per Rule 86(C), submissions regarding sentencing should be rendered during closing arguments. Procedurally speaking, at the ICC the sentencing hearing may occur right at the close of the trial phase; pursuant to Article 76(2) of the Rome Statute, however, a separate sentencing hearing may occur upon the discretion of the Trial Chamber or upon the request of either the Prosecutor or the accused. Evidence regarding sentencing may in any event be adduced over the course of the trial. The Malabo Protocol appears to be silent on these procedural matters. Nonetheless, it can readily be seen that aspects of these could be, as in the ad hoc tribunals and the ICC, addressed under the Rules of Procedure and Evidence of the Court. A key advantage of that would be their amenability to amendments at a technical level without requirement of involving states.

The Rome Statute also establishes guidelines regarding appeals against sentence. In practice at the ICC, and at the *ad hocs*, an appeal may be granted against sentence on the basis of discernible error on the part of the trial judge. Appeals on this basis, however, are relatively uncommon in light of the broad discretion awarded to trial judges when it comes to sentencing. Sentences may be adjusted, however, because the appeals chamber may quash or substitute convictions. Pursuant to the Statute as amended by Malabo Protocol Article 16 (2), the International Criminal Law Section shall have three Chambers: pre-trial, trial, and appellate. Article 18(2) empowers the prosecutor or the accused to appeal a "decision" of the Pre-Trial or Trial Chamber on grounds of a procedural error, an error of law, and an error of fact. Article 18(3) provides that an appeal may be made "against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction." No mention is herein made of an appeal against sentence. Presumably, however, "decision" in Article 18(2) would be interpreted broadly enough so as to include an appeal of a sentence, or pursuant to Article 18(3) the appeal against conviction could also include an appeal of the sentence. Even if not explicitly stated, therefore, it appears that the issue is impliedly addressed through appeal of a decision on conviction.

3. PENOLOGICAL ASPIRATIONS

The Court would do well to identify, as soon as practicable, what it values as the penological goals of sentencing. In terms of natural persons, international

[30] K. Ambos, *Treatise on International Criminal Law, Vol. II: The Crimes and Sentencing*, (Oxford: Oxford University Press, 2014) 278.

criminal law has posited a number of penological aspirations. Retribution and general deterrence emerge as the two most frequently cited punishment goals.[31] The Court will also need to assess whether and how these goals map onto legal persons: in other words, will these goals be identical in cases of corporate liability as in the case of natural persons?

The many facets of retributivist theory share a common thread, namely, that the infliction of punishment rectifies the moral balance, in particular, when imposed through public condemnation of the criminal conduct. Punishment is to be proportionate to the extent of the harm caused by the perpetrator's criminal conduct and also to the perpetrator's degree of responsibility. In international crimes, to be sure, grievous harms may be caused by persons with attenuated intent. This apparent paradox arises because of the collective nature of the violence, the diffusion of authority within groups, the reality of following orders, and the normalization of violence under rubrics of self-defense or group survival. Notwithstanding retributivism's initial roots in *lex talionis* and just deserts, international tribunals have emphatically emphasized that "retribution should not be misunderstood as a way of expressing revenge or vengeance."[32] Consequently, these sentencing institutions conceptualize retribution deontologically as the "expression of condemnation and outrage of the international community."[33]

[31] *Situation en République démocratique du Congo, affaire Le Procureur c. Germain Katanga, No. ICC-01/04–01/07, Décision relative à la peine (Art. 76 du Statut)*, Chambre de première instance II, ¶ 38 (23 mai 2014) ("[L]a peine a donc deux fonctions importantes: le châtiment d'une part, c'est-à-dire l'expression de la réprobation sociale qui entoure l'acte criminal et son auteur et qui est aussi une manière de reconnaitre le préjudice et les souffrances causées aux victims; la dissuasion d'autre part, dont l'objectif est de détourner de leur project d'éventuels candidats à la perpétration de crimes similaires."); *Prosecutor v. Stakić*, Case No. IT-97–24-A, ¶ 402 (ICTY Appeals Chamber, March 22, 2006) (stating that "the Appeals Chamber notes that the jurisprudence of the Tribunal and the ICTR consistently points out that the two main purposes of sentencing are deterrence and retribution"); *Prosecutor v. Marqués et al.*, Case No. 09/2000, ¶ 979 (Dili Dist. Ct. Serious Crimes Spec. Panel, Dec. 11, 2001) ("The penalties imposed on accused persons found guilty by the Panel are intended, on the one hand, as retribution against the said accused, whose crimes must be seen to be punished (*punitur quia peccatur*). They are also intended to act as deterrence; namely, to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate such serious violations of law and human rights (*punitur ne peccetur*.)".

[32] *Prosecutor v. Kordić and Cerkez*, Case No. IT-95–14/2-A, ¶ 1075 (ICTY Appeals Chamber, Dec. 17, 2004); *Situation en République démocratique du Congo, affaire Le Procureur c. Germain Katanga*, No. ICC-01/04–01/07, Décision relative à la peine (Art. 76 du Statut), Chambre de première instance II, (mai 23, 2014) ¶ 38.

[33] *Prosecutor v. Momir Nikolić*, Case No. IT-02–60/1-S, ¶ 86 (ICTY Trial Chamber, December 2, 2003).

Retributive motivations thereby flirt with the goals of expressivism, which presents as another penological rationale in international criminal law. The expressivist punishes to strengthen faith in rule of law among the general public (including the aggressor community), rather than punishing simply because the perpetrator deserves it or will be deterred by it. Expressivism, in my opinion, may also transcend retribution and deterrence in claiming as a central goal the edification of historical narratives, the authentication of atrocity through judicial text, and the public dissemination thereof.[34] Whereas some scholars envision expressivism as a subset of retribution or deterrence, others prefer to see it as an independent goal. Others still, for example Saira Mohamed, see it as serving aspirational purposes, that is, to positively set forth goals for human behavior in extenuating circumstances rather than simply clarifying – retrospectively and in decontextualized fashion – what might be normal or deviant.[35] Mohamed encourages courts to become sites of storytelling to help elucidate how individuals choose to perpetrate unspeakable crimes. The prospect of corporate criminal liability at the Court adds the question how expressivism might interface with liability of legal persons and what sorts of aspirations could thereby be established for corporate conduct.

General deterrence posits that the purpose of prosecuting and punishing those who commit mass atrocity is utilitarian in nature, that is, to dissuade others (in the same jurisdiction, elsewhere, or anywhere) from re-offending. Specific deterrence implies that punishing the individual offender will deter recidivism in his or her specific case. The focus of international criminal law, however, remains oriented toward general deterrence. From a general deterrence perspective, punishment is inflicted because of the consequentialist effect of reducing the incidence of crime. The question whether international criminal trials actually fulfill deterrent aspirations remains unsettled; scholars and observers straddle a gamut of positions.

On occasion, judges on international criminal courts and tribunals also refer to other penological rationales. These other rationales include rehabilitation, incapacitation, restoration, and reconciliation.[36] These rationales, however, are not particularly influential. Although rehabilitation is among the

[34] *See* M. A. Drumbl, Atrocity, Punishment, and International Law 173–6 (2007).

[35] S. Mohamed, "Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law", 124 *Yale Law Journal* (2015) 1628.

[36] When it comes to these rationales, an interesting question arises, that is, how the Court might interact with alternative justice measures that African states may deploy domestically as part of post-conflict transitions, for example, *mato oput*. While these questions are more appropriately considered in the framework of complementarity, they also bear upon penological conversations as well.

more frequently mentioned of this group of subjacent objectives, it is often pithily described as not deserving of undue weight.[37] Reconciliation arose in the 2014 *Katanga* judgment, where an ICC Trial Chamber actively recognized the convict's *post hoc* efforts to demobilize and disarm child soldiers as a mitigating factor in his eventual sentence of twelve years.[38] Restorative justice remains particularly marginal within the law-in-practice of international courts and tribunals, although in the case of the Rome Statute framework it may be better served through the compensation and victim reparations procedures, along with the Trust Fund for Victims. The Malabo Protocol, like the Rome Statute, contemplates reparations to victims and a Trust Fund (Article 46M). Many details still need to be resolved on this front, however. The Malabo Protocol is well aware of this need, insofar as Article 45(1) calls upon the Court to establish principles relating to reparations.

4. POST-CONVICTION ENFORCEMENT

Article 46J of the Statute as amended by the Malabo Protocol governs enforcement of sentences. This provision superficially parallels that of other international criminal justice institutions.[39] Pursuant to Article 46J, sentences are to be served in states designated by the Court from a list of willing states who would have concluded enforcement agreements with the Court in this regard. The *ad hoc* international tribunals, for example, and the MICT have made agreements with many different states to detain convicts.[40] Article 46J*bis* obliges states parties to "give effect to" fines or forfeitures ordered by the Court, albeit "without prejudice to the rights of *bona fide* third parties." It is

[37] *Prosecutor v. Milutinović et al*, Judgment Case No. IT-05–87-T, Trial Chamber (February 26, 2009), ¶ 1146.

[38] *Situation en République démocratique du Congo, affaire Le Procureur c. Germain Katanga*, No. ICC-01/04–01/07, Décision relative à la peine (Art. 76 du Statut), Chambre de première instance II, (mai, 23 2014) ¶¶ 88, 115, 144.

[39] MICT Statute Art. 25, along with *inter alia* a MICT practice direction from April 24, 2014, determine where a convict is to serve sentence. Such determinations involve four steps. First, the Registrar communicates with one or more states to determine their willingness to enforce the sentence. Second, the Registrar submits a report to the MICT President, which lists potential enforcing states and contains other pertinent information. Third, the President designates an enforcement state, based on the information submitted by the Registrar and any other inquiries he or she chooses to make. Fourth, the Registrar executes the decision. Imprisonment shall be in accordance with the applicable law of the concerned state, although the MICT has the power to supervise sentence enforcement.

[40] ICTY convicts have been incarcerated in Germany, Austria, Spain, Italy, Denmark, Finland, Norway, the United Kingdom, Sweden, Portugal, Estonia, and France. ICTR convicts have been incarcerated in Mali, Bénin, Italy, and Sweden (nearly all in Mali and Bénin, however).

unclear what exactly is meant by this latter caveat, though Joanna Kyriakakis suggests that it refers to shareholders and employees.[41] Furthermore, the procedure for giving effect to fines or forfeitures is to be that "provided for in [the state's] national law."[42]

Article 46K governs pardon or commutation of sentences. These terms have, notwithstanding their specific meaning, become equated with early release ("parole") in the practice (and vernacular) of international criminal justice institutions. Pursuant to Article 46K, a convict may be eligible for pardon or commutation of sentence according to the national law of the state where sentence is being served. This shall be granted only "if the Court so decides on the basis of the interests of justice and the general principles of law." The ICTY had adopted a "rule of thumb" to permit eligibility for conditional early release upon a convict's having served at least two-thirds of the sentence; the ICTY did so despite the fact that this benchmark did not reflect the municipal law of all enforcing states.[43] In three cases of early release, the ICTR diverged and determined a three-quarters benchmark.[44] The Rome Statute of the ICC expressly adopts the two-thirds benchmark (or 25 years in the case of life imprisonment).[45] The SCSL's first case of early release (definitively granted in 2015) involved Moinina Fofana, a CDF leader, who is serving his sentence in Rwanda. Fofana has spent roughly twelve years in detention. He will serve the remainder of his sentence (three years) in Sierra Leone under release supervised by Sierra Leonean authorities.[46] Another SCSL convict, former Liberian President Charles Taylor, is incarcerated in the United Kingdom. In 2015, the Residual Court for Sierra Leone, which has taken over the SCSL's

[41] See Chapter 27 in the present volume.

[42] *See also* Art. 46L(2)(f), which requires states parties to comply without undue delay with any request for assistance or an order issued by the Court related to the "identification, tracing and freezing or seizure of proceeds, property and asserts and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of *bona fide* third parties."

[43] R. Mulgrew, Towards the Development of the International Penal System 57–58 (Cambridge, UK: Cambridge University Press 2013).

[44] *Prosecutor v. Muvunyi*, Case No. ICTR-00–55A-T, Decision on Application for Early Release (ICTR, March 6, 2012); *Prosecutor v. Rugambarara*, Case No. ICTR-00–59, Decision on Application for Early Release (ICTR, February 8, 2012); *Prosecutor v. Bagaragaza*, Case No, ICTR-05–86-S, Decision on Application for Early Release (ICTR, October 24, 2011).

[45] Rome Statute, Art. 110. A sentence reduction may be issued if the ICC determines the existence of one or more of the following factors: (1) "early and continuing willingness" of cooperation by the convict; (2) the convict's "voluntary assistance . . . in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims"; or (3) other factors "establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules . . ."

[46] At trial, Fofana had been sentenced to a six-year term. The SCSL Appeals Chamber increased his sentence to fifteen years after it rejected fighting for a just cause as a mitigating factor in sentencing.

work as of December 2013, denied Taylor's motion to terminate the enforcement of his sentence in the United Kingdom (where he is segregated from the general prison population for security reasons in a maximum security facility in Durham) and to transfer him to Rwanda. Rwanda incarcerates all the other persons convicted by the SCSL. Taylor's counsel had unsuccessfully argued that Taylor's rights to a family life had been violated by incarcerating him so far from his home and family; moreover, this *sui generis* character of incarceration, it was submitted, also departed from the practice at other tribunals, including the SCSL itself, to arrange for convicts to be incarcerated in their continent of origin.[47] The judges of the Residual Court for Sierra Leone strongly rejected the defense motion on several grounds including, *inter alia*, that Taylor's case indeed was an exceptional one.

The MICT, which is now responsible for enforcement of all the sentences issued by the *ad hoc* tribunals, has declared the adoption of the two-thirds rule. A petition for pardon or commutation of sentence is to be made by a convict to the MICT President, who also decides thereupon. Rule 151 of the MICT Rules of Procedure and Evidence also impacts this decision, along with a practice direction from July 5, 2012. Rule 151 identifies a number of illustrative factors that the MICT President shall take into account in such determinations. These are: the gravity of the crime or crimes for which the prisoner was convicted; the treatment of similarly-situated prisoners; the prisoner's demonstration of rehabilitation; and any substantial cooperation on the part of the prisoner with the Prosecutor. In addition, the President may consider the interests of justice and the general principles of law (MICT Statute Article 26); any other information that he or she considers relevant; along with the views of any judges of the sentencing chamber who are MICT judges.[48]

ICTY judges have ruled that the prospect of early release should not factor into the determination of the length of the sentence.[49] In other words, it would be improper to gross up the length of sentence to absorb the possibility of early release.

Overall, early release is an important aspect of the administration of international criminal law. As of July 2013, nearly half of all international convicts

[47] T. Reisman, "Charles Taylor Will Remain in Prison in the UK", *International Justice Monitor* (March 26, 2015).

[48] Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY, or the Mechanism. MICT/3 (July 5, 2012) at ¶ 9.

[49] *Prosecutor v. Dragan Nikolić*, Case No. IT-94–2-A, ¶¶ 97 (ICTY Appeals Chamber, February 4, 2005).

have been released; the vast majority of this group having been granted early release through the aforementioned procedures.[50]

The pursuit of predictability and certainty might nudge the Court to develop further clarifications to operationalize Articles 46J and 46K, for example, in the Court's eventual rules (*see*, *e.g.*, Article 46J(2)). An aperture arises, perhaps, to more deeply integrate measurable rehabilitative goals. As Roísín Mulgrew astutely observes, the enforcement of sentences of *ad hoc* tribunal convicts is bereft of meaningful rehabilitative programming. According to Mulgrew, "[i]nternational prisoners serving their sentences in national prisons [. . .] may not have clear or structured sentence plans, access to offending behavior programmes or assistance with preparation for release."[51] Holá and van Wijk flatly note that, following release, these individuals "simply disappear from the radar of the international community"; they do so notwithstanding great variation in their post-release experiences.[52] Holá and van Wijk add that some "go back to their countries of origin and return to political posts they [previously] held" and some "return as celebrated war time heroes," while others "just go back to their old house, cannot find a job, feel rejected [by . . .] society and fight to make a living."[53] Instead of the current "warehousing" practice that Mulgrew identifies as characterizing the enforcement of international sentences, the Court might push a more structured, supervisory, and consistent arrangement.[54]

Alternately, the establishment of the Court opens an opportunity to reconsider the availability of early release. Early release remains controversial (particularly among victim communities) despite its ubiquity. Perhaps the opportunities for such release should be approached somewhat more diffidently so as to emphasize the centrality of retribution as a penological rationale. This is up to the Court.

Also of pressing salience is that some international prisoners cannot exit international detention notwithstanding being released since no country is willing to admit them. Such is the case with certain acquitted and released individuals from the ICTR who are effectively stranded in Tanzania. This situation, which presents as a grave human rights concern, should be

[50] B. Holá and J. van Wijk, "Life after Conviction at International Criminal Tribunals", *Supranational Criminology Newsletter* (June 2014) 6–7, at p. 6 (also noting the lack of structure in post-release policies which leads to considerable disparity in the prospects for social reintegration among former international prisoners).

[51] Mulgrew, supra note 43, at 96.

[52] Holá and van Wijk, supra note 50, at pp. 6–7 at p. 7.

[53] Ibid.

[54] Mulgrew, supra note 43, at 193.

pre-empted by the Court through the development of ententes as to the locations to which convicts who fear persecution upon release should be able to emigrate. Another important theme is defining the content of *ne bis in idem* ahead of time, insofar as a convict at the Court, upon release, might return to a state with jurisdiction over related crimes and thereby face prosecution. This is a situation that has arisen in the *Katanga* case at the International Criminal Court.

5. CONCLUSION

The Court's creation as a regional entity would offer an opportunity to break new ground in terms of refining penological rationales and streamlining carceral enforcement. In this regard, looking beyond political motivations, potential duplications, and financial contingencies, the Court – if established – opens a space for substantive and progressive development of the law – international as well as regional – in a vital area that is generally underserved.

The Court also could be groundbreaking in advancing a conversation about what sentencing and penalties actually mean in the context of corporate entities. A turn to a more sophisticated penology, moreover, also could help elucidate differences, or similarities, between gravity and conceptual assessments in cases of "core" international crimes, on the one hand, and transnational crimes, on the other, and thereby refine a much broader conceptual and theoretical landscape. Such a move might also better unpack, and possibly typologize, crimes according to the extent to which they are influenced by collective political and ideological forces rather than dispositional and material motivations. Core crimes may be more ecological in nature than transnational crimes. Or perhaps not.

Alternately, it may well be that a punishment heuristic rooted in social psychology can serve to differentiate, in principle, core crimes from transnational crimes yet also permit both to remain within the category of, in the least, regional international law. A distinction between the two categories, then, could retain its relevance when it comes to sentencing. Obversely, the Court could proceed in a fashion that sentences transnational crimes indifferently from core international crimes. Moving in this latter direction could peel back the conceptual distinctions between these two categories and, in this vein, soften the existence of these erstwhile boundaries. Once again, these moves are up to the Court.

Among the goals of creating the Court, and endowing it with jurisdiction over a broad array of crimes, is to guard against scattershot use of universal

jurisdiction proceedings and to promote a continental response to crimes of concern to Africa. Attainment of this goal would be furthered by the development of a coherent and cogent approach to sentencing. Sentencing and penalties have unfortunately proven to be afterthoughts in the historical development of international criminal law, but this neglected status is neither inexorable nor preordained. The space created by the Court offers a chance to develop regional norms regarding the sentencing of international and transnational crimes and also, through careful reference to the work of other international tribunals, hook those norms into – and improve – broader international legal practice. The creation of the Court offers an opportunity for Africa to take the lead in this area of great importance to victims.

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A Promise Too Dear?

The Right to Reparations for Victims of International Crimes Under the Malabo Protocol of the African Criminal Court

GODFREY M. MUSILA

1. INTRODUCTION

The inclusion of the right of victims of international crimes to participate and to reparations in the Rome Statute of the International Criminal Court (Rome Statute) constituted one of the most important developments in international criminal justice. It introduced a victim-centered approach into international criminal justice, affirming that victims of international crimes have broader interests than those entailed in the prosecution of perpetrators. Departing as it did from practice at the ad hoc international criminal tribunals in which victims played no part other than that of witness when selected, the Rome Statute traced the future trajectory of international criminal law by affirming the central position that victims of international crimes should play in judicial processes in which the guilt of their tormentors is determined.[1] The Malabo Protocol that amends the 2008 Protocol on the Statute of the African Court of Justice and Human Rights (African CJ & HR) recognizes victims' right to reparations.[2] It also adopts the Rome Statute formula in terms of which – in relation to reparations – a trust fund to be used for the benefit of victims is to be established within the African Court, which is comprised of three chambers: General Affairs Section; Human Rights Section and the Criminal Law Section (African Criminal Court). There are significant divergences, however, in terms of how the founding documents of the International Criminal Court (ICC) and the proposed

[1] On the Rome Statute regime on victims' rights, see generally G.M. Musila, *Rethinking International Criminal Justice: Restorative Justice and the Rights of Victims in the International Criminal Court* (Lap Lambert Academic Publishing; 2010).

[2] Art. 20 Malabo Protocol, replaced Article 45 of the Statute on the African Court of Justice and Human Rights (Protocol on Merged Court).

section of the African Court (African Criminal Court) deal with the question of reparations.

This chapter attempts to identify gaps in the legal and institutional framework for giving effect the right to reparations and proposes a preferred reading of the text as well as legal reforms that best serve the protected interests while giving effect to the stated objectives of the African Criminal Court (ACC) of ending impunity and protecting the right of the defense to a fair trial. To this end, the chapter conducts a review of the relevant text in the Malabo Protocol in the context of the ICC's law and practice pertaining to reparations. This is by no means an easy task, primarily because the Rules of Procedure and Evidence as well as regulations that should govern the internal aspects of the organs of the ACC were not adopted alongside the main treaty and statute of the Criminal Law Section. Large parts of the analysis focus on what the idealized state of affairs should be, rather than the state of the art.

2. THE MALABO PROTOCOL IN HISTORICAL REFERENCE TO VICTIMS' RIGHTS IN AFRICA

The debate relating to the establishment of an African court with jurisdiction to try core international crimes in Africa emerged out of Africa's fallout with the ICC over its indictment of, and subsequent issuance of arrest warrants against, President Omar Al Bashir of Sudan for crimes of genocide, war crimes and crimes against humanity committed during the armed in Darfur. The African Union's unhappiness with the ICC was expressed in a series of resolutions urging states to withhold their cooperation from the ICC in the case of President Al Bashir,[3] and later, their membership from the court.[4] In the AU's view, the Court's indictment of Al Bashir and issuance of arrest warrants undermined its [AU's] efforts to negotiate a peace settlement between the Government of Sudan and rebels based in Darfur. The AU's relations with the court soured, and the regional body

[3] Resolution not to cooperate with the ICC: for a discussion, see G.M. Musila, "The Role of the African Union in International Criminal Justice: Force for Good or Bad?", in E. Ankumah (ed), *The International Criminal Court and Africa: One Decade On* (Cambridge: Intersentia, 2016) 299.

[4] See African Union, *Report of the Meeting of African States Parties to the Rome Statute of the ICC*, 8–9, June 2009, Addis Ababa, Ethiopia, MinICC/Legal/3; AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) July 21, 2008, 142 Meeting, resolution 11 (i); AU PSC Communiqué PSC/PR/Comm.(CLXXV) Rev.1, March 4, 2009 Addis Ababa, 175 meeting.

dragged its feet or refused to accede by some accounts, when asked to respond to the ICC's request to establish a liaison office at the AU's seat in Addis Ababa.

Ten years before, international criminal justice had become a reality in Africa with the establishment of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone in response to major atrocities committed in Rwanda and Sierra Leone respectively. Experience from those tribunals shows that the international community aimed for minimalist justice: prosecution of major war criminals that masterminded mass atrocities with the hope that sending a message that impunity would not be countenanced could yield dividends for stability in respective countries and restore international peace and security. In these trials, victims and survivors of horrendous maiming, rapes, torture and mass murders would have no role greater than that reserved for witnesses. As the call for a permanent criminal court picked pace in their wake, more than 50 years after the International Military Tribunal at Nuremberg closed its doors, its legacy loomed large over the revival of international criminal justice: victims' interests were still not adequately protected.[5]

In Africa, the AU wrestled with calls for justice against former Chadian strongman Hissène Habré for over a decade, eventually supporting the establishment, within the Senegalese judiciary, of the Extraordinary African Chambers that convicted Habré a decade later in 2016 for several crimes against humanity, torture and war crimes.[6] The campaign to bring Habré to justice was waged doggedly by victims and human rights organizations, who would eventually secure a historic conviction and an order against Habré to pay reparations to victims amounting to €34,000 each.[7]

[5] See G.M. Musila, supra note 2, at 34–59; V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Leiden: Martinus Nijhoff Publishers, 1995) at 167, 286–7; A. Rydberg, 'Victims in the International Criminal Tribunal for the Former Yugoslavia' in H. Kaptein and M. Malsch (eds), *Crime Victims and Justice: Essays on Principles and Justice* (Abingdon: Rutledge, 2004) 126–40, at 131; G. Mekjian & M. Varughese, 'Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court' 17 *Pace University School of Law Journal* (2005) 1–46.

[6] On the decades' long efforts to bring Habré to trial and an overview of the judgement, see generally S.A Høgestøl 'The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight against Impunity,' 34 *Nordic Journal of Human Rights* (2016) 147–56. Available at http://dx.doi.org/10.1080/18918131.2016.1233374 (accessed on 10 December 2017).

[7] On reparations, see the Appeals Chamber Decision, available at www.chambresafricaines.org/pdf/Arr%C3%AAt_int%C3%A9gral.pdf (accessed on 10 December 2017).

Since the ICC opened its first investigations in Uganda in 2004,[8] the large number of victims that have applied to participate in cases from different situation countries and the absence of national reparations initiatives speak to the overwhelming hope among many that the ICC will secure them a measure of reparative justice that most are unable to obtain in their home countries. Opposition by victims and civil society groups to calls made by the AU to the 3 African States parties to the ICC[9] to withdraw from the court is an expression of their determination to preserve an institution that, for many, is effectively the only avenue to obtain justice. Equally, the voices that were ranged against the adoption of the Malabo Protocol on the ACC mirrored reservations in large swathes of the African population with several aspects of that proposal, questioning whether the AU's expressed desire to fight impunity for mass atrocities was genuine given the inclusion of several problematic provisions such as the immunity clause, a litany of institutional design problems, and the lack of resources that would likely bedevil the court once established.[10] If the adoption of the Malabo Protocol is not borne out of a genuine expression of intent to complement, in the broadest sense, the work of the ICC and that of national courts, then it stymies the efforts that victims from many of Africa's conflict zones have made to obtain justice. It is upon this background – one depicting the constant struggles to expand access to justice for victims of international crimes – that the proposed ACC and, in particular, its framework on the right to reparations, is assessed.

3. THE LEGAL FRAMEWORK ON VICTIMS' RIGHTS

In keeping with the increasing evidence of the acceptance of the right to reparations as integral to international criminal justice, the Malabo Protocol provides for the right of victims to reparations, which includes restitution, compensation and rehabilitation. Article 20 of the Protocol that amends

[8] See ICC case information Sheet, available at, Decision on Victims' Applications for Participation Applications for Participation, *Situation in Uganda*, *In the case of the Prosecutor v Joseph Kony*, *Vincent Otti*, *Okot Odhiambo*, *Dominic Ongwen*, (ICC-02/04) Pre-Trial Chamber II, 10 August 2007.

[9] For the list of African States Parties, see: https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (accessed 20 December 2017).

[10] Amnesty International, *Malabo Protocol: legal and institutional implications of the merged and expanded African Court* available at www.amnesty.org/en/documents/afr01/3063/2016/en/ (accessed on 9 December 2017); A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' 24 *European Journal of International Law* (2013) 933–46.

Article 45 of the 2008 Protocol and Statute on the African Court of Justice and Human Rights (African CJ & HR) constitutes the core legal framework on the right to reparations. It reproduces large portions of Article 75 of the Rome Statute but omits or writes in additional language that is consequential in terms import for the court and the benefits that redound to victims.

First, significantly, the court is called upon to develop principles on the right of victims to reparations, including those pertaining to aspects such as damage, loss and injury. In terms of Article 45(1) Malabo Protocol, the court is called upon to 'establish Rules of Court principles relating to reparations'. From the practice of human rights tribunals and the ICC, other aspects in respect of which principles should be developed include: causation, standard of proof, the scope of a convicted persons liability, quantum of reparations, the role of the court and Trust Fund for Victims (TFV), how to implement reparations awards, as well as 'underlying philosophical questions pertaining to the right'.[11] The introduction of 'Rules of Court' in the language of Article 45(1) can be interpreted to mean that the court is to develop and publish principles on reparations in *its regulations*, which is judge-made law that covers mostly procedural issues,[12] and serve as subsidiary legislation to the Statute and Rules of Procedure and Evidence, which are promulgated by the States Parties as part of the legal framework that constitutes the primary sources of law for the court. Should AU member states include principles pertaining to reparations in the Rules of Procedure and Evidence (RPE), or even Regulations of the Court, this approach would be different than that adopted by the ICC, where judges of the Trial Chamber developed those principles after the conviction in *Lubanga*, the first case to be tried by the ICC. The judges of the future African court would have to abstract principles should they decide to include these in the regulations of the court that govern its work, and while there is enough to draw on from the ICC's jurisprudence, national courts and international human rights bodies, it might be ideal to build from a factual basis that a real case offers and to adapt the standards when needed in subsequent cases.

[11] See generally, *The Prosecutor v. Thomas Lubanga Dyilo*, *Situation: Situation in the Democratic Republic of the Congo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations available online at www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3129&ln=en (accessed on 2 February 2018); Musila supra note 2, chapter six.

[12] See ICC, 'Regulations of the Court', adopted by the judges of the Court on May 26, 2004 pursuant to Art. 52 Rome Statute. Available online at www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf (accessed 19 December 2017).

Second, the ACC has the discretion under Article 45(3) Malabo Protocol, to 'take account of representations from or in behalf of the convicted person, victims, other interested persons or interested states' before making an order. The omission of 'under this article' that one finds in Article 75(3) Rome Statute from the Article 45(3) appears to establish, at first blush, a general right of those named therein to make representations to the court. This provision should not be read as inferring a general right to participation by victims, states and the undefined category of 'other interested persons'. It is not clear why states and 'other interested parties' would have an interest in reparations proceedings and why the court would consult them during proceedings. At the ICC, the Court – through the TFV – generally consults states on the implementation of reparations orders. This said, the ACC may request states to take measures to preserve or convey the proceeds of property subject to forfeiture orders located on its territory to the court for use toward reparations or to be returned to its lawful owner as foreseen under Article 43A of the Malabo Protocol. Obligations of states relating to enforcement of fines and forfeiture orders are detailed in Article 46J *bis* Malabo Protocol. The cooperation framework – one of the key pillars of the ACC – and the specific circumstances under which states parties are obliged to cooperate with the court are detailed in Article 46L under the rubric 'cooperation and judicial assistance'. Under this provision, which is an abridged version of Article 93 of the Rome Statute that enumerates areas of cooperation and assistance to the ICC, the 'identification, tracing and freezing or seizure of proceeds of property and assets and instrumentalities of crime' feature prominently on the list of issues in respect of which cooperation and assistance by states parties is mandated and the court has made such requests in the past, notably in the *Bemba* and *Kenyatta*[13] cases.

Third, Article 43 empowers the court to order a convict to pay reparations to or in respect of victims, and as the ICC Appeals Chamber has held in *Lubanga*, the court is to affirm the 'civil liability' of a convict even in case of indigence.[14] To be eligible, victims must prove harm, injury or loss occasioned by criminal conduct for which the accused has been convicted. Such victims would have made an application by way of prescribed forms for reparations, which application is assessed based on criteria established in the Statute and RPE. In the first place, an applicant must be victim and the harm,

[13] *The Prosecutor v. Uhuru Muigai Kenyatta*, Situation: Situation in the Republic of Kenya, Decision on the implementation of the request to freeze assets ICC-01/09–02/11–931, available online at www.icc-cpi.int/CourtRecords/CR2014_06208.PDF (accessed on 2 February 2018).

[14] *Lubanga* (Reparations) Appeals Chamber, supra note 11, at para 65.

loss or injury they complain of is causally connected to one or more of the charges for which an accused is convicted.[15] If the RPE to be adopted by the AU includes a rule analogous to Rule 85 of the ICC RPE, 'victim' would connote both a natural person that has suffered harm directly or indirectly (such as surviving family members) and legal persons defined in the rule as 'organizations or institutions that suffer direct harm to any of their property dedicated to religious, education, art, science or charitable purposes as well as other places such as hospitals dedicated to humanitarian purposes.'[16]

The identification of victims of core international crimes and piracy should be a straightforward task. The inclusion of new crimes in the Statute of the ACC – unconstitutional change of government, mercenarism, corruption as well as several transnational crimes which may lack clarity in terms of nature and scope of proscribed conduct as shown in separate chapters in this volume – throws up interesting definitional challenges that have to be considered in the RPE and which the ACC is likely to be called to grapple with. Take for instance the crime of unconstitutional change of government (UCG). This crime consists of the unconstitutional change of government through coups (by military, mercenaries or rebels) or overstaying in power by an elected government past the expiration of a mandated term. In this case, who are the victims? The president and his/her government that are forced out? The vendors that lose property through looting? Demonstrators (those pro or against the change) that are killed or maimed? Many other pertinent questions flow from the definition, and deserve close attention from the drafters of the RPE, the judges and the Trust Fund.

Given the trajectory of developments pertaining to victims' rights detailed above, and the fact that the Malabo Protocol was adopted 16 years after the Rome Statute, it is not clear why the Malabo Protocol does not make provision for victims' right to participate at all stages of proceedings. This aspect constitutes one of the most transformative innovations of the Rome Statute that should be considered as an affirmation of norms as they stood in 1998.[17] The right of victims to participate in their capacity as victims in criminal

[15] See the Decision on Requests Regarding Reparations in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* Situation: Situation in the Republic of Kenya ICC-01/09–01/11, Trial Chamber V(A), 1 July 2016 (the court rejected an application for reparations following the withdrawal of charges against the accused). Available online at www.icc-cpi.int/CourtRecords/CR2016_04798.PDF (accessed on 19 December 2017).

[16] Rule 85 (b) ICC RPE.

[17] On the right to participation at the ICC, see generally, Musila, supra note 1, at chapter 5; M. Pena and G. Carayon, 'Is the ICC Making the Most of Victim Participation?,' 7 *International Journal of Transitional Justice* (2013) 518–35.

proceedings was one of the key gains of the victims' rights movement, and a transformative innovation of the Rome Statute. It gives victims a voice, and affirms the idea that victims' rights are wider than the right to justice and limited judicial truth about crimes that is revealed by trials. The right to participate in at all stages of the proceedings is closely tied to the right to reparations. Victims' pursuit of reparations has been adjudged on several occasions as a vital interests for purposes of Article 68(3) Rome Statute, which is the general clause on participation, and requires proof of an interest in the trial for one to be admitted.[18] The instrumental value of the right to participate for victims may have been lost to the promoters of the Malabo Protocol, but it is telling that standing for victims before the Human Rights Section – the second of three chambers in the African Court of Justice and Human and Peoples Rights of which the ACC forms part – is conditioned on a mandatory declaration by State parties accepting the receipt of petitions from individuals and Non-Governmental Organizations.[19] However, one need not have been admitted to participate in trial proceedings to be eligible to receive reparations. In *Lubanga*, the Appeals Chamber and Trial Chamber concurred that victims that were not admitted to participate in the trial could receive reparations implemented through the Trust Fund for Victims from resources obtained from sources other than an indigent convict.[20] ICC chambers have held that for victims to be admitted to participate in the proceedings, they have to demonstrate an interest that they seek to protect, and their desire to receive

[18] Prosecution's Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, *Situation in the Democratic Republic of the Congo*, *In the case of the Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04–01/06), Pre-Trial Chamber I, 6 June 2006, at ¶ 63. The Court noted with respect to participation at the investigation stage that 'The personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators and to solicit reparations'. See also Separate Opinion of Judge Sang-Hyun Song, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decisions of the Appeals Chamber" of 2 February 2007, *Lubanga* (1CC-01/04–01/06–925), Appeals Chamber, 13 June 2007, at ¶10 noting that victims have at least two interest-to obtain reparations and to receive justice.

[19] See Art. 30 (f) Statute of the African Court of Justice and Human Rights (as amended by Art 16 Malabo Protocol). This provision is a carry-over from the Protocol Establishing the African Court on Human and Peoples' Rights (Art 34(6)).

[20] Appeal Chamber Reparations Decision, *Prosecutor v Thomas Lubanga Dylo* (ICC-01/04–01/06 A A 2 A 3), Appeals Chamber, March 3, 2015, available online at www.icc-cpi.int/CourtRecords/CR2015_02631.PDF (accessed on 12 December 2017); Decision Establishing the Principles and Procedures to be Applied to Reparations, *Prosecutor v Thomas Lubanga Dylo* (ICC-01/04–1/06), Trial Chamber I, 7 August 2012, available online at www.icc-cpi.int/CourtRecords/CR2012_07872.PDF (accessed on 12 December 2017).

reparations is one such interest.[21] In terms of Article 19A *bis*, the Malabo Protocol also includes the rights of victims to protection, stipulating in part that 'the Pre-Trial chamber may issue such orders as may be required to provide for the protection and privacy of witnesses and victims…' Unlike the Rome Statute, however, a general obligation that mandates all organs of the court to protect victims and witnesses is absent in the Malabo Protocol, but could be legislated through RPE to be adopted in future.[22]

4. INSTITUTIONAL FRAMEWORK SUPPORTIVE OF REPARATIONS

A Trust Fund, 'for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families' is foreseen in Article 46M of the Malabo Protocol, but its actual establishment is conditioned on a decision of the Assembly of Heads of State and Government of the AU. It is unclear why this decision is postponed and reserved for the Heads of States, including those from non-state parties, once the Protocol Establishing the African Court is in force. In the absence of a trust fund for victims, the African Court would fall short of international standards and constitute regression insofar as the protection of the rights of victims is concerned. Although the TFV at the ICC has fallen short in significant ways, the fact that victims' right to reparation forms part of international criminal justice is not in doubt. As the Trial Chamber has stated in *Lubanga*, reparations constitute a vital interest of victims of crimes and serve multiple functions: they relieve the suffering caused by commission of crime, afford victims justice by alleviating the consequences of crime, deter future violations, promote reintegration of victims into society and foster reconciliation.[23] Once the decision to create the fund is made, consideration should be given to several critical aspects.

First, the Trust Fund, as envisioned in the Malabo Protocol, is not dedicated solely to reparations for victims; it is proposed that it will finance legal aid as well as assistance to indigent suspects, accused and victims. This has institutional design, financial and capacity implications for the ACC as the expanded mandate of the Fund presupposes that appropriate levels of funding as well as institutional capacity to administer the three strands of work. Since many accused are likely to be indigent, and witnesses will require support to

[21] Art. 68(3) Rome Statute; see for instance *Kony et al.*, supra, note 8.

[22] Art. 68(1) Rome Statute

[23] Decision establishing the principles and procedures to be applied to reparations, *The Prosecutor v. Thomas Lubanga Dyilo*, *Situation: Situation in the Democratic Republic of the Congo* (ICC-01/04–01/06) (Reparations), at para 179 available online at www.icc-cpi.int/CourtRecords/CR2012_07872.PDF (accessed on 2 February 2018).

testify at the court, a significant amount of resources have to be raised to pay for legal fees and investigations for defendants as well as travel costs and related expenses for witness for the prosecution and defense. For comparison, the ICC's budget for 2017 makes provision for 12 defense teams and up to five teams of legal representatives of victims.[24] The TFV also runs assistance programs for victims in Northern Uganda and Democratic Republic of Congo (DRC). They equip victims with skills, provide startup capital for small income generating activities as well as medical assistance and rehabilitation for victims of sexual and gender based violence.[25]

Second, it is unclear whether the Fund will draw its budget from members' assessed contributions to the African Court or whether, as is the case of the ICC's TFV, it will rely on voluntary contributions and donations. The experience of the ICC's TFV and the Court's overall perceptions in the eyes of victims should be instructive. Until now, three cases, that of *Lubanga* and *German Katanga*, both from DRC, and *Al Mahdi* from Mali, have been completed by the court, including the determination of the legal responsibility for payment of reparations and the institutional arrangements for implementing reparations. Lubanga's indigence, as is the case for Katanga and Al Mahdi, meant that the 14 victims in his case could not claim reparations from him, although the Appeals Chamber, in agreeing with the Trial Chamber (Reparations) held that his obligation to pay reparations was not extinguished by his lack of means. The 14 victims, together with other victims that did not participate in the trial – or those that could not prove that the harm, loss or injury they suffered – were causally connected to the crimes for which Lubanga was convicted and could benefit from collective reparations to be implemented by the TFV using voluntary contributions. A similar situation obtains in *Katanga*, where 297 victims out of 341 that applied for reparations were awarded a symbolic €250 each as individual reparations and will also benefit from collective reparations amounting €1 million to be implemented for the benefit of the larger community from which they hail.[26] Additionally, reparations were allocated for *Al Mahdi*, where the destruction of cultural artifacts implicates the rights of the immediate community in Timbuktu for

[24] Assembly of States Parties, *Proposed program budget for 2017 of the International Criminal Court* (2016) available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf (accessed on 12 October 2017), at ¶ 42.

[25] Ibid., at ¶ 693.

[26] Ordonnance de réparation en vertu de l'article 75 du Statut, *The Prosecutor v. Germain Katanga*, (ICC-01/04-01/07-3728), La Chambre de Premiére Instance II, 24 March 2017, available online at www.icc-cpi.int/CourtRecords/CR2017_01525.PDF (accessed 19 December 2017).

damage to buildings of cultural value and attendant economic loss, as well as moral harm to the entire humanity that are invested in the cultural property's unique and intangible value.[27] The TFV was ordered to submit an implementation plan for the implementation of collective reparations amounting to €2.7 million in February 2018.

The fact that the reparations scheme in the Rome Statute can be said to be inadequately responds to the multiple needs of victims as intended negates the purposes for which it was enacted. The lack of adequate funds available to implement reparations is limiting in terms of potential beneficiaries of mostly collective reparations. Equally, liability-free assistance programs operated by the Fund in Northern Uganda and DRC (with potential for extension to Central African Republic, Cote d'Ivoire and Kenya, subject to funds) secure medical treatment, rehabilitation and skills to some victims with and are important but inadequate. It is fair to conclude that the ICC has turned out to be disappointing for victims, a majority of whom are from the eight African states currently the subject of investigations or preliminary examination at the court. It is thus imperative that the AU prioritizes funding modalities for the Trust Fund to be established in the ACC.

The Registry, which serves as the neutral administrative organ of the court, is established under Article 22B of the Malabo Protocol. It is a critical linkage institution that services other organs within the court, including the Judiciary and Office of the Prosecutor. It facilitates communication between and among organs of court as well as between the organs and victims and witnesses. If the ICC serves as a model, the Registry should host the Victims and Witnesses Unit. It is mandated to provide 'protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.'[28] Adequate provision should be made to assemble in adequate quantities expertise that enables the court to respond to multiple protection and assistance needs. In addition victims and witnesses, the ICC's experience shows that the inadequacy of the legal and institutional mechanisms for implementing protective measures in respect of intermediaries – individuals on whom various organs of the court came to rely on to access victims and witnesses – not only compromised their security but also impacted the court operationally. It is unlikely that the ACC will find

[27] Reparations Order, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, (ICC-01/12–01/15–236), Trial Chamber VII, 17 August 2017, available online at www.icc-cpi.int/CourtRecords/CR2017_05117.PDF (accessed on 19 December 2017).

[28] Art. 22B(9)(a) Malabo Protocol.

it unnecessary to work with intermediaries, given the finite nature of resources available to it and the diversity of victim and witness communities in situation countries.

5. CHALLENGES IN IMPLEMENTING REPARATIONS: AREAS FOR REFORMS

Proponents of the Malabo Protocol and supporters of the ACC face an uphill task in convincing African States to ratify and commit funds to establish the African Court. Once these milestones are reached, numerous structural problems are likely to undermine how the court functions, and whether it can deliver justice for victims have to be addressed. These challenges, which are discussed in turn include: immunities for senior political leaders, gaps in the legal and institutional framework, substantive jurisdiction of the ACC, financial and human resource.

First, the grant of immunity to heads of states and an undefined category of 'other senior officials' from investigation and prosecution by the ACC has elicited sharp criticism, particularly from victims, civil society and academic commentators.[29] Article 46A *bis*[30] provides that: 'No charges *shall be commenced or continued before the Court* against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.' For purposes of this chapter, the effect of this clause is to suspend the court's jurisdiction in respect of a category of senior political leaders that tend to sit beyond the reach of national courts, either because of immunities in national law or their influence on criminal justice. This is a group of individuals for whom international courts are most well suited, particularly in relation to the prosecution of core international crimes of genocide, war crimes, crimes against humanity and aggression. If the grant of immunity to public officials is indicative of reticence of African leaders to submit themselves to regional criminal justice, it also sends the message – as illustrated in the Al Bashir and Kenyatta cases – that they would be reluctant to submit themselves to and cooperate with the ICC, where a suspect's official capacity does not

[29] See for instance, Amnesty International, supra note 10; Africog, *Seeking Justice or Shielding Suspects?: An analysis of the Malabo Protocol on the African Court* available online at http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf (accessed on 2 November 2017); A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' 24 *European Journal of International Law* (2013) 933–46.

[30] Chapter 29 in this volume treats the subject of immunities in greater detail.

constitute a bar to the exercise of jurisdiction by the Court.[31] In addition, it is unlikely that they would only be amenable to having other less significant actors tried, if at all, when called upon to cooperate with the ACC. While it is not suggested here that the trial of say, third tier perpetrators does not advance the cause of justice, this class of perpetrators are likely to be indigent and would lack the means to pay for their own legal fees let alone reparations to victims when they are convicted. With respect to subject matter jurisdiction, there are numerous concerns that could pose challenges for the prosecution of non-core international crimes proscribed in the Malabo Protocol.[32] For these reasons, it is likely that when established, the court is unlikely to be the forum of choice for victims of *any* international crime who seek a real opportunity to receive reparations for harm, injury and loss suffered.

Second, valid concern has been expressed by commentators on whether the African Union can marshal the resources needed on a sustained basis to fund a court with three chambers – General Affairs Section (that exercises jurisdiction similar to the International Court of Justice), Human Rights Section and Criminal Law Section. The General Affairs Section also serves as the Administrative or Labor Court for the Union. It has been argued that the AU's dependence on cooperation assistance to fund its human rights bodies does not bode well for the ACC in which one trial could cost €20 million. As opposed to the ICC which has 18 judges, the Protocol of the African Court of Justice and Human and Peoples Rights makes provision for 16 judges,[33] with only four assigned to the ACC. This will pose serious capacity challenges, particularly when the scope of substantive criminal jurisdiction pertains not just to the core international crimes over which the ICC has jurisdiction, but includes 10 new crimes.[34] Of the four assigned to the Criminal Law Section, only one presides over the Pre-Trial Chamber (PTC) while three serve in the Trial Chamber. The Appellate Chamber hears appeals from all three sections of the court and therefore substantively combines general international law, human rights and international criminal law jurisdiction. This could pose

[31] See Art. 27 Rome Statute. For interpretation, see for instance, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Situation in Darfur, Sudan (ICC-02/05–01/09–139), Pre-Trial Chamber I, December 12, 2011, available online at www.icc-cpi.int/CourtRecords/CR2011_21722.PDF (accessed on 20 December 2017). See also Chapter 29 in this volume.

[32] See various chapters on substantive crimes in this volume.

[33] Art. 3, Statute of the African Court of Justice and Huma Rights (2008)

[34] Art. 28A–28M Malabo Protocol.

serious challenges for efficiency once the court's uptake of cases picks up. When compared to the ICC, the number of judges falls far short of required capacity.[35] One judge on the PTC of the Criminal Law Section, as compared to the ICC's six, is unlikely to effectively perform all the functions normally assigned to the PTC, which includes exercising judicial controls over the Office of the Prosecutor as well as determining questions pertaining to participation and reparations. The process of considering applications for reparations and participation is labor intensive.[36]

The adequacy or otherwise of funds at the disposal of the Trust Fund for the implementation of reparation is the third key challenge that the victims' reparations regime will face. As the experience of the ICC shows, the exclusion of state responsibility for reparations is a good indicator as to whether victims are taken seriously by the ACC. The fact that the decision as to whether a Trust Fund is to be established or not is conditioned on an affirmative future decision of the Assembly of Heads of State and Government does not speak glowingly about the AU's concern for victims. Yet, reparations are integral to the promise of justice for victims of international crimes in Africa. The voluntary nature of the ICC's TFV has left it chronically underfunded even as more cases reach the reparations stage. As noted, ICC Trial Chambers (sitting as reparation chambers) have, of December 2017, issued reparations orders in three cases from two situations: in *Thomas Lubanga*, *Germain Katanga* (currently on appeal), and *Al Mahdi* (Mali), while orders are awaited in the case of *Bemba* (CAR). According to the President of the TFV, the Fund lacks adequate resources to fund various aspects of its work which is both expansive and complex:

> The volume and complexity of work related to reparations mandate are huge and almost overwhelming for the limited resource capacity of the TFV. To name a few, this includes legal submissions to the relevant Chambers; the development and adaptation of a draft implementation plan, requiring frequent missions to the field to consult directly with victims and relevant authorities; competitive bidding procedures to identify the most suitable local implementing partners; and in certain delivery modalities, the direct on-site involvement of the TFV staff. Moreover, the workload arising from the reparations mandate is completely out of control for the TFV and is largely unpredictable both in its volume and pace.[37]

[35] Amnesty International, supra note 10.

[36] On the role of the PTC in pre-trial proceedings at the ICC, see Musila supra, note 2 at 141–143.

[37] ICC Trust Fund for Victims, *Report of the Board of Directors of the Trust Fund for Victims to the Sixteenth Session of the Assembly of States Parties*, 4 December 2017, available at https://trustfundforvictims.org/sites/default/files/reports/ASP-16-BDTFV.pdf (accessed on 19 December 2017).

While the operational budget of the TFV is primarily funded from the ICC's general budget (assessed contributions), funds are raised periodically from voluntary attributions to mount assistance programs in various situation countries and following the finalization of the cases in *Luganga, Katanga and Al Mahdi*, implementing reparations programs for the benefit of victims (individual and collective). For the year 2017, the allocation for the operational budget of the TFV was € 2.5 million, most of which goes to payment of staff salaries.[38] The experience of the ICC should be instructive for African policy makers.

The last major concern that needs a fix is the legal and institutional framework pertaining to victims' rights and reparations in particular. Some of the lacunae in the founding protocols and statutes have been cited above. The legal framework on reparations is to be completed once RPE as well as Regulations of the TFV and Regulations of the Court are adopted. In the analysis in preceding sections, reference has been made to relevant provisions in the ICC's legal framework as well as jurisprudence which should inform the AU's legislative activities as they relate to the ACC and victims' rights in particular. This contribution has also urged the inclusion of victims' right to participation in the statute, coupled with relevant rules and regulations. This would have institutional and resource implications, and a section would have to be designated within the ACC's Registry to facilitate the exercise of this right.

6. FUTURE PROSPECTS: REAL JUSTICE FOR VICTIMS?

The future of the ACC, and whether it will offer a real option to complement the work of the ICC and national courts depends on commitment by states not only to allow the court to function independently, but also to commit the required resources to the enterprise. The experience of the ICC with victims' rights shows that a funding model for the trust fund based on voluntary contributions is grossly inadequate. This experience speaks eloquently of the necessity to adopt a sustainable funding model that ensures that victims' rights to reparations are taken seriously. Yet, with a few exceptions, African states parties have so far not shown themselves to be champions of victims' rights at the ICC and voluntary contributions to the TFV have largely come from non-African states and private sources. Even states that should situation countries that referred situations to the ICC, have tended to step back and hope that the

[38] For the year 2017, the allocation for the operational budget was €2.5 million, most of which goes to payment of staff salaries. See Assembly of States Parties, *Proposed Program Budget for 2017 of the International Criminal Court* (2016), available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf (accessed on 12 December 2017) at ¶¶ 699–721.

Court will take on the full burden of ensuring that victims access justice. The future of the ACC, and the fate of victims, will depend on not only on a change in attitudes, but also on appreciable commitment to justice, demonstrable through a willingness to establish an adequate legal and institutional framework and provide required resources.

This contribution has made a forceful case for the inclusion of the right to reparations and the right to participation in the Malabo Protocol on the ACC, given the inadequacies in the current regime. With reference to relevant texts, jurisprudence and relevant ICC practice, the key elements to which reforms should be directed were identified.

PART III

The Human Rights Jurisdiction of the African Court

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The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights

RACHEL MURRAY

1. INTRODUCTION

While the African Court on Human and Peoples' Rights has been operating for over a decade from Arusha, Tanzania, parallel discussions have been ongoing on the development of, firstly, an African Court of Justice with a general international jurisdiction, and then, subsequently on merging this latter Court with the existing court and adding an international criminal law element to its work.

Although the Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights (1998 Protocol) was adopted in 1998 and had the necessary number of 15 ratifications for it to come into force in January 2004, it took until November 2006 before the African Court on Human and Peoples' Rights (ACHPR Court) was to become operational. One of the reasons for this delay was due to a recognition by States that with the advent of the AU a new judicial body was also envisaged by the Constitutive Act. The African Court of Justice (ACJ), provided for in Articles 5 and 18 of the Constitutive Act, was to be the 'principal judicial organ of the African Union' with jurisdiction over not only the Constitutive Act but also 'the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union; any question of international law; all acts, decisions, regulations and directives of the organs of the Union; and all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer

This chapter draws on a consultancy that the author conducted for Amnesty International in 2015 on the Malabo Protocol. These findings were used in a report that has now been published, see: Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, 22 January 2016, Index number: AFR 01/3063/2016.

jurisdiction on the Court'.[1] There was a concern that it would not be financially viable for the AU to administer two courts, this ACJ and the ACHPR Court. Proposals therefore started for the creation of a protocol to merge the two courts and a decision was taken that in the meantime the ACHPR Court should become operational.[2]

In parallel, discussions were also taking place on the continent on whether an African regional court should try Hissene Habré,[3] in part the response of African States to what they viewed to be a 'blatant abuse of the principle of universal jurisdiction'[4] to indict African leaders before the ICC and European courts for international crimes, and the perceived African bias by the International Criminal Court towards Africa.[5]

Combined with the desire to merge the ACHPR Court with the ACJ, and brought to a head with the indictment by the ICC of presidents and senior government officials including Al-Bashir of Sudan and Uhuru Kenyatta who would subsequently become President of Kenya,[6] the AU adopted in June 2014 the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the 'Malabo Protocol'). This created an African Court of Justice and Human and Peoples' Rights (ACtJHPR) setting out the details of its composition, jurisdiction and other issues in a Statute annexed to the Protocol (Statute of the ACtJHPR).[7]

[1] Protocol of the Court of Justice of the African Union, July 2003, Articles 2(2) and 19.

[2] Decision EX.CL/Dec.165 (VI) of 2005.

[3] Report of the Committee of Eminent African Jurists on the case of Hissene Habré, 2 July 2006, §§ 22–6.

[4] Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.243 (XIII), Rev.1, § 4. See also Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.271 (XIV), Feb 2010; Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.335 (XVI).

[5] See e.g. Decision on the Progress Report of the Commission on the Implementation of Decision Assembly AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.296 (XV). M. du Plessis, T. Maluwa and A O'Reilly, *Africa and the International Criminal Court*, Chatham House, International Law 2013/01, July 2013.

[6] See Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, Assembly/AU/Dec.221 (XII), 2009; Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245 (XIII), Rev.1; Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366 (XVII). See also N.J. Udombana, '"Can These Dry Bones Live?": In Search of a Lasting Therapy for AU and ICC Toxic Relationship', 1(1) *African Journal of International Criminal Justice* (2014) 57–76.

[7] Although the Malabo Protocol is entitled a Protocol 'on the African Court of Justice and Human Rights', it was decided, recognising the title of the ACHPR Court, that this new court

Most of the attention and discussion on the Malabo Protocol has centred around the ACtJHPR's criminal jurisdiction and concerns, for example, with the immunity clause which provided that '[n]o charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions, during their tenure of office'.[8] The human rights jurisdiction of the proposed Court has been less visible. This chapter will, firstly, provide an overview of the current ACHPR Court before moving on to consider the human rights jurisdiction of the proposed Court in the Malabo Protocol's Statute of the ACtJHPR. It will conclude with some practical suggestions as to how to take the issues forward.

2. THE HUMAN RIGHTS JURISDICTION OF THE ACHPR COURT AND ITS LIMITATIONS

As of November 2018, the ACHPR Court's website refers to 165 applications from individuals, 12 from NGOs and 3 from the African Commission, for its contentious jurisdiction that have been submitted to it since its inception. These are against States, the AU, Pan-African Parliament, the African Commission on Human and Peoples' Rights, and Mozambique Airlines. Of these, the Court found in a significant number of these cases that it lacked jurisdiction including for want of an Article 34(6) declaration by the State party,[9] by

should be entitled 'the African Court of Justice and Human and Peoples' Rights'. Furthermore, the Malabo Protocol itself has a number of broader provisions but the Statute of the ACtJHPR is contained in an Annex to the Protocol. This will be referred to throughout this chapter as 'Statute of the ACtJHPR'.

8 Article 46A *bis*, Statute of the African Court of Justice and Human Rights, Annex, Malabo Protocol.

9 *Ernest Francis Mtingwi v Republic of Malawi*, Application 001/2013, Decision of 15 March 2013; *Delta International Investments SA, MR, AGL de Lange and Mrs M de Lange v Republic of South Africa*, Application 002/2012, Decision of 30th March 2012; *Emmanuel Joseph Uko and others v Republic of South Africa*, Application 004/2012, Decision of 30th March 2012; *Amir Adam Timan v Republic of Sudan*; *Baghdadi Ali Mahmoudi v Republic of Tunisia*, Application 005/2012, Decision of 30th March 2012; *Femi Falana v* AU, Application 001/2011, Judgment of 26th June 2012; *Soufiane Ababou v People's Democratic Republic of Algeria*, Application 002/2011, Decision of 16th June 2011; *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, Application 005/2011, Decision of 16th June 2011; *Association Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d'Ivoire*, Application 006/2011, Decision of 16th June 2011; *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria*, Application 008/2011, Decision of 23rd September 2011; *National Convention of Teachers' Trade Union v Republic of Gabon*, Application 012/2011, Decision of 15th December 2011; *Michelot Yogogombaye v Republic of Senegal*, Application 001/2008, Judgment of 15th December 2009.

which they submit themselves to adjudication in communications filed by individuals and NGOs, because the individual or organization did not have standing,[10] or because the State had not ratified the Protocol,[11] or where it was brought against another actor, not a State.[12] It has held a number to be inadmissible,[13] and struck out others for the failure of the applicant to pursue the case.[14] For some where it has found no jurisdiction it has transferred cases to the African Commission.[15] It has decided on the merits, finding violations,[16] and ruled on provisional measures in several.[17] Other cases are pending. Public hearings have been held in several cases.[18] The Court's advisory jurisdiction has been requested on thirteen occasions.[19] This is a light docket

[10] *National Convention of Teachers' Trade Union v Republic of Gabon*, Application 012/2011, Decision of 15th December 2011.

[11] *Youssef Ababou v Kingdom of Morocco*, Application 007/2011, Decision of 2nd September 2011.

[12] E.g. against the Pan-African Parliament: *Efoua Mbozo'o Samuel v Pan African Parliament*, Application 010/2011, Decision of 30th September 2011; or the African Union itself: *Atabong Denis Atemnkeng v African Union*, Application 014/2011, Judgment of 15th March 2013.

[13] *E.g. Peter Joseph Chacha v United Republic of Tanzania*, Application 003/2012, Judgment of 28th March 2014; *Urban Mkandawire v Republic of Malawi*, Application 003/2011, Judgment of 21st June 2013.

[14] *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahariya*, Application 004/2011, Order of 15th March 2013.

[15] *Soufiane Ababou v People's Democratic Republic of Algeria*, Application 002/2011, Decision of 16th June 2011; *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, Application 005/2011, Decision of 16th June 2011; *Association Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d'Ivoire*, Application 006/2011, Decision of 16th June 2011; *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria*, Application 008/2011, Decision of 23rd September 2011.

[16] *Tanganyika Law Society and Legal and Human Rights Centre, and Reverend Christopher R Mtikila v Republic of Tanzania*, Applications 009 and 011/2011, Judgment of 14th June 2013; *The Beneficiaries of the Late Norbert Zongo and others v Burkina Faso*, Application 013/2011, Judgment of 28th March 2014; *Lohé Issa Konaté v Burkina Faso*, Application 004/2013, Judgment of 5th December 2014; *Alex Thomas v Tanzania*, Application 005/2013, Judgment of 20th November 2015.

[17] *African Commission on Human and Peoples' Rights v Libya*, Application 002/2013, Order of Provisional Measures, 15th March 2013; *Lohé Issa Konaté v Burkina Faso*, Application 004/2013, Order of Provisional Measures, 4th October 2013.

[18] E.g. *Wilfred Onyango Nganyi and others v Republic of Tanzania*, 006/2013; *Mohamed Abubakari v Tanzania*, 007/2014.

[19] *Republic of Mali*, 001/2011; *Advocate Marcel Ceccaldi on behalf of the Great Socialist People's Libyan Arab Jamahariya*, 002/2011; *Socio Economic Rights and Accountability Project*, 001/2012; *Pan African Lawyers Association and Southern African Litigation Center*, 002/2012; *Socio Economic Rights and Accountability Project*, 001/2013; *African Committee of Experts on the Rights and Welfare of the Child*, 002/2013; *Coalition on the International Criminal Court and others*, 001/2014; *RADDHO*, 002/2014; *Coalition on International Criminal Court, LTD/GTE*, 001/2015; *Centre for Human Rights University of Pretoria and Coalition of African Lesbians (CAL)*, 002/2015; *Centre for Human Rights, Federation of Women Lawyers in Kenya, Women's*

for the principal human rights judicial body in Africa and the Court itself has recognized the low ratification and declaration rate of States, which 'if such a situation were allowed to continue, the entire system of judicial protection of human rights at the continental level, which the Court symbolizes, would be adversely affected'.[20]

Article 3 of the ACHPR Court Protocol provides:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

An advisory jurisdiction is provided in Article 4 of the 1998 Protocol and the eleven member ACHPR Court has the capacity to reach an amicable settlement between the parties,[21] adopt provisional measures[22] and to interpret its judgments which are binding.[23]

There are several issues that have been the subject of some discussion with respect to the jurisdiction of the ACHPR Court. These relate principally to issues of standing in contentious and advisory cases, but also its broad jurisdiction.

3. THE ISSUE OF STANDING IN CONTENTIOUS CASES

One of the main criticisms that has been directed towards the ACHPR Court Protocol was that it did not permit individuals or NGOs (the mainstay of the African Commission's casework) to submit cases directly to the Court unless the State, in addition to ratifying the Protocol, also made a declaration under Article 34(6) of the Protocol to provide the Court with the jurisdiction to do so. For those eight States who have made this declaration,[24] jurisdiction on this

Legal Centre, Women Advocates Research and Documentation Centre, Zimbabwe Women Lawyers Association, 001/2016. Request No 002/2016 – Request for Advisory Opinion Association Africaine de Defense des Droits de l'Homme.

[20] Report of the African Court on Human and Peoples' Rights, January 2012, EX.CL/718 (XX), § 89.

[21] Article 9 1998 Protocol.

[22] Article 27(2) 1998 Protocol.

[23] Article 28, 1998 Protocol. See also Rule 26 of the Rules of Court.

[24] These are: Benin, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania. In March 2016 Rwanda notified the Court that it had deposited an instrument of withdrawal of its Article 34(6) declaration at the African Union Commission on 29 February 2016. In a case

basis is straightforward.[25] While there are an increasing number of cases that the Court has been able to deal with, many in relation to the host State Tanzania, Article 34(6) has inevitably limited the overall volume of cases the Court has and is likely to receive. As a result the issue of standing has been the focus of much of the debate on the African Court since its inception.[26] As the only other actors that Article 5 permits to submit cases to the Court are the African Commission, States and African intergovernmental organizations, and given States are unlikely to use an inter-State communication procedure, in reality this meant that the Court was, certainly in these early years, always going to be largely dependent on the African Commission for its workflow. The relationship with the Commission is complex, as will be discussed below, and it is not surprising that this was never going to be a fruitful source of the African Court's caseload. Parallels can inevitably be drawn with the early years of the Inter-American Court.[27]

Many of the early cases before the ACHPR Court have related to standing, specifically who can bring the case, and those where there has been a misunderstanding of the Court's jurisdiction with respect to who the case can be brought against. Therefore, a considerable number of the cases before the Court, alleging violations of a variety of rights, have not succeeded because they are brought by individuals or NGOs against States which have not made a declaration under Article 34(6) of the Protocol.[28] There has been

pending before the Court against Rwanda, *Ingabire Victoire Umuhoza v Republic of Rwanda*, Application 003/2014, the Court ordered that the parties should make written submissions on the effect of this withdrawal. The Court ruled in June 2016 that while Rwanda was entitled to withdraw its declaration, a one year notice period would apply and the Court still had jurisdiction to determine the matters in the case before it, Ruling on Jurisdiction, 3 June 2016. It subsequently adopted its judgment on 24 November 2017.

[25] *Urban Mkandawire v Republic of Malawi* Application 003/2011, Judgment, § 35.

[26] E.g. D. Juma, 'Access to the African Court on Human and Peoples' Rights. A Case of the Poacher Turned Gamekeeper', 4 *Essex Human Rights Law Review* (2007) 1–21; M. Ssenyonjo, 'Direct access to the African Court on Human and Peoples' Rights by Individuals and Non-governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008–2012', 2(1) *International Human Rights Law Review* (2013) 17–56.

[27] See e.g. D. Padilla, 'An African Human Rights Court: Reflections from the Perspective of the Inter-American System', 2(2) *AHRLJ* (2002) 185–194.

[28] e.g. *Delta International Investments SA, MR AGL de Lange and Mrs M De Lange v Republic of South Africa*, which alleged violations of torture and rights to dignity, property, information, privacy and discrimination where the Court held that as South Africa had not yet made a declaration under Article 34(6) of the Protocol 'it is evident that the Court manifestly lacks jurisdiction to receive the Application submitted' and therefore struck it off the list, Application 002/2012, Decision of 30th March 2012, §§ 9 and 10.

some rather innovative, albeit unsuccessful, attempts by some entrepreneurial lawyers to test the Court's approach to the limitations of Article 5.[29]

A few cases have tested the jurisdiction *ratione personae* with respect to the respondent, bringing cases against the AU organs;[30] and against a State which was not party to the AU Constitutive Act neither the Protocol.[31]

4. LIMITS OF THE ADVISORY JURISDICTION

The ACHPR's Court's advisory jurisdiction[32] is provided in Article 4 of the 1998 Protocol:

1. At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.
2. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting decision.

Only one State (Mali) has requested an opinion,[33] and concerns as to whether the African Commission on Human and Peoples' Rights and the African Committee on the Rights and Welfare of the Child are organs of the AU for the purposes of Article 4 are no longer an issue.[34] What is more

[29] See *In the Matter of Femi Falana v The African Union*, Application 001/2011, Judgment of 26th June 2012, and Dissenting Opinions of Justices Akuffo, Ngoepe and Thompson. Also *Atabong Denis Atemnkeng v AU* Application 014/2011, Judgment; *Michelot Yogogombaye v Republic of Senegal*, Application 001/2008, Judgment, 15th December 2009.

[30] E.g. Pan-African Parliament, *Efoua Mbozo'o Samuel v The Pan African Parliament*, Application 010/2011, Decision of 30th Sep 2011.

[31] *Youseff Ababou v Kingdom of Morocco*, Application 007/2011, Decision 2 September 2011, § 12.

[32] AP van der Mei, 'The Advisory Jurisdiction of the African Court on Human and Peoples' Rights', 5 *African Human Rights Law Journal* (2005) 27–46, at 32–7.

[33] *Demande d'Avis Consultatif*, 001/2011. In Application 002/2001, *Request for Advisory Opinion by Advocate Marcel Ceccaldi on behalf of the Great Socialist Peoples' Libyan Arab Jamahiriya*, the application was rejected because the author failed to prove he was acting on behalf of the State, Order of 30 March 2012.

[34] Article 5, Constitutive Act lists its organs as the Assembly, the Executive Council, the Pan-African Parliament, the African Court of Justice, the AU Commission, the Permanent Representatives Committee, the Specialized Technical Committees, the Economic, Social and Cultural Council and the Financial Institutions, It does also State that 'other organs that the Assembly may decide to establish'. In *the Matter of Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African*

interesting is the ability of NGOs to assert that they are 'African organisations recognised by the [AU]' for the purposes of Article 4 of the Protocol. In a series of Opinions adopted in 2017 the African Court closed this avenue for NGOs who had attempted to argue that as they had observer status before the African Commission on Human and Peoples' Rights and that this Commission was an organ of the AU, they were hence 'recognised' by the AU. The African Court disagreed.[35]

5. THE BREADTH OF THE JURISDICTION

The ACHPR Court has jurisdiction not only to rule on the interpretation and application of the African Charter on Human and Peoples' Rights (hereinafter 'African Charter') and the Protocol establishing the Court, but also 'any other relevant human rights instruments ratified by the States concerned'.[36] It is not uncommon for international and regional courts to draw upon each others' jurisprudence and this is an approach that has been adopted similarly by the ACHPR Court in numerous cases.[37] However, Article 3 of the 1998 Protocol enables the ACHPR Court to go further to find not only violations of the African Charter but also, for example, violations of the International Covenant on Civil and Political Rights and ECOWAS Treaty.[38] In this regard it was willing to rule on violations of the ICCPR, even where the State has not ratified the Optional Protocol permitting the Human Rights Committee jurisdiction to examine individual complaints;[39] and having found a violation of a particular right in the African Charter has then gone on automatically to conclude that this was also a violation of the right in the ICCPR given that the latter 'guarantees in the same manner' the right in the African Charter.[40]

The ACHPR Court's interpretation of *ratione loci*[41] and *temporis* have been relatively uncontroversial. However, while it has found jurisdiction where

Court on Human and Peoples' Rights, 5 December 2014, the ACHPR Court held that the African Committee on the Rights and Welfare of the Child was an organ of the AU.

[35] See Request For Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP) No, 001/2013, Advisory Opinion, 26 May 2017.

[36] Article 3 Protocol Establishing the African Court on Human and Peoples' Rights.

[37] In *Tanganyika Law Society and the Legal and Human Rights Centre v United Republic of Tanzania and Reverend Christopher R Mtikila v United Republic of Tanzania*, 009/2011 and 011/2011, § 107.3.

[38] *Matter of the Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and Le Mouvement Burkinabé des Droits de l'Homme et des Peuples*, Application 013/2011. See also *Lohé Issa Konaté v Burkina Faso*, §§ 36–37.

[39] *Matter of the Beneficiaries of the Late Norbert Zongo*, ibid., § 48.

[40] Ibid., § 170.

[41] *Lohé Issa Konaté v Burkina Faso*, § 41.

there is a continuing violation,[42] overall it has not been consistent in terms of the relevant date which is taken to determine its jurisdiction. It has on some occasions held that the relevant date was the date of ratification of the Charter, even if the violations took place before the Protocol came into force: 'by the time of the alleged violation, the Respondent had already ratified the Charter and was therefore bound by it. The Charter was operational and there was therefore already a duty on the Respondent at the time of the alleged violation to protect those rights'.[43] In contrast, it noted in other cases that there were a number of relevant dates: 'those of the entry into force, with regard to the respondent State, of the Charter (21 October 1986), the Protocol (25 January 2004), and the Covenant (4 April 1999) as well as the optional declaration accepting the jurisdiction of the Court to hear applications from individuals or non-governmental organizations (25 January 2004)'.[44] It went on to find that given that the violation of the right to freedom of expression took place 'on 10 May 2013 or well after the Respondent State had become Party to the Charter and the Covenant, and had made the declaration accepting the Court's jurisdiction to receive applications from individuals or non-governmental organizations (NGOs). Consequently, the Court finds that it has the *ratione temporis* jurisdiction to hear the allegation of violation of the right to freedom of expression'.[45]

6. THE MALABO PROTOCOL AND HUMAN RIGHTS

The Malabo Protocol needs to be understood as a reflection of its political and legal history. Building upon the desire initially to merge the ACHPR Court with the ACJ, its articles inevitably, in part, are influenced by not only the Protocol Establishing the African Court on Human and Peoples' Rights but also the Protocol on the Statute of the ACJ. The subsequent wish to extend the jurisdiction to including international crimes resulted in the drafters not only using these instruments and the ICJ Statute, for example, but also drawing heavily on the provisions of the Rome Statute, and the Statutes of the ICTR

[42] *Matter of the Beneficiaries of the Late Norbert Zongo*, supra note 38; *Urban Mkandawire v Republic of Malawi*, Application 003/2011, Joint dissenting opinion of Judges Gerard Niyungeko and El Hadji Guisse, § 9.

[43] *Consolidated Matter of Tanganyika Law Society and the Legal and Human Rights Centre v United Republic of Tanzania* and *Reverend Christopher R Mtikila v United Republic of Tanzania* Applications 009/2011 and 011/2011, § 84.

[44] *Lohé Issa Konaté v Burkina Faso*, Judgment, § 38.

[45] Ibid., § 40.

and ICTY. On the one hand this is positive: it reflects a willingness to learn from the existing courts and build upon examples of good practice. Indeed, there is evidence of incorporation of examples of good practice certainly in the criminal jurisdiction of the proposed Court.[46]

But the human rights provisions largely reflect the ACHPR Protocol with some tweaks that do not necessarily suggest a coherence in the approach of the drafters to draw or build upon the experience of the ACHPR Court. This is not to say that the Malabo Protocol does not include some positive elements which should be commended, such as providing the new Court with more autonomy in determining its own budget than existing Court;[47] or consolidating the requirement for gender representation on the bench.[48] However, it is difficult to see overall that there is a consistent or strategic approach to increasing or enhancing the strength of the proposed Court's human rights jurisdiction.

7. TOO BROAD A JURISDICTION?

Article 28 of the Statute of the ACtJHPR provides:

The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:

(a) the interpretation and application of the Constitutive Act;
(b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;
(c) 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;
(d) the crimes contained in this Statute, subject to a right of appeal;

[46] E.g. with the inclusion of a Defence Office on an equal status with the Office of the Prosecutor (Article 2, Malabo Protocol) and a Victims and Witnesses Unit (Article 22B(9)(a), Statute of the ACtJHPR).

[47] Statute of the ACtJHPR, Article 26.

[48] Article 3 of the Statute of the ACtJHPR provides that the 'Assembly shall ensure that there is equitable gender representation in the Court. This goes further than the 1998 Protocol which only requires that 'due consideration shall be given to adequate gender representation in the nomination process', and Article 14(3) that the representation shall only be 'adequate' not 'equitable'.

(e) any question of international law;
(f) all acts, decisions, regulations and directives of the organs of the Union;
(g) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;
(h) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
(i) the nature or extent of the reparation to be made for the breach of an international obligation.

This therefore includes not only human and peoples' rights but also international law and international criminal law. Many have criticized this breadth noting this is 'unprecedented under international law'.[49] There are a number of issues that arise for its human rights jurisdiction.

Firstly, it is argued that by combining the three different jurisdictions into one Court the human rights mandate will be diluted. As has been evidenced in part by the discussions leading up to the adoption of the Malabo Protocol, many are concerned that criminal matters will be more visible, and human and peoples' rights will be sidelined. Furthermore, it is argued that combining a court which is to determine not only State responsibility but also individual criminal responsibility, is unworkable,[50] not least because of the different standards of evidence that apply and the likelihood that the latter will take significantly more resources.[51]

Secondly, there are also concerns that the legacy of the current ACtHPR and any experience it has acquired will be lost. Suggestions that there be a separate court for criminal trials,[52] or that States should be given the option of accepting only jurisdiction on general affairs, human rights or criminal matters,[53] were refused.

Finally, it is also argued that if States have to ratify a protocol providing a Court with the jurisdiction to try international crimes as well as human rights, they may refuse to ratify at all (whereas they may have ratified courts with distinct jurisdictions).[54]

[49] F. Viljoen, 'AU Assembly should consider human rights implications before adopting the Amended merged African Court Protocol', 2012, AfricLaw, available online at http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/, § a.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid., § b.

8. STRUCTURE OF THE COURT AND NUMBER OF JUDGES

The way in which the proposed ACtJHPR is structured raises a question as to whether there are sufficient numbers of judges able to deal with the human rights cases and a lack of clarity as to how this will be managed. The new court is to be composed of 16 judges.[55] Article 16 of the Statute of the ACtJHPR provides that there will be three sections for the new Court: general, human and peoples' rights and international criminal law. Article 16(3) States that the 'allocation of judges to the respective Sections and Chambers shall be determined by the Court in its Rules'. Furthermore, the 'President and Vice President shall, in consultation with the Members of the Court and as provided for in the Rules of Court, assign Judges to the Sections'.[56] This would appear to be appropriate. However, there is inconsistency with Article 6 which provides that it is the Chairperson of the AU Commission which will separate out the lists of candidates into the different Sections prior to their actual election.[57] This implies that in practice the determination of which judges will sit in which Sections is determined not by the Court but by the AU. Although this may have been a formulation borrowed from the ICC, it raises certain challenges and will require careful consideration when judges are nominated.

Article 17 provides for the process for assignment of matters to Sections of the Court. Here the General Affairs Section appears to act as the default

[55] Article 3(1) Statute of the ACtJHPR.

[56] Article 22(3) Statute of the ACtJHPR.

[57] Article 6 Statute of the ACtJHPR reads: 1. For the purpose of election, the Chairperson of the Commission shall establish three (3) alphabetical lists of candidates presented as follows:

   i. List A containing the names of candidates having recognized competence and experience in International law;
   ii. List B containing the names of candidates having recognized competence and experience in international human rights law and international humanitarian law; and
   iii. List C containing the names of candidates having recognized competence and experience in international criminal law.

2. States Parties that nominate candidates possessing the competences required on the three (3) lists shall choose the list on which their candidates may be placed.
3. At the first election, five (5) judges each shall be elected from amongst the candidates on lists A and B, and six (6) judges shall be elected from amongst the candidates of list C respectively.
4. The Chairperson of the Commission shall communicate the three lists to Member States, at least thirty (30) days before the Ordinary Session of the Assembly or of the Council during which the elections shall take place.

Section for the Court, in that 'all cases . . . except those assigned to the Human and Peoples' Rights Section and International Criminal Law Section' will fall within its mandate. Given that similarly, the Human and Peoples' Rights Section is competent to hear 'all cases relating to human and peoples' rights' and the International Criminal Law Section is similarly competent to hear 'all cases relating to the crimes specified in this Statute', this is a broad approach and does not address the issue of where there is an overlap or where cases involve one or more elements of international law, human and peoples' rights and international crimes.

9. TREATIES WITHIN THE COURT'S JURISDICTION

As noted above Article 28 of the Statute of the ACtJHPR provides a broad range of instruments upon which the ACtJHPR may be required to rule. In some respects this reflects the mandate of the current ACHPR Court as set out in Article 3 of the 1998 Protocol. Besides the concern, dealt with above, of combining a criminal and human rights jurisdiction, and leaving aside the debate around the breadth of the list of crimes provided for in the Statute of the ACtJHPR, and the possibility, as outlined in its Article 28(2)(A), for further crimes to be added,[58] Article 28 also refers to 'other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity', as well as the ACHPR, ACRWC, Protocol on the Rights of Women in Africa, 'or any other legal instrument relating to human rights, ratified by the States Parties concerned' will be under its jurisdiction, in addition to the other documents referred to in sub-sections (e)-(i).[59] On the one hand, some have noted that this breadth is extensive and unworkable.[60] On the other, however, international courts such as the ICJ have shown themselves able to rule on an extensive range of international and indeed international human rights issues. The ACHPR Court itself does not appear to have been daunted by the potential for it to rule on other treaties beyond the African Charter and where it has been required to do so, has taken a pragmatic approach. It may be, therefore, that these provisions will in practice provide litigants with greater scope and the Court with greater freedom.

[58] A. Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects', 60 *Netherlands International Law Review* (2013) 27–50, p.36.

[59] See also Article 31 of the Statute of the ACtJHPR.

[60] M. Du Plessis, 'Implications of the AU Decision to give the African Court jurisdiction over international crimes', ISS Paper 235, June 2012, p.6.

10. STANDING

Judges of the current ACHPR Court have shown sympathy with the idea that individuals and NGOs should be able to access the Court directly,[61] but on the whole they have not considered that this is within the power of the Court to change given the restrictions of Articles 5 and 34(6). Rather they have viewed this as being an issue for the Member States to determine.[62]

With respect to individuals and NGOs, the opportunity that the Malabo Protocol may have provided to increase access of individuals and NGOs directly to the Court proved unsuccessful. Articles 29 and 30 of the Statute of the ACtJHPR provide:

> **Article 29**
> Entities Eligible to Submit Cases to the Court
>
> 1. The following entities shall be entitled to submit cases to the Court on any issue or dispute provided for in Article 28:
>   (a) State Parties to the present Protocol;
>   (b) The Assembly, the Peace and Security Council, the Parliament and other organs of the Union authorized by the Assembly;
>   (c) A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union;
>   (d) The Office of the Prosecutor.
> 2. The Court shall not be open to States, which are not members of the Union. The Court shall also have no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol.
>
> **Article 30**
> Other Entities Eligible to Submit Cases to the Court
>
> The following entities shall also be entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by 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 relevant to human rights ratified by the States Parties concerned:

[61] Separate Opinion of Judge Fatsah Ouguergouz in *Femi Falana*, § 37: 'same as Mr Falana, I am in favour of the automatic access to the Court by individuals and non-governmental organizations'.

[62] Ibid.

(a) State Parties to the present Protocol;
(b) the African Commission on Human and Peoples' Rights;
(c) the African Committee of Experts on the Rights and Welfare of the Child;
(d) African Intergovernmental Organizations accredited to the Union or its organs;
(e) African National Human Rights Institutions;
(f) African individuals or African Non-Governmental Organizations with Observer Status with the African Union or its organs or institutions, but only with regard to a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a State Party which has not made a Declaration in accordance with Article 9(3) of this Protocol.

To be welcomed is that whereas the 1998 Protocol does not permit the African Committee on the Rights and Welfare of the Child nor NHRIs to submit cases to the Court, they are able to do so before the new ACtJHPR.

Unfortunately, however, limiting standing to 'African individuals or African Non-governmental organizations' which are defined in Article 1 as 'Non-governmental Organizations at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council', raises questions about the potential for further restrictions on NGOs accessing the court. Whether international NGOs would fall within this definition is debatable. 'African individuals' are not defined in the preamble.

Similarly, Article 53 of the Statute of the ACtJHPR is more prescriptive than Article 4 of the 1998 Protocol with respect to the Court's advisory jurisdiction. Article 53 reads:

1. The Court may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions or any other organ of the Union as may be authorized by the Assembly.
2. A request for an advisory opinion shall be in writing and shall contain an exact Statement of the question upon which the opinion is required and shall be accompanied by all relevant documents.
3. A request for an advisory opinion must not be related to a pending application before the African Commission or the African Committee of Experts.

This appears to limit requests for advisory opinions only to organs of the AU and closes the door on NGOs and others having this capacity.

11. REMEDIES

The ACHPR Court has a broad remit under Article 27(1) to 'make appropriate orders to remedy the violation including the payment of fair compensation or reparation'. Indeed, Article 27(1) requires that the Court 'shall' do so if a violation is found. Rule 63 of the Rules of Court provides that such an order can be part of the same decision finding the violation or 'if circumstances so require, by a separate decision'.

The ACHPR Court in its practice so far has been prepared to order a range of remedies and reparations from guarantees of non-repetition;[63] damages, both material and moral[64]; costs and compensation[65]; and publication and dissemination of the ACHPR's judgment.[66] These orders have been made in some cases in the judgment itself,[67] and in others in a separate ruling on reparations.[68] In general it has held that 'any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation', citing ICJ case law and that this is a principle of customary international law, and as provided for in Article 27(1) of the Protocol.[69] Applicants have to provide the necessary evidence to support their claims.[70]

Article 45 of the Statute of the ACtJHPR does not make reference to the possibility of separate rulings on reparations.

12. MONITORING AND EXECUTION OF JUDGMENTS

Article 43 of the Statute of the ACtHPR largely reflects Article 28 of the 1998 Protocol for the current ACHPR Court. Article 43 reads:

[63] *Ruling on Reparations on Application 011/2011, Rev Christopher R Mtikila v United Republic of Tanzania*, § 43.

[64] *Judgment on Reparations. In the Matter of Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabé Human and Peoples' Rights Movement v Burkina Faso*, Application 013/2011, 5 June 2015, § 26.

[65] *Ruling on Reparations on Application 011/2011, Rev Christopher R Mtikila v United Republic of Tanzania*, § 29.

[66] Ibid., § 44.

[67] E.g. *Alex Thomas v Republic of Tanzania*, see e.g. § 159.

[68] E.g. *Ruling on Reparations on Application 011/2011, Rev Christopher R Mtikila v United Republic of Tanzania*.

[69] Ibid., § 27.

[70] *Tanganyika Law Society and the Legal and Human Rights Centre v United Republic of Tanzania and Reverend Christopher R Mtikila v United Republic of Tanzania*, 009/2011 and 011/2011, § 124.

Judgments and Decisions

1. The Court shall render its judgment within ninety (90) days of having completed its deliberations.
2. All judgments shall State the reasons on which they are based.
3. The judgment shall contain the names of the Judges who have taken part in the decision.
4. The judgment shall be signed by all the Judges and certified by the Presiding Judge and the Registrar. It shall be read in open session, due notice having been given to the agents.
5. The Parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States and the Commission.
6. The Executive Council shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.

Furthermore, Article 46 reads:
Binding Force and Execution of Judgments

1. The decision of the Court shall be binding on the parties.
2. Subject to the provisions of Article 18 (as amended) and paragraph 3 of Article 41 of the Statute, the judgment of the Court is final.
3. The parties shall comply with the judgment made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.
4. Where a party has failed to comply with a judgment, the Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment.
5. The Assembly may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act.

The ACHPR Court is still grappling with the exact nature of its role with respect to monitoring and execution of its judgments. Article 31 of the 1998 Protocol provides: 'the Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgement'. In fact the current Court has also adopted other reports in the case of Libya identifying its failure to comply with an order for provisional measures.[71] The ACHPR Court has also suggested that it should be able to

[71] Interim Report of the African Court on Human and Peoples' Rights notifying the Executive Council of Non-Compliance by a State, in accordance with Article 31 of the Protocol, available online at: www.african-court.org/en/images/documents/Reports/AFCHPR_Interim_Report__Non_compliance_by_a_State__-_Libya.pdf

report not just once a year (which had become the practice) but to 'each regular session of the Assembly' as required under Article 31.[72]

13. LEGAL AID

Article 10(2) of the current ACHPR 1998 Protocol provides that 'free legal representation may be provided where the interests of justice so require'. No such provision is provided for in the Statute of the ACtJHPR. Although there is reference to the possibility of legal assistance being funded from the Trust Fund[73] in relation to 'victims of human rights violations or their families', the new Statute does not appear to reflect fully the work that the ACHPR Court has done on this issue.[74] On the other hand, the provisions provided a Defence Office in the criminal jurisdiction of the Court gives effect to the right to counsel for individual defendants in the criminal cases. It maybe, in that context and in light of the current protocol, the legal aid policy would still be maintained to increase the scope of possible human rights cases.

Practical and other challenges arising from its merging of human rights with other jurisdiction and how to address them.

As can be seen from the examples provided above, the Malabo Protocol may make some welcome amendments with respect to the human rights jurisdiction of the proposed Court which reflect the experience of the existing ACHPR Court, but in other respects the changes are more troubling. The question is what can now be done to work with the Malabo Protocol.

It is worth stressing that the Malabo Protocol is likely to take several years to come into force, even if the 15 States required[75] are willing to ratify it

[72] Activity Report of the African Court for the Year 2013, 10. The Court is currently in the process of considering a detailed methodology for how it will monitor implementation of its judgments and how it will share that task with the AU organs. See R. Murray, D. Long, V. Ayeni and A. Some, 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights', 1 *African Human Rights Yearbook* (2017) 150–166.

[73] Article 46M, Statute of the ACtHPR. A draft Statute on the Establishment of the Legal Aid Fund of the African Court on Human and Peoples' Rights

[74] The 2013 Report of the African Court notes that the Court adopted a Legal Assistance Policy at its 27th session in order to 'facilitate indigent applicants to be able to effectively litigate applications before the Court', and called for applications for those lawyers able to be on a Roster to assist such applicants. Further consultancy was being carried out to develop a Legal Assistance Fund, Activity Report to the African Court for the year 2013, EX.CL/825 (XXIV), §§ 35–8. See Legal Aid Policy for the African Court on Human and Peoples' Rights, 2014–2015, available online at: http://en.african-court.org/index.php/component/k2/item/27-legal-aid-policy-2014–2015.

[75] Article 11 Malabo Protocol.

quickly. As of November 2018 there are only 11 signatories and no ratifications. There is considerable confusion, given the existence of not only the Malabo Protocol but also previous Protocols as well as the ACHPR Court 1998 Protocol that it is by no means clear for States which instrument they should be ratifying. In addition, the potential clash between compliance with the Rome Statute obligations and with the provisions of the Malabo Protocol around immunities in particular, as well as the steer given by the AU not to cooperate with the ICC may have prompted reluctance on some States to ratify.[76] This confusion, lack of clarity and timeframe can be exploited to ensure that if and when the Malabo Protocol does come into force, its human rights jurisdiction is stronger than currently reflected in its provisions.

14. CONSOLIDATING AND STRENGTHENING THE EXISTING ACHPR COURT

The ACHPR Court has continued to function during these negotiations and it will continue to function until the Malabo Protocol comes into force. A weak human rights court with a limited jurisprudence behind it and which has had little opportunity to explore the breadth of its mandate is less likely to leave much of a mark on the continent. If this time can be used to bolster the legacy of the ACHPR Court, some of the concerns with the human rights jurisdiction of the proposed ACtJHPR may become obsolete.

There are various ways this could be developed. Firstly, this could be through continuing strategic and other litigation on substantive rights, particularly those which the African Commission on Human and Peoples' Rights has not also yet had the opportunity to consider. In addition, increasing use of the ACHPR Court's advisory jurisdiction by AU organs, the African Commission and African Committee on the Rights and Welfare of the Child should be encouraged.

There is of course the issue of whether States should be encouraged to ratify the 1998 Protocol. At the very least the 22 that have already ratified but not made an Article 34(6) declaration should be encouraged to do so in order to

[76] See e.g. Decision on the International Criminal Court, Assembly/AU/Dec.590(XXVI), January 2016, 'Commends the Republic of South Africa for complying with the Decisions of the Assembly on non-cooperation with the arrest and surrender of President Omar Al Bashir of The Sudan' and 'The imperative need for all African States Parties to the Rome Statute of the ICC to continue to ensure that they adhere and articulate common agreed positions in line with their obligations under the Constitutive Act of the African Union'.

ensure access by individuals and NGOs and thereby increase the likelihood of a fuller docket of the Court.[77]

Furthermore, the relationship between the ACHPR Court and the African Commission on Human and Peoples' Rights is fundamental to the future of the human rights courts on the continent. Article 2 of the 1998 Protocol provides for the ACHPR Court to complement the protective mandate of the African Commission. As noted above the African Commission is among one of the bodies entitled to submit a case directly to the ACHPR Court under Article 5 of the 1998 Protocol. Article 6 enables the Court to request the opinion of the African Commission when the former is deciding issues of admissibility and gives it the option of transferring cases to the Commission.[78] The 1998 Protocol and the Rules of the Court reflect the fact that the functioning of the ACHPR Court is intrinsically linked to that of the African Commission.

Besides simple matters such as the ACHPR Court requesting the African Commission's clarification on whether the NGO has observer status before the Commission,[79] and whether the case is still pending before the Commission or has been withdrawn,[80] more importantly, the African Commission retains the power to submit cases to the Court directly through Article 5. Rule 118 of the Commission's Rules of Procedure set out three situations in which cases may be submitted to the ACHPR: in the event of a failure to comply with its recommendations; failure to comply with its provisional measures; or if the situation is considered to be one of serious or massive violations. Although it has used this opportunity on very few occasions[81] and has, it is argued, not necessarily thought through fully the implications of these cases before the Court, this issue is unlikely to go away before the proposed Court. Any clarity that can therefore be obtained at this stage in working through the instances where the African Commission will submit cases to the ACHPR Court can only be of assistance for any future court.

[77] Indeed, the AU Human Rights Strategy includes among one of its indicators 'four Member States make a declaration allowing individuals CSOs direct access to the Courts', Department of Political Affairs, African Union Commission, Human Rights Strategy for Africa, 2012–2016, 3.2.

[78] Article 6(3).

[79] E.g. *National Convention of Teachers Trade Union v Republic of Gabon*; *Association Juristes d'Afrique Pour La Bonne Gouvernance v Republique de Cote d'Ivoire*

[80] As required by Rule 29(6) of the Rules of Court, see *Urban Mkandawire v Republic of Malawi*, Application 003/2011, Judgment, § 33.

[81] *Matter of African Commission on Human and Peoples' Rights v Republic of Kenya*, Application 006/2012. *In the matter of African Commission on Human and Peoples' Rights v The Great Socialist Libyan People's Arab Jamahiriya*, Application 004/2011.

Conversely, there are numerous cases where the ACHPR Court has referred cases to the African Commission.[82] The grounds for doing so are not particularly clearly explained but raise a number of issues and the inconsistency and lack of clarity in the approach of the Court in this regard has been identified by one judge, Judge Fatsah Ouguergouz, who has issued numerous dissenting opinions repeating his concern with the way in which the Court has handled this issue.[83]

The opportunity now to further articulate the criteria on which the ACHPR Court will refer cases to the African Commission should not be missed. As Ouguergouz notes, consideration of whether referral is done on the basis, for example, of alerting the Commission to a situation of serious or massive violations and thereby acting as a form of 'early warning system' for the African Commission, goes to the heart of what role both the ACHPR Court and the African Commission play in the African human rights system as a whole.[84]

Similar considerations are also relevant to the relationship with the African Committee on the Rights and Welfare of the Child. Although the Malabo Protocol mentions this Committee only briefly, there is reference in Article 27 of the Statute of the ACtJHPR to the need for the Court to bear in mind its relationship of complementarity not only with the African Commission on Human and Peoples; Rights but also this Committee in the elaboration of its Rules.

Further work needs to be done on how the ACtHPR's judgments will be monitored in terms of their implementation by States. The roles of the Assembly, Executive Council and other AU organs in this regard need to be transparent and considered. Further engagement with the Court and AU bodies on this issue will be of relevance to any new Court.

Finally, it is not at all clear that the current ACHPR Court is yet particularly well known. The confusion at its inception between it and the ACJ has continued and been exacerbated by the extended criminal jurisdiction and finally the Malabo Protocol itself. Arguably, only those with an intimate knowledge of the AU and these developments fully understood the context and which Court was actually operational. It is not clear that much has changed 10 years on, despite valiant efforts by organisations such as the

[82] E.g. *Ekollo Moundi Alexandre v Republic of Cameroon and Republic of Nigeria*, Application 008/2011. *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*; *Association Juristes d'Afrique Pour La Bonne Gouvernance v. Republique de Cote d'Ivoire*.

[83] See in particular *Ekollo Moundi Alexandre v Republic of Cameroon and Republic of Nigeria*, Application 008/2011.

[84] Ibid., Dissenting Opinion of Judge Ouguergouz, §§ 29–30.

Coalition for an African Court to increase the number of ratifications and declarations under Article 34(6).

15. STRENGTHENING THE HUMAN RIGHTS MACHINERY AND BODIES ON THE CONTINENT

Through its Human Rights Strategy the AU commits itself to enhancing:

> Coordination and collaboration among AU and RECs organs and institutions and Member States;
>
> Strengthen the capacity of AU and RECs institutions with a human rights mandate; Accelerate ratification of human rights instruments;
>
> Ensure effective implementation of human rights instruments and decisions;
>
> Increase promotion and popularization of African human rights norms.[85]

This is to be achieved through, among other things, 'strengthened capacity of institutions at continental, regional and national Levels'.[86]

Besides the ACHPR Court, it is also important that sight is not lost of the African Commission, not least because regardless of what will happen to the Court, the Commission's mandate is unaffected. In addition, there are a range of other organs and bodies in the AU which have a role in human rights. This includes not just, for example, the Peace and Security Council or Pan-African Parliament, but also the African Peer Review Mechanism and ECOSOCC.

The opportunities missed, when the OAU transformed into the AU, for the development of a coherent overall strategy for engagement between the AU human rights bodies and instruments, could be taken up now. This could include revisiting the AU's Human Rights Strategy and specifically to 'consolidate and review co-ordination, complementarities and subsidiarity gaps and overlaps in the African human rights system, as well as reform of affected instruments in the human rights framework for policy decision and action to be taken'.[87] Continued regularly engagement between the relevant organs could also be accompanied by mapping out respective roles and relationships. It is imperative that the AU organs respect the independence of both the African Commission and the African Court and do not continue along the path they appear to be treading with the adoption in July 2018 of a decision

[85] Human Rights Strategy for Africa, AU Commission, § 24.
[86] Human Rights Strategy for Africa, AU Commission, § 29(b).
[87] Human Rights Strategy for Africa, AU Commission, Summary of Outputs, 1B.

calling into question decisions of the Commission and signaling a shift towards greater interference by the AU political organs in their work.[88]

Lastly, one should not forget some fundamental principles underlying the establishment of any new or expanded court. These include not only a focus on the rights of victims, whether from an international criminal or human rights law perspective, but also the importance of an independent, robust and experienced bench.

Building on work that the AU has already done to improve the pool of candidates for judges on the ACHPR Court and clarifying criteria for appointment it is hoped has dissuaded States from nominating and electing individuals who hold positions which will be incompatible with being a member of the judiciary. If these policies and procedures can be made more robust with respect to the existing ACHPR Court as well as the African Commission and African Committee of Experts on the Rights and Welfare of the Child, it is hoped by the time the Malabo Protocol comes into force they will be well established in practice.

16. CONCLUSION

Practically taking these issues forward with respect to the human rights jurisdiction requires not only working with the existing ACHPR Court, but also engagement with the AU, other bodies at the regional as well as the sub-regional and national levels. One of the challenges is that this requires consideration not just of human rights but also international law and international criminal law, and therefore necessitates conversations with and among a range of what are often seen as different groups of organizations and sectors.

Amending the provisions of the Malabo Protocol, on the face of it, does not appear to be too onerous a procedure, requiring either that the Court itself proposes amendments, or a State party 'makes a written request to that effect to the Chairperson of the Commission. The Assembly may adopt, by simple majority, the draft amendment after all the States parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment'.[89] In practice this is likely to be extremely difficult and

[88] 'Decision on the Report of the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR), EX.CL/Dec.1015 (XXXIII); and Decision on the Activity Report of the African Court on Human and Peoples' Rights (AfCHPR), EX,CL/Dec.1013 (XXXIII).

[89] Article 12, Malabo Protocol.

there may be little appetite now for further amendments. In addition, opening up the text of the Protocol also opens the possibility that the result may be less favourable than the current provisions.

The drafters of the Malabo Protocol were willing to draw upon examples of good practice in other international and regional courts. States and civil society organizations can take advantage of this positive approach and use the occasion to develop softer tools, including first drafts of Rules of the Court, practice directions, guidelines, polices and memoranda of understanding. This may also provide further opportunities for the experience of the ACHPR Court to be incorporated into documents for the new court. Furthermore, referring to examples from the domestic courts in Africa, something the drafters of the Malabo Protocol did not appear to do, should also be considered.

Many hope that the Malabo Protocol, for its many flaws, might slip into obscurity and never come into force. At the very least, even if it is in the shadow of the highly ambitious establishment of a regional court, there is now a chance for some consolidation and strengthening of what the continent already has. It would be a shame if this opportunity were not taken.

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Complementarity between the International Criminal Law Section and Human Rights Mechanisms in Africa

PACIFIQUE MANIRAKIZA

1. INTRODUCTION

Until quite recently, domestic criminal law and institutions were regarded as primary tools for the effective enforcement of the African Charter on Human and Peoples' Rights (African Charter) and other human rights treaties relevant to Africa, as far as criminal justice is concerned.[1] Today, Africa is expanding its frontiers by exploring new paths to enhance protection of human and peoples' rights. In 2014, the African Union (AU) Assembly of Heads of State and Government adopted the *Malabo Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Malabo Protocol)[2] which is posed to be a major contribution to the development of international law. The Protocol sets up a 'megacourt' since, for the first time, an international court will have jurisdiction on both human rights, international/African criminal matters and general affairs of international law. While this is a salutary and innovative initiative, the future court, in this particular format, will certainly face challenges, which could undermine its effectiveness.

However, the major innovation of the *Malabo Protocol* is undoubtedly the institution of the first ever regional criminal court, with jurisdiction on

[1] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, African Commission, 15 May 2006, at 215; *Gabriel Shumba v. Zimbabwe*, *Communication 288/04, African Commission, 2 May 2012, at 194(2); Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt, Communication 323/06, African Commission, 16 December 201,1 at 275(v).*

[2] *Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, adopted at the Twenty-Third Ordinary Session of the African Union Assembly, 26–27 June 2014, Malabo, Equatorial Guinea; see Decision on the Draft Legal Instruments (Doc. Assembly/AU/8(XXIII)).

international crimes and serious crimes of African international law.[3] This chapter will then focus on the Criminal Section of the future Court in order to explore its relationship with the existing human rights mechanisms in Africa, as well as its potential contribution to the protection of human and peoples' rights on the continent. In fact, the chapter argues that the new African Criminal Court (ACC) should be embedded within the broader system of human rights protection in Africa. Therefore, the chapter sheds some light on legal issues at the intersection of human rights and international criminal law in the African context. Then, Section 2 briefly addresses the general question of the relationship between (international) criminal law and human rights law. Section 3 explores the Criminal Section's interactions with the major African human rights mechanisms. Section 4 concludes by putting forward the theory of mutual reinforcement between different entities for a better strengthening of the African human rights system.

2. A COMPLEX RELATIONSHIP BETWEEN (INTERNATIONAL) CRIMINAL LAW AND HUMAN RIGHTS

Analyzing the relationship between criminal law and human rights is the starting point towards a better understanding of the relationship between the future ACC and other human rights mechanisms on the continent. In fact, (international) criminal law (ICL) and international human rights law (IHRL) have been cohabitating since time immemorial. Their relationship is sometimes harmonious, and other times tense.

A. *A Harmonious Relationship between Criminal and Human Rights Law*

International criminal law and human rights law have both matured and developed in the context of mass atrocities committed during the twentieth century, which have culminated in the perpetration of the Holocaust of Jews by the Nazis during the Second World War, the genocide in Rwanda, the ethnic cleansing in the Balkans and other mass criminality in other parts of the world. Both branches of law make the same call: ending impunity of

[3] On the envisaged Court, see P. Manirakiza, 'The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa', in V. Nhemielle (ed.), *Africa and the Future of International Criminal Justice*, (Den Haag [Pays Bas], Eleven International Publishing, 2012) 375–404; G. Werle and M. Vormbaum (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol* (The Hague, TMC Asser Press, 2017).

perpetrators of core crimes, which also correspond partly to serious violations of human rights. It is therefore understandable that ICL and IHRL share the same goals and are, to some extent, mutually reinforcing. For instance, in certain areas such as due process, both branches of international law protect the same values. They both enshrine the same fundamental principles that are the tenets for fairness of proceedings. Both ICL and IHRL instruments, for example, provide for the principle of legality, the principle of non-retroactivity, the presumption of innocence, etc.[4] In some circles, it seems like both branches of international law are of the same nature. They are presented as the two sides of the same coin. To that effect, international criminal law is viewed at times as 'an outgrowth of human rights law and celebrated as one of the most significant developments in the struggle to hold human rights violators accountable.'[5]

Similarly, ICL and IHRL reinforce each other; which allow each branch to reach its potential and fulfil its purpose. Before the development of the ICL discipline, most human rights treaties relied on domestic criminal law and institutions to ensure their effective enforcement. This fully explains why most human rights instruments request States parties to criminalize some acts deemed to be human rights violations.[6] Likewise, the former are duty-bound to investigate human rights violations, prosecute and eventually punish persons responsible for rights violations in accordance with their criminal laws.[7]

[4] See, for example, the *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 16 December 1966, Art. 14; *Rome Statute for the International Criminal Court*, Doc. A/CONF.183/9; 17 July 1998, Arts. 66 and 67; *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*; SC Res. 955, 8 November 1994; subsequently amended by SC Res.1165 (1998), SC Res.1329 (2000), SC Res.1411 (2002) and SC Res. 1431 (2002); Art. 20.

[5] A. Clapham, '*Human Rights and International Criminal Law*', in W.A. Schabas (ed), *Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2016), at 5.

[6] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 39/46, 10 December 1984, Art. 4; *Forced Labour Convention*, 1930 (No. 29); Adopted on 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session, Art. 25, etc.

[7] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan* (African Commission on Human and Peoples' Rights), Decision of May 27, 2009, at 147; *Velasquez Rodriguez Case (Velasquez Rodriguez v. Honduras)*, judgment of July 29, 1988 (Inter-American Court of Human Rights), at 166; *Prosecutor v. Anto Furundzija*, (ICTY: Judgment, 10 December 1998), at 145.

The development of ICL has provided a valuable tool to complement human rights law and to reinforce its application. For instance, the creation of international and internationalized criminal courts relevant to Africa[8] have contributed to protect and uphold human rights enshrined in the African Charter on Human and Peoples' Rights (African Charter) and other human rights treaties relevant to Africa. Therefore, ICL has also contributed in supplementing the domestic criminal law and institutions which were regarded as primary tools for the effective enforcement of human rights instruments.

Moreover, the criminalization of systematic and serious human rights violations is a continuation of the human rights struggle by other means. Professor Mégret somewhat emphasizes this by stating that 'the apex of the human rights movement comes in the form of a tribunal that is not a human rights tribunal properly so-called.'[9] This explains the critical role the human rights community plays, both at national or international level,[10] to ensure that perpetrators of human rights violations do not go unpunished. However, it seems peculiar that the African human rights community, especially civil society organizations, did not support nor promote the idea of an African regional criminal court in the beginning![11] In fact they opposed the idea perhaps due to the context in which it has been nurtured, i.e. the tension

[8] International and hybrid courts relevant to Africa are the International Criminal Tribunal for Rwanda; the Special Court for Sierra Leone; The International Criminal Court and the Hissène Habré Special Court.

[9] F. Mégret, 'The Politics of International Criminal Justice', 13–15 *European Journal of International Law* (2002) 1261–84, at 1265.

[10] For instance, Human rights NGOs under the umbrella of the Coalition for an International Criminal Court actively pushed for the creation of the ICC and intensively lobbied governmental representatives during the Rome Conference on the establishment of the ICC; Commissions of Inquiry or fact-finding missions put in place to investigate allegations of human rights violations usually recommend or call upon criminal tribunals to ensure individual accountability; see for example, the Commission of Inquiry in Burundi recommended that Burundian authorities 'Initiate, as soon as possible, an investigation into the crimes committed in Burundi in the light of the conclusions contained in the present report and other information at its disposal.', see *Report of the Commission of Inquiry on Burundi*, A/HRC/36/54 (2017) at 99. Similarly, a fact-finding mission carried out by the African Commission on Human and Peoples' Rights recommended 'the establishment of an independent internationally supported special tribunal in Burundi whose mandates include holding perpetrators of human rights violations and other abuses criminally accountable during the current crisis', see *Report of the Delegation of the African Commission on Human and Peoples' Rights on Its Fact-finding Mission to Burundi*, December 2015, at 172 c).

[11] In a Statement signed up by 30 civil society organizations, the latter stated: 'The African Court is an important continental mechanism to promote the ideals of justice, accountability and human rights. However, we recognise that the Court is currently limited in its mandate (its focus is on human rights violations of the African Charter), its judges are not specialists in international criminal law, and it has no prosecutorial or investigative powers or institutional

between AU and the International Criminal Court (ICC). Consequently, they complained of having been sidelined in the discussion leading to the adoption of the *Malabo Protocol*.

Finally, ICL has strengthened the human rights regime in two ways at least. Firstly, the criminalization and elevation of serious human rights violations, whether committed in peacetime or wartime, to the level of international crimes confirm that they are an affront to the entire humanity, not simply a matter for the individual victims. For example, torture constitutes an international crime punishable either as a crime against humanity,[12], a war crime[13] or even genocide[14] if the legal ingredients are present. Secondly, ICL plays a protective role of human rights. For example, the international criminal law's affirmation of the principle that serious human rights violations amounting to international crimes are not subject to statutory limitations[15]. Thus, it further reinforces the human rights regime and upholds human dignity.

In return, IHRL has contributed to the development and the humanization of ICL. Even if this is not obvious at the first glance, it is important to underline that human rights law provides the parameters within which international criminal law is implemented.[16] For instance, IHRL constrains key players in the area of the international justice to act within its confines. It is not trivial that the Rome Statute prescribes that applicable law before the ICC 'must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'[17] For Professor Mégret, human rights law constitutes the 'constitutional' framework of reference that prevents international criminal law from

capacity to take on the extra burden of bringing to justice perpetrators of international crimes. There is the further danger that loading this responsibility on the African Court will undermine its early progress towards acting as a dedicated regional human rights mechanism.' see *Statement by Representatives of African Civil Society and the Legal Profession on the Implications of the African Union's Recent Decisions on Universal Jurisdiction and the Work of the International Criminal Court in Africa*, Cape Town, 11 May 2009: available online: www.hrw.org/sites/default/files/related_material/2009_CapeTown_%20statement.pdf (visited 10 August 2017)

[12] Judgment, *Akayesu*, (ICTR-96–4-T), Trial Chamber, 2 September 1998, at 593 and 595; Judgment, *Furundžija* (IT-95–17/1-T), Trial Chamber, 10 December 1998, *at. 141*.

[13] Ibid., *at. 162*.

[14] Ibid., *at. 141*.

[15] *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, GA Res. 2391 (XXIII), 26 November 1968; Art. 29 ICC St.

[16] Clapman, supra note 5, at 20.

[17] Art. 21(3) ICC St.

derailing into an illiberal system.[18] Therefore, human rights law has the potential to act as a guideline to teleological interpretations of international criminal law.[19] Additionally, needless to say that due process, which is an important characteristic of a rule of law society, is as much a concern for IHRL as it is for ICL. IHRL fixes the parameters of due process in criminal proceedings. Today, due process standards go beyond respect of the rights of the accused to include those of the victims, which have, quite recently, infiltrated the international criminal proceedings.[20]

B. *A Suspicious Relationship between Criminal and Human Rights Law*

The apparent convergence of the two disciplines is also marred with tensions, at times confrontation. Criminal law is sometimes suspected to be a violator of human rights standards. In fact, criminalizing a certain conduct, either as an act or an omission, entails a restriction of rights, at least the right to liberty, personal autonomy, etc. In this spirit, the primary role of human rights law is to afford protection to human rights holders from criminal law.[21] In order to minimize the negative impact of criminal law on human rights, most international and regional human rights treaties contain protective provisions aimed at securing rights. For instance, there are provisions aimed at ensuring fair trial guarantees to persons suspected or accused of perpetrating crimes.[22] This demonstrates that human rights doctrine entertains a suspicion towards criminal law and it therefore supports a human right law intervention in order to ensure protection and to humanize criminal proceedings.

Similarly, it is to be noted that sometimes there is a normative tension between the two disciplines. For instance, the ICL position on the right to

[18] F. Mégret, 'Prospects for 'Constitutional' Human Rights Scrutiny of Substantive International Criminal Law by the ICC, With Special Emphasis On the General Part', *Roundtable in Public International Law and Theory*, Washington University School of Law, Whitney R. Harris World Law Institute, International Legal Scholars Workshop (Saint Louis, 4–6/2/2010).

[19] P. Soares, 'Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism', 23 *Criminal Law Forum* (2012) 161–91, at 190–1.

[20] Arts. 15(3); 68(3); 75 and 79 ICC St.; Judgment, *Lubanga* (ICC 01/04–01/06), Trial Chamber, 14 March 2012 at 14.

[21] F. Tukens, 'The primary, traditional role of human rights is to afford protection from the criminal law' 9 *Journal of International Criminal Justice* (2011), 577–95, at 579.

[22] ICCPR, Art. 14, Art. 7; African Charter; Malabo Protocol, Art. 46(A).

habeas corpus or provisional release differs from that of IHRL. ICL places a heavy burden of proof on the accused who has to demonstrate exceptional circumstances justifying his/her provisional release.[23] This contradicts the philosophy of human rights according to which detention is an exception and liberty the principle![24]

International criminal norms do also constrain the applicability of human rights law. For example, the principle of non-retroactivity may be a limitation to the enjoyment of human rights, especially the rights of victims. The latter cannot be vindicated for some particular harmful conducts which were not considered criminal at the time they were committed. For instance, discovering new crimes may be in the interests of the rights of victims, while the accused will successfully argue that this violates the right not to be tried for a crime that did not exist at the time the acts were committed. Similarly, when the accused has not been formally charged for such conduct by the prosecution, criminal judges are not allowed to make a determination of culpability for that in the course of a trial on other counts.[25] The rights of the accused will then trump those of the victims in this particular instance.

Despite the paradoxical nature of international criminal law, both as human rights protector and violator,[26] this branch and human rights law reinforce each other and there is a deep interconnection between them. The above overview of the interaction between ICL and IHRL provides the framework that helps to conceptualize and understand the relationship between their distinctive enforcement mechanisms in the African context.

[23] For an overview of how the legal regime changed over the time, see R. Sznajder, 'Provisional Release at the ICTY: Rights of the Accused and the Debate that Amended a Rule' 11 *Nw. J. Int'l Hum. Rts.* (2013) 110; K. Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization* (The Hague: Asser Press, 2016) International Criminal Justice Series 5, at 189–289.

[24] ICCPR, Article 9(3): '(. . .) It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.', see also *General comment No. 35 Article 9 (Liberty and security of person)*, CCPR/C/GC/35, 16 December 2014, at. 37 where the Human Rights Committee holds that 'Extremely prolonged pretrial detention may also jeopardize the presumption of innocence under article 14, paragraph 2'.

[25] Lubanga, supra note 20, at 629–30 (re: sexual violence related crimes which were not part of the indictment).

[26] M. Delmas-Marty, 'Le paradoxe pénal', in M. Delmas-Marty and C. Lucas de Leyssac (eds), *Libertés et droits fondamentaux* (Paris: Seuil, 1996) 368–92, at 368.

3. DEVISING A RELATIONSHIP BETWEEN THE CRIMINAL LAW SECTION AND THE AFRICAN HUMAN RIGHTS MECHANISMS

The core argument of this chapter is that the ACJHR's Criminal Law Section is an addition to the African human rights mechanisms and therefore serves the same cause. Henceforth, entities pursuing the same objective – human rights protection – should not be competing but they should respectfully complement one another. The principle of complementarity, and to a certain extent the principle of comity, can guide the relationship between the ACC and the human rights mechanisms.

A. *Complementarity as a Guiding Principle*

Complementarity as it is used in this chapter should not be taken in its technical sense provided for in ICL, especially the Rome Statute.[27] Here, it is used in its ordinary and plain meaning referring to 'a relationship or situation in which two or more different things improve or emphasize each other's qualities'[28] or 'the state of working usefully together'.[29] In concrete terms, in order for them to achieve their goals or objectives, I suggest that the future ACC and the existing human rights mechanisms will be of assistance to one another, both at the institutional and the jurisprudential level.

1. Complementarity at the Institutional Level

The current African human rights system is conceived in accordance with the Westphalian philosophy. According to the latter, founded in a state-centric law approach, only States are the duty-bearers of international obligations. Only they can be found responsible for human rights violations, including those committed by non-state actors (NSAs) and individuals.[30] So the three main pillars of the African human rights system[31] are competent to only

[27] Art. 1 and preamble, par.10 ICC St.

[28] *Oxford English Dictionary*, available online at: https://en.oxforddictionaries.com/definition/complementarity (visited 15 August 2017).

[29] Cambridge Dictionary, available online at: http://dictionary.cambridge.org/dictionary/english/complementarity (visited 15 August 2017).

[30] Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) v Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights (2001), at 58.

[31] P. Manirakiza, 'Typology and Appraisal of the African Human Rights System', in G. DiGiacomo and S. Lang, *The Human Rights Institutions: Developments and Practices* (Toronto, University of Toronto Press), 2018, 181–201.

determine State responsibility for human rights violations. In traditional IHRL, NSAs and individuals cannot be held accountable for human rights violations, except indirectly in accordance with domestic laws of member State Parties to relevant instruments. However, the new *Malabo Protocol* innovates in that it enshrines the principle of individual and corporate criminal responsibility,[32] making the future mechanism be the first international court equipped with corporate criminal jurisdiction. This is laudable given the fact that NSAs and individuals nowadays are involved in perpetration of human rights violations amounting to international crimes (child soldier recruitment or conscription and use in armed conflicts, child labour, human trafficking, etc.). The fact that the Criminal Section is empowered to prosecute individuals and corporate entities is a major complement to the African human rights mechanisms. It will actually expand the scope and the reach of the latter. Therefore, the Malabo Protocol helps to send the message IHRL is not sending: individuals and corporations, like States, can be held responsible for human rights violations. They can be directly prosecuted and take the blame themselves instead of blaming their national state for their actions.[33]

The fact that the existing human rights mechanisms are not empowered to prosecute persons responsible for human rights violations is a major impediment to their efforts aimed at achieving victims' justice. One has to rely on States' apparatuses to ensure that perpetrators are effectively prosecuted and punished, which is not often the case. The creation of the ACC will strengthen the African system of human rights by enhancing the African capacity to provide remedies for human rights violations.[34] Therefore, the International Criminal Law Section is not a replacement but an important addition to the African human rights architecture. It is a necessary component in the African struggle for the promotion and the protection of human rights; it adds a second layer on the human rights protection shield in Africa.

However, the new criminalization of gross human rights violations on the continent does not necessarily guarantee the improvement of the human rights situation. One has to understand that the ACC is not a panacea. Like any other criminal tribunal, it has its own and inherent limitations in terms of its resources, methods and objectives that will constrain its functioning. For instance, none can expect it to dig into the root-causes of massive and serious human rights violations, i.e. the systemic and structural problems that give rise to them, as this may not be relevant to its final objective, which is to determine

[32] Arts. 46B, 46C Malabo Protocol.
[33] Ibid.
[34] Manirakiza, supra note 3, at 383–6.

guilt or innocence of the accused individual. That is why other less constrained institutions such as the African Commission and the future Court's Human Rights Section will still be relevant and well-positioned to address the root-causes of human rights violations. However, to better address situations of serious human rights violations requires a complementary approach of criminal and human rights justice.

2. The International Criminal Law Section and the African Commission on Human and People' Rights

The African Court, as it stands today, entertains a special and statutory working relationship with its sister institution, the African Commission on Human and Peoples' Rights (ACHPR). In fact, the Court has been created to complement the protective role of the Commission.[35] The modalities of this relationship are provided for in the rules of procedure of both institutions,[36] and they are refined in annual statutory meetings between the Court and the Commission.[37] The Criminal Law Section will certainly capitalize on this existing practice, looking at the Commission as a special partner. The partnership between the Criminal Law Section and the African Commission is founded on necessity and it is justified by mutual reinforcement for better effectiveness.

(a) THE AFRICAN COMMISSION COMPLEMENTS THE CRIMINAL LAW SECTION

Being a trailblazer in the field of human and peoples' rights in Africa, the quasi-judicial African Commission has developed methods to improve the enjoyment of human rights on the continent. It is now equipped with impressive tools and expertise that the Criminal Section can take advantage of, being the newcomer in this domain. In this regard, the Commission can assist the Section in many areas, including evidence gathering and the implementation of its decisions and judgments, contributing therefore to its mission to end impunity and ensure justice for victims of gross human rights violations.

(i) The African Commission as an 'Investigator' for the Criminal Section

The African Commission enjoys investigative powers which are exercised in a variety of ways. The Commission can conduct fact-finding missions, *proprio*

[35] Art. 4 African Court St.

[36] Art. 114 – 23 African Commission Rules of Procedure; Arts. 5, 6(1) & (3), 8 and 33 African Court Protocol.

[37] Art. 115 African Commission Rules of Procedure.

motu[38] or at the request of AU policy organs.[39] Fact-finding missions are important tools to gather facts and evidence of gross human rights violations. By conducting fact-finding missions, one needs to keep in mind that the objective of the Commission is not for the purpose of criminal prosecutions but rather denunciation, monitoring and advocacy for proper respect and protection of human rights. At the same time, fact-finding missions, most of the time, do reach substantive findings, e.g., the perpetration of international crimes such as crimes against humanity, war crimes and even genocide sometimes.[40] Moreover, material and testimonial evidence is collected, along with a list of potential suspects sometimes.

Similarly, through the protective mandate of the African Commission, the amount of information provided by parties to a communication, along with its own information gathering mechanism make the Commission get a big picture and the full scope of human rights violations in a particular situation.

The question that arises then is to what extent the information gathered and the evidence collected through fact-finding missions and during the examination of communications (cases) can be useful to the Criminal Section? Certainly, they are not irrelevant. First of all, it should be reminded that in virtually every situation, human rights professionals, including those from the Commission, arrive on the field long-time before criminal investigators and other analysts deployed in the name of an international, hybrid or regional court. Being the first ones to show up, most of the time when the situation is still dire, human rights experts experience dramatic situations and can collect valuable information including fresh evidence of potential crimes. Criminal investigators and analysts on their part are deployed years after the perpetration of the crimes. It is then understandable that the first source for their work is to be those reports and other open materials from human rights professionals.[41]

[38] Art. 45(2) and 46 African Charter; Art. 81 African Commission Rules of Procedure. Missions of these nature have been carried out in CAR (September 10– 14th, 2014), Mauritania (June 19–27th, 1996), Zimbabwe (June 24–28th, 2002), etc.

[39] Art. 45(4) African Charter; Missions of these nature have been carried out to Sahraoui Republic (September 24–28th, 2012), see AU Executive Council, Decision EX.CL/Dec. 689 (XX) (2012) and recently to Burundi (December 7–13th, 2015), see Peace and Security Council, *Communiqué PSC/PR/COMM.(DLI)*, para. 12(iv), 17 October 2015.

[40] For instance, the Commission's fact-finding mission in Mali concluded that 'The Aguel'hoc and Diabali attacks may also be classified as crimes against humanity. The rape carried out against women and girls during the crisis are crimes against humanity and should be judged by the International Criminal Court in the absence of action by the Malian Government.'. See *Report of the Fact-Finding Mission to the Republic of Mali*, 3–7 June 2013, at 91.

[41] This was the case for instance for ICTR investigators who relied heavily on reports from human rights community in their early work, such as reports of the Special Rapporteur of the Commission on Human Rights, Mr. René Degni Segui, who concluded that acts of genocide

Similarly, one can anticipate that the Criminal Section will seriously consider and even rely on the work of the African Commission. The latter can share information at its disposal with the former. This is imperative and advisable considering that the Commission uses a flexible methodology, which enables its staff and members to get access to valuable sources of information, in a non-adversarial or suspicious environment. Also, the Commission has a network of informants and collaborators, either within governmental structures or within the civil society community, which are key sources of information. Henceforth, as Bergsmo and Whiley hold, '(...) human rights organizations are often well placed to contribute to the analysis and further investigation of the crime base upon which any given inquiry and investigation must in large part rest. Knowledgeable human rights professionals also tend to have a detailed understanding of the conflict in question, its main actors and the chronology of relevant patterns of events which can aid criminal investigation services in their analysis of the allegations of crimes and subsequent prioritization or selection of cases for prosecution.'[42] The information provided by human rights professionals can therefore be useful and/or constitute a starting point for investigations. It can also help in case selection or the establishment of contextual elements of crimes when it is necessary.

The Criminal Section's investigators will however keep in mind that the evidence was not primarily collected for criminal purposes. Therefore, a question arises whether or not the Commission's generated evidence can be used in court as such and/or, related to this, whether a member or staff of the Commission can appear before the Criminal Section as a witness. And if yes, under what conditions this can take place? In the absence of any indication in the Malabo Protocol or other basic legal instruments, one can explore and seek guidance from the international case law and practice. In the *Situation of*

and crimes against humanity were committed in Rwanda; see for instance *Report on the Situation of Human Rights in Rwanda*, UN Doc E/CN.4/S-3/1, 25 May 1994 at 48, 54. For Burundi, there is no doubt that ICC investigations will definitely rely on the substantive reports from the UN Commission of Inquiry on Burundi (*Report of the Commission of Inquiry on Burundi*, A/HRC/36/54 (2017); the United Nations Independent Investigation on Burundi Committee of Independent Experts (*Report of the United Nations Independent Investigation on Burundi (UNIIB) Established Pursuant to Human Rights Council resolution S-24/1*, A/HRC/33/37 (2016).

[42] M. Bergsmo and W. H. Wiley, 'Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes', in S. Skåre, I. Burkey and H. Mørk (eds), *Manual on Human Rights Monitoring, An Introduction for Human Rights Field Officers*, (Oslo: Norwegian Centre for Human Rights, 2008) at 28.

the Democratic Republic of Congo, ICC investigations and prosecutions were made possible because of the information the Prosecutor's Office got from different organizations, mostly from the United Nations. For the most part, documents and other material received from the UN, especially the UN peacekeeping Mission in Congo (MONUC) were handed to the Prosecutor's Office under the condition of confidentiality, pursuant to prior agreements between the UN and ICC.[43] Under the *Relationship Agreement between the International Criminal Court and the United Nations*, 'The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.'[44] It is worth mentioning that confidentiality is not absolute; it can be waived by the UN or the relevant UN programme or agency and disclosure of the evidence is possible upon their consent.[45]

However, in such situation, the Prosecutor finds himself in a dilemma because on one hand he is bound by the confidentiality towards the information provider[46] and, on the other hand, he is under the duty to disclose evidence in his possession or control to the defence, especially exculpatory evidence, in the name of fairness and respect for fair trial rights of the accused persons.[47] Therefore, which duty takes precedence in this kind of situation? This issue was dealt with and settled in *Lubanga* case where the Prosecutor was unable to disclose to the defence more than 200 documents that contain potentially exculpatory information or evidence that is potentially material to the preparation of the defence because the Prosecutor had obtained the

[43] *Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court (with Annexes and Exchange of Letters)*, [hereinafter MONUC MOU], New York, 8 November 2005, Art. 10(6).

[44] *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, [hereinafter ICC-UN Agreement], 4 October 2004, art. 18(3); see also MONUC MOU, Art. 10(6).

[45] ICC-UN Agreement, Art. 18(3) and Art. 20; MONUC MOU, Art. 10(10).

[46] Art. 54(3)(e) of the ICC Statute provides that the prosecutor may agree not to disclose material obtained on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; see also ICC-UN Agreement, Art. 18(3) and Art. 20; MONUC MOU, Art. 10(6).

[47] Art. 67 (2) ICC St.

documents on condition of confidentiality.[48] While the Trial Chamber was of the opinion that the Prosecutor should disclose relevant evidence, the Appeals Chamber took a different approach when it holds that 'If the Prosecutor has obtained potentially exculpatory material on the condition of confidentiality pursuant to article 54 (3) (e) of the Statute, the final assessment as to whether the material in the possession or control of the Prosecutor would have to be disclosed pursuant to article 67 (2) of the Statute, had it not been obtained on the condition of confidentiality, will have to be carried out by the Trial Chamber and therefore the Chamber should receive the material. The Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality agreement and cannot order the disclosure of the material to the defence without the prior consent of the information provider.'[49] Therefore, although confidentiality is a paramount principle, which can assist the Prosecutor discharge its mandate derived from the ICC Statute, at the same time, it should not be to the expense of fairness of the proceedings.

Regarding the possibility of UN staff or officials posed to appear as witnesses before the ICC, it should first be stressed that they enjoy privileges and immunities, including the immunity from legal process in respect of all words spoken or written and all acts performed by them in the performance of their mission for the United Nations.[50] As the privileges and immunities are enjoyed in the interests of the United Nations and continue to exist notwithstanding the fact that the holder is no longer employed on any such mission, then the UN Secretary General has 'the right and the duty to waive those immunities in any case where, in his opinion, they can be waived without prejudice to those interests.'[51] The law and protocols require that their immunity be waived by the employer organization. For instance, in the same *Lubanga* case, the immunity of a former Special Rapporteur for the UN Commission on Human Rights in Congo was waived by the UN in order for him to testify as an expert witness before the ICC, pursuant to a court

[48] Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', *Lubanga* (ICC-01/04–01/06 OA 13), Appeals Chamber, 21 October 2008 at 21.

[49] Ibid., at 3 and 48.

[50] *Convention on the Privileges and Immunities of the United Nations*, 16 UNTS, (1946–1947), 13 February 1946, Art. VI.

[51] *Letter re: The Prosecutor v. Thomas Lubanga Dvilo: Expert Testimony of Mr. Roberto Garreton, from Mr. Peter Taksce-Jensen Assistant Secretary-General in charge of the Office of Legal Affairs to Ms. Silvana Arbia, Registrar International Criminal Court*, 23 January 2009, at 2.

order.[52] Sometimes, the UN can still appoint a representative before the ICC to assist the employee or official during its testimony.[53]

If we apply this to the relationship between the African Commission and the future Criminal Section, the former is undoubtedly a potential information provider to the latter, given its standing as human rights promoter and protector on the continent for the last 30 years.[54] So, to what extent is the Commission prepared to play its role of an indirect investigator for the Criminal Section? Like the UN, it does not need to receive a special mandate as such; the investigative powers of the Commission derive straight from its mandate as defined by the African Charter.[55] However, there will be a need to adjust its *modus operandi* in consideration of its potential indirect investigator status. For instance, the Commission will need to revisit how it carries out its fact-finding missions, for its factual and legal findings to be relevant to the work of the Criminal Section. They are supposed to be conducted in a more rigorous manner than mere promotional field visits. The latter are more or less a diplomatic exercise aimed at sensitizing the visited State Party on the mission and mandate of the Commission; the latter gets also informed on the State's human rights best practices and challenges. Which means, fact-finding missions need to be planned properly so as to distinguish them from promotional missions and to clearly outline the objective of collecting evidence of serious human rights violations amounting to international crimes. For that purpose, fact-finding missions need to be carried out in a relatively reasonable timespan. It is to be noted that whether fact-finding missions are initiated *proprio motu* by the Commission or requested by the AU policy organs, they have been conducted in a few days,[56] casting doubt over the quality and substance of the evidence that can reasonably be collected during that time span. Fact-finding missions should then be taken seriously; time and resources should be devoted to them for better results.[57]

Moreover, the Commission will need to adopt a clear policy guiding its relationship with the future Criminal Section. The policy should explain why

[52] Ibid., at 3.
[53] ICC-UN Agreement, Art. 16(2).
[54] The Commission was operationalized in November 1987, a year after the African Charter on Human and Peoples' Rights became into force, available online: www.achpr.org/files/news/2017/11/d314/30_anniversary_celebrations_bronchure_eng.pdf (visited 6 December 2017).
[55] Art. 45(2) and 46 African Charter; Art. 81 African Commission Rules of Procedure.
[56] Missions in CAR last only 5 days; Burundi: 6 days; Sahraoui Republic: 5 days.
[57] P. Manirakiza, 'The African Human Rights System: A Multi-pillar Legal and Institutional Framework', in G. DiGiacomo and S. Kang (eds), *The Institutions of Human Rights: Developments and Practices*, (Toronto: Toronto University Press, Forthcoming, 2018)

collaboration in a human rights friendly initiative well-warranted; it should also address, inter alia, the issue of its members or staff testifying as expert witnesses, the question around the kind of information that can be shared, when, how and under what conditions (e.g. confidentiality), etc. Later on, building on the UN-ICC relationship agreement as an example, a special agreement should be established between the African Commission and the Criminal Section, which will regulate the complementarity in the particular context of criminal proceedings.

Whether the information or evidence gathered from the ACHPR will actually be used before the Criminal Section, as well as its attached value, will depend on a range of factors. One, the criminal investigators must find it relevant to a potential case; and, due regard must be shown to the accused's fair trial rights. While the information can be used in court provided it is relevant and reliable, the Prosecutor should be conscious that some of its evidence may have been collected by ACHPR in violations of suspects' fundamental rights. Most of the time, suspects may be interviewed by human rights professionals but they have no clue that their testimony will be used against them in court. Similarly, third party witnesses may testify against some individuals without full knowledge that they are collaborating in disguised criminal investigations. The information gathered from third party witnesses will be relayed to criminal investigators without giving suspects an opportunity to say something or to rebut it. Therefore, when adducing that evidence, the Prosecutor should do it in a manner consistent with the rights of the accused. For instance, the disclosure rule should be respected and the accused should get the entire document or conversation for his/her own perusal. Otherwise the proceedings may derail and even collapse, as was the case in *Lubanga* and Gbagbo.

Regarding the value of information and evidence obtained from the ACHPR, the defence can oppose the reliance on materials from external sources. But, as the single judge sitting in the *Gbagbo* case held, 'there does not exist in the applicable law any impediment to the use of such material, or any requirement that it be corroborated.'[58] However, he was of the opinion that those materials from external sources are not of conclusive evidentiary value by themselves. The court must analyse all the material placed before it, in order to determine what weight must be given to each.[59]

[58] Public Redacted Version Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'; Gbagbo (ICC-02/11–01/11), Appeals Chamber, 13 July 2012 at 54.

[59] Ibid.

In brief, although the ACHPR cannot carry out criminal investigations or prosecutions, it can nevertheless gather facts and other material evidencing serious human rights violations.[60] Henceforth, the Criminal Law Section may take over the task and substantially rely on information collected by ACHPR. It is to be reminded that the future Criminal Section Investigation team will not big enough to cover each corner of hot spots, i.e. crisis/conflict zones. The Section will not be therefore benefit from the expertise and the work of the African Commission. Similarly, it can rely on its expertise, experience and network to ensure implementation or follow-up of the Section's orders and judgments.

(ii) The African Commission as an (Enforcement Agent) of the Criminal Section's Decisions and Judgments

The Criminal Section, like any other international criminal court, will rely on State cooperation to enforce its decisions. Since it will not be equipped with a police force or penitentiary facilities for instance, States parties to the *Malabo Protocol* will certainly be called upon to assist the court to enforce its orders and judgments.[61] In the real life, States rarely comply with court orders which risk political implications as exemplified by the arrest warrant issued by the ICC against President Al Bashir of Sudan.[62] Furthermore, they resist and often defy orders or sanctions, which concern them directly or indirectly.[63] The Criminal Section may suffer the same fate as other African institutions in terms of non-compliance with its orders or sanctions. Existing human rights mechanisms, the African Commission in particular, can contribute to ensure follow-up of and compliance with its decisions. This can be done in different

[60] One caution, ACHPR members or staff should not been seen as disguised investigators. This can jeopardize their mission and impede State cooperation, which is critical in order to gather facts and information on human rights violations. States have begun to be suspicious towards human rights officers or experts working on the fields. Burundi for instance has declared persona non grata three experts who were members of the United Nations Independent Investigation on Burundi Committee of Independent Experts, see Letter No 204.01/988/Ref/2016 from the Minister of External Relations and International Cooperation addressed to all ambassadors and representatives, declaring Ms. Maya Sahli Fadel, Mr. Christof Heyns and Mr. Pablo de Greif.

[61] Art. 46L(1)(2) Malabo Protocol.

[62] Many countries, including ICC States Parties, such as Malawi, Chad, Democratic Republic, Kenya, South Africa and Jordan have refused to comply with ICC orders to arrest President Al Bachar while present on their territories for official visits.

[63] See for instance Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', *Kenyatta* (ICC-01/09–02/11–1032), Appeals Chamber, 19 August 2015; Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, *Al-Bashir* (ICC-02/05–01/09), Pre-Trial Chamber II, 6 July 2017.

ways. In the course of the execution of its promotional mandate, Commissioners can raise questions about the visited State Party's level of compliance with decisions of the Criminal Section. The Commission can also use its extensive networks to lobby States institutions and monitor compliance during its promotional visits. Similarly, during the examination of periodic reports, special mechanisms holders or the entire commission can pose questions and push State representatives to respond and make their position known publicly.

(iii) The African Commission as an Agent of the International Criminal Justice System

One of the main objectives of the whole international criminal justice system is to ensure justice for victims. A web of judicial, quasi-judicial and non-judicial institutions concur to the attainment of that objective. The African Commission is part of that community of justice-prone institutions; it contributes to ensure criminal accountability of perpetrators of gross human rights violations. For instance, once a State party is found responsible for Charter violations that amount to international crimes, at the conclusion of its protective proceedings by the way of communications, the African Commission orders investigations and/or prosecutions as a form of remedy.[64] Furthermore, it will ensure that its orders and decisions are complied with. In so doing, the quasi-judicial organ exercises a quasi-criminal jurisdiction[65] and henceforth pursues the objectives of eradicating the impunity of mass atrocities, ensuring justice for victims and preventing further serious violations. By requiring investigations and prosecutions of serious human rights violations amounting to international crimes for instance, ACHPR is immensely contributing to the achievement of the goals of the international criminal justice system, as represented here by the Criminal Law Section. In a sense, ACHPR does also share the same goal with the Criminal Law Section: ending impunity of mass atrocities and ensuring justice for victims.

(b) the criminal law section complements achpr

The African Commission constantly expresses its concerns regarding the suffering of victims of serious human rights violations as well as the impunity

[64] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02 (African Commission), 15 May 2006 at 215; *Gabriel Shumba v. Zimbabwe, Communication 288/04 (African Commission), 2 May 2012 at 194(2); Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt, Communication 323/06 (African Commission), 16 December 2011 at 275(v).*

[65] A. Huneeus, 'International Criminal Law by Other Means: The Quasi-criminal Jurisdiction of the Human Rights Courts', 107 (1) *American Journal of International Law* (2013) at 1–2.

that the perpetrators of the said abuses continue to enjoy.[66] In order to address this situation, as it has been highlighted above, the Commission, at its level, usually requests States to investigate and prosecute serious human rights violations. Alternatively, it draws the attention of the Assembly of the AU Heads of State and Government, in accordance with art. 58 of the African Charter[67]. However, it is to be noted that this approach is not particularly effective, given the level of impunity of atrocity crimes and also the fact that States rarely conform to the Commission's decisions. Mindful of this, the Commission has been welcoming the creation of international criminal tribunals and calling upon African States to rapidly ratify their respective constitutive instruments.[68] The Commission's vision and expectation of the role of the criminal courts is that they will enhance and immensely contribute to the protection of human and peoples' rights on the continent.[69] It is within this perspective that I submit, as it has been highlighted above, that the Criminal Section contributes to further protection of human rights in Africa. In fact, it complements well the protective work of the Commission by providing an additional layer to current continental criminal apparatus whose pillars are constituted of domestic courts. In this perspective, the Criminal Section can then strengthen the African criminal infrastructure against the impunity of massive or serious human rights violations.

3. The International Criminal Law Section and Other Court's Sections

(a) building a systemic internal harmony

It has been mentioned earlier that the *Malabo Protocol* sets up an impressive judicial structure equipped with three distinct sections: the Human and Peoples' Rights Section; the General Affairs Section and the International

[66] *87: Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court (*African Commission on Human and Peoples' Rights, 38th Ordinary Session, Banjul, The Gambia from 21 November to 5 December 2005 (preamble); *344: Resolution on the fight against impunity in Africa* - ACHPR/Res. 344(LVIII) 2016 (preamble, paras. 8 and 9).

[67] Art. 58 African Charter.

[68] *344: Resolution on the fight against Impunity in Africa* - ACHPR/Res. 344(LVIII) 2016 ('Welcoming the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights granting the court criminal jurisdiction over international crimes affecting Africa' (preamble, para. 7)); *87: Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court*, ACHPR/Res.87(XXXVIII) 05 (preamble).

[69] *59: Resolution on the Ratification of the Statute of the International Criminal Court by OAU Member States*, Pretoria, South Africa; 16th May 2002.

Criminal Law Section.[70] Each section is endowed with a special jurisdiction; each one is reasonably expected to have its special rules of procedure, which will differ from a section to another. For instance, the criminal court does not abide by the exhaustion of local remedies while this is a requirement for the human rights and general sections. Also, the methods and purpose of each section differ substantially. The Criminal Section's purpose, for example, is to determine the individual criminal responsibility while the Human Rights and General Affairs Sections determine state responsibility for the violations of international law. In short, each section of the Malabo 'megacourt' is, in itself, a 'mini-court', with a particular set of international law rules to apply and interpret. This may present, at the face of it, the risk of fragmentation of the applicable law because there is no supremacy or primacy of a section over the others. The lack of a hierarchical relationship raises the question of how to ensure an internal legal harmonization, at least in the areas of convergence. A reading into Article 33(3)(c) of the Vienna Convention on the Law of Treaties, which provides for the method of systemic integration, may offer a way to explore. In accordance with the latter method, 'each instrument of international law must be interpreted and applied in a manner that safeguards harmony within the broader normative environment.' The method is highly regarded by the International Law Commission 'as one of the main tools for counteracting the normative fragmentation of international law. It is widely regarded as one of the main channels that enable the concurrence between special and general international law.'[71] Likewise, the fact that the different sections of the Africa Court are not stand-alone entities is a potential way to avoid fragmentation and instead consolidate the system.

So, although each section of the megacourt will be interpreting and applying different instruments, it is expected that each section will resort to the method of systemic integration to interpret treaties and other instruments relevant to its mission and area of specialization. In order to cement the expected systemic legal coherence at the African court, the next section analyses the intimate and unavoidable relationship between the Criminal Law and the Human Rights Sections.

(b) relationship between the criminal law section and the human rights section of the court

At the outset, it is important to note that the Criminal Law Section and the Human Rights Section are distinct despite the close relationship between

[70] Art. 16(1) Malabo Protocol.

[71] V.P. Tzevelekos, 'The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?', 31 *Mich. J. Int'l L.* (2010) 621, footnote 7.

international criminal law and human rights law as explored in Section 2. If one considers the methods and the objectives of each section, the procedure before the Criminal Section aims at fostering individual responsibility, while the human rights procedure pursues the determination of State responsibility for human rights violations. However, the two procedures can mutually reinforce each other. First of all, the Human Rights Section, like the ACHPR, will be exercising what an author calls 'quasi-criminal jurisdiction'[72] because it can order, as remedies, States parties responsible for violations to investigate and prosecute international crimes. Thereafter, the Section will ensure and monitor States' compliance with its orders. In so doing, the Human Rights Section will be complementing the efforts the Criminal Law Section will be deploying to ensure that the impunity gap is closed and that justice is done for the victims of serious human rights violations amounting to international crimes.

Also, the complementarity of the Human Rights Section can go beyond that and be much more direct. For instance, in the course of its proceedings, if the Human Rights Section gets ample information that can evidence a possible perpetration of international crimes, can it seize the Criminal Law Section? Although it will not technically be called a referral, nothing forbids the HR Section to forward information and documents to the Office of the Prosecutor (OTP) of the Criminal Law Section. While the evidence collected may not necessarily be conclusive, one would expect the Prosecutor to weigh it with other information and documents at his/her disposal in order to reach the conclusion on the possibility of conducting either a preliminary examination or a proper investigation into a situation. Thus, the Human Rights Section is a potential investigator agent for the Criminal Section.

Finally, the last question that warrants some attention is this: should the Human Rights Section play a supervisory role on the Criminal Section's decisions, which are alleged to constitute violations of human rights? As paradoxical as it may sound, it is not impossible for a court to act in violation of fundamental rights of the accused as evidenced in the *Barayagwiza* case.[73] Therefore, the Criminal Law Section can potentially be in the same position as ICTR. However, in general, international criminal courts are not under any external supervision by a constitutional or human rights court, in contrast to national criminal courts and (criminal) authorities, which are generally

[72] Huneeus, supra note 65, at 1–2.

[73] Decision, *Barayagwiza* (ICTR-97–19-AR72), Appeals Chamber, 3 November 1999, at 73, 108; Judgment, *Gatete* (ICTR-00–61-A), Appeals Chamber, at 45 and 286.

supervised by a domestic constitutional court and an international or regional human rights mechanism, either a court or a quasi-judicial entity. However, in IHRL, as well as in modern international criminal law, international criminal courts, like States, have a legal duty to respect and uphold fundamental human rights, especially those of individuals under their effective control. In fact, as international organizations are endowed with an international legal personality,[74] international criminal tribunals are subjects of international law and, therefore, are bound by general rules of international law, including IHRL.[75] For example, according to the Rome Statute regime, the applicable law before the ICC 'must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'[76] Although there is no similar general provision in the *Malabo Protocol*, the Criminal Section will not be excused from the same legal obligation. At a minimum, the Section must uphold and enforce fair trial rights of the accused. Likewise, since the Criminal Section will have people in its detention centre pending trials or resettlement in domestic prisons once a final guilt verdict has been handed down, detainees' rights must be respected. In fact, the then–Second Vice President of the ICC once made a comparison when he stated that, '(. . .) under certain circumstances, the ICC is in a comparable position as States in that it has to respect the human rights of individuals under its effective control.'[77] The same applies for the Criminal Section.

In case of violations of their rights by the Criminal Section, the accused shall be entitled to remedies, including those of a judicial nature. The question that arises then is before which forum this right to remedy can be invoked? Possible venues such as the African Commission or international human rights mechanisms are not in line since the Criminal Section is not a state, albeit being in comparable situation, to some extent. One of the relevant forums to address the situation is the Appeals Chamber of the court.[78] But

[74] See for instance Art. 4(1) ICC St.

[75] Zeegers, supra note 23, at 21.

[76] Art. 21(3) ICC St.

[77] H-Peter Kaul, *Human Rights and the International Criminal Court*, Address delivered at the International Conference on 'The Protection of Human Rights through the International Criminal Court as a Contribution to Constitutionalization and Nation – Building', German – Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG), Thammasat University – Faculty of Law, in cooperation with the German Embassy Bangkok, Bangkok, Thailand, 21 January 2011 at 12–13.

[78] For instance, ICTR Appeals Chamber addressed and remedied numerous allegations of violations of the rights of the accused, see *Gatete* case, supra note 73, at 287.

what is interesting from an academic perspective is whether or not the Human Rights Section of the court could constitute such a venue for remedying human rights violations perpetrated by the Criminal Section. First of all, referring or reviewing the conduct of a court before another court, as far as human rights are concerned, is not a new phenomenon. The European Court on Human Rights has regularly been seized of cases alleging violation of human rights.[79] In our case study, the *Malabo Protocol* seems to support such a possibility when it provides that 'the Human Rights Section shall be competent to hear all cases relating to human and peoples' rights.'[80] However, a closer reading of the Protocol may suggest otherwise. For instance, decisions of the Criminal Section are deemed to be decisions of the Court in accordance with the spirit of Article 9(2) of the Protocol which provides that 'a judgment given by any chamber shall be considered as rendered by the Court'. Likewise, as far as criminal jurisdiction is concerned, the decisions of the appellate chamber shall be final.[81]

The matter will further be complicated by the fact that the Criminal Section is not a State; only States are justiciable before human rights bodies, including the Human Rights Section. Even before the European Court of Human Rights, all successful cases were directed against States. Cases against international organizations have been declared inadmissible sometimes because the functional immunity regime comes into play in the proceedings.[82] In our case study, the Criminal Section is an organ of an international organization (AU)[83] and as such it is not linked to a particular State to which its conduct violating human rights can be attributed. So, if the Criminal Section were to find itself a respondent party before the Human Rights Section, it is possible that it can also invoke the immunity regime that applies to international organizations against all forms of prosecutions, either criminal or civil.

In conclusion, Articles 7 and 17(3) should be read with due regard to the *ratione personae* jurisdiction of the Human Rights Section which extends only to States. One can then assume the above-mentioned provisions are finally conceived that way only for purposes of division of labour between the Court's sections. So, if the accused has been able to complain of his or her human

[79] *Milosevic v. The Netherlands*, 77631/01, Council of Europe: European Court of Human Rights, 19 March 2002.
[80] Arts 7 and 17(3) Malabo Protocol, emphasis added.
[81] Art. 8(4) Malabo Protocol.
[82] *Stichting Mothers of Srebrenica and Others v. The Netherlands*, European Court of Human Rights (3rd Section), Application no. 65542/12, 11 June 2013.
[83] By virtue of Art.5 (1)(d) of the African Union Constitutive Act.

rights situation up to the appellate chamber, then the latter's decisions should not be subjected to review by the Human Rights Section. It is to be presumed that the entire Court would have already exhausted its jurisdiction in this regard. However, it is important for the Criminal Law Section to build bridges with other human rights mechanisms in order to ensure legal harmony and prevent fragmentation of applicable rules.

4. TOWARDS A THEORY OF JUDICIAL DIALOGUE BETWEEN HUMAN RIGHTS MECHANISMS AND THE CRIMINAL SECTION

A. *Plural Entities and the Risk of Legal Fragmentation*

The expansion of the African judicial and quasi-judicial infrastructure for the promotion and protection of human rights poses a particular challenge for the entire system: how can we ensure that this proliferation is not detrimental to the cause it is supposed to serve and that all those institutions are mutually reinforcing in order to maintain some degree of legal coherence instead of competing for hegemonic power? In this last section, I argue that the new Criminal Section and existing human rights mechanisms should engage in a judicial dialogue posed to avoid fragmentation of applicable law and to enhance the coherence and legitimacy of the system. In the absence of clear 'rules of relationship',[84] i.e. rules of international law that clarify the interrelationship between different mechanisms, and in the absence of any form of hierarchical order, the judicial dialogue may prove difficult to achieve and sustain. Pessimistic voices claim that international courts are in a competitive battle. Koskenniemi and Leino posit that international tribunals are 'involved in a hegemonic struggle in which each hopes to have its special interests identified with the general interest.'[85] For Justice Guillaume, the former President of the International Court of Justice, each court 'has a tendency to go its own separate way'[86] to the point that even the interjudicial dialogue is insufficient to resolve potential inconsistencies. The ICTY in the *Tadić* jurisdiction decision went further and set the alarm: 'International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a

[84] U. Linderfalk, 'Cross-fertilisation in International Law', 84 *Nordic Journal of International Law* (2015) 428–55, p. 435.

[85] M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 553–79 at 562.

[86] G. Guillaume, *The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order*, Speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000.

number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).'[87]

However, there are optimistic voices who claim that the mere increase of tribunals and other adjudicatory mechanisms does not necessarily lead to fragmentation. As alluded to earlier, if different judicial and quasi-judicial entities resort to the method of systemic integration while interpreting and applying their founding instruments, they can easily counter the normative fragmentation risk.[88] In practice, international criminal courts and human rights judicial or quasi-judicial institutions are in constant dialogue despite the *Tadić* holding which provoked fragmentation anxiety. In fact, it is not unusual for a criminal court to face a human rights issue;[89] similarly, human rights mechanisms do also face international criminal law related issues.[90] It is therefore conceivable and highly probable that each entity will resort to the work and jurisprudence of the other. I anticipate that the Criminal Section will not deviate from this practice. However, in the absence of hierarchy among institutions, the question that arises relates to the value and weight of the case law of each one vis-à-vis the others. I will briefly examine the existing practice and determine how the Criminal Section will use the jurisprudence of other human rights mechanisms and vice-versa.

B. *Judicial Dialogue in Practice among International Legal Entities*

The necessity for judicial dialogue at the international level derived out of necessity due to the lack of rules of relationships between international tribunals and human rights courts and supervisory bodies. The *Tadić* holding emphasizes on the 'the separateness and equality of diverse international tribunals'.[91] The fact that each tribunal is a self-contained system[92] is much telling about the horizontality of international judicial and quasi-judicial

[87] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Dusko Tadić a/k/a 'DULE'* (ICTY Appeals), 2 October 1995, at 11.

[88] *Tzevelekos*, supra note 71, at 665, 688

[89] See *Barayagwiza* case and *Gatete* cases, supra note 73

[90] See Judgment, *Hadijatou Mani Koraou v. Niger*, (ECW/CCJ/APP/0808) ECOWAS, October 27, 2008, at 72–89 (considering whether slavery is a crime against humanity in accordance to relevant international criminal law norms).

[91] R. Teitel and R. Howse, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order', 41 *N.Y.U. J. Int'l L. & Pol.* (2008–2009) 959, at 967.

[92] *Tadić*, supra note 87, at 11.

institutions. However, horizontality does not preclude any cross-reference or judicial dialogue between them. In fact, as Teitel and Howse argue,

> what the Tadić court was resisting in its reference to 'self-contained systems' was the hegemony or binding authority of an external tribunal. It could not accept the notion that the material of that tribunal be treated as *stare decisis* rather than as part of the normative material to be considered in solving the legal problem at hand within the parameters of the regime to which the tribunal solving the problem was charged in its mandate.'[93]

Henceforth, decisions of an international judicial institution are not binding upon other international tribunals or quasi-judicial mechanisms such as the human rights supervisory bodies. However, they don't lack authority. Regarding decisions and jurisprudence from human rights treaty bodies, the ICTR held that they 'are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.'[94]

The concept 'persuasive authority' may look ambiguous. Schauer thinks that the term 'optional authority' would fit better than 'persuasive authority'.[95] Thus, for him, 'persuasive authority' seems to be interchangeable with the terms 'inspiration', 'basis for discussion', 'assistance', 'orientation', or 'interpretive guidance'.[96] In the literature and in the understanding of the international courts, it means that judges and other decision-makers are not required to follow the result or reasoning of other judges' decisions, but have a choice whether to use the authority or not.[97] A judge or court will make a reference to a decision or judgment only if he finds its reasoning persuasive.[98] For international criminal courts, Geneus argue that whenever faced with a human rights issue, they are obligated to consult the jurisprudence of the European Court of Human Rights, and, after a thorough review, they can decide whether they are persuaded by its reasoning or whether they want to deviate from it and re-interpret the human rights standard.[99] If a court is persuaded by the decision, it will decide how to translate a particular norm in the context of

[93] Teitel and Howse, supra note 91, at 976.
[94] Barayagwiza case, supra note 73, at 40.
[95] F. Schauer, 'Authority and Authorities', 94 *Virginia Law Review* (2008) at 1946.
[96] Ibid.
[97] J. Geneuss, 'Obstacles to Cross-fertilisation: The International Criminal Tribunals' "Unique Context" and the Flexibility of the European Court of Human Rights' Case Law', 84 *Nordic Journal of International Law* (2015) 404–27, at 424.
[98] Ibid., at 424–5.
[99] Ibid., at 425.

criminal proceedings, keeping in mind the delicate balance between accused's fair trial rights and public interest. This was for example the case in *Furundžija* where the ICTY relied on the definition of torture as provided for in the Convention against torture, considering it as reflecting customary international law.[100]

Many authors warn against a direct transplantation of norms or concepts originating from another branch of international law. For instance, the legal norm or concept must be translated from the language of the original legal system into the language of the receiving one.[101] Contextualization becomes relevant because 'judges would have to apply their own founding statutes and there may be limits to how far decisions originating from different statutes may be transposable'.[102] Thus,

> importing a human rights norm into international criminal law requires an assessment of whether such norm shares the same concerns, serves the same aims and is grounded on legal principles which are corner-stones of international criminal law. Because human rights instruments ultimately aim at protecting the individual against the abuse of state power, the definition of crimes under human rights law cannot be automatically transposed on international criminal law where the relationship is private in the sense that the individual is opposed to other individuals.[103]

If a court decides to depart from interpretations of human rights norms, it should carefully explain and provide a sound justification of the deviation, given the fact that those interpretations from human rights bodies prove to be authoritative. For instance, the high degree of persuasiveness attached to the case law of the European Court of Human Rights, which, according to Geneuss, 'carries the weight of "directory authority"[104] any "re-interpretation" of a straightforward (autonomous) interpretation of specific terms that determine the scope of applicability of a human rights norm by the ECtHR, like criminal charge, witness or penalty, seems to be possible only in very exceptional circumstances'.[105] For example, 'in regard to a re-interpretation of a generalizable juridical test, on the other hand, ICTs [International criminal tribunals] must identify the factors used by the ECtHR. Then ICTs can add

[100] *Furundžija*, supra note 12, at 159 and 160; *Furundžija* Appeals Judgment at 111.
[101] Geneuss, supra note 97, at 406.
[102] A.Z. Borda, 'How Do International Judges Approach Competing Precedent? An Analysis of the Practice of International Criminal Courts and Tribunals in Relation to Substantive Law,' 15 *International Criminal Law Review* (2015) 124–46 at 136.
[103] Soares, supra note 19, at 183.
[104] Geneus, supra note 97, at 426.
[105] Ibid.

additional factors that reflect the unique context in which they operate and might omit those factors that are not relevant because they only matter in the domestic context.[106]

Borda distinguishes situations where departure is warranted: when an international criminal court considers that a human rights body has erred on a legal point in its decision[107] or in the interests of justice when a particular norm needs to be adapted to the contextual background of the case.[108] In any case, the principle of judicial comity among institutions is usually respected to the point that it is rare to notice a 'frontal' collision of courts in their decisions, at the exception of the *Tadić* (ICTY) and *Nicaragua* (ICJ) cases which articulate different tests of attribution of State responsibility for acts committed by non-states actors acting under their control.[109] Therefore, for Miller, a court will respect the jurisdiction of others and will be 'reluctant to show its disrespect for another by distinguishing or explicitly disagreeing with its decisions.'[110] Romano reinforces this point by arguing that

> if judges of one court feel differently from those of another court on a given point of law, out of judicial comity they will often simply omit to take cognizance of judgments that do not support the reasoning chosen. Citing to say 'they got it wrong' will generally be avoided, and probably even severely frowned upon … Likewise, whenever judges of one court feel the need to depart from established case law or practices propound followed by other courts, they will usually try to avoid arguments on the merits of the other court's decision-making. Rather, they will stress differences in the respective constitutive instruments and missions.[111]

However, under the disguise of 'uniqueness', 'specificity' or 'distinctiveness' of international criminal courts, comity does not forbid a re-interpretation of human rights norms developed by human rights courts and supervisory bodies to the point that they develop their own human rights

[106] Ibid.
[107] Borda, supra note 102, at 139.
[108] Ibid., at 138.
[109] While the ICJ ruled in favor of an 'effective control' test (see Judgment, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)*, ICJ, 27 June 1986, at 105–115), the ICTY propounded the 'overall control' test (see, *Tadić*, ICTY, Appeals Chamber (IT-94–1-A) 15 July 1999, at 145 and 162. See also A Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18–4 *European Journal of International Law* (2007) 649–68.
[110] N. Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', 15 *Leiden Journal of International Law* (2002) at 499.
[111] C.P.R. Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue', 41 *Journal of International Law and Politics* (2009) 766–7.

standards.[112] This hard deviation is a double-edge sword. It can enhance or undermine legal protections of the accused.[113] For instance, international tribunals' stance on the right to *habeas corpus* or provisional release is particularly instructive. While human rights bodies emphasize on the right to liberty to be upheld, even in criminal proceedings unless special circumstances justify detention,[114] international criminal courts reverse the burden of proof by requiring the accused to demonstrate exceptional circumstances justifying provisional release,[115] making 'detention appears to be the rule and provisional release the exception'.[116] The justification for this departure lies in the particularly odious and complex nature of the crimes prosecuted before international criminal tribunals and the special circumstances under which they function, particularly their reliance to state cooperation.[117] Similarly, in the *Kunarac* case, ICTY departed from the torture rule provided for in human rights law by holding that a person acting in his private interests can be held accountable.[118]

In case of departure, 'an earlier interpretation by a sister court would not, generally, be formally overruled and, in principle, both would therefore remain valid.'[119] Therefore, two decisions of equal legal force but containing different interpretation of the same standard may co-exist, given the fact that each court is a self-contained institution, which precludes any kind of

[112] E. Møse, 'Impact of Human Rights Conventions on the Two Ad hoc Tribunals', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Leiden: Martinus Nijhoff, 2003) 185–204 at 189.

[113] M. Fedorova and G. Sluiter, 'Human Rights as Minimum Standards in International Criminal Proceedings', 3 *Human Rights & International Legal Discourse* (2009) at 18 et seq. But see, S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford, Oxford University Press, 2003) at p. 7 (who argues that the adherence of ICTs to international human rights is a policy issue, not a legal question).

[114] Human Rights Committee, *Cagas v. Philippines* (Comm No 788/1997), CCPR/C/73/D/288/1997, 23 October 2001 at 7.4.

[115] Sznajder and Zeegers, supra, note 23; ICCPR, supra, 24. Amendments Adopted at the Thirteenth Plenary (26–27 May 2003), 10. The requirement of exceptional circumstances was removed from the Rules of Procedure and Evidence of ad hoc tribunals, respectively at the twenty-first plenary session of the judges (ICTY) in November 1999 and, more than three years later, at the Thirteenth Plenary (26–27 May 2003) for ICTR.

[116] Decision on Jadranko Prlic´'s Motion for Provisional Release, *Prosecutor v. Prlic´ et al* (IT-04–74-T), ICTY, 21 April 2011, at 28.

[117] Decision on Motion for Provisional Release filed by the Accused Zejnil Delalic´, *Delalic´ et al* (IT-96–21-T), Trial Chamber, 25 September 1996, at 19.

[118] Judgment, *Kunarac, Kovac and Vukovic*, (IT-96–23& IT-96–23/1-A), Appeals Chamber, 12 June 2002 at 148.

[119] Borda, supra note 102, at 136–7.

precedence of any on the other. This can give rise to fragmentation and potential conflict and insecurity to accused persons and practitioners.

It has been highlighted earlier that human rights norms and case law developed by human rights bodies are not binding on international criminal courts. They are of persuasive authority and international courts can take them as a starting point[120] in order to justify their specific interpretations of human rights norms, based on the nature and content of the human right in question placed within the context in which international criminal courts operate.[121] I submit that a justice and fairness-oriented approach would prevent a demarcation very detrimental to the human rights of the accused persons. In fact, in order to put it into practice, it is now well settled that international courts founding legal instruments include an explicit and unequivocal obligation to interpret and apply their applicable law in a manner consistent with 'internationally recognized human rights',[122] contrary to the ad hoc tribunals, which do not have an explicit statutory obligation to adhere to IHRL.

C. *Whither Judicial Dialogue between the Criminal Law Section and Human Rights Mechanisms?*

Finally, how can we translate the above principles around the judicial dialogue among international judicial and quasi-judicial human rights and criminal institutions, in the African context? Concretely, being the last born, will the Criminal Section simply transplant norms and principles adopted by pre-existing African human rights mechanisms throughout their work? In the alternative, to what extent the Criminal Section may depart from interpretations made by human rights mechanisms? This section addresses these questions.

The relationship between the Criminal Section and existing African human rights mechanisms should rest on the same principles developed above which guide the relationship between international criminal courts and human rights courts and supervisory bodies. In a nutshell, one can expect the Section to take into account the case law developed by the current African Court on Human and Peoples' Rights, the RECs courts and the ACHPR as well. While the case law should not be binding on the Section, it nevertheless carries with it an important persuasive value. The Section cannot afford to ignore the existing norms and principles set up by authoritative institutions on

[120] Geneuss, supra note 97, at 384.
[121] Ibid.
[122] Art. 21(3) ICC St.

the continent. However, none can expect a direct transplant of the said human rights principles and norms in the criminal proceedings. At a minimum, their application and interpretation should be contextualized in view of the specificity of the methods and purposes of the Criminal Section.

A problem may arise with the African Commission's decisions. What is the value of the latter in the eyes of the Criminal Section? Should this entity also consider them as persuasive or simply depart from them, the reason being that they have been engineered by a non-judicial body? In my view, it is not advisable for the Section to go this road. Instead, it should follow the footsteps of the current continental human rights court which considers the Commission's decisions as persuasive. In practice, the current Human Rights Court regularly cites the Commission's decisions on different issues such as exhaustion of local remedies, fair trial rights, etc. Therefore, the Criminal Section should not easily dismiss the persuasiveness of African Commission's decisions, arguing the quasi-judicial nature of the institution. But for the sake of contextualization, no rule forbids the Criminal Section to adopt a different interpretation of human rights issues.

On the other hand, we expect human rights mechanisms to also reference or draw inspiration from the case law of the Criminal Section when they will be dealing with human rights violations amounting to international crimes. This is not new on the continent. For instance, the ECOWAS Court exercising its human rights jurisdiction in the *Hadijatou Mani* slavery case did refer to ICTY jurisprudence in *Kunarac* case and endorsed the tribunal's 'indicators' of modern day slavery essentially involving the nature and degree of control, physical and psychological, over the individual.[123]

In conclusion, the Criminal Section and other African human rights mechanisms should engage in a judicial dialogue instead of each one stubbornly acting as a self-contained entity without any regard to other institutions with similar goals. Actually, the *Human Rights Strategy for Africa* makes the same call for collaboration.[124] This is a win-win deal, which is posed to strengthen each entity and assist it in reaching its potentials. Therefore, cross-fertilization and cross-referencing between the Criminal Section and Human Rights Mechanisms 'either at the standard-setting level or at the interpretation stage' will avert fragmentation but also will meet the challenges posed to the African law where judicial and quasi-judicial entities interact. It will maintain its normative unity.

[123] *Koraou* case, supra note 90, at 77.
[124] *Human Rights Strategy for Africa*, (Addis-Ababa: African Union Commission, Department of Political Affairs) 2011, at 23, 24 & 41.

5. CONCLUSION

The creation of an ACC is undoubtedly a major breakthrough in the fight against impunity of serious violations of human rights on the African continent. The Criminal Section of the ACJHR is an important and indispensable addition to the existing human rights institutions operating at the continental, sub-regional or national level. In fact, it was the missing link towards strengthening of the African human rights architecture. Contrary to other continental human rights mechanisms, it is tasked with the determination of the individual and corporate criminal responsibility. This ever-lacking pillar at regional level will undoubtedly complement the actual system entrusted with the power to only determine states' responsibility for human rights violations. This will contribute towards the convergence between state and the individual responsibility for human rights violations. However, it is important to conceive the Criminal Law Section in more functional and utilitarian terms, as a preventive tool instead of being merely reactive to serious human rights violations.

However, the new criminalization of gross human rights violations on the continent does not necessarily guarantee the improvement of the human rights situation; but at the same time, this chapter contends that the new criminal law section will enhance the capacity of the human rights system to ensure protection of human rights. The Section is therefore an integral part of the struggle against human rights violations. It is part and parcel of the human rights architecture. Although proliferation of mechanisms can spread some fears of fragmenting African human rights standards and law, this chapter has showed that the risk can be mitigated or avoided through cross-referencing between relevant institutions, guided/informed by the principles of complementarity and comity. In this regard, the African criminal Section should apply and interpret its relevant instruments in a way compatible with the existing human rights case law. This will be a major contribution to the normative unity and harmony of African human rights law instead of promoting its disintegration.

PART IV

The General Jurisdiction of the African Court

35

The ACJHR's General Jurisdiction for General Affairs

Any Question of International Law? Not Quite

EDWIN BIKUNDO

1. INTRODUCTION

This chapter outlines and analyzes the general jurisdiction for the general affairs section of the proposed African Court of Justice and Human Rights (ACJHR) as set out in the Malabo Protocol on the Statute of the African Court of Justice and Human Rights (The Malabo Protocol). The chapter focuses in particular on the most general clause of this general jurisdiction referencing 'Any question of international law' to examine whether that clause should be read expansively or restrictively in light of the Malabo Protocol especially as regards the 'ultimate objective' of the African Union (AU) which is the ambitious progressive federalization agenda. That is to say the legal implications of progressive Pan-Africanization. The proposed court *could* work in attaining progress towards that ultimate goal but it will take immense collective effort and commitment. This inquiry is important because the general jurisdiction conferred on the General Affairs Section of the Court by necessary implication encompasses all international law matters that are not excluded by either the Human and Peoples' Rights or the International Criminal Law sections of the Court.

The chapter begins by explaining the provision's immediate origins in the two preceding protocols going back to reforming the African Court of Justice. The next two sections go on to examine, first, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, and second, the Protocol on the Statute of the African Court of Justice and Human Rights. The discussion section draws together the insights gleaned earlier to make the preliminary conclusion that the 'any question of international law' clause has to be read in a uniquely restrictive sense in the African context. Having said that, it has the potential scope to be the most litigated clause in the entire instrument given for instance the sheer number, scale and

variety of treaties and conventions that would require re-examination should and when the United States of Africa comes into being. The overall argument is that the clause should be read not so much as conferring a specific jurisdiction as such but as restating a preference for legality as an approach to resolving disputes over diplomacy and even the use of force. To place this is a continuum between politics and law, the clause indicates a pendulum swing to the legalization of political disputes as opposed to the politicization of legal disputes.

Speaking of the Malabo protocol provisions on the general jurisdiction of the, at the moment, proposed ACJHR is an intriguing prospect. Not least because that protocol, which is not yet in force, amends an earlier protocol which is itself not yet in force, and indeed will never be in force except in the form and content of the new provisions once they enter into force. This renders it necessary to delve into the history of the provisions as well as speculate upon its future application. These are two strikingly different approaches. The first has a trajectory that moves from the present backwards, and the second moves from the present forwards. The first is genealogy while the second is speculation, if you like. Not law as it is nor law as it should be, but law as it *shall* be.

Methodologically, the approach favoured is as a consequence doctrinal – from a comparative and historical perspective. That is to say to compare as well as contrast the proposed court with a similar institution or institutions. As we shall see, these include – in this specific instance – the International Court of Justice (ICJ) and possibly the European Court of Justice (ECJ). The similarities are chiefly along the lines of subject matter jurisdiction as well as certain equivalences in origin. These go beyond the AU matching up semantically with the European Union (EU) and their resultant courts of justice (although these of course cannot be dismissed as merely coincidental), but the history of amendments of the Nice and Lisbon treaties in the case of the ECJ and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights and second the Protocol on the Statute of the African Court of Justice and Human Rights in the case of the ACJHR. Furthermore, the transition from the Permanent Court of International Justice (PCIJ) to the International Court of Justice (ICJ) also has some bearing on the matter. As a consequence, the PCIJ, the ICJ the ECJ could be possible sources among others of persuasive precedent for the ACJHR in interpreting and construing what 'any question of international law' means once the court is established. This court itself would be a mega-court jurisdictionally combining, as it does, the jurisdiction of the ICJ in its General Affairs Section, The European Court of Human Rights (ECHR) in

its Human and Peoples' Rights and the International Criminal Court (ICC) in its International Criminal Law Section. The table below comparing the PCIJ/ICJ, and ACJHR illustrates this point:

TABLE 35.1 *Comparative Chart PCIJ/ICJ, and ACJHR*

Name of Court	Subject-Matter Jurisdiction	International / Regional
PCIJ	Article 36 The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force. The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.	International
ICJ	Article 36 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation;	International

(*continued*)

Table 35.1 (*continued*)

Name of Court	Subject-Matter Jurisdiction	International / Regional
	d. the nature or extent of the reparation to be made for the breach of an international obligation.	
ACJHR	The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to: (a) the interpretation and application of the Constitutive Act; (b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity; (c) the interpretation and the application of the African Charter~~,~~ (d) any question of international law (e) all acts, decisions, regulations and directives of the organs of the Union; (f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court; (g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; (h) the nature or extent of the reparation to be made for the breach of an international obligation.	Regional

From a historical perspective it is clear too that the evolution of the point was actually intended to encourage the peaceful settlement of disputes through the medium of law as opposed to diplomacy and *a fortiori* the use of military force. The table below demonstrates the gradual development of the clause as progressively encouraging the use of law over diplomacy and even war:

Article 16 1899 Hague Convention for the Pacific Settlement of International Disputes	In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

Article 38 1907 Hague Convention for the Pacific Settlement of International Disputes	In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle. Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.
Article 13 The Covenant of the League of Nations	The Members of the League agree that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration or judicial settlement. Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement. For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them. The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which

	complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.
Article 36 of the Statute of the International Court of Justice (excerpt)	1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.

The developmental arc ends with judicial settlement of international disputes. The decisions of the ICJ, and in particular the Nicaragua (Merits) Case,[1] then becomes the principal source of law for the ACJHR.

2. PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS (MALABO PROTOCOL) 2014

As is customary, although the preamble does not have the force of law, it nevertheless sets out the background, overall context, and intent of the document. This is important because customary international law is a necessary resource given the varying status of the separate body of documents that

[1] Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States, Merits, Judgment, (1986) ICJ Rep 14.

make up the relevant body of law, as well as the generality of the statement 'any question of international law' which goes beyond treaty law.

In the preamble the Member States of the African Union whom are the parties to the Constitutive Act of the African Union recall the objectives and principles enunciated in the Constitutive Act that was adopted on 11 July 2000 in Lome, Togo. That rather general statement is linked to a less general one which nevertheless vaguely references the commitment to peaceful settlement of disputes. This reference to 'peaceful settlement of disputes' is key to understanding the genealogy of the phrase 'any question of international law'. It first occurred in the form 'questions of a legal nature' under Article 16 of the 1899 Hague Convention for the Pacific Settlement of International Disputes. It reappeared in identical form in Article 38 of the 1907 Hague Convention for the Pacific Settlement of International Disputes. Its present form first appeared in Article 13 of the Covenant of the League of Nations and then in Article 36 of both the Statute of the International Court of Justice and that of the Permanent Court of International Justice. There is no equivalent clause in either the Treaty on European Union or the Treaty on the functioning of the European Union. This renders their resultant case law not as relevant as, for instance the ICJ, even though the ECJ is, like the ACJHR, also a regional court.

A rather more specific statement on the provisions of the Protocol on the Statute of the African Court of Justice and Human Rights and the Statute annexed immediately follows this recollection to it that was adopted on 1 July 2008 in Sharm El Sheikh, Egypt. The Member States go on to recognize that the Protocol on the Statute of the African Court of Justice and Human Rights had merged the African Court on Human and Peoples Rights and the Court of Justice of the African Union into a single court. Along with this the Member States bear in mind their collective commitment to promote peace, security and stability on the African continent, and likewise to protect human and people's rights in accordance with the African Charter on Human and Peoples Rights and other relevant instruments.

The Member States made a point to acknowledge the pivotal role that the African Court of Justice and Human and Peoples Rights can play in strengthening the commitment of the African Union to promote sustained peace, security, and stability on the Continent, and to promote justice and human and peoples' rights as an aspect of their efforts to promote the objectives of the political and socio-economic integration and development of the Continent with a view to realizing the ultimate objective of a United States of Africa.

There are seventeen new articles inserted by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights that grant the Court international criminal jurisdiction. However, it is

its general jurisdiction that specifically interests us particularly as spelt out in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights beginning in Article 3 setting out the Court's Jurisdiction as:

1. The Court is vested with an original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the Statute annexed hereto.
2. The Court has jurisdiction to hear such other matters or appeals as may be referred to it in any other agreements that the Member States or the Regional Economic Communities or other international organizations recognized by the African Union may conclude among themselves, or with the Union.

It is imperative therefore to examine the provisions of the Protocol on the Statute of the African Court of Justice and Human Rights as both protocols have to be read more or less side-by-side to be given both effect and meaning.

3. PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS (SHARM EL SHEIKH PROTOCOL), 2008

The first chapter of the Sharm El Sheikh Protocol merges the African Court On Human and Peoples' Rights with the Court of Justice of The African Union. Article 1 replaces the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998 in Ouagadougou, Burkina Faso (entry into force 25 January 2004), and the Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique. Article 2 then goes on to establish a single Court, the 'African Court of Justice and Human Rights'. For removal of doubt Article 3 provides that any references made to the 'Court of Justice' in the Constitutive Act of the African Union shall be read as references to the 'African Court of Justice and Human Rights'.

Crucially, in the very first article of the Statute of the African Court of Justice and Human Rights contained in the Annex to the Protocol on the Statute of the African Court of Justice and Human Rights 'Section' has now been sought to be amended to mean either the General Affairs, or Human and Peoples' Rights, or International Criminal Law Section of the Court.

Article 28, which provides the jurisdiction of the court, will as a consequence now have to be read down with the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights in

mind. It is reproduced below with the affected bits of its text either struck out or amended with underlining wherever appears necessary:

> The General Section of the Court shall [with the following exceptions] have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:
>
> a) the interpretation and application of the Constitutive Act;
> b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity excluding questions of either international criminal law or international human rights law;
> c) ~~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;~~
> d) **any question of international law** [excluding questions of either international criminal law or international human rights law];
> e) all acts, decisions, regulations and directives of the organs of the Union [excluding questions of either international criminal law or international human rights law];
> f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court [excluding questions of either international criminal law or international human rights law];
> g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union [excluding questions of either international criminal law or international human rights law];
> h) the nature or extent of the reparation to be made for the breach of an international obligation [excluding questions of either international criminal law or international human rights law].

4. DISCUSSION AND ARGUMENT

The fact that a dispute contains a legal question does not exclude politics. The weight of the authorities both judicial and academic weigh onto the side that a legal question when taken as one that is amenable to legal resolution references the jurisdictional capacity of a judicial organ as opposed to a political organ. Which is to say that just because a question has political aspects that would not preclude a court from making a final determination over the matter.

Indeed the ICJ noted in the Hostages Case (Merits) 'legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned'.[2]

Hersch Lauterpacht writing in 1933 about the PCIJ made the point that under a clause conferring jurisdiction to decide 'any question of international law' a court of justice was empowered to deal with the customary international law doctrine of *rebus sic stantibus* or a fundamental change of circumstance.[3] This clause includes not just legal interpretation but also the ascertainment as well as consideration of facts. Indeed, for Lauterpacht 'any question of international law' could conceivably cover all possible disputes that states can submit to an international judicial tribunal. He therefore argued against a one-sided or restrictive interpretation. His position of course cannot be applied to the equivalent clause in the ACJHR without qualification principally because both international criminal law questions and international human rights law questions are excluded from the general jurisdiction of the general section of that court. Nevertheless, the question of examining a fundamental change of circumstance rendering a treaty or treaties inapplicable is still a very wide and powerful judicial discretion that deserves further study, and perhaps even invocation, as states are expected to dissolve themselves as independent sovereign entities to a single United States of Africa.

Writing in 1924 of the distinction between legal and political questions, Charles Fenwick expressed the view that legal questions were those governed by a more or less ascertainable rule of law.[4] For him, these were synonymous with justiciable questions, which were those that could be properly submitted to a judicial tribunal.[5] Quincy Wright, in speaking of the same distinction, preferred to look at it in instrumental function in distinguishing 'legal from political questions as those questions in which more interests will be satisfied by a settlement according to law than by some other mode of settlement.'[6]

[2] [1980] ICJ Rep 3, 20 (Judgment of the Court).

[3] H. Lauterpacht, *The Function of Law in the Community*, (1st edition ebook; Oxford: Oxford University Press, 2011), at 281.

[4] C. Fenwick and E. Borchard. 'The Distinction between Legal and Political Questions', vol. 18, *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)*, 1924, 44–57, at 44.

[5] Ibid. at 45.

[6] Q. Wright, 'The Distinction between Legal and Political Questions with Special Reference to the Monroe Doctrine', vol. 18, *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)*, 1924, 57–83, at 57.

This formulation has the advantage of bringing in the language of the Hague conference.

In the first advisory opinion of the ICJ on the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, The Court found that it could not 'attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision'.[7] Erika de Wet finds that distinguishing between legal and political questions is unimportant when compared to distinguishing between legal and political methods in determining disputes. For her 'a legal dispute implies both a legal and political answer' to the same question.[8] For Lauterpacht, because there was 'no fixed limit to the possibilities of judicial settlement', all international political conflicts were reducible 'to contests of a legal nature', therefore, the 'decisive test' for justiciability of a dispute would the willingness of the parties to submit to legal arbitration.[9] David S. Patterson found that the impetus for a world court came from lawyers who wanted the United States to lead in the quest for pacific alternatives to international violence.[10] Akande elegantly phrases this important point in the double negative: 'The Statute in no way excludes any question of international law from the consideration of the Court in cases in which it has jurisdiction'.[11] For him, as long as the Court has jurisdiction over a legal question before it then it 'has a duty to decide the matter' notwithstanding that another political organ may have the same matter before it.[12] Just because a political institution has been seized of jurisdiction does not preclude the court's jurisdiction over the same matter.[13]

This is why international courts and tribunals could say that:

> The doctrines of 'political questions' and 'non-justiciable disputes' are remnants of the reservations of 'sovereignty', 'national honour', etc., in very old

[7] Article 4 UN Charter.

[8] E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004), at 50.

[9] H. Lauterpacht, *The Function of Law in the International Law* (1933) at 389, cited in *Nicaragua (Merits)* , International Court of Justice, 1986, at 169 (Separate Opinion of Judge Lachs).

[10] D. Patterson, 'The United States and the Origins of the World Court', vol. 91, *Political Science Quarterly*, (Summer, 1976), 279–95, at 295.

[11] Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations', 46 *International and Comparative Law Quarterly*, (1997), 309–43, at 332.

[12] Ibid., at 343.

[13] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, International Court of Justice, 24 May 1980, ICJ Reports 3, at 553–84.

> arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the 'political question' argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well. The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law.[14]
>
> Dissenting and separate opinions 'however political be the question, there is always value in the clarification of the law. It is not ineffective, pointless and inconsequential'[15] '[D]ecision can contribute to the prevention of war by ensuring respect for the law'.[16] The political aspects of the dispute may make legal determination all the more urgent:
>
> Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate.[17]

The ACJHR's General Jurisdiction for General Affairs cannot therefore be an exception to the ever expanding contemporary dynamic of political disputes being rendered amendable to legal adjudication.

[14] *Prosecutor v. Tadic* (Defence Motion for Interlocutory Appeal on Jurisdiction), Case No IT–94–1–AR72 (2 October 1995) [24] ('Tadic').

[15] *Nuclear Weapons Opinion*, International Court of Justice, 1996, ICJ Reports (year), at 226, and 328 (Dissenting Opinion of Judge Weeramantry).

[16] Ibid. (Dissenting Opinion of Judge Koroma).

[17] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 87, para 33.

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Some Observations on the Jurisdiction of the African Court of Justice and Human Rights over International Administrative Law

ADEJOKÉ BABINGTON-ASHAYE

The extension of the African Court's jurisdiction to disputes between the African Union and its staff members is an anomaly in the order of international and regional courts, as these courts rarely adjudicate internal disputes between international organizations and their staff members. The body of law which governs such disputes is known as international administrative law or international civil service law, and it has developed over the last eighty-plus years through the tribunals created by these organizations. Since organizations such as the United Nations and the African Union enjoy jurisdictional immunities, national courts are limited in their ability to protect the labour rights of international civil servants - employees of these organizations. The development of internal justice systems that include an independent judicial body therefore became a necessary balance to the immunities enjoyed by these organizations. In *The Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, the International Court of Justice (ICJ) held that it would 'hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.'[1]

In 1966 the Organization of African Unity (OAU), predecessor to the African Union, established an Administrative Tribunal noting that 'the service relations in the Organization must be regulated only by internal rules of the Organization, any competence of national courts being excluded.'[2] This

[1] *Effect of awards of compensation made by the U. N. Administrative Tribunal*, Advisory Opinion, International Court of Justice, 13 July 1954, ICJ Reports (1954) 47, at 57.

[2] Preamble, Statute of the Administrative Tribunal, Organization of African Unity, CM/99/Rev.2, at 1.

Tribunal, which now operates as the African Union Administrative Tribunal (AUAT), is competent to receive applications from staff members of the African Union alleging non-observance of contracts of employment or violations of the provisions of the Staff Regulations and Rules by the organization. In a manner similar to a national court, the AUAT issues binding decisions which include remedies to compensate the aggrieved staff member. With the inclusion of Article 29(1)(c) in the Protocol on the Statute of the African Court of Justice and Human Rights (The Protocol), employees of the African Union and its organs now have the unprecedented right to appeal decisions of the AUAT to the region's highest court – the African Court of Justice and Human Rights.

This chapter offers initial observations on the inclusion of an appellate jurisdiction over international administrative law in the Statute of the African Court. It will first set out the legal framework and historical context for this provision, and further assess four main observations on the exercise of this jurisdiction.

1. LEGAL FRAMEWORK AND HISTORICAL CONTEXT

To understand the context in which the African Court exercises jurisdiction over administrative law matters, Article 29(1)(c) of the Protocol is best read in conjunction with Rule 62 of the 2010 African Union Staff Regulations and Rules. Pursuant to Rule 62.1, a staff member of the African Union may submit an application to the AUAT[3] contesting administrative and disciplinary decisions by the organization taken against him or her. The AUAT is competent to hear 'appeals submitted by staff members or their beneficiaries, alleging violations of the terms of appointment, including all applicable provisions of the Staff Regulations and Rules, or appeals against administrative and disciplinary measures.'[4] Recourse to the Tribunal forms an internal remedy, the exhaustion of which is necessary before a staff member can approach the African Court. Rule 62.3 of the Staff Regulations and Rules provides that:

> In the event of breach of contract of employment or violation of these Regulations and Rules, a staff member who has exhausted all the internal procedures provided for by these Regulations and Rules, shall file within sixty (60) days from the date of judgment, an appeal to the African Union's Court of Justice and Human Rights.

[3] The AUAT is the descendant of the *ad hoc* Administrative Tribunal of the Organization of African Unity.

[4] Rule 62.2, AU Staff Regulations and Rules, CM/1745(LVII) Annex 1 Rev. 1.

Article 29(1)(c) of the Protocol cements this right of appeal by noting that:

> The following entities shall be entitled to submit cases to the Court on any issue or dispute provided for in Article 28:
>
> [...]
>
> c) A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.

These provisions in Article 29(1)(c) of the Protocol and Rule 62 of the Staff Regulations and Rules represent two significant changes in the processes available to address disputes between staff members and organs of the African Union. First, prior to the 2010 Staff Regulations and Rules, the 1993 OAU Staff Regulations & Rules provided a different form of dispute settlement. In contesting an administrative decision, the then *ad hoc* Administrative Tribunal represented the final recourse available to staff members challenging the organization's alleged non-observance of the Staff Rules or terms of employment. Such finality in its decisions is a common feature in the statutes of the tribunals of other international organizations such as the World Bank,[5] the African Development Bank[6] and the International Labour Organization,[7] which exercises jurisdiction over employment disputes in more than sixty international organizations and some UN agencies.

Under the OAU Staff Regulations & Rules, the staff member in question was first required to 'address a letter to the Secretary-General requesting that the administrative decision in question be reviewed.'[8] If the Secretary-General confirmed the decision, or if the staff member received no response within thirty days of his/her letter, the staff member 'shall be entitled to file, within a further thirty days, an appeal with the Administrative Tribunal in the form prescribed in the Tribunal's Rules of Procedure [...].'[9]

The opportunity to appeal the Tribunal's decision to a higher body was non-existent. This proved immensely problematic as the AUAT was non-

[5] Article XI (1) of the Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development Association and International Finance Corporation, available online at https://webapps.worldbank.org/sites/wbat/Pages/Statute.aspx.

[6] Article XII (1) of the Statute of the Administrative Tribunal of the African Development Bank, available online at www.afdb.org.

[7] Article VI (1) of the Statute of the Administrative Tribunal of the International Labour Organization, available online at www.ilo.org/tribunal/about-us/WCMS_249194/lang–en/index.htm.

[8] See Article 62(a), OAU Staff Regulations & Rules, CM/1745 (LVII) Annex 1 Rev. 1.

[9] Ibid.

operational between 1999 and 2014, denying staff members the judicial resolution of their employment disputes.[10] This matter was expressly addressed in the 30 September 2011 decision of the African Court of Human and Peoples' Rights (ACHPR) in the matter of *Efoua Mbozo'o Samuel v. The Pan African Parliament*.[11]

On 6 June 2011, Mr. Efoua Mbozo'o filed a case before the ACHPR against the Pan African Parliament alleging breach of paragraph 4 of his contract of employment and of Articles 13(a)[12] and (b)[13] of the OAU Staff Regulations & Rules. He also claimed there was an improper refusal to renew his employment contract and 're-grade' him. When prompted by the ACHPR Registrar to specify the human rights violations he alleged, the Applicant responded by making further submissions underlining allegations of breach by the Pan African Parliament which included:

a. Paragraph 4 of his contract of Employment and Article 13(a) and (b) of the OAU Staff regulations by refusing to renew his contract and advertising his post even though he had satisfactory evaluation reports; and
b. Executive Council Decision EX.CL/DEC 348 (XI) of June 2007 with regard to the remuneration and grading of his employment.

In finding that it lacked jurisdiction to hear the case, the ACHPR held that:[14]

5. Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

[10] In one of its recent judgments issued on October 2015, the AUAT observed the following: 'This matter was first initiated on 25 February 2000 against the Secretary-General of the Organization of African Unity, now the Chairperson of the African Union Commission. The Tribunal notes, with regret, that the application could only be heard when the Tribunal convened at its September 2014 Session after a long period of inactivity.' See *BW v. Chairman of the African Union Commission*, Judgment No. AUAT/2015/008, at 2.

[11] *Efoua Mbozo'o Samuel v. The Pan African Parliament*, Application No. 010/2011.

[12] Article 13(a) provides that: 'In order to respect the principle of recruitment according to geographical and sub-regional distribution of staff provided for in sub-paragraph (d) of Article 12 of the Staff Regulations, not more than ten (10) staff of the Frist Category of Group II (Professional Staff) shall be nationals of the same Member State. However, whenever a Member State does not totally fill its quota, the quota may be filled on short term contracts by nationals of any other Member State.'

[13] Article 13(b) provides that: 'The Secretary-General shall determine the age limit for each post to be filled.'

[14] Ibid. at 3.

> 6. On the facts of this case and the prayers sought by the Applicant, it is clear that this application is exclusively grounded upon breach of employment contract in accordance with Article 13 (a) and (b) of the OAU Staff Regulations, for which the Court lacks jurisdiction in terms of Article 3 of the Protocol. This is therefore a case which, in terms of the OAU Staff Regulations, is within the competence of the Ad hoc Administrative Tribunal of the African Union. Further, in accordance with Article 29(1)(c) of its Protocol, the Court with jurisdiction over any appeals from this Ad hoc Administrative Tribunal is the African Court of Justice and Human Rights. The present Court therefore concludes that, manifestly it doesn't have the jurisdiction to hear the application.

The Protocol on the African Court had not entered into force at the time of Mr. Efoua Mbozo'o's application, and is still yet to do so. The ACHPR centred its decision on its apparent lack of subject matter jurisdiction (*ratione materiae*). While the ACHPR did not expressly state so, it also clearly lacked jurisdiction *ratione personae* given that it has jurisdiction only over complaints against States Parties to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, and not complaints against regional institutions or their organs. A matter which Justice Fatsah Ouguergouz addressed in his Separate Opinion.[15] Justice Ouguergouz further highlighted certain aspects of the Application which stressed the inaccessibility of AU staff members to an effective internal justice mechanism. He observed that:[16]

> In his application, as supplemented by his letter of 22 August 2011, the Applicant indeed draws the attention of the Court to an appeal which he reportedly lodged before the Ad Hoc Administrative Tribunal of the African Union on 29 January 2009. On 15 April 2009, this appeal is reported to have been declared admissible by the Acting Secretary of the Tribunal and on 29 September 2010, after many reminders addressed to the latter, the Applicant is said to have been informed that the Tribunal 'had not been able to sit for the last 10 (ten) years due to inadequate financial means and due to the fact that the Tribunal did not have any Secretaries.' The Applicant purports that two years and four months after his appeal was declared admissible, the Tribunal was still to sit and that it is due to the 'silence' of the latter that he decided to refer the matter to the Court.

[15] He stated that 'only after establishing its personal jurisdiction that it can look at its material jurisdiction (ratione materiae) and/or, if the case arises, its temporal (ratione temporis) and geographical (ratione loci) jurisdiction. Since its jurisdiction is not compulsory, the Court must first of all ascertain that it has jurisdiction ratione personae to consider the application.' *Efoua Mbozo'o Samuel v. The Pan African Parliament* (Separate Opinion – Fatsah Ouguergouz).

[16] Ibid. at 2.

Mr. Efoua Mbozo'o, like other staff members in his position, was denied access to a justice mechanism to address his dispute with the African Union. The *ad hoc* Administrative Tribunal was, to use the words of the then Chairman of the AU Commission, 'long-moribund,'[17] and the ACHPR, even if it had jurisdiction over the Applicant's claim, did not consider whether this denial of access amounted to a human rights violation.[18]

The second significant change resulting from Article 29(1)(c) of the Protocol is a change in persons eligible to submit cases to the African Court in its capacity as an appellate body reviewing decisions of the AUAT. Article 29(1)(c) is derived from Article 18(1)(c) of the 2003 Protocol of the Court of Justice of the African Union which provides that:[19]

> 1. The following are entitled to submit cases to the Court:
> [...]
> (c) *The Commission or* a member of staff of the Commission in the dispute between them within the limits and under the conditions laid down in the Staff Rules and Regulations of the Union. [Emphasis added].

Conspicuously missing from Article 29(1)(c) is that the African Union Commission, which represents the AU organs in employment disputes, is equally eligible to appeal decisions of the AUAT. This omission is significant for the reasons stated in the observations below.

2. OBSERVATIONS ON THE COURT'S APPELLATE JURISDICTION IN INTERNATIONAL ADMINISTRATIVE LAW

A. *Unequal Access to the African Court*

The AU Commission's exclusion from the Court's jurisdiction represents an interesting twist in the discourse and debate on procedural inequality in the rare appeal of decisions by administrative tribunals, which are otherwise intended to be final and binding. This discussion revolves around the fact

[17] *Welcome Remarks of the Chairperson of the African Union Commission, Dr. Nkosazana Dlamini Zuma, to the 28th Ordinary Session of the Permanent Representative Committee, Malabo, Equatorial Guinea*, 20 June 2014, available online at https://au.int/en/newsevents/29234/welcome-remarks-chairperson-african-union-commission-dr-nkosazana-dlamini-zuma-28th.

[18] On this matter see R. Boryslawska et al, 'Identifying the Actors Responsible for Human Rights Violations Committed against Staff Members of International Organizations: An Impossible Quest for Justice?' *Human Rights & International Legal Discourse* 1 (2007), 381.

[19] Protocol of the Court of Justice of the African Union, available online at https://au.int/en/treaties/protocol-court-justice-african-union.

that previously, under the Statute of the Administrative Tribunal of the International Labour Organization (ILOAT), organizations which were dissatisfied with the decision of the Tribunal could submit a request to the ICJ for an Advisory Opinion to review the decision of the ILOAT.[20] In its request, the organization either challenged 'a decision of the Tribunal confirming its jurisdiction', or 'considered that a decision by the Tribunal is vitiated by a fundamental fault in the procedure followed'.[21] The staff member, however, did not have the same right or access to the ICJ.

In its 1956 Advisory Opinion on *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U. N. E.S. C. O.*,[22] the ICJ made the following observation about this inequality of access:[23]

> According to generally accepted practice, legal remedies against a judgment are equally open to either party. In this respect each possesses equal rights for the submission of its case to the tribunal called upon to examine the matter. This concept of the equality of parties to judicial proceedings finds, in a different sphere, an expression in Article 35, paragraph 2, of the Statute of the Court which, when providing that the Security Council shall lay down the conditions under which the Court shall be open to States not parties to the Statute, adds "but in no case shall such conditions place the parties in a position of inequality before the Court." However, the advisory proceedings which have been instituted in the present case involve a certain absence of equality between Unesco and the officials both in the origin and in the progress of those proceedings. In the first place, in challenging the four Judgments and applying to the Court, the Executive Board availed itself of a legal remedy which was open to it alone. Officials have no such remedy

[20] Since this chapter was first written, the International Labour Conference, at its 105th Session (June 2016), adopted amendments to the Statute of the ILO Administrative Tribunal which deleted Article XII which enabled only the defendant organizations to challenge a decision. See www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_498369/lang–en/index.htm.

[21] Former Article XII of the Statute of the ILOAT provided that:

1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.
2. The opinion given by the Court shall be binding.

[22] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U. N. E.S. C. O.*, Advisory Opinion of October 23rd, 1956, ICJ Reports 1956, 77.

[23] Ibid. at 85.

> against the Judgments of the Administrative Tribunal. Notwithstanding its limited scope, Article XII of the Statute of the Administrative Tribunal in this respect confers an exclusive right on the Executive Board.

This matter arose once again in 2010 when the International Fund for Agricultural Development (IFAD) submitted a request for an Advisory Opinion to the ICJ, challenging the decision rendered by the ILOAT in Judgment No. 2867, and questioning the validity of that Judgment.[24] The ICJ observed that the development of the principles of equality of access may be seen in Article 14(1) of the 1966 International Covenant on Civil and Political Rights which provides that '[a]ll persons shall be equal before the courts and tribunals.' In its General Comment on this Article, the Human Rights Committee in 2007 noted that this right guarantees equal access and equality of arms. The ICJ held that:[25]

> While in non-criminal matters the right of equal access does not address the issue of the right of appeal, if procedural rights are accorded they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds [. . .]. In the case of the ILOAT, the Court is unable to see any such justification for the provision for review of the Tribunal's decisions which favours the employer to the disadvantage of the staff member."

The ICJ recalled its 1956 Advisory Opinion in which it held that '[t]he principle of equality of the parties follows from the requirements of good administration of justice.'[26] It further emphasized that this principle 'must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds.'[27]

The matter at hand is whether the inequality of access to the African Court can be justified on objective and reasonable grounds. There are no public *travaux préparatoires* or explanatory comments to shed light on the reasoning behind the removal of the African Union Commission's access to the African Court in employment disputes. This is unfortunate as the changes made are significant. On the one hand, one could contend that staff members are generally at a disadvantage since they do not readily have access to a litigation

[24] See *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, ICJ Reports (2012) 10.
[25] Ibid. at 27, § 39.
[26] Ibid. at 86.
[27] Ibid. at 29, § 44.

department, so provision of an additional procedural right of appeal levels the playing field. However, on the other hand, the inability of one party to challenge a decision which can freely be challenged by the other party connotes an image of inequality and unfairness in the process, regardless of who the disenfranchised party is.

In performing its functions as an appellate body on administrative law matters, the African Court operates akin to the United Nations Appeals Tribunal (UNAT). In 2009, the United Nations General Assembly introduced a new system for handling internal disputes and disciplinary matters. In redesigning the UN system of administration of justice, a two-tier judicial system was created with judges serving on the UN Dispute Tribunal (UNDT) and on the UNAT. Under this system, both staff members and the administration can appeal a decision by the UNDT to the UNAT.

At the ICJ, the Court attempted to cure the inequality of access by providing equal opportunity for the parties to address the issues before it. This meant providing the staff member with the opportunity to comment and bring statements to the attention of the ICJ. The ICJ further determined that there would be no oral proceedings since the Statute of the ICJ does not permit individuals to appear before it.

It is indeed laudable that the Statute of the African Court provides staff members of the AU with the right to appeal to the region's highest court. That they are provided this unique standing before the African Court is worthy of recognition. Article 29(1)(c) falls short, however, with the exclusion of the organization from this appeal mechanism. Should Article 29(1)(c) remain unamended to include the African Commission, the African Court would need to take steps to ensure that the views of the organization concerned are heard and addressed on an equal footing as the staff member in light of the fact that any appellate judgment is binding on the organization.

B. *Scope of the African Court's Appellate Jurisdiction*

The next issue to be explored is the scope of the African Court's appellate jurisdiction. Article 29(1)(c) of the Protocol does not elaborate on this matter, merely providing that the staff member's appeal must be 'within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.' Rule 62.3 of the AU Staff Regulations also does not address the scope of the African Court's appellate review; rather it notes the subject matter of the appeal must be allegations of breach of the employment contract or violation of the Staff Regulations and Rules. It thereby appears that the scope of the African Court's appellate jurisdiction is unrestricted, and the Court

may, in theory, conduct a *de novo* review of the merits of each application submitted on appeal.

Such a broad scope is noteworthy in light of the fact that other judicial bodies with a similar appellate function are limited in their scope of review. For instance, the UNAT which is competent to hear and pass judgment on an appeal filed against a judgment rendered by the UNDT, is only able to review assertions that the UNDT:[28]

(a) Exceeded its jurisdiction or competence;
(b) Failed to exercise jurisdiction vested in it;
(c) Erred on a question of law;
(d) Committed an error in procedure, such as to affect the decision of the case; or
(e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

Furthermore, the power of the ICJ to review a judgment of the ILOAT by reference to Article XII of the Annex to the Statute of the ILOAT was limited to two clearly defined scenarios. First, that the ILOAT wrongly confirmed its jurisdiction, or second, that the decision is vitiated by a fundamental fault in the procedure followed.[29] In its 1956 Advisory Opinion on *Judgments of the Administrative Tribunal of the I.L.O.*, the ICJ held that the '[r]equest for an Advisory Opinion under Article XII is not in the nature of an appeal on the merits of the judgment. It is limited to a challenge of the decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. Apart from this, there is no remedy against decisions of the Administrative Tribunal.'[30]

At first glance, a broad scope of review may be appealing, particularly to the staff member who would have another opportunity to plead his or her case. Yet, such a broad scope further undermines the finality of the AUAT's judgment, which as detailed above, would otherwise be binding. Elaborating on the

[28] See Article 2(1), United Nations Appeals Tribunal Statute, January 2016, available online at www.un.org/en/oaj/files/unat/basic/2012-04-11-statute.pdf.

[29] Article XII(1) of the Statute of the ILOAT provides that: 'In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.'

[30] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, supra note 22, at 98.

finality of its judgments, the World Bank Administrative Tribunal (WBAT) stated in *van Gent (No. 2)*:[31]

> Article XI lays down the general principle of the finality of all judgments of the Tribunal. It explicitly stipulates that judgments shall be "final and without appeal." No party to a dispute before the Tribunal may, therefore, bring his case back to the Tribunal for a second round of litigation, no matter how dissatisfied he may be with the pronouncement of the Tribunal or its considerations. The Tribunal's judgment is meant to be the last step along the path of settling disputes arising between the Bank and the members of its staff.

The WBAT also stated in *Mpoy-Kamulayi (No. 7)* that: 'This rule of finality of the Tribunal's judgments is essential to the operation of the Bank's internal justice system. Once the Tribunal has spoken, that must end the matter; no one must be allowed to look back to search for grounds for further litigation.'[32] That concept of finality is enshrined in the 1967 Statute of the *ad hoc* Administrative Tribunal of the OAU which the AUAT appears to still utilize.[33] Article 17(vi) of that Statute provides for the finality of the Tribunal's decisions subject to an application by any party for review upon the discovery of a new fact of a decisive nature,[34] or for annulment on specific grounds.[35] With the

[31] *M. van Gent (No. 2)*, (No. 13), 1983, § 21, available online at www.worldbank.org/tribunal.

[32] *Mpoy-Kamulayi (No. 7)*, (No. 477), 2013, § 27, available online at www.worldbank.org/tribunal.

[33] Upon request by the author to the Secretariat of the AUAT for its Statute and Rules, the author was provided with the Statute and Rules of the OAU *ad hoc* Administrative Tribunal.

[34] Article 20 of the 1967 Statute of the Administrative Tribunal of the Organization of African Unity provides that:

> (i) Any party to the dispute may apply to the Tribunal for review of a judgment on the basis of the discovery of some new fact of such a nature as to be decisive factor, which factor was unknown to the Tribunal and also to the party claiming review when the judgment was given. The application must be made within six months of the notification of the judgment;
> (i) The party claiming the review shall communicate the new fact to the Tribunal, and if the Tribunal is satisfied, the judgment shall be reviewed.

[35] Article 21 of the 1967 Statute of the Administrative Tribunal of the Organization of African Unity provides that:

> Any party to the dispute may request annulment of the award by applying to the Tribunal on one or more of the following grounds:
>
> (ii) That the Tribunal has manifestly exceeded its competence or that it has failed to exercise jurisdiction vested in it;
> (iii) That there has been a serious departure from a rule of procedure;
> (iv) That the Tribunal has erred on a question of law to the Charter of OAU and to this Statute;
> (v) That rules of natural justice were not observed.

introduction of Article 29(1)(c) and Rule 63, a staff member appears to also have the right to a second decision on the merits of their case.

In performing its appellate review of the AUAT's decisions, it is recommended that the African Court establishes specific rules on the scope of this review. First, it may be guided by the functioning of its appellate review in its International Criminal Law Section. The new Article 18 of the Court's Statute, contained in the Amendments Protocol,[36] provides that:

> 2. In the case of the International Criminal Law Section, a decision of the Pre-Trial Chamber or the Trial Chamber may be appealed against by the Prosecutor or the accused, on the following grounds: (a) A procedural error; (b) An error of law; (c) An error of fact.
> 3. An appeal may be made against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction.
> 4. The Appellate Chamber may affirm, reverse or revise the decision appealed against. The decision of the Appellate Chamber shall be final.

The basis of previous appeals to the ICJ from the ILOAT could also serve as further guidance to the African Court. As noted above, an organization was previously ale to challenge the ILOAT's decision confirming its jurisdiction, or contend that the decision is 'vitiated by a fundamental fault in the procedure followed'. It is useful to note, as the ICJ did, that a 'challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision.'[37] Furthermore, addressing an appeal on the grounds that the ILOAT made a 'fundamental error in procedure,' the ICJ observed in its 1973 *Advisory Opinion on Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, paragraph 92, that while it may not be easy to exhaustively state what is involved in the concept of a 'fundamental error in procedure which has occasioned a failure of justice,' the essence of this ground for appeal:

> may be found in the fundamental right of a staff member to present his case, either orally or in writing, and to have it considered by the Tribunal before it determines his rights. An error in procedure is fundamental and constitutes "a failure of justice" when it is of such a kind as to violate the official's right to a fair hearing as above defined and in that sense to deprive him of justice. . . . [C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which

[36] See Article 9 of the Amendments Protocol.

[37] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U. N. E.S. C. O*, supra note 22, at 99.

> have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision.

Article 2(1) of the UNAT's Statute also lays down concrete grounds of appeal which the African Court may wish to consider:

> The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:
>
> (a) Exceeded its jurisdiction or competence;
> (b) Failed to exercise jurisdiction vested in it;
> (c) Erred on a question of law;
> (d) Committed an error in procedure, such as to affect the decision of the case; or
> (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

Finally, the African Court may also be guided by Article 21 of the Statute of the *ad hoc* Administrative Tribunal which provides grounds for a request for an annulment of the Tribunal's judgment. It is unclear whether the Tribunal has conducted such a review in the past given the limited information available on its decisions prior to 2014, and the fact that it was non-operational for over a decade. With the introduction of an appeal in the legal regime governing employment matters at the African Union, it is curious to discover how the annulment process in Article 21 will operate alongside the right of appeal.

It is proposed that once the Statute of the African Court enters into force, the Court should adopt rules which consolidate and address any discrepancies in the implementation of its appellate jurisdiction. It is recommended first, that Article 29(1)(c) of the Statute be amended to permit appeals from the AU Commission. It is further recommended that the text of Article 21 of the *ad hoc* Administrative Tribunal's Statute, as well as the grounds described above, be merged to establish a concrete scope of the Court's appellate jurisdiction over decisions of the AUAT. These concrete grounds could be contained in the Court's Rules and Procedures to avoid further amendments of its Statute.

C. *Applicable Law*

This section addresses the sources of law which the General Section of the African Court will rely on in performing its appellate jurisdiction. Article

31 of the Protocol lays out the applicable law governing the functions of the African Court in general. These are: the Constitutive Act of the African Union; international treaties of a general or specialized nature; international custom, as evidence of a general practice accepted as law; general principles of law recognized universally or by African States; judicial decisions and writings of the 'most highly qualified publicists of various nations,' as well as regulations, directives and decisions of the African Union as a subsidiary means of determining the rules of law; and 'any other law relevant to the determination of the case.'[38]

Although Article 31 of the Protocol does not specify the sources of law applicable in the exercise of the Court's appellate review of AUAT decisions, the specific sources of law applicable in international administrative law are well covered under the provision for 'any other law relevant to the determination of the case' (Article 31(1)(f)). As Amerasinghe observes, '[i]n seeking the sources of employment law (international administrative law) it would be too naïve and simple to draw analogies from the sources of public international law.'[39] Indeed, '[i]t is tempting to assume that the sources of international administrative law may easily be derived, at least by analogy, from the sources of public international law, because international administrative law is a part of public international law.'[40]

Few statutes of international administrative tribunals expressly state the applicable law. Three exceptions can be found in the statutes of the Commonwealth Secretariat Arbitral Tribunal (CSAT), the African Development Bank Administrative Tribunal (AfDBAT) and the Administrative Tribunal of the Organization of American States (OASAT).

Article XII(1) of the Statute of the CSAT provides that the CSAT shall be 'bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual member countries.'[41] The Statute further provides that in other cases the CSAT 'shall apply the law specified in the contract. Failing that, it shall apply the law most closely connected with the contract in question.' Article V(1) of the Statute of the AfDBAT provides that 'the Tribunal shall apply the internal rules and regulations of the Bank, and generally recognized principles of international

[38] Article 31(1)(f), Protocol on the Statute of the African Court of Justice and Human Rights.
[39] C.F. Amerasinghe, *Principles of the Institutional Law of International Organization*, (2nd edn., Cambridge: Cambridge University Press, 2005), at 283.
[40] Ibid.
[41] Article XII(1) of the Statute of the Commonwealth Secretariat Arbitral Tribunal.

administrative law concerning the resolution of employment disputes of staff in international organizations.'[42]

The Statute of the OASAT makes clear that '[f]or the adjudication of any disputes involving the personnel of the General Secretariat, the internal legislation of the Organization shall take precedence over general principles of labour law and the laws of any member State; and, within that internal legislation, the Charter is the instrument of the highest legal order, followed by the resolutions of the General Assembly, and then by the resolutions of the Permanent Council, and finally by the norms adopted by the other organs under the Charter - each acting within its respective sphere of competence.'[43]

In performing its appellate review of decisions of the AUAT, the applicable primary sources of law would be the AU Staff Regulations and Rules and the contracts, conditions and terms of appointment of the staff member submitting an appeal before the African Court. As the WBAT clarified in its first case, though the employment contract may be the *sine qua non* between the staff member and the international organization, 'it remains no more than one of a number of elements which collectively establish the ensemble of conditions of employment operative between the [organization] and its staff members.'[44]

Further sources of law could include Articles of Agreement, By-laws, administrative circulars, manuals and statements issued by management of the African Union depending on the circumstances of the case. Rule 78.3 of the 2010 Staff Regulations and Rules[45] enumerates these administrative documents, which could be applicable depending on the case under review:

(a) Administrative Circulars;
(b) Administrative Procedure Manual;
(c) Code of Ethics;
(d) Policy on Sexual Harassment;
(e) Information, Communication and Technology Policy;
(f) Medical Assistance Plan;
(g) African Union Travel Policy;
(h) Orientation Training Manual;
(i) Performance Appraisal Policy;
(j) Policy on Education Allowance;
(k) Policy on the Management of HIV/AIDS at the Workplace;

[42] Article V(1) of the Statute of the Administrative Tribunal of the African Development Bank.
[43] Article 1(v) of the Statute of the Administrative Tribunal of the Organization of American States.
[44] *de Merode*, (No. 1), 1981, § 18, available online at www.worldbank.org/tribunal.
[45] Rule 78.3, Assembly/AU/4/(XV), at 82–3.

(l) Procurement Manual;
(m) Pension Policy;
(n) Safety and Security Guideline;
(o) Training Policy; and
(p) Recruitment, Advancement, Upgrading and Promotion Policy.

The practice of the organization may also become part of the conditions of employment in certain circumstances. General principles of law would include those applicable in the law of contracts, and other jurisprudence developed by other administrative courts and tribunals. Finally, it is worth noting the overlap, in some areas, between human rights and international administrative law. Where necessary, the Court may rely on applicable human rights treaties as well as established human rights principles.

D. *Procedural Matters*

This section briefly explores a limited number of observations on procedural matters. Some procedural matters not addressed here include the need to extend the definition of eligible persons to include former staff members who may be challenging decisions concerning their pension, as well as beneficiaries of deceased staff members.

1. Binding Force and the Availability of Enforcement Measures

Article 46(2) of the Court's Statute as amended by the Amendments Protocol, provides that '[s]ubject to the provisions of Article 18 (as amended) and paragraph 3 of Article 41 of the Statute, the judgment of the Court is final'.[46] Article 46 further includes provisions on enforcement measures which, while evidently drafted with inter-state disputes in mind, could be equally relied upon by appellants to ensure full compliance by the African Union with remedies awarded such as re-instatement in the event of termination of employment, or compensation.

According to Article 46(4) where a party has failed to comply with a judgment, the 'Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment.' This may be useful to rely upon in the event that the organization is reluctant to

[46] See Article 21(2) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

implement the awards and remedies issued, and it would be interesting to observe whether an appellant is able to rely on this provision in practice.

2. Remedies and Compensation

Article 45 of the Protocol offers a general basis on which to determine the appropriate compensation. Article 45 provides that:[47]

> Without prejudice to its competence to rule on issues of compensation at the request of a party by virtue of paragraph 1(h), of Article 28 of the present Statute, the Court may, if it considers that there was a violation of a human or peoples' right, order any appropriate measures in order to remedy the situation, including granting fair compensation.

Other remedies which are available in international administrative law include rescission of the contested decision, specific performance, restitution and moral damages. In light of the fact that the African Court will review the decision of the AUAT, and not the administrative or disciplinary decision of the organization, applicable remedies could also include vacation of the AUAT's decision, affirming, reversing, modifying the findings of the AUAT, or remanding the decision back to the AUAT for additional finding of fact. The latter, which is a remedy available in the UNAT Statute, may be difficult to apply since the AUAT Judges sit together in plenary.[48]

3. Non-Suspensive Effect of AUAT Decisions and the Availability of Provisional Measures

It is observed that there are two provisions which would need to be reconciled on the matter of non-suspensive effect and availability of provisional measures. The first is Rule 62.4 of the AU Staff Regulations and Rules which provides that '[t]he filing of an appeal with the African Court of Justice and Human Rights shall not have the effect of suspending the execution of the Administrative Tribunal decision being contested.' The second provision, contained in the Protocol, is Article 35 on provisional measures. Article 35(1) permits the

[47] Article 28(1)(h) provides that the Court shall have jurisdiction over cases and all legal disputes which relate to the nature or extent of the reparation to be made for the breach of an international obligation.

[48] It is unclear how remanding the decision to the AUAT would work. At the UNAT this is one of the options but it includes the option to require a different judge to adjudicate the matter. (Article 2(6) of the UNAT Statute). However, all judges at the AUAT sit in plenary to determine each case.

Court, 'on its own motion or on application by the parties, to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of the parties.'

With the exception of the UN internal justice system,[49] the non-suspensive effect of administrative decisions is standard in administrative law jurisprudence. However, it is equally accepted that a staff member may request interim or provisional measures to suspend a decision where it is demonstrated that the execution of that decision would cause irreparable hardship. For instance, Rule 13(1) of the Rules of the WBAT provides that though the filing of an application would not have suspensive effect on the contested decision, the applicant may submit 'a request to suspend the contested decision until the Tribunal renders its judgment in the case'. Rule 13(3) further adds that '[t]he Tribunal, or when the Tribunal is not in session, the President of the Tribunal may grant such a request in a case in which the execution of the decision is shown to be highly likely to result in grave hardship to the applicant that cannot otherwise be redressed.'[50]

Article VI (4) of the Statute of the Administrative Tribunal of the International Monetary Fund also provides that the filing of an application shall not have the effect of suspending the implementation of the contested decision. However, its accompanying Commentary notes that:[51]

> Section 4 follows the principle applicable to other tribunals that the filing of an application does not stay the effectiveness of the decision being challenged. This is considered necessary for the efficient operation of the organization, so that the pendency of a case would not disrupt day-to-day administration or the effectiveness of disciplinary measures, including removal from staff in termination cases. This rule is also consistent with the principle, strictly applied in the employment context, that an aggrieved employee will not be granted a preliminary injunction unless he would suffer irreparable injury without the injunction. [...] [I]t is difficult to envisage a situation in which the harm to an applicant, in the absence of interim measures, would be "irreparable," as that concept has been construed by the courts. Nevertheless, the statute would not preclude the tribunal from ordering such measures if warranted by the circumstances of a particular case.

[49] Article 7(5) of the UNAT's Statute provides that '[t]he filing of appeals shall have the effect of suspending the execution of the judgement or order contested.'

[50] Rule 13(3) of the Rules of the World Bank Administrative Tribunal, available online at www.worldbank.org/tribunal.

[51] Commentary on the Statute, Administrative Tribunal of the IMF [2009], available online at www.imf.org/external/imfat/report.htm.

It would be useful for the Court to make clear, in its Rules, the conditions upon which a request for provisional measures may be granted in appeals by employees of the AU, thereby reconciling the above-mentioned provisions and ensuring consistency with international administrative law.

3. CONCLUSION

The availability of the African Court as a viable extension of the justice mechanisms for staff members of the African Union depends on the politics of when, and if, the Protocol enters into force, and the African Court becomes operational. Nevertheless, the extension of the Court's jurisdiction to matters of international administrative law provides an opportunity for a more robust system for the resolution of such disputes, given the immunities enjoyed by the African Union. The Court has the potential to greatly impact and develop the law of international organizations, given its unique position as the region's highest court and its mandate to interpret fundamental principles of international law.

As a body conducting appellate reviews of decisions of the AUAT, it is imperative that the Court ensures equality of access and protects the due process rights of each party. Recommendations noted above include amendment of Article 29(1)(c) to include the African Commission as an entity eligible to appeal decisions of the AUAT. To ensure consistency with the jurisprudence and practice of international administrative tribunals, it is also recommended that the adopted Rules of Procedure: (a) clarify the scope of the Court's appellate review; and (b) consolidate provisions on the non-suspensive effect of AUAT decisions and the availability of provisional measures.

PART V

Funding the African Court and the Role of Civil Society

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Financing and Sustaining the African Court of Justice and Human and Peoples' Rights

VINCENT O. NMEHIELLE

1. INTRODUCTION

The resolve of the African Union (AU) to merge the currently existing African Court on Human and Peoples' Rights (ACtHPR or Human Rights Court)[1] with the African Court of Justice (ACJ)[2] to form the African Court of Justice and Human Rights (ACJHR) through the adoption of the Protocol on the Statute of the African Court of Justice and Human Rights[3] (hereafter, Merger Protocol), no doubt began the redefinition and streamlining of the African Union organs, bodies or mechanisms. This streamlining or rationalization of institutions, or what this author would call the *Merger Project*, was predicated on the increasingly diminishing resources available to the continental body as this author has alluded to

The views expressed in this chapter are solely those of the author and not necessarily of the African Development Bank, the African Union Commission, or any other organ or agency of the African Union with whom the author worked closely during his time as the Legal Counsel of the African Union.

[1] The ACtHPR was created pursuant to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (OAU/DOC.CAB/LEG/66.5) adopted on 10 June 1998 during the Organization of African Unity (OAU) Summit in Ouagadougou, Burkina Faso. It entered into force on 24 January 2004.

[2] The ACJ is one of the institutions created by the Constitutive ACT of the African Union, which was adopted by the Thirty-Sixth Ordinary Session of the Assembly of the OAU in Lome, Togo on 11 July 2000. Article 18 of the Constitutive Act specifically establishes the Court, whose 'statute, composition and functions . . . shall be defined in a protocol relating thereto.'

[3] Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples Rights and the African Court of Justice (Assembly/AU/Dec. 196(XI). See specifically DOC. Assembly/AU/13(XI)).

elsewhere.[4] The further decision that the AU Assembly took in 2014 in Malabo, Equatorial Guinea[5] to extend the jurisdiction of the ACtHPR to include international crimes (the so-called Malabo Protocol) is the latest dimension of the AU judicial institutions rationalization process. This decision thus creates one single court to be known as the African Court of Justice and Human and Peoples' Rights (ACJHPR).[6] The extension of criminal jurisdiction to the Court has generated and continues to generate ample debates from a number of commentators – debates that range from the propriety and legality of such decision in the era of the International Criminal Court (ICC), the resource questions, to the political ramifications of the decision.[7]

It is not the intention in this chapter to delve into the debate on the propriety, legality or otherwise of the AU decision to merge the ACJ with the ACtHPR, or its extension of the jurisdiction of the Human Rights Court to include international crimes. That debate is now stale and would therefore, serve no more meaningful purposes. This author had amply dealt with the issue in the years past.[8] Rather, this chapter, as the title suggests, focuses on the resources question relative to the significance of the African Union judicial mechanism as the composite judicial body of the Union. In other words, we must emphasize the reality that the ACJHPR when fully constituted, will be the main judicial organ of the African Union. The

4 V. O. Nmehielle, '"Saddling" the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?' 7 *African Journal of Legal Studies* (AJLS) (2014) 7–42, at 9.

5 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Adopted at the Twenty-third Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, 27th June 2014 (Hereafter, the Malabo Protocol). The Protocol is not yet in force. Pursuant to the provisions of Article 11 of the Protocol, it would enter into force 30 days after 15 Member States have ratified it. As at February 2018, the period of writing, only 10 AU Member States (Benin, Chad, Comoros, Congo, Ghana, Guinea Bissau, Kenya, Mauritania, Sierra Leone, and Sao Tome and Principe) have signed the Protocol. *See* Status List available at https://au.int/en/treaties (last visited 18 February 2018). There are no ratifications so far.

6 *See* the Malabo Protocol, Art. 1 that defines the term 'Court'. *See* also Art. 8 on the nomenclature of the Court.

7 *See* generally, Nmehielle, note 4, 7–42; C.B. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal* Justice (2011), 1067–88; A. Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects', 60 *Netherlands International Law Review* (2013), 27–50; P. Manirakiza, 'The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa' (hereinafter The Case for an African Criminal Court), in V.O. Nmehielle (Ed.), *Africa and the Future of International Criminal Justice* (Eleven International Publishers, The Hague, 2012), p. 375, among various others.

8 *See* Nmehielle, note 4.

importance of this phenomenon cannot be overstated; it is indeed a big deal. While the composite court is not yet in force, it is important to engage at the strategic level on financing and sustaining the Court taking into account its significance and enormous role as a single Court. There may be the temptation to focus only on the resources needed to effectively sustain the criminal arm of the Court. That would not do justice to the significance and importance of the Court, as the holistic financing of the court must be the focus. It is also in the interest of continental norm creation and dispute resolution that a holistic emphasis is placed on the development of a robust continental judicial process that is adequately resourced. Thus, the chapter will be forward–looking; perhaps to provide the AU policy makers some food for thought in their planning in the continental body's new scheme to ensure autonomous financing of the African Union and its institutions. The chapter will not go into the dollar and cents requirements of the ACJHPR, or the numerical staffing needs of the Court, as that would be practically impossible to do in this limited piece. That would require a holistic resource-focused study. The chapter will, however, provide a thematic discussion and evaluation of the resource needs of the Court taking into account its structure and applicable international practice and standards.

The chapter is divided into seven (7) sections. Following the above introductory section, section two deals with the notion of the ACJHPR as a single Court. The section flags the holistic nature of the court particularly because there may be a tendency to have a segregated view of the African Union's judicial mechanism in the form of a separate Court of Justice, a Human Rights Court and more emphatically, an international criminal tribunal. Section three examines the adoption of the Malabo Protocol and tries to make sense of its adoption without a prior determination of the cost implication of the endeavour. Section four takes a thematic overview of the ACJHPR from a resource perspective. It examines the organic structure of the Court and juxtaposes that structure against the kind of resources that should be envisaged. In this regard, it highlights the Presidency of the Court, the Registry, Office of the Prosecutor and the Defence Office in terms of the enormity of the judicial project and its resource implications. Section five briefly discusses applicable examples of other judicial mechanisms in terms of the financial implication of organizing them. Such examples include the International Court of Justice (ICJ), the United Nations-backed Special Court for Sierra Leone (SCSL), the United Nations International Criminal Tribunal for Rwanda (ICTR), and the current African Court on Human and Peoples' Rights (ACtHPR). Section 6 delves into what could be done to sustainably finance the ACJHR leveraging

on the current reform of the African Union funding mechanism – the 0.2 per cent import levy on eligible imports into the continent. Section 7 concludes the chapter, emphasizing the significance of the current AU financing mechanism reform – the 0.2 per cent levy on eligible imports into the continent, as a great opportunity for effectively financing and sustaining the ACJHPR. The section calls on the AU to make provisions for the funding of the Court through a regular budget from member states' assessed contributions, an endowment or trust fund from surpluses, and provision for voluntary contributions from willing member states and partners to cater for ad hoc needs and short-term resource requirements.

2. THE ACJHPR AS A SINGLE AND COMPOSITE COURT

It must not be lost on any observer, commentator, or policy maker that the ACJHPR is a single Court and the main judicial organ of the African Union. As a result, any evaluation of its resource needs must begin from that perspective. The court as a single and composite court will have four Organs – a Presidency, an Office of the Prosecutor, a Registry and a Defence Office.[9] The Court will be made up of three Sections – 'a General Affairs Section, a Human and Peoples' Rights Section and an International Criminal Law Section'.[10] Specifically, the International Criminal Section is endowed with 'a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber'.[11] Similarly, all the Sections are allowed to 'constitute one or more Chambers in accordance with the Rules of [the] Court.'[12] The General Section of the Court has jurisdiction over disputes other than human rights questions and international crimes, which are accordingly within the purview of the Human Rights and International Criminal Law Sections, respectively. The reality of the above configuration of the Court is that, in effect, you have three courts fused into one. The strategic leadership of the Court revolves around the four organs enumerated above. The President of the Court would be assisted by a Vice President[13]; the Prosecutor will have two Deputies.[14] The Registry of the Court would be overseen by one Registrar who in turn would be assisted by three Assistant Registrars.[15] The Defence Office would be presided over by the

[9] Malabo Protocol, Art. 2.
[10] St. of the African Court of Justice and Human and Peoples Rights, Art. 16(1).
[11] Id., Art. 16 (2).
[12] Id., Art. 9(1).
[13] Id., Art. 22.
[14] Id., Art. 22A.
[15] Id., Art. 22B.

Principal Defender[16] with requisite staff complement to ensure the rights of accused persons or others that may require legal assistance.

The above structure of the Court shows the enormity of the African Union's ambitious judicial project. It is in the interest of the African Union that this judicial project is realized if it should be taken seriously in fully implementing the noble aspirations contained in the AU Constitutive Act. The fact that the African Court of Justice was not operationalized despite the entry into force of the Protocol on the ACJ[17] adopted pursuant to Article 18 of the Constitutive Act – due to the *Merger Project*, calls for a meaningful engagement and credible efforts to bring the Malabo Protocol into force.

3. ADOPTING THE MALABO PROTOCOL WITHOUT COST IMPLICATIONS

Some may, for argument sake, contend that it was imprudent on the part of the African Union to adopt the Malabo Protocol without first ascertaining the cost implications of implementing the objectives and provisions of the Protocol, which was mainly to extend the jurisdiction of the merged African Court of Justice and Human Rights to include international crimes. The same argument could be made regarding any other treaty negotiated by the African Union or any other interstate institution such as the United Nations (UN) or other regional organizations. It is not usually very easy to fully appreciate the cost implications of adopting any international agreement before such an agreement is adopted. Where such a forwarding financial thinking exists, it will no doubt make life very easy for the eventual implementation of the objectives of an intended treaty. This author would, however, think that the paramount issue would be whether there is a strong collective will to undertake a particular objective through the adoption of a treaty or an international agreement. The crystallization of that objective through the actual adoption of the treaty should provide the impetus for working out the cost implication of its implementation within the timeline of preparation for its entry into force.

In the case of the Malabo Protocol, this is even more so applicable. It needs recalling that the implementation of the Protocol on the Court of Justice of the African Union despite its entry into force, was aborted by the *Merger*

[16] Id., Art. 22C.

[17] Protocol of the Court of Justice of the African Union; adopted in Maputo, Mozambique, on 11 July 2003. The Protocol entered into force on 11 February 2009, having garnered the required 15 ratifications. As at February 2018, there are 18 ratifications. *See* List of Countries which have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the African Union.

Project leading to the adoption of the Merger Protocol, which also is yet to enter into force[18] and which also had its own structures. During preparations for the adoption of the Malabo Protocol that eventually brought everything together, there was an attempt to evaluate the final implication of its implementation. When the Protocol was presented during the AU Summit of January 2013, it was not decided upon by the AU Assembly. The Executive Council, which normally prepared for the meeting of the Assembly rather decided that a report on the financial and structural implications of adopting the Protocol, among other issues, should be prepared and reported on at the following midyear Summit.[19] The eventual adoption of the Protocol in Malabo in July of 2014 was not faced with the same fate of first elucidating on the financial and structural implications before it was adopted. The urgency of adopting the Protocol in the face of the increasing strong concerns of the African Union Assembly about the activities of the International Criminal Court (ICC) in Africa would have primarily worked on the minds of the Assembly in this regard. This author who had become Legal Counsel of the African Union during the period in November 2013, was also of the opinion that it would not be very helpful to hurry a report on the structural and financial implications of the Protocol before its adoption. The reason was simple; it was necessary that the report on the financial implications should be well informed by a thorough study between the adoption of the Protocol and its entry into force based on the finally adopted Protocol. I was of the view that an initial assessment hurriedly put together by a Consultant was not thorough enough and could not have taken adequate account of the Protocol that eventually emerged having regard to the composite character of the Court and available best practices. It mainly focused on the financial implications of extending criminal jurisdiction to the existing ACtHPR.[20] In terms of the structural implications of the Court, the court's structure is now very clear based on its organic composition from which a clear assessment of personnel and resource needs could be made taking into account international courts of a similar nature.

[18] The Merger Protocol has only 6 ratifications as at February 2016 (Benin, Burkina Faso, Congo, Liberia, Libya and Mali) out of the 15 ratifications required by Article 9. *See* Ratification Status List available https://au.int/en/treaties (last visited 18 February 2018).

[19] *See* Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Doc. EX.CL/Dec.766(XXII; Doc. PRC/Rpt (XXV)), p. 1, para. 2; also cited in Nmehielle, note 4 at 41.

[20] *See Report on the Final and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes*, EX.CL/773(XXII) Annex II, 1–7.

While awaiting the ratification and entry into force of the Malabo Protocol, it is now vital for a comprehensive study on the financial implications of the ACJHPR to be undertaken where an evaluation of the resource needs of the various sections of the Court would be made. That study will now benefits from an adopted Protocol, whose structure is set. Thus, the General, Human Rights and International Crimes Sections as the fused components of the Court would be thoroughly examined to ensure effective resource allocation. This is even more important now that the African Union has launched its reform agenda with a strong focus on effectively and adequately financing the African Union. At its Twenty-Seventh Ordinary Summit in Kigali, Rwanda in 2016, the AU Assembly took a Decision to finance the African Union 'in a predictable, sustainable, equitable and accountable manner with the full ownership by its Member States'.[21] The Decision created a new mechanism for funding the African Union – instituting and implementing '0.2 percent Levy on all eligible imported goods into the Continent to finance the African Union Operational, Program and Peace Support Operations Budgets starting from the year 2017'.[22] A committee of African Union Ministers of Finance made up of ten ministers, two from each AU region (referred to as the F10) is charged with working out the implementation of the 0.2 per cent levy to ensure adequate and sustainable funding of the African Union by being involved in the budgetary process.[23] This reform of the AU is led by President Paul Kagame of Rwanda who recently became the Chairperson of the AU Assembly. President Kagame presented his report to the AU Assembly in January 2017.[24]

There is no doubt that the reform of the African Union, particularly the way it is funded has implications for the financing of the judicial arm of the African Union – the ACJHPR, and in a more sustainable manner. It becomes imperative for AU policy makers to look at Financing the Union in a very holistic way that pays deliberate attention to the Court in the same manner as it does to peace support operations within the renewed emphasis on the 'Peace Fund', which the Assembly financing Decision recognizes as having 'three (3) thematic windows, namely Mediation and Preventive Diplomacy; Institutional

[21] Decision on the Outcome of the Retreat of the Assembly of the African Union, Assembly/AU/Dec.605 (XXVII), 1–2, at 1.

[22] Id.

[23] Id. at 2.

[24] *See* H.E. Paul Kagame, The Imperative to Strength our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union, Presented to the African Union Assembly on 29 January 2017. On file with this author and also available at https://au.int/en/au-reform (last visited on 18 February 2018).

Capacity; and Peace Support Operations'[25] The *Merger Project* is a huge initiative and must be realized. It will involve enormous resources, which resources need to be available based on a deliberate, proper and systematic planning. The question then is how does the AU assess such resource requirements to sustainably finance the Court? In this regard, there is need for a systematic evaluation of what the composite Court involves. This will bring out a clear picture of the various compartments of the Court from where a sense of the resource requirements could be established.

4. THEMATIC OVERVIEW OF THE ACJHPR'S STRUCTURE FROM A RESOURCE IMPLICATIONS PERSPECTIVE

While I continue to emphasize that the ACJHPR is a single Court, it is indeed a composite court that literally combines three courts together – the initially planned Court of Justice of the African Union, the currently existing African Court on Human and Peoples' Rights, and the Malabo Protocol's creation – the International Criminal arm. An appreciation of this composite nature of the Court will be very helpful in evaluating the resource needs of the Court because of the diverse expertise needed for the Court to fully perform its role and to achieve its mandate. It will thus be useful to examine the organs of the Court and each of the Sections and juxtapose them against what may be required in its sustainable financing.

A. *The Presidency*

The Presidency is the organ that represents the judicial and political leadership of the Court and generally oversees the strategic operation of the Court. It oversees the judges of the Court. It is a collective of the judges of all the Sections of the Court – the General Affairs, Human Rights and International Criminal Law Sections. The Court when fully constituted will be made up of 16 Judges elected by the African Union Assembly from its five AU Regions who would serve for a single term of nine years.[26] In the configuration of the Court and based on how the Judges are elected, the General Affairs and Human Sections will be composed of five (5) Judges each while the International Criminal Law Section will have six (6) Judges[27]. The

[25] Assembly/AU/Dec.605 (XXVII), supra note 21 at 2.

[26] *See* the St. of the African Court of Justice and Human Rights, Art. 3 as amended by Art. 2 of the St. of the St. of the African Court of Justice and Human and Peoples' Rights.

[27] *See* Id., Art. 6(1) as amended by Art. 4 of the St. of the Statute of the African Court of Justice and Human and Peoples' Rights.

Presidency will be led by the President of the Court who together with the Vice President will be elected by all the judges for a terms of two years renewable once.[28] Of the 16 Judges of the Court, only the President and the Vice President would initially serve full-time.[29] It is envisaged that all the Judges of the Court could serve on a full-time basis but at such a time that would be determined by the AU Assembly based on the Court's recommendation.[30]

From a resource perspective, it means that, taking into account Article 23 of the Protocol on the Statute of the African Court of Justice and Human Rights on the remuneration of the Judges, provisions have to be made for the Presidency in a manner that firstly takes into account the salaries or allowances of the Judges for the initial period where they are largely expected to serve on a part-time basis except for the President and the Vice President who would always serve full-time and also envisaging the resource needs for when all the judges would be required to serve full-time. There is no doubt that the caseload of the Court, among other considerations, would determine whether the Court continues to function on a part-time basis over a long term or a much shorter period in terms of the salaries and allowances of the Judges. If the experience of the currently existing African Court on Human and Peoples' Rights is anything to go by, it can provide some lessons for the future.[31] Only the President of the Human Rights Courts serves on a full-time basis and in just 12 years of its existence, the caseload and other activities of the Court have increased tremendously. In 2016 alone the Court received 59 cases and 2 advisory opinion requests[32]. Effectively delivering on its judicial mandate and timely so, may be impacted by the part-time nature of the Judges' work, as they are also generally involved in other occupations. Secondly, the Presidency would require formidable administrative support befitting of its role and mandate. The 16 Judges will require competent legal officers, assistants and secretaries, among other essential personnel. Such support staff complement for the Presidency must be clearly assessed taking into account the various

[28] *See* the St. of the African Court of Justice and Human and Peoples' Rights, Art. 22.

[29] *See* the St. of the African Court of Justice and Human Rights, Art. 8(4) as amended by the St. of the African Court of Justice and Human and Peoples' Rights, Art. 5.

[30] Id., Art. 8(5) as amended by the St. of the African Court of Justice and Human and Peoples' Rights, Art. 5.

[31] *See* generally V.O. Nmehielle, 'Seven Years in Business: Evaluating Developments at the African Court on Human and Peoples' Rights' 17 *Law, Democracy and Development* (LDD) 317–41 (2013).

[32] *See* 2016 Activity Report of the African Court on Human and Peoples' Rights, EX.CL/999 (XXX), 1–24, at 19, para. 47.

stages of the Court's development. Extrapolating from the currently existing Human Rights Court would be helpful even though the current Human Rights Court is only made up of 11 Judges, five Judges shy of the 16 required for the ACJHPR.

B. *The Registry*

In the workings of a judicial institution such as a Court, the Registry is literally the engine room where the administrative functioning of the Court is overseen. Without an effectively equipped and functioning Registry it will be very difficult for a court to deliver on its mandate. For the ACJHPR, the Registry is a vital organ of the Court. Article 22B (1) of the Statute of the ACHPR provides for a Registrar to lead the Registry supported by three Assistant Registrars. It is no coincidence that the Statute makes provision for three Assistant Registrars within the Registry. The three distinct Sections of the Court that have various jurisdictional mandates will surely require jurisdiction-specific attention in the way the Registry functions. The General Affairs Section, which is mainly a civil jurisdiction arm of the Court would require registry expertise in civil processes thus requiring an Assistant Registrar to oversee that arm. In the same vein, the Human Rights Section would need an Assistant Registrar to manage the human rights processes of the Court in the same way that the International Criminal law Section would require an Assistant Registrar versed in criminal processes. The Registrar would serve for a single term of seven (7) years while the Assistant Registrars would for a term of four (4) years renewable once.

Because of the importance of the Registry to the holistic administrative operations of the Court, it is important to properly assess its resource needs. There will be such departments or units within the Registry that are a *sine qua non* to a composite Court in the nature of the ACJHPR. Apart from the immediate office of the Registrar, there is the larger administrative services department that will be responsible for general recruitment/human resources, finance and budget, facility maintenance, procurement and the like. There will also be the language services department that will be responsible for ensuring translation of documents and the interpretation of proceedings in the various working languages of the African Union. The importance attached to a judicial process that makes for effective participation by litigants or respondents from various legal and language traditions cannot be overemphasized. There will also be a witness and evidence unit or department that would further be arranged in terms of the civil, Human Rights and criminal dimensions of the Court. This will require a Victims and Witness

Unit as well as a Detention Management Unit to specifically account for the international criminal law requirements of the Malabo Protocol[33].

The various components of the Registry highlighted above require enormous resources that must be deliberately put in place for a credible ACJHPR to exist and to be taken seriously. It is therefore very important that AU policy makers pay attention to the detail. The detail from the beginning is important for a sustainable financing model to be arrived and applied over the years taking into account the stage of the Court in terms of its caseload and other activities over time.

C. *Office of the Prosecutor*

The extension of the jurisdiction of the African Court of Justice and Human Rights to international crimes that led to the adoption of the Malabo Protocol effectively created an international criminal tribunal of the African Union. In contemporary international criminal adjudication, enormous resources are required to run such courts. Article 22A of the Malabo Protocol provides for the Office of the Prosecutor which is composed of a Prosecutor and two Deputy Prosecutors who would all be elected by the Assembly of the African Union.[34] The Prosecutor's term of office will be one term of seven (7) years while the terms of office of the Deputy Prosecutors will be for four (4) years each, renewable only one.[35] The Statute vests the Office of the Prosecutor with the responsibility to prosecute and investigate the proscribed crimes.[36] The Statute requires the Prosecutor to be assisted by such staff as are necessary for the effective and efficient discharge of the mandate and responsibility of the office.[37]

For the ACJHPR to be a credible Court from the perspective of its criminal justice mandate, it must be equipped to deliver quality justice through the efficiency of its prosecutorial arm. The ability of the Office of the Prosecutor to do this is dependent on how it is resourced on two fronts – it investigative and prosecution mandates. It is in this regard that the Prosecutor is assisted by two Deputy Prosecutors – one to oversee investigations and the other the prosecution. The experience of the United Nations-backed Special Court for Sierra Leone (SCSC)[38], the United Nations International Criminal Tribunal

[33] *See* St. of the African Court of Justice and Human and Peoples' Rights, Art. 22(9) (a) and (b).
[34] Id., Art. 22(A) (1) and (2).
[35] Id., Art. 22(A) (3) and (4).
[36] Id., Art. 22(A) (6).
[37] Id., Art. 22(A) (7).
[38] The SCSL was established by 'An Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone' pursuant to United Nations Security Resolution 1315 of 14 August 2000.

for Rwanda (ICTR)[39], the United Nations International Criminal Tribunal for Yugoslavia (ICTY)[40], the International Criminal Court (ICC)[41], the Special Tribunal for Lebanon (STL), and most recently, the Extraordinary African Chambers (EACs)[42], clearly shows that the work of the prosecutor is dependent on robust investigations and efficient prosecution of the alleged crimes. Apart from the general staffing and resources for the immediate or front office of the Prosecutor, ample resources will be required for properly equipping both the investigations and prosecutions departments. The number of staff as well as resources required for the various departments in the Office of the Prosecutor would of course be dependent on the stage of the Court's work, requiring a short-term and a long-term outlook. Thus, conscious preparations must be made to determine what would be need in the short, immediate and long terms for the office of the Prosecutor.

D. *The Defence Office*

A lot of emphasis is usually placed on the Prosecution of accused persons resulting in enormous resources being at the disposal of the Prosecutor with little attention paid to defence issues. The importance of ensuring the rights of accused persons in international criminal justice adjudication necessitated the need to interrogate the level of attention paid to those who undergo criminal trials in international justice mechanisms as envisaged in the Malabo Protocol. The initial main and substantive attention in this regard was the eventual creation of the Office of the Principal Defender of the Special Court for Sierra Leone, which I had referred to elsewhere as the watershed in international criminal justice adjudication.[43] The mandate of the SCSL Defence Office in

[39] The ICTR was created by UN Security Council Resolution 955 of 8 November 1994 in response to the Rwandan genocide of the same year.

[40] Pursuant to SC Res. 827, 25 May 1993, the United Nations Security Council established the ICTR for judicial accountability arising from the atrocities from the conflicts in former Yugoslavia.

[41] The STL was established by an 'Agreement between the United Nations and the Lebanese Republic' pursuant to SC Res. 1757, 20 May 2007 to deal with terrorist activities that led to the killing of Prime Minister Rafiq Hariri among others.

[42] The EACs were created pursuant to an 'Agreement between the Government of the Republic of Senegal and the African Union on the establishment of the Extraordinary African Chambers' signed on 22 August 2012. The agreement established the EACs within the judicial system of Senegal to for criminal accountability for international crimes committed in Chad from 7 June 1982 to 1 December 1990 when Hissene Habre was the president of Chad.

[43] *See* V.O. Nmehielle, 'The Defence Office of the Special Court for Sierra Leone: A Watershed in Realizing the Rights of Accused Persons International Criminal Justice' in Charles Chernor

accordance with Rule 45 of the Rules of Procedure and Evidence of the SCSL was to ensure 'the rights of suspects and accused' persons. That office carried out its mandate by providing initial advice, attending detention issues, providing legal assistance as may be ordered by the court, ensuring that facilities were made available to counsel for the defence of the accused, maintaining a roster of counsel that could be called upon to defend the accused and its personnel acting as duty counsel for the accused as me required, among various other things.[44] While the SCSL may have blazed the trail in flagging the importance of defence issues in international criminal justice, its Defence Office was not independent but subject to the administrative oversight of the Registrar of the Court. The ICC would later establish the office of the Principal Counsel for the Defence in the mould of the Principal Defender of the SCSL. It is the Special Tribunal for Lebanon that established a fully independent Defence Office as an Organ[45] within the principle of equality of arms between the Prosecution and the Defence.

The Malabo Protocol has followed in the footsteps of the STL to make the Defence Office of the ACJHPR an Organ of the Court.[46] Article 22(C) of the amended Statute of the ACJHPR establishes the Defence Office as an independent Organ under the oversight of the Principal Defender, who would be appointed by the Assembly of the African Union. He or she would be assisted by such staff members as are required to enable the office to effectively and efficiently deliver on its mandate.[47] As envisaged in the Statute of the of the ACJHPR, the Defence Office, just like other Organs of the Court would require enormous human and other resources to be able to fulfil its mandate of watching over the rights of accused persons including acting as public defender for indigent accused persons or such accused persons that the interest of justice would require the provision of legal assistance. There is nowhere else that the functions of the Defence Office would be more useful than in Africa where the average accused person is generally indigent requiring the need for elaborate legal assistance. In operationalizing the ACJHPR, attention must be paid to fully resourcing the Defence Office, as it is expected to play a vital role right from the beginning of the process in the same way as the Prosecution.

Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge: Cambridge University Press, 2013) 527–49.

[44] *See* Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 45(A)–(F).

[45] *See* St. of the Special Tribunal for Lebanon, Arts. 7 and 13.

[46] *See* The Malabo Protocol, Art. 2.

[47] *See* St. of the African Court of Justice and Human and Peoples Rights, Art. 22(C) (1)–(8).

The organic structure of the ACJHPR as described above is indicative of what operationalizing the Court involves and should inform what resource measures to put in place to have a credible court. For the African Union to be able to do this, it must evaluate the Court's resource needs in the context of what the Court is expected to do, drawing lessons from what has been done elsewhere. In this regard, it may be important to look at the Court, though a single court, from its composite nature of three courts fused into one. From this perspective, it could be said that the General Affairs Section of the Court is a mini International Court of Justice (ICJ); the Human Rights Section, a mini Human Rights Court; and the International Criminal Law Section, a mini International Criminal Court. It is thus important to study and draw lessons from similar endeavours for indicative resource needs and how that could be sustained.

5. RESOURCE NEEDS AND APPLICABLE LESSONS

Sustainably providing for the ACJHPR is a huge endeavour and requires a deliberate effort on the part of the African Union. The continental organization must draw lessons from similar institutions such as the ICJ, the SCSL, the ICTR and the ACtHPR, to name a few. The ICJ was operationalized in 1947 as the principal judicial organ of the United Nations. It is composed of 15 judges and has more or less a general affairs jurisdiction with no Human Rights and international criminal justice jurisdictions as envisaged under the ACJHPR. Structurally, it has a Presidency and a Registry. In the almost 71 years of it existence, the ICJ had had only 168 cases listed in it General List.[48] The two-yearly budget of the ICJ for 2016 to 2017 was $ 52,543,900[49] and that of 2018 to 2019 is $46,963,700[50]. There is no doubt that the ICJ has had limited judicial work compared to regional courts of a similar nature. It is generally funded within the United Nations system and thus through the regular general member states assessment.[51] Funding the ICJ through member states assessment ensures stability in the ability of the Court to function and to carry out its mandate.

The SCSL as an international criminal justice mechanism only dealt with international crimes. It had a somewhat similar structure as the International

[48] *See* www.icj-cij.org/en/cases (last visited 3 March 2018).
[49] *See* Report of the International Court of Justice 1 August 2015 to 31 July 2016, at 10.
[50] *See* Report of the International Court of Justice 1 August 2016 to 31 July 2017, at 10.
[51] According to Article 33 of the Statute of the International Court of Justice, 'The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly'.

Criminal Law Section of the ACJHPR. While it dealt with and convicted only ten persons, its average annual budget was not low. As I have observed elsewhere, 'As small as the SCSL operation was relative to the other [international criminal] tribunals, its annual budget averaged between 26 and 30 million dollars'[52] It is important to note that the funding of the SCSL was based on voluntary contributions – a not so good way of funding or sustaining any judicial or justice mechanism. The voluntary nature of funding the SCSL created an unhealthy anxiety from time to time regarding whether or not the Court would have adequate resources to continue to carry out its mandate.

The ICTR was the most significant international criminal justice mechanism to have operated on the African continent. As a mechanism designed to ensure legal accountability for the atrocities arising from the Rwandan genocidal war, it received enormous support having been established pursuant to a United Nations Security Council Resolution.[53] The ICTR indicted 93 individuals of which 62 were convicted and sentenced.[54] The Tribunal as an *ad hoc* measure operated for a period of over twenty years from 1994 to 2015 when it officially wound up and entered into a residual mechanism and it had an army of professional and general service staff. The proposed budget of the ICTR for the period 2004–2005 was $251.4 million,[55] which meant that the resources required for the functioning of the Court from its inception to when it formally wound up end entered into a residual mechanism phase was quite enormous.

The experience of the currently existing ACtHPR is very instructive in deciphering the resource requirements of the ACJHPR. In its 12 years of existence, the Human Rights Court has received 161 applications or cases[56]. The total 2016 budget of the present Human Rights Court stood at USD 10,386.101.[57] Seventy-Six percent of the said budget, representing USD 7,934,615, is from the assessed contributions of member states of the African Union while 24 per cent of the budget in the amount of USD 2,451.486 came from 'international partners'[58]. This budget outlay needs to be considered

[52] Nmehielle, note 4, at 35.
[53] UNSC Res. 955 of 8 November 1994.
[54] See United Nations Mechanism for International Criminal Tribunals' website – http://unictr.unmict.org/en/tribunal (Last visited 4 March 2018).
[55] UN General Assembly Fifth Committee Press Release, GA/AB/3594, 24 November 2003 available at www.un.org/press/en/2003/gaab3594.doc.htm (last visited 4 March 2018).
[56] ACtHPR, Press Release – African Court on Huma on Human and Peoples' Rights begins 48th Ordinary Session, Arusha 23 February 2018.
[57] 2016 Activity Report of the African Court on Human and Peoples' Rights, supra note 32 at 16.
[58] Id.

within the context of the present characteristics of the ACtHPR as purely a part-time court that deals with Human Rights cases without the complexities inherent in criminal prosecutions of international crimes, or complex international civil claims between member states as could be envisaged in the International Criminal Law and General Affairs Sections of the ACJHPR, respectively.

The above overview of lessons from various judicial mechanisms provides a glimpse into what it may take to adequately resource the ACJHPR if it is to fulfil its mandate as a credible judicial arm of the African Union. It must be a court that should remain financially sustainable and fully financed by the resources of the African Union. How this could be done is the focus of the next section of this chapter, taking the current AU reform agenda into account.

6. SUSTAINABLY FINANCING THE ACJHPR

As an institution that fuses three jurisdictional and legal competencies into one operation, the ACJHPR must be provided with adequate financial and human resources that are competitive, and sustainably so. The Court would complete the organic structure of the African Union as one of the most vital and permanent organs of the Union. It is not therefore, a body that is envisaged to fizzle out soon; in fact not at all. It thus becomes important that in the current mood of an AU reform as an organization that needs to take the financing of the Union much more seriously, the sustainable financing of the ACJHPR should occupy a central place in AU fiscal arrangements. Within this reform and under the funding mechanism envisaged in the AU 0.2 per cent levy on eligible imported goods into the continent, the AU must deliberately address the funding of its judicial arm in a forward looking manner. This it could do in three ways – through a regular budget, an endowment or a trust fund, and voluntary contributions from member states and willing partners. A regular budget would provide for the functioning of the Court based on predictable judicial and other activities from year to year from a predictable member states assessed contributions. A trust fund or an endowment fund would provide a reliable and sustainable source of funding for the future through proper investment channels. This would ensure that the court is placed in a position where it can be sure of its financial stability knowing the volatility of African economies that are dependent on commodities. This will enable the Court to continue to adequately function in circumstances of unforeseen financial drought. Voluntary contributions on the other hand, would assist the court to deal with ad hoc projects or activities, or enable it

to bring on board short-term expertise that it may require to enhance its capacity from time to time.

It is envisaged that the new AU funding formula, if truly and fully implemented, would result in the Union generating more resources than it may immediately need or require. The situation where, in applying the 0.2 per cent import levy, member states would have the prerogative to keep for their domestic needs proceeds that are over and above their assessed contributions[59], should be rethought. Those surpluses should be the source for the seed money for the endowment or trust fund for the Court.

The AU reform agenda provides an unmatched opportunity for the Union to really address how its institutions are funded. To ensure adequate financial accountability and to match the needs of those institutions with essential resources - particularly as it affects the ACJHPR, the AU must take a needed proactive step. As discussed earlier, it is essential to evaluate through a comprehensive study, the resource needs and requirements of the ACJHPR among other AU organs. This study should analyze the Malabo Protocol in terms of the structure of the Court and the resources for the optimal functioning of each of the structures – the sectional aspects of the Court – the General Affairs Section, the Human Rights Section and the International Criminal Law Section. In the same vein, the study should look at the organic structure – the Presidency, the Registry, the Office of the Prosecutor and the Defence Office. A clear assessment of resource needs that is specifically and holistically made, will provide a chance for getting it right in the sustainable financing of the ACJHPR.

It must not be business as usual where haphazard provisions are made for African Unions institutions without adequately thinking and really being alive to the needed resource requirements. For the ACJHPR, the significance of the situation cannot be overstressed – without the operationalization of the mechanism under the Malabo Protocol, a reputable and holistic judicial arm of the African Union will remain lacking. I would not want to imagine a United Nations without the International Court of Justice to articulate and interpret the norms established over the years by the United Nations systems when the need arises. Thus, an African Union without the operationalization of its judicial mechanism that is envisaged in its Constitutive Act for a continuously

[59] According to the implementation discussions on the 0.2 per cent levy, 'Any surplus collected by Member States after the fulfillment of obligations under the assessed contribution are to be retained by the State . . .' See Financing of the Union by Africa for Africa (a Summary Note on the financing reform on file with the author) at 7.

long period does not support the ideals that resulted in the transformation of the Organization of African Unity to the African Union.

7. CONCLUSION

Indeed, the adoption of the Malabo Protocol in 2014 was the ultimate streamlining of African Union's judicial institutions that innovated the fusion of what could ordinarily stand as three separate courts – a Court of Justice of general jurisdiction, a Human Rights Court and an International Criminal Tribunal into a single judicial institution - the African Court of Justice and Human and Peoples' Rights. The adoption of the Protocol was one thing; in fact, the simplest thing - all things considered; but operationalizing the Court that the Protocol created remains the most difficult. And the Court must be operationalized, as the AU cannot afford not to have a respectable judicial entity that should be relied on to resolve legal disputes within the African Union system. That is the significance of the ACJHPR. The need to operationalize the Court therefore must evoke serious thinking and concrete action on the financial sustainability of the institution, which has been the preoccupation of this chapter. Granted that there was no concerted effort to fully assess the financial implications of adopting the Malabo Protocol before it was adopted, this chapter sees it as a blessing in disguise, as it would have been nearly impossible to clearly articulate what would or would not be adopted by the AU Assembly at the time. Now that the Protocol has been adopted with clear organic structures and opened for ratification, it presents an opportunity for the AU to proactively take the next step to make the financial sustainability of the Court a cardinal point of emphasis and action. The chapter sees the current reform embarked upon by the AU on how its institutions are financed as the greatest singular opportunity in this regard. The strong resolve of the African Union to take its financial future into its own hands rather than overly relying on international partners to fund its programmes and institutions could not have come at a better time. The 2016 Kigali decision by the AU to impose 0.2 per cent import levy on eligible imports into the continent as way for member states to support the financing of AU institutions rather than from state treasury has the potential of making the AU financially sustainable. In this effort, the Court must therefore be prioritized, as the fused judicial institution would require enormous and sustainable resources to be able to fulfil its mandate. To get it right, the AU must take steps to embark on a post Malabo Protocol adoption study on the comprehensive resource needs of the Court so as to be able to place

its financial requirements within the 0.2 per cent import levy financing mechanism just like the AU peace support operations. A concerted effort in this regard would ensure sustained financing for the Court through a regular budget from assessed contributions, an endowment or trust fund from surpluses as well as through voluntary contributions from partners to cater for ad hoc or short-term requirements of the Court.

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Between Hope and Doubt

The Malabo Protocol and the Resource Requirements of an African Criminal Court

STUART FORD

1. INTRODUCTION

In the nearly twenty years since the Organization for African Unity became the African Union (AU),[1] it seems the AU has been in a state of perpetual reorganization, expansion, or modification.[2] The pace of change has sometimes been dizzying. Just in 2016, the AU committed to creating the African Minerals Development Centre, the African CDC, the African Science Research and Innovation Council, the Pan African Intellectual Property Organization, the Africa Sports Council, and the African Observatory in Science Technology and Innovation.[3]

But many of these institutions exist only on paper.[4] For example, the AU formally adopted a constitutive document for all of the organizations listed in the paragraph above, but those documents have not been ratified by enough member states for them to enter into force.[5] The result is that the

[1] *See* Corinne A. A. Packer & Donald Rukare, 'The New African Union and Its Constitutive Act', 96 *American Journal of International Law* 365 (2002) 365–379 (describing the formation of the AU); Konstantinos D. Magliveras & Gino J. Naldi, 'The African Union – A New Dawn for Africa?', 51 *International and Comparative Law Quarterly* 415 (2002) 415–425 (same).

[2] *See* Tiyanjana Maluwa, 'Ratification of African Union Treaties by Member States: Law, Policy and Practice', 13 *Melbourne Journal of International Law* 636–684, at 638 (2012) (arguing that the increase in the rate of treaty adoption after 2002 was the result of the AU's "realization that these treaties are critical to the acceleration of African economic and political integration").

[3] *See* OAU/AU Treaties, Conventions, Protocols & Charters, available at https://au.int/web/en/treaties (last visited June 22, 2017).

[4] *See* Maluwa, supra note 2, at 639–40 (noting that the AU has been far more successful at creating new treaties than it has been in getting member states to ratify those treaties so that they can enter into force).

[5] *See* OAU/AU Treaties, Conventions, Protocols & Charters, available at https://au.int/web/en/treaties (last visited June 22, 2017).

organizations exist in limbo waiting for the state support they need to come into being. Once their constitutive documents come into force, the AU will still have to give them the resources they need to succeed.

Even some older institutions still exist only on paper. For example, the Protocol on the African Investment Bank (adopted 2009), the Agreement for the Establishment of the African Risk Capacity Agency (adopted 2012) and the Protocol on the Establishment of the African Monetary Fund (adopted 2014) have not been ratified by enough states to enter into force.[6] In fact, of the three financial institutions that were specifically listed in the AU's Constitutive Act in 2001 as being core components of the AU,[7] none of them exist yet.[8] The repeated failure of the AU to create functioning institutions has raised legitimate questions about whether the AU has the political will and capacity to follow-through on its many commitments.[9]

These questions about the AU's ability and desire to create functioning institutions are particularly relevant to its recent adoption of the Malabo Protocol.[10] The Malabo Protocol adds an international criminal law component to the jurisdiction of the African Court of Justice and Human Rights (ACJHR).[11] The addition of criminal jurisdiction to the ACJHR represents a significant increase in the court's subject matter jurisdiction.[12] It also greatly increases the difficulty of the court's work and necessitates a more complex organizational structure.[13] But can this new and improved ACJHR be successful? Will the AU have the political will to make it a reality? This chapter argues that the resources that the AU eventually devotes to the ACJHR will shed light on whether to be hopeful or doubtful about the court's eventual success.

Building a functioning international criminal court is not easy. It requires substantial investigative and adjudicative resources.[14] If the AU does not

[6] Id.

[7] *See* Constitutive Act of the African Union, Art. 19 (listing the AU's financial organs as the African Central Bank, the African Investment Bank and the African Monetary Fund)

[8] The constitutive documents for the Investment Bank and the Monetary Fund have been adopted but have not yet come into force, while the constitutive document for the Central Bank is still being drafted. *See* The Financial Institutions, available at https://au.int/web/en/organs/fi (last visited June 22, 2017).

[9] *See* Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (2016) at 29–31 (noting the difficulty the AU has had in providing sufficient resources to sustain its institutions).

[10] *See* infra Part 2 (describing the Malabo Protocol).

[11] Id.

[12] *See* infra Part 3.

[13] Id.

[14] *See* infra Parts 6–8.

devote sufficient resources to the ACJHR, it will not be successful.[15] Of course, having sufficient resources is not a guarantee of success, but if the AU devotes sufficient resources to the international criminal law component of the ACJHR that would be a very hopeful sign. First and foremost, it would indicate that the AU is committed to the ACJHR's success. This is incredibly important as the ACJHR will not be successful if it does not have the financial and political support of the AU.[16]

Thus, this chapter will explore the resources that will be needed to give the ACJHR a functioning international criminal law component. The International Criminal Court (ICC) will be used as a comparator. The ICC has publicly released information about the resource requirements of its own work and that will form the basis for predicting the eventual requirements of the ACJHR. While it is impossible to know exactly what resources are needed to carry out the Malabo Protocol, this chapter estimates that a fully operational ACJHR will need about 370 full-time personnel and a budget of approximately 50 million euros per year.[17] It is unlikely that the Malabo Protocol can be successful in the long-run with dramatically fewer resources than this. When the Malabo Protocol comes into force, the resources that the AU devotes to its implementation will give us insight into whether the expanded ACJHR can be successful.

2. THE DEVELOPMENT OF THE AU'S JUDICIAL BODIES

In general, the evolution of the AU's judicial bodies looks similar to the rest of the AU in that they have undergone rapid and extensive changes.[18] It also looks similar to the rest of the AU in that there has been a lack of follow-

[15] *Cf.* Stuart Ford, 'What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach', 16 *Washington University Global Studies Law Review* 1–70 (2017) (arguing that the ICC has insufficient resources and that is one of the reasons it has not been as successful as its supporters had hoped).

[16] *Cf.* Stuart Ford, 'The ICC and the Security Council: How Much Support Is There For Ending Impunity?', 26 *Indiana International and Comparative Law Review* 33–67, at 62–3 (arguing that the ICC is weak compared to states and that it cannot be successful without the political support of the international community).

[17] *See* infra Part 9. Less than this would be needed during the court's startup phase, but eventually these resources will be necessary.

[18] *See* Amnesty International, supra note 9, at 7–11 (describing the development of the AU's judicial bodies). *See also* Firew Kebede Tiba, 'Regional International Criminal Courts: An Idea Whose Time Has Come?', 17 *Cardozo Journal of Conflict Resolution* 521, at 539–545 (2016); Vincent Nmehielle, "Saddling' the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?', 7 *African Journal of Legal Studies* 7–42, at 12–23 (2014).

through. The first judicial body within the AU was the African Court of Human and Peoples' Rights (the ACHPR). It was created to foster the "attainment of the objectives of the African Charter on Human and Peoples' Rights."[19] The protocol establishing the ACHPR was opened for signature in June 1998 and entered into force in January 2008.[20]

In addition, the AU's Constitutive Act called for the establishment of a Court of Justice[21] to serve as the "principal judicial organ" of the AU.[22] A protocol for the establishment of the African Court of Justice (ACJ) was adopted in July 2003 and entered into force in February 2009.[23] Almost as soon as the ACJ's constitutive document had been adopted, the AU began talking about merging the ACHPR and the ACJ into a single court.[24] This was premised, at least in part, on the desire to reduce the cost of supporting two separate international courts.[25]

In 2008, the AU issued the Protocol on the Statute of the African Court of Justice and Human Rights.[26] This protocol merges the two existing courts to create the ACJHR.[27] While the protocol to establish the ACJHR was adopted in 2008, it has never come into force. It requires fifteen ratifications to enter into force,[28] but has only been ratified by six states.[29]

Yet even though the protocol establishing the ACJHR had not come into force, in 2009 the AU began discussing modifying the ACJHR to add an

[19] *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, Preamble, available at https://au.int/web/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and.

[20] *See* OAU/AU Treaties, Conventions, Protocols & Charters, available at https://au.int/web/en/treaties.

[21] *See* Constitutive Act of the African Union, art. 18(1).

[22] *See* Protocol of the Court of Justice of the African Union, art. 12, available at https://au.int/web/en/treaties/protocol-court-justice-african-union.

[23] *See* OAU/AU Treaties, Conventions, Protocols & Charters, available at https://au.int/web/en/treaties.

[24] *See* Amnesty International, supra note 9, at 8.

[25] *See* Nmehielle, supra note 18, at 9.

[26] *See* OAU/AU Treaties, Conventions, Protocols & Charters, available at https://au.int/web/en/treaties.

[27] *See* Protocol on the Statute of the African Court of Justice and Human Rights, art. 2, available at https://au.int/web/en/treaties/protocol-statute-african-court-justice-and-human-rights ("The African Court of Human and Peoples' Rights . . . and the Court of Justice of the African Union . . . , are hereby merged into a single Court and established as 'The African Court of Justice and Human Rights.'").

[28] Id. art. 9(1).

[29] *See* List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute Of The African Court Of Justice And Human Rights, available at https://au.int/web/en/treaties/protocol-statute-african-court-justice-and-human-rights.

international criminal component.[30] This was driven largely by the indictment of African government officials by European states and the ICC.[31] The indictments were seen by the AU as inappropriate interference in African affairs.[32] By adding a criminal component to the ACJHR, the AU hoped to take control of the indictment and trial of African leaders.[33] These discussions culminated in 2014 in the adoption of the awkwardly-named Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (hereafter called the "Malabo Protocol" because it was adopted in the city of Malabo in Equatorial Guinea).[34] Entry into force of the Malabo Protocol requires fifteen ratifications,[35] but, as of July 2017, it had not been ratified by a single country.[36]

The story of the AU's judicial bodies has been one of over-commitment and under-delivery. Almost ten years ago, the AU decided to merge the ACHPR and the ACJ to form a single court – the ACJHR. Progress toward that goal has been slow. But despite the fact that the ACJHR had not been established yet, the AU almost immediately began discussions to greatly expand the planned ACJHR by adding an international criminal law component.

At the rate that ratifications are currently being received, it could be another five or ten years before the protocol establishing the ACJHR comes into force.[37] At that point, it would require another fifteen ratifications of the Malabo Protocol before the amendments to add a criminal component to the ACJHR would take effect. As a result, it is not clear when or if the Malabo Protocol will come into effect, but it is unlikely to occur in the near future.[38]

[30] *See* Amnesty International, supra note 9, at 9.
[31] *See* Nmehielle, supra note 18, at 18–22.
[32] Id.
[33] Id.
[34] *See* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available at https://au.int/web/en/treaties.
[35] Id. art. 11(1).
[36] *See* List of Countries Which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available at https://au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights.
[37] *But see* Christopher Isike and Olusola Ogunnubi, 'The Discordant Soft Power Tunes of South Africa's Withdrawal from the ICC', 44 *Politikion* 173–9 (2017) (suggesting that the withdrawal of African states from the ICC could speed up the process of adopting the ACJHR protocol and the Malabo protocol).
[38] *See* Ademola Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects', 60 *Netherlands International Law Review* 27, 37–42 (2013) (noting several reasons why African states may be reluctant to ratify the Malabo Protocol); Maluwa, supra note 2, at 659 (arguing that the slow pace of ratification of treaties related to the AU human rights courts is the result of "the ambivalence of most member states toward the

3. A NEW AFRICAN CRIMINAL COURT?

Assuming that, at some point in the future, the Malabo Protocol comes into force, what would happen? The Protocol makes a number of significant changes to the ACJHR. First, it alters the structure of the ACJHR. As originally conceived, the ACJHR would have two sections: a Human Rights Section that would hear all cases relating to "human and/or peoples' rights" and a General Affairs Section that would hear all other eligible cases.[39] The Malabo Protocol adds a new International Criminal Law Section,[40] which has jurisdiction over "all cases relating to the crimes specified" in the statute.[41]

The addition of a criminal component to the ACJHR required other structural changes. For example, it necessitates the creation of an Office of the Prosecutor, and a Defence Office.[42] The Office of the Prosecutor will be responsible for "the investigation and prosecution" of crimes[43] while the Defence Office will be responsible for "protecting the rights of the defence [and] providing support and assistance to defence counsel."[44]

The Malabo Protocol also lays out the crimes the expanded ACJHR will have jurisdiction over. First, it will have jurisdiction over the core crimes under international law: genocide, war crimes, and crimes against humanity.[45] It will also have jurisdiction over the crime of aggression.[46] The definitions of these four crimes appear to have been largely based on the definition of those crimes in the Rome Statute of the International Criminal Court, although some changes have been made to expand them at the margins.[47] The ACJHR will also have jurisdiction over a number of crimes that are not within the jurisdiction of the ICC like piracy, terrorism, corruption, money laundering, drug trafficking, human trafficking, and the exploitation of natural resources.[48]

idea of a pan-continental judicial body empowered to stand in judgment over alleged human rights violations by these states"). *But see* Tiba, supra note 18, at 547 (arguing that it is a "foregone conclusion that a regional international criminal court will be up and running in Africa in the not too distant future").

[39] Original Statute of the African Court of Justice and Human Rights, arts. 16, 28.

[40] Amended Statute of the African Court of Justice and Human Rights, art. 16.

[41] Id. art. 17(3).

[42] *See* Malabo Protocol, art. 2.

[43] *See* Amended Statute of the African Court of Justice and Human Rights, art. 22A(6).

[44] Id. art. 22C(2).

[45] Id. art. 28A.

[46] Id.

[47] *See* Amnesty International, supra note 9, at 16–17.

[48] *See* Amended Statute of the African Court of Justice and Human Rights, art. 28A. *See also* Nmehielle, supra note 18, at 29–30.

These new crimes represent a potential source of problems as some of them do not have well-established definitions.[49]

The overall result is a significant change in both structure and jurisdiction for the ACJHR. The resulting court will be unique in its attempt to incorporate the components of a regional international court, a human rights court, and an international criminal court into a single institution.[50] But will the new and expanded ACJHR be successful? This question will be explored below.

4. BETWEEN HOPE AND DOUBT

The adoption of the Malabo Protocol has left many observers unsure whether to be hopeful or doubtful. On the one hand, there are reasons to be hopeful that the Malabo Protocol will make a positive impact.[51] First, having a regional court capable of investigating mass atrocities committed in Africa could help shrink the impunity gap on the continent.[52] Second, there may be some benefit in having cases arising out of African situations prosecuted in Africa.[53] Third, the Malabo Protocol will grant to the ACJHR the ability to prosecute some crimes that are outside the jurisdiction of the ICC, but are relevant in an African context.[54] Fourth, it says all the right things.[55] In the Preamble to the Malabo Protocol, the AU reiterated its commitment to "peace, security and stability on the continent" and to protecting human rights, the rule of law and good governance.[56] The members of the AU also stressed their "condemnation and rejection of impunity" and claimed that the changes in the Malabo Protocol will help "prevent[] serious and massive violations of human and peoples' rights … and ensur[e] accountability for them wherever they occur."[57] In short, the stated goals of the Malabo Protocol are very positive.

[49] *See* Amnesty International, supra note 9, at 16–18. *See also* Abass, supra note 38, at 32–5.
[50] *See* Nmehielle, supra note 18, at 23.
[51] *See* Amnesty International, supra note 9, at 5–6.
[52] Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Human Rights', 9 *Journal of International Criminal Justice* 1067, at 1081 (2011).
[53] *See* Stuart Ford, 'The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers?', 43 *John Marshall Law Review* 715, 715–16 (2010); Murungu, supra note 53, at 1085 (2011) ("It would be good for Africa to establish a court which will be close to the African people and which might have access to victims and areas where crimes have been committed.").
[54] *See* Munguru, supra note 52, at 1085–6; Nmehielle, supra note 18, at 29–30.
[55] *See* Amnesty International, supra note 9, at 5.
[56] Malabo Protocol, Preamble.
[57] Id.

They hold out hope of preventing atrocities and ensuring accountability. Thus, there are reasons to be hopeful.[58]

On the other hand, there are also reasons to be doubtful.[59] The first concern is that the AU often appears to lack the political will and capacity to implement its vision for the organization.[60] This can be seen with the AU's financial institutions. Despite being identified as key to the organization in the Constitutive Act, more than fifteen years later they still do not exist.[61] Something similar may happen to the Malabo Protocol.[62] Even if the Malabo Protocol does come into force, will the AU have the political will and resources to adequately fund the expanded ACJHR?[63]

A second concern is whether the AU really intends the Malabo Protocol to be successful. The AU has a tense relationship with the ICC.[64] The ICC has brought charges against a number of African leaders and this has upset many AU member states.[65] The indictments of Presidents Al-Bashir of Sudan and Kenyatta of Kenya "galvanized [the] AU's resolve to establish an African regional criminal court to basically serve as a substitute and operate parallel to the ICC."[66] Thus, one way to view the Malabo Protocol is as a mechanism to prevent the ICC from exercising jurisdiction over senior government officials accused of committing crimes in Africa.[67] And indeed, there are

[58] *See, e.g.*, Matiangai Sirleaf, 'The African Justice Cascade and the Malabo Protocol', 11 *International Journal of Transitional Justice* 71 (2017) (offering a guardedly optimistic evaluation of the Malabo Protocol's future).

[59] *See* Abass, supra note 38 (offering an essentially pessimistic evaluation of the Malabo Protocol's future); Murungu, supra note 52, at 1082–85 (noting many obstacles to the success of the Protocol).

[60] *See* Amnesty International, supra note 9, at 29–33 (noting concerns about whether the AU has the capacity to make the Malabo Protocol a success).

[61] *See* supra text accompanying notes 7–8.

[62] *See* supra text accompanying notes 31–7.

[63] *See* Murungu, supra note 52, at 1084.

[64] *See* Amnesty International, supra note 8, at 23; Abass, supra note 38, at 28–9; Murungu, supra note 52, at 1077–9.

[65] *See* Amnesty International, supra note 9, at 9; Benson Chinedu Olugbuo, 'The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa', 7 *African Journal of Legal Studies* 351, 352–4 (2014).

[66] *See* Amnesty International, supra note 9, at 9. *See also* Nmehielle, supra note 18, at 18–22 (arguing that the AU adopted the Malabo Protocol to reassert control over investigations and prosecutions of violations of international law committed in Africa).

[67] *See* Amnesty International, supra note 9, at 6 (noting that "[s]ome commentators argue that the proposal is an attempt by the AU to shield African heads of state and senior officials from being held to account when there is reasonable grounds to believe that they are criminally responsible for crimes under international law").

some signs that the drafters of the Malabo Protocol hoped that the addition of criminal jurisdiction to the ACJHR would have this effect.[68]

Creating a regional court whose work would prevent the ICC from exercising jurisdiction over violations of international criminal law committed in Africa would be fine if the AU intended the ACJHR to fairly and impartially prosecute violations committed by African leaders.[69] But there is also the possibility that the AU intends to use the Malabo Protocol to try and shield African leaders from accountability for human rights violations.[70] For example, the Malabo Protocol has a worrying provision on immunities.[71] It prevents the ACJHR from instituting or continuing cases against "any serving AU Head of State" or "other senior state officials."[72] This has led to fears that the Protocol is designed, not to end impunity, but to shield African leaders from accountability.[73]

Given that there are reasons to be both hopeful and doubtful about the Malabo Protocol, how should we view it?[74] The answer may lie in what happens

[68] For example, the Malabo Protocol references the AU's Decision on the Abuse of the Principle of Universal Jurisdiction. *See* Malabo Protocol, Preamble. The AU has long been concerned with what it considers the abuse of the principle of universal jurisdiction, which seems to mean the charging of senior African government officials in non-African courts with crimes under a theory of universal jurisdiction. *See* Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.199(XI), dated July 1, 2008 (describing the use of universal jurisdiction to charge African official in non-African courts as endangering international law and order and a "clear violation of the sovereignty and territorial integrity" of African states). *See also* Nmehielle, supra note 18, at 21–2.

[69] *Cf.* Rome Statute, art. 17(1) (noting that the ICC lacks jurisdiction in situations where a case is being investigated or prosecuted by a state unless that state is "unwilling or unable to genuinely carry out the investigation or prosecution"). While the Rome Statute refers only to states in Article 17, others have argued that this can be extended by analogy to regional organizations such that an investigation or prosecution by a regional organization would properly deprive the ICC of jurisdiction unless that investigation or prosecution was not genuine. *See* Murungu, supra note 52, at 1081; Nmehielle, supra note 18, at 25. Under this reading, the creation of a regional court with jurisdiction over international criminal law would be consistent with the Rome Statute's principle of complementarity.

[70] *Cf.* Maluwa, supra note 2, at 659 (noting that many AU member states are very ambivalent about creating a "pan-continental judicial body" that would have the power to investigate their own human rights abuses).

[71] *See* Amnesty International, supra note 9, at 11, 26–7; Tiba, supra note 18, at 533.

[72] *See* Amended Statute of the African Court of Justice and Human And Peoples' Rights, art. 46A *bis*.

[73] *See* Amnesty International, supra note 9, at 27 (noting that the immunity provision "promotes and strengthens the culture of impunity that is already entrenched in most African countries"); Abass, supra note 38, at 49–50; Murungu, supra note 52, at 1086–1087.

[74] *Cf.* Nmehielle, supra note 18, at 32–5 (acknowledging that the actions of AU member states in the past have raised legitimate concerns about whether the Malabo Protocol is intended to facilitate or obstruct human rights in Africa but arguing that the AU is not monolithic and that

if and when the Protocol enters into force. At that time, the AU will have the difficult task of turning the blueprint in the Malabo Protocol into a functioning international criminal court. It will have to staff the court and give it the resources and support it needs to be successful. This will not be an easy task.[75]

One key indicator of the AU's intentions toward the new and improved ACJHR will be the resources it devotes to the court. For it to live up to the hopeful vision of a successful regional court that reduces impunity and prevents atrocities, the ACJHR will have to have sufficient resources to carry out both its investigative and its adjudicative functions. On the other hand, if the court is mainly intended to insulate African leaders from accountability for human rights abuses, it will probably not be given the resources to conduct robust investigations and prosecutions. Thus, one way to evaluate the court will be to look at the resources it receives.

Of course, adequate resources are not a guarantee of success, but they are a prerequisite for it.[76] It will be extremely difficult for the court to be successful if it lacks the resources to carry out its functions. The rest of this chapter will examine what sort of resources one would expect the new ACJHR to need to be successful. Section 5 will look at the scope of the crimes usually investigated by international criminal courts, while Section 6 explores the investigative resources necessary to meaningfully investigate those crimes. Section 7 describes a typical trial at an international criminal court, while Section 8 explores the adjudicative resources necessary for such a trial. Section 9 presents an estimate of the staffing needs and costs of a fully operational ACJHR, while Section 10 compares those estimated costs to the AU's early projections of the expense of the court. Finally, this chapter's conclusions are presented in Section 11.

5. INTERNATIONAL CRIMES

Most domestic crimes involve a single perpetrator, a single victim and a single crime site.[77] And very few domestic crimes involve the most serious offenses

individual states want different things out of the court). Professor Nmehielle implicitly takes the position that it is too soon to know whether the Malabo Protocol is intended to be promote or obstruct justice.

[75] The AU is aware of the difficulties. It twice delayed adoption of the Malabo Protocol because of concerns about the "financial and structural implications" of the changes to the ACJHR. *See* Nmehielle, supra note 18, at 39–41.

[76] *See* supra text accompanying note 15.

[77] *See* Stuart Ford, 'What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach', 16 *Washington University Global Studies Law Review* 1, 37–8 (2017).

like rape and murder.[78] International crimes, at least the ones that are investigated and tried before international courts, look nothing like the typical domestic crime.

First, the kinds of crimes that are investigated and prosecuted at international tribunals are almost always perpetrated by large hierarchically organized groups working together.[79] Most often the perpetrators are military or paramilitary units of various sorts. In addition, the majority of international crimes take place as part of an armed conflict, with all the systematic violence that entails.[80] Even when there is not an armed conflict, there is still usually extensive politically-motivated violence aimed at civilians.[81] International crimes are also usually much larger in geographic and temporal scope than domestic investigations. The typical ICC investigation involved crimes committed at dozens of different crime sites over time periods that ranged from several months to several years.[82]

International crimes also tend to be extremely serious and involve the widespread commission of rape, torture, murder, inhumane treatment and forcible displacement. For example, at the ICC, the average investigation covered the unlawful deaths of more than a thousand people[83] and the forcible displacement of huge numbers of civilians.[84] Systematic rape is a common feature of international crimes.[85] International crimes also tend to be marked by extreme cruelty, often against vulnerable groups like women, children, and the elderly.[86]

As a result of these features, international crimes are vastly more complex than the average domestic crime. They involve a larger number of victims, more serious offenses, and take place over larger areas and longer time periods. They also take place during periods of systematic violence and tend to be carried out by large hierarchically organized groups. As a result, they require substantial resources to investigate.[87]

[78] Id.
[79] Id. at 32.
[80] Id. at 31.
[81] Id. at 31–2.
[82] Id. at 33.
[83] Id. at 34.
[84] Id. at 33 (noting that the number of people forcibly displaced in the average ICC investigation ranges from hundreds of thousands to more than a million).
[85] Id. at 34.
[86] Examples of extreme cruelty include mutilation, disembowelment, gang rapes and abduction into sexual slavery. Id.
[87] Id. at 21–4 (arguing that the features of international crimes make them inherently more difficult to investigate than typical domestic crimes).

6. INVESTIGATIVE RESOURCES

Assuming the ACJHR undertakes criminal investigations that are similar in gravity to those undertaken by the ICC,[88] the ICC's experience can be a guide to the investigative resources the ACJHR will need. The typical ICC investigation lasts about three years.[89] The investigative team varies in size over the course of the investigation, with fewer in the first few months and the last few months. But for at least two years, during what the ICC calls the "full investigation" phase, the investigative team is composed of about 35 personnel.[90]

This team includes investigators and analysts, as well as a handful of lawyers, legal assistants and case managers.[91] It also includes specialists in forensics and digital evidence, and personnel to provide field support and security.[92] Over the course of three years, this team will screen hundreds of potential witnesses, interview about 170 of them, and collect thousands of pieces of physical and digital evidence.[93] It will then analyze this information so that the Prosecutor can decide whether to issue charges and, if so, who to charge, and what to charge them with.

It might be tempting to conclude that the ACJHR needs only one investigative team, but then it would only be able to undertake one investigation every three years. This would almost certainly not be enough. For example, the ICC anticipates opening nine new preliminary investigations and one new full investigation every year.[94] This is on top of the six active investigations it will have in any given year.[95]

The ACJHR will probably need at least two investigative teams. Given that investigative teams only need to be at full strength during the middle of the investigation, it seems plausible that two teams could handle three

[88] This seems to be a reasonable assumption given that a large number of the ICC's current investigations are in Africa and the primary purpose of the Malabo Protocol is to permit the ACJHR to assert control over African situations that would otherwise fall under the jurisdiction of the ICC. As a result, the ACJHR will likely face investigations similar in scope to those the ICC has undertaken in Africa.

[89] Id. at 50.

[90] Id. at 51–3.

[91] Id. at 52.

[92] Id. While the international criminal law component of the ACJHR will presumably be based in Arusha, Tanzania, it will be expected to carry out investigations anywhere in the AU. As a result, it will probably (like the ICC) need to establish field offices in countries where it is conducting investigations.

[93] Id. at 51.

[94] Office of the Prosecutor, Report of the Court on the Basic Size of the Office of the Prosecutor, Doc. No. ICC-ASP/14/21, dated Aug. 7, 2015 (hereafter "OTP Basic Size Document") at 4.

[95] Id.

investigations every three years (assuming that the start of the investigations was staggered). This would give the ACJHR the capacity to undertake approximately one new investigation every year. Thus, in any given year, the ACJHR would have two investigations ongoing, one that was being wrapped up, and have the ability to open one new one, if necessary. This is less investigative capacity than the ICC has, but would probably be sufficient, at least initially.

7. INTERNATIONAL TRIALS

Of course, completing an investigation is only the first step in a long process. The most visible part of the process comes next: the trial. International trials are complex undertakings that can take years to complete. For example, at the International Criminal Tribunal for the former Yugoslavia (ICTY), the average trial took 176 court days to complete.[96] During the trial, an average of 120 witnesses testified and more than 2,000 exhibits were entered into evidence.[97] While some have criticized international trials as too long and too slow,[98] it appears that this complexity is necessary.[99]

International trials feature a number of factors that increase their complexity relative to the average domestic trial. First of all, they often involve multiple defendants accused of acting together, which increases trial complexity.[100] International trials also tend to involve a large number of charges against each accused, which also increases complexity.[101] Finally, another hallmark of international trials is that the accused tend to be senior military or political leaders, which also increases the length of the resulting trial.[102]

This latter point is particularly important as it generates significant additional trial complexity.[103] This complexity appears to be a result of the difficulty of attributing responsibility for mass atrocities to senior leaders who are both geographically and organizationally distant from the crimes.[104] Attributing responsibility requires establishing evidence that links the charged persons to the crimes carried out by the direct perpetrators. International

[96] *See* Stuart Ford, 'Complexity and Efficiency at International Criminal Courts', 29 *Emory International Law Review* 1, 28 (2014).
[97] Id.
[98] Id. at 3–4.
[99] *See generally* Stuart Ford, 'The Complexity of International Criminal Trials is Necessary', 48 *George Washington International Law Review* 151 (2015).
[100] Id. at 172.
[101] Id.at 173.
[102] Id. at 172–3.
[103] Id. at 181–2.
[104] Id. at 182–3.

criminal lawyers refer to this as the "linking evidence" and it is critical to demonstrating the guilt of the accused. Establishing this link, however, is complex and time-consuming. This complexity is necessary, however, if courts are serious about ending impunity for those most responsible for mass atrocities.[105]

One result of the length and complexity of international trials is that courts need significant resources to carry them out. This is true both in the Office of the Prosecutor and Chambers. If adjudicative resources are insufficient, then trials may be delayed. In a worst case scenario, prosecutions may fail for lack of evidence or accused may have to be released because of the delay in bringing them to trial.

8. ADJUDICATIVE RESOURCES

So, what adjudicative resources does the new ACJHR need to conduct successful trials? Again, the experience of the ICC will be used as a guide. The Office of the Prosecutor at the ICC estimates that the average trial takes about five and a half years from the completion of the investigation until the conclusion of the appeal. This includes half a year of pre-trial preparation, three years for the actual trial, and two years for the appeal.[106] The core trial team is composed of about 15 personnel. The majority of these personnel come from the prosecution division and includes lawyers, legal assistants, and case managers.[107] They are supported by a small number of investigators who provide support for cross-examination of defense witnesses and investigation of defense theories.[108] This team has to be in place for about three and a half years to complete a single trial. Assuming that the ACJHR closes one investigation each year[109] and that (like the ICC) the majority of new investigations result in immediate trial proceedings,[110] then there will be approximately one new trial beginning each year. Given that each trial lasts three years, the ACJHR would need at least three trial teams to staff those trials.

The Office of the Prosecutor at the ACJHR will also need a group of lawyers and support staff dedicated to appeals. If one trial finishes each year, and appeals last two years, then on average there will be at least two final appeals

[105] Id. *See also* id. at 184–200 (arguing that there are few practical ways to reduce the complexity of international trials without sacrificing their most important goals).
[106] *See* OTP Basic Size Document at 51.
[107] Id. at 52–5.
[108] Id. at 54.
[109] *See* supra Section 6.
[110] *See* OTP Basic Size Document at 13.

going on at any time. To handle two final appeals plus a small number of interlocutory appeals arising out of ongoing cases, the ICC requires seven personnel.[111] It seems likely that the ACJHR would need an appeals section of about the same size.

In addition to the required personnel within the Office of the Prosecutor, the ACJHR will also require the necessary staff within Chambers. The new International Criminal Law Section will have within it three Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.[112] But, it appears the International Criminal Law Section as a whole will have only six judges.[113] This is almost certainly inadequate.[114]

The Pre-Trial Chamber requires one judge, the Trial Chamber requires three judges, and the Appellate Chamber requires five judges. Even if only one trial was going on at a time six judges would be inadequate because it would be impossible to staff all three chambers unless judges sat on multiple chambers for the same case. This would be problematic as it would require a judge who sat at an earlier stage of a case (say as a trial judge) to then adjudicate a later stage (say as an appellate judge). Having the same judge sit at different stages of the same case undermines the defendants' fair trial rights.[115] So, for this reason alone, the ACJHR would need at least nine judges so that no judge would have to sit at different stages of the same case.

But even nine judges would probably not be enough. Assuming that one new trial begins each year and that each trial lasts about three years,[116] the ACJHR will need to constitute three Trial Chambers. This would require nine judges on its own. Even if the existing Appellate Chamber could handle all of the appeals and a single Pre-Trial Chamber judge could handle all pre-trial matters that would still mean that the ACJHR would need fifteen judges just in the International Criminal Law Section.[117]

[111] Id. at 57.
[112] *See* Amended Statute of the African Court of Justice and Human And Peoples' Rights, art. 16.
[113] The ACJHR as a whole has sixteen judges, but it appears that five are assigned to the General Affairs Section and five to the Human and Peoples' Rights Section, leaving six to staff the International Criminal Law Section. *See* Amended Statute of the African Court of Justice and Human And Peoples' Rights, art. 6.
[114] *See* Amnesty International, supra note 9, at 26.
[115] Id.
[116] *See* supra text accompanying notes 110–1.
[117] At least in 2012, the AU was taking the position that there would "be NO addition of judges beyond the sixteen" provided in the draft protocol. *See* African Union, Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, Doc. No. EX.CL/773(XXII) Annex 2 at 2 (copy on file with author). Having said that, the same report also acknowledges that there might be a need to be "flexible" about the number of judges in the future. Id.

In addition to 15 judges, the International Criminal Law Section would also need the necessary legal personnel to support those judges. The ICC estimates that it needs five full-time legal personnel assigned to Chambers per trial.[118] If the ACJHR has similar needs, it would require fifteen legal personnel to staff the three Trial Chambers. Again, following the ICC's model, the Appellate Chamber would need a staff of ten legal officers[119] while the Pre-Trial Chamber would require only two personnel (assuming that only a single judge is assigned to it).[120]

Finally, the Chambers will need something like the ICC's Court Management Section, which maintains the official records of the proceedings, distributes orders and decisions and maintains the Court's calendar, including the scheduling of all hearings.[121] The ICC employs 33 people in the Court Management Section[122] to support the work of 18 judges.[123] This chapter argues that the ACJHR will eventually need fifteen judges in the International Criminal Law Section. This is on top of the judges in the Human and Peoples' Rights Section and the General Affairs Section. Accordingly, it seems likely that the ACJHR will need a similarly sized court management section to support the work of those judges.

9. STAFFING A NEW INTERNATIONAL TRIBUNAL

As the previous sections have demonstrated, building a functioning international criminal court is far from simple. First, it will need to have the staff to carry out its investigative functions. Within the new ACJHR's Office of the Prosecutor this will probably mean two investigative teams of about 35 personnel each. This will include a mix of investigators, analysts, forensics experts, and legal personnel.

The court will also have to have sufficient personnel to carry out its adjudicative functions. This will almost certainly mean in increase in the number of judges assigned to the International Criminal Law Section to 15 or so judges.

[118] *See* Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated Aug. 17, 2016, at 144.

[119] Id. at 40 (noting that the ICC's Appeals Chamber needed ten legal personnel to support the five judges of the Appeals Chamber; a ratio of two legal officers per judge).

[120] Id. at 37 (noting that the ICC's Pre-Trial Chamber needed twelve legal personnel to support the six judges of the Pre-Trial Chamber; a ratio of two legal officers per judge).

[121] *See* Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated Aug. 17, 2016, at 151.

[122] Id.

[123] Id. at 34.

They would need to be supported by at least twice that number of legal officers. In addition the prosecutions division within the Office of the Prosecutor will need three trial teams of about 15 personnel each plus an appeals team of about 7 or 8 personnel. Finally, there must be some organ like the ICC's Court Management Section to create the official record and handle all of the scheduling issues.

And these are just the core personnel tasked with carrying out the investigations and trials. In practice, international courts need additional personnel to support the core tasks. For example, the OTP at the ICC contains a Services Section that contains the Information and Evidence Unit and the Language Services Unit.[124] These are important units that help control and preserve evidence and provide the interpretation and translation services that are almost certainly going to be needed by the investigative and prosecutorial teams.[125] The Services Section at the ICC is about one-third the size of the Investigation Division and half the size of the Prosecutions Division.[126]

In addition, the Amended Statute of the new ACJHR specifically says that the Registrar must create a Victims and Witnesses Unit to provide "protective measure and security arrangements, counselling and other appropriate assistance" for victims and witnesses.[127] It also requires the Registrar to set up a Detention Management Unit to "manage the conditions of detention of suspects and accused persons."[128] Finally, the Amended Statute provides for an independent Defence Office that will be responsible for "protecting the rights of the defense, providing support and assistance to defence counsel . . . ."[129] These units will have to be staffed. At the ICC, the Office of Public Counsel for the Defence has similar functions to the ACJHR's Defence Office and has five personnel.[130] Similarly, the ICC's Detention Section has five staff members.[131] The ICC office most similar to the ACJHR's

[124] *See* OTP Basic Size Document at 17.
[125] *See* Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated Aug. 17, 2016, at 56–7.
[126] *See* OTP Basic Size Document at 5 (noting that the Services Section would have 81 personnel, while the Investigations Division would have 255 and the Prosecutions Division would have 142).
[127] *See* Amended Statute of the African Court of Justice and Human And Peoples' Rights, art. 22B(9).
[128] Id.
[129] Id. art. 22C.
[130] *See* Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated August 17, 2016, at 158.
[131] Id. at 154.

Victims and Witnesses Unit is the Victims and Witnesses Section.[132] The ICC employs 63 people in this task.[133]

It is also highly likely that the new ACJHR will need other more general support services. At the ICC, these are located within the Registry. It is likely the same would be true at the ACJHR.[134] At the ICC, the Registry includes functions like a Human Resources Section,[135] a Budget Section,[136] a Finance Section,[137] a Security and Safety Section[138] and a General Services Section.[139] While the ACJHR would not necessarily need to be structured in the exact same way, it will need the same services. It will need to have staff that provide security, clean and maintain the buildings, and pay the bills. Even if we assume that the new ACJHR would only need about half as many personnel in these functions as the ICC, it would still need something like 80 people in these support positions.

The following organizational charts make an educated guess about what resources the new and expanded ACJHR will need to successfully investigate and prosecute international crimes once it is fully operational.[140] These are not meant to be exact predictions. For example, it may be possible to make the

[132] Id. at 163 (noting that the Victim and Witnesses Section provides "protective measures and security arrangements, counselling and other appropriate assistance" for victims and witnesses).

[133] Id.

[134] *See* Amended Statute of the African Court of Justice and Human And Peoples' Rights, art. 22B(5) (noting that the Registry "shall be responsible for the non-judicial aspects and servicing of the Court"). *See also* id. art. 22B(7) (noting that the Registrar "shall be assisted by such other staff as may be necessary for the effective and efficient performance of the functions of the Registry").

[135] This office provides advice on human resources issues, develops human resources policies, helps manage the staff, participates in recruitment and placement, and deals with issues like salaries, benefits, and pensions. *See* Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated Aug. 17, 2016, at 144. There are 25 total staff in the Human Resources Section. Id.

[136] This office prepares and oversees implementation of the budget. Id. at 145. There are six staff members in the Budget Section. Id.

[137] This office oversees payments to vendors as well as payment of travel expenses. It also monitors compliance with the budget and prepares the Court's financial statements. Id. at 146. There are 17 personnel in the Finance Section.

[138] This office provides security for the Court facilities and its personnel. Id. at 149. There are 72 personnel in the Security and Safety Section. Id.

[139] This office provides building maintenance, utilities services and cleaning services, among other things. Id. at 147. There are 46 staff members in the General Services Section. Id. at 148.

[140] These are not the resources that the court would need in its first year of operation. Personnel could be phased in over time as they are needed to lower the startup costs. For example, the court probably will not need two investigative teams in its first year and it will probably not need trial teams until the first investigations are completed, which may take two or three years. Similarly, it will not need to fully staff the Trial and Appeal Chambers until the initial investigations have been completed and the first case is ready for trial. But it will need those resources eventually.

investigations teams slightly smaller. Or it might be possible to have fewer legal officers in Chambers and fewer personnel in the Victims and Witnesses Unit. Perhaps the court can get by with fewer personnel in support roles. Of course, cutting corners on resources can be counter-productive, as the ICC has discovered.[141]

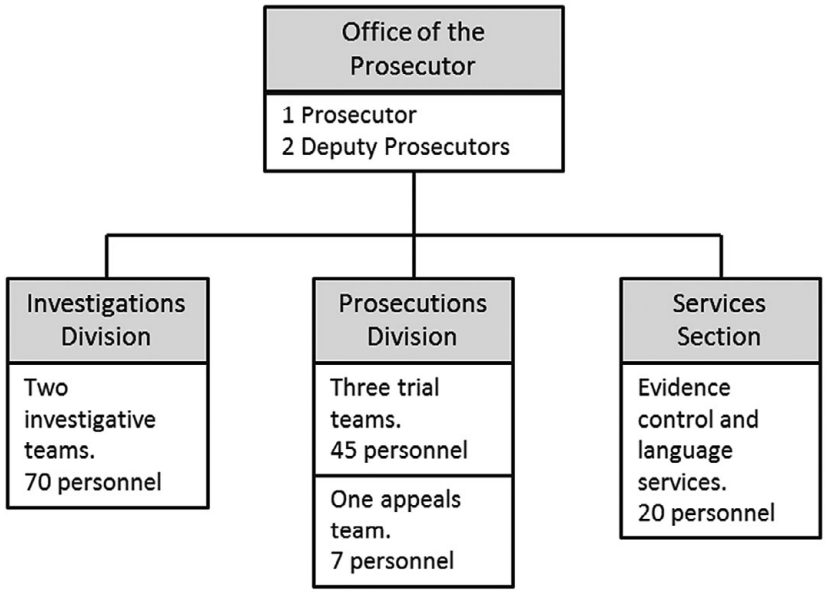

FIGURE 38.1

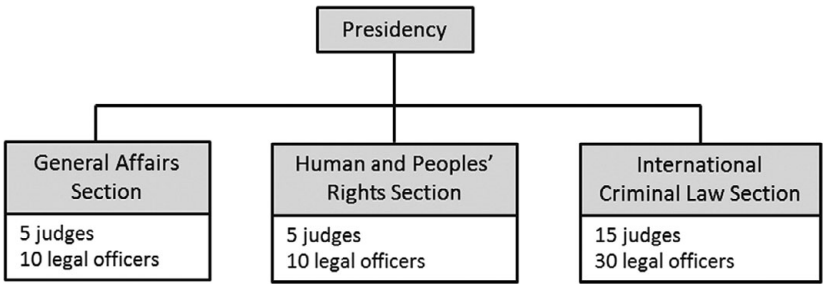

FIGURE 38.2

[141] The Prosecutor at the ICC initially tried lean investigations, but those resulted in weak cases and she was forced to switch back to more thorough investigations. *See* Ford, supra note 77, at 66–7.

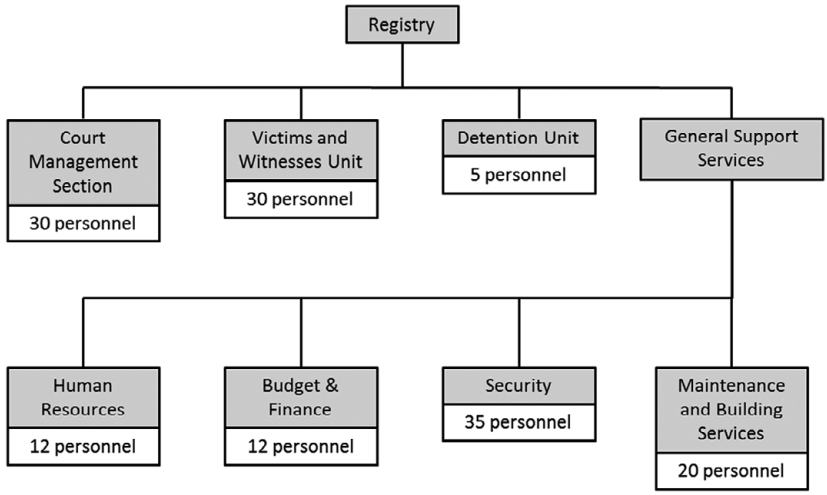

FIGURE 38.3

These figures suggest a court with about 145 personnel in the Office of the Prosecutor. The majority of the personnel in the OTP would be working on investigations. The Presidency would be composed of 25 judges and 50 legal officers. Their primary function would be to hear the trials and appeals. Finally, the Registry would require about 145 personnel to provide the needed support services to the court. In addition, the Defence Office will have five or six staff members. This assumes that there will be no permanent interpretation/translation office in the Registry and that interpretation and translation services will be provided under service contracts rather than through the hiring of full-time personnel.[142]

Overall, the expanded ACJHR would have a staff of about 370 personnel. This would make it roughly one-third the size of the ICC, which currently has about 1,100 personnel.[143] This implies an expected cost of about 48 million

[142] While it may turn out that some in-house interpretation/translation service is required, the large number of languages that will likely be needed and the intermittent demand for those languages probably makes it cheaper to contract for interpretation and translation as a service. *Cf.* OTP Basic Size Document, at 73 (noting that at the ICC the "requirement for language services is often volatile on account of uncertainty around, amongst other things, . . . how many and which languages will be encountered in any given situation country, especially regarding insider witnesses and victims whose evidence may need transcribing, and interpreting and translating into a working language and also regarding the accused, who are entitled to translations of evidence in a language they fully understand" and that, as a result, most of this work is done by freelancers rather than permanent staff).

[143] *See* Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated Aug. 17, 2016, at 27 (noting that the ICC is budgeting for 980 permanent posts and 179 GTA positions in 2017).

euros per year for the new ACJHR.[144] This is many times the current budget of the AU's judicial bodies.[145]

10. EARLY AU ESTIMATES OF THE ACJHR'S NEEDS

The AU's member states have been concerned about the consequences of expanding the ACJHR's jurisdiction.[146] So, for example, at a meeting of Ministers of Justice in 2012, various delegations asked about the "financial and budgetary implications" of expanding the jurisdiction of the court.[147] This concern has resulted in a small number of documents that discuss the expected resource requirements of the ACJHR. Unfortunately, these documents are from 2012, so it is unclear whether they still represent the position of the AU.[148] But given that they are the only financial projections from the AU that are available, this chapter will discuss them.

The reports discuss whether there are existing courts that could be used as examples of the resources the ACJHR will need. For example, the report of the meeting of Ministers of Justice notes that the Special Court for Sierra Leone (SCSL) cost $16 million per year in 2011 and employed slightly more than 100 personnel.[149] It also notes that the International Criminal Tribunal for Rwanda (ICTR) cost $130 million per year in 2010 and employed 800 staff.[150] But it takes no position on whether either of them is a good model for the ACJHR. Another report suggests that the trial of the former President of Chad, Hissène Habré, in Senegal, which reportedly cost about 7 million euros over three years, represents the "most appropriate" comparison.[151]

[144] This number was arrived at by taking the ICC's cost in 2017 (150 million euros for 1,160 positions) and scaling it down to account for the 370 expected positions at the ACJHR. Id. (noting that the ICC budget for 2017 is 150 million euros). *Cf.* Nmehielle, supra note 18, at 35 (noting that "effectively establishing and sustaining such a court would run into hundreds of millions of dollars").

[145] Id. at 35–6.

[146] *See* supra note 76.

[147] *See* African Union, Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, dated 14 and 15 May 2012 at 5–7 (copy on file with author).

[148] There may be more recent reports that provide updated estimates on the resource requirements of the ACJHR, but if so they do not appear to be publicly available.

[149] Id. at 7.

[150] Id.

[151] *See* Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, supra note 117, at 4.

All of these comparisons are flawed. The ACJHR probably does not need to be as big as the ICTR at its height.[152] Nor is the trial of a single individual – Hissène Habré – likely to represent the experience of the ACJHR, which may need to open one new investigation and begin one new trial every year.[153] The SCSL in 2011 is not a particularly good comparison either. By 2011, the SCSL had almost completed its mandate. The only significant legal activity that year was the trial of Charles Taylor.[154] There were no new investigations[155] and minimal activity by the Appeals Chamber.[156] The expanded ACJHR will have to undertake complex investigations and be able to deal with more than one trial and appeal at a time. The most obvious contemporaneous comparator is the ICC. The omission of references to the ICC in the AU's documents may stem from its difficult relationship with the ICC.[157]

If the SCSL is to be used as a comparator, however, then the SCSL in 2007 is a better choice. In that year, the SCSL was engaged in the CDF trial, the RUF trial, and the AFRC trial.[158] There was also substantial activity in the Appeals Chamber.[159] The Office of the Prosecutor, in addition to participating in the ongoing trials, was also engaged in the investigation of the Charles Taylor case.[160] This is more like what a fully operational ACJHR can expect. But it is worth noting that the SCSL cost $36 million in 2007 and employed more than 400 people.[161] This is similar to the projections in this chapter.[162]

Besides looking for appropriate comparators, one of the AU's reports also contains a proposed staffing table for the expanded ACJHR.[163] A summary of that information is contained below in Table 38.1.[164] One noticeable (and presumably deliberate) omission is any entry for the judges and their salaries.

[152] *See* supra Section 9.
[153] *See* supra Sections 6, 8.
[154] *See* SCSL, Eighth Annual Report of the President of the Special Court for Sierra Leone, June 2010 to May2011, at 11–17.
[155] Id. at 22–3.
[156] Id. at 14–17.
[157] *See* supra text accompanying notes 65–9.
[158] *See* SCSL, Fifth Annual Report of the President of the Special Court for Sierra Leone, June 2007–May 2008, at 13–18.
[159] Id. at 22 (noting that the Appeals Chamber rendered judgments in two appeals).
[160] Id. at 28–30.
[161] Id. at 44.
[162] *See* supra Section 9.
[163] Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, supra note 117, at 5–7.
[164] The AU report is somewhat ambiguous, but it appears that the column titled "Number in ACJHPR" represents the projected staffing of the expanded ACJHR. Id.

TABLE 38. 1 *AU's Proposed Staffing for ACJHR*

Office	Components	No. of Staff	Estimated Cost
Registrar			
	Office of the Registrar	18	$420,791
	Information and Communication	3	$89,403
	Languages Unit	41	$1,127,451
	Sub-Total	62	$1,637,645
Legal Division			
	Office of the Division	1	$45,551
	Legal Unit	16	$511,568
	Library, Archives, and Documentation	14	$266,692
	Sub-Total	31	$823,811
Finance, Admin. and HR			
	Office of the Division	2	$91,102
	Finance, Budgeting, and Accounting	6	$131,838
	HR and Administration	8	$169,668
	Procurement, Travel, and Transport	11	$144,809
	IT Services	10	$254,860
	Security and Safety	30	$326,022
	Protocol Unit	9	$168,546
	Sub-Total	76	$1,286,845
Office of the Prosecutor			
	Office of the Prosecutor	6	$189,696
	Prosecution Division	5	$161,511
	Investigation Division	1	$38,489
	Sub-Total	12	$389,696
Total		**181**	**$4,137,997**

But beyond that, there are some staffing assumptions that are simply unrealistic.

For instance, the Office of the Prosecutor does not have sufficient capacity. Apart from the Prosecutor and two Deputy Prosecutors, it has only four legal officers in the Prosecution Division. This might be enough to conduct a single, relatively simple trial, but even then it lacks sufficient support in the

form of legal assistants and case managers.[165] It would not permit the ACJHR to undertake complex trials or try more than one case at a time. There is also no provision for an appellate team. This may not be needed at start-up, but at some point the Office of the Prosecutor will need staff devoted to appeals.[166]

A bigger problem is the lack of investigative capacity. The staffing table only provides for a single individual in the Investigation Division. This is inadequate, even at start-up. International criminal investigations are enormously complex and require substantial resources.[167] The typical ICC investigation team is composed of 35 personnel, including investigators, analysts, lawyers, legal assistants, case managers, and specialists in forensics and digital evidence.[168] Without a robust investigative capacity, the ACJHR cannot be successful.

There are also problems in other organs of the court. For instance, there appears to be only a single person assigned to the Defence Office and a single person assigned to the Victims and Witnesses Unit. Both of these units will almost certainly need additional staff. The ICC has five personnel in the Office of Public Counsel for the Defence and 63 people in the Victims and Witnesses Section.[169] The ACJHR may not need this many personnel, but two people is almost certainly insufficient.

In addition to omitting the judges and their salaries, the proposed staffing table does not provide for any legal officers in Chambers. The ICC averages almost two legal officers per judge, which implies a need for approximately 30 legal officers in Chambers.[170] A final issue is that the proposed staffing table does not appear to provide for a large enough court management section. It indicates that there will be 9 personnel assigned as either court recorders, assistant court recorders, or court clerks. This is probably not enough.[171]

While the staffing proposal is presented as the ACJHR's staff requirements at the "outset,"[172] it would not be sufficient even at start-up. As soon as the

[165] *See* supra text accompanying notes 108–9 (noting that ICC trial teams are comprised of about 15 personnel including lawyers, legal assistants and case managers supported by a small number of investigators).

[166] *See* supra text accompanying note 112.

[167] *See* supra Parts 5–6.

[168] *See* supra text accompanying notes 91–3.

[169] *See* supra text accompanying notes 130–3.

[170] *See* supra text accompanying notes 119–21.

[171] *See* supra text accompanying notes 121–3 (estimating that the ACJHR will need about 30 personnel in its court management section).

[172] Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, supra note 117, at 5 (describing the staffing proposal as a "rough tabulation of minimum staff requirements at the outset").

ACJHR received its first case, which would likely occur during the court's first year of operation, the problems would begin. Without any investigative capacity it would not be able to conduct an investigation. The court would likely be overwhelmed with victims and witnesses that it is ill-prepared to accommodate. It also seems to lack the legal officers and court management personnel necessary to support the judges in their work.

It may be a mistake to read too much into the AU's early projections. Nevertheless, if the expanded ACJHR's staffing ends up looking like the 2012 proposal, it is unlikely that it will be successful. Such a court might be able to try one small case every two or three years, but it would not be able to live up to the AU's expectations. The Malabo Protocol states that the expanded ACJHR is intended to prevent serious violation of human and peoples' rights and ensure accountability for those violations.[173] For it to achieve these goals, the ACJHR will need robust investigative, prosecutorial, and adjudicative capacity. Furthermore, If it does not have sufficient resources to investigate and prosecute those situations which would otherwise fall under the purview of the ICC, it will not be able to achieve the AU's goal of depriving the ICC of jurisdiction over situations in Africa either.[174]

11. CONCLUSION

The main takeaway from this chapter is that operating an international criminal court is not cheap. Investigating and prosecuting mass atrocities takes significant resources. Thus one way to evaluate the expanded ACJHR will be to look at the resources the AU assigns to the court. If the AU does not assign it sufficient resources to carry out complex in-depth investigations and difficult multi-year trials and appeals, then it is extremely unlikely that the court will be successful in shrinking the impunity gap or preventing atrocities. If, on the other hand, the AU does provide the ACJHR with the resources and political support it needs to carry out its mandate, then there will be reason to be hopeful about its eventual success.[175]

[173] *See* infra Section 4.
[174] *See* supra text accompanying notes 31–33, 64–8.
[175] *See* Nmehielle, supra note 18, at 36–7 (suggesting that if the ACJHR receives sufficient funding, capable staff, and the political support of the AU, it can be successful).

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Civil Society and International Criminal Justice in Africa

Perspectives on the Proposed African Court of Justice and Human Rights

NETSANET BELAY AND JAPHET BIEGON

1. INTRODUCTION

Civil Society Organizations (CSOs) have played and continue to play a critical role in the advancement of the international criminal justice system. One of the hallmark of CSOs influence is the establishment of the International Criminal Court (ICC), regarded by some analysts as a creation of civil society.[1] Through the non-governmental organization (NGO), the Coalition for an International Criminal Court (CICC), CSOs influenced both the content of the Statute (Rome Statute) and the design of the ICC.[2] Following its establishment, CSOs have been actively involved in the implementation of the Rome Statute, and in particular, in bridging the gap between the ICC and local communities,[3] pushing member states

[1] M Glasius, "Global justice meets local civil society: The international Criminal Court's investigations in the Central African Republic" (2008) 33 *Alternatives: Global, Local, Political* 413, 414. See also G. Augustinyova & A. Dumbryte, "The indispensable role of non-governmental organizations in the creation and functioning of the International Criminal Court" (2014) *Czech Yearbook of International Law* 39.

[2] For a detailed analysis of the involvement of CSOs in the Rome Statute negotiations see Z. Pearson "Non-governmental organizations and the International Criminal Court: Changing landscapes of international law" (2006) 2 *Cornell International Law Journal* 243.

[3] As above. See also M. Glasius "What is global justice and who decides? Civil society and victim responses to the International Criminal Court's first investigations" (2009) 31 *Human Rights Quarterly* 496.

through advocacy and litigation to respect and enforce the Statute,[4] and documenting evidence of international crimes.[5]

Beyond interaction in global and domestic spheres, civil society's engagement on international criminal law and justice is increasingly becoming prominent regionally, especially in Africa, where the African Union (AU) has become a critical actor in the field. In the last few years, the AU Assembly – composed of African heads of state and government – has adopted numerous resolutions and policy decisions on the application of the Rome Statute in Africa as well as on the ICC's intervention in the continent.[6] Perhaps more importantly, and partly in reaction to what the AU and some member states see as an unfair and biased global international criminal justice system,[7] the AU has sought to establish its own regional criminal justice system.

In June 2014, the AU Assembly, meeting in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). The Malabo Protocol extends the jurisdiction of the yet-to-be established African Court of Justice and Human Rights (ACJHR) to cover crimes under international law and transnational crimes. Through the Malabo Protocol, the AU seeks to establish a regional criminal court, operating in a manner akin to the ICC but within a narrowly defined geographical scope. The regional court will have

[4] See, for example, A. Mudukuti "Complementarity and Africa: Tackling International Crimes at the Domestic Level" in E Ankumah (ed) *The International Criminal Court and Africa: One decade* on (2016) 489; N. Mue & J. Gitau "The Justice Vanguard: The Role of Civil Society in Seeking Accountability for Kenya's Post-election Violence" in C de Vos et al. (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015) 198; C. Bjork & J. Goebertus "Complementarity in action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya" (2011) 14 *Yale Human Rights & Development Journal* 205.

[5] See, for example, "Civil society and the International Criminal Court: Local Perspectives on Fact-finding" available at www.ijmonitor.org/2015/11/civil-society-and-the-international-criminal-court-local-perspectives-on-fact-finding/ (last visited on September 26, 2016).

[6] See, for example, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.296(XV); Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of Republic of Sudan, Assembly/AU/Dec.221(XII); Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245(XIII), Rev 1; Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366 (XVII); Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Assembly/AU/Dec.482(XXI).

[7] See generally S. Odero, "Politics of International Criminal Justice, the ICC's Arrest Warrant for Al Bashir and the African Union's Neo-colonial Conspirator Thesis" in C. Murungu and J. Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 145.

jurisdiction over a long list of crimes: genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and aggression. Undoubtedly, the AU's decision to establish a regional criminal court is bound to have far-reaching legal and institutional implications for various stakeholders involved in the pursuit of international criminal justice in Africa, including the AU, states, and civil society.

This chapter examines the scope of possible interaction between civil society and the future regional criminal court (if it will be established at all) and suggests avenues for civil society engagement in addressing these concerns in order to strengthen the court. In order to understand and contextualize this possible interaction, the first half of the chapter traces the level of participation of civil society in the drafting of the Malabo Protocol. The second half of the chapter is devoted to a discussion of two key areas in which civil society organizations will have to engage in order to contribute toward the strengthening of the future court. The first one relates to the challenge of strengthening the human rights mandate of the court, including the issue of restricted access to civil society as a result of successive amendments to the Court Protocol. The second section focuses on issues raised by civil society with respect to legal standards, competing obligations and challenges of domestication that may arise upon operationalization of the Court. Much of the analysis on the legal and institutional implications of the Malabo Protocol discussed in this chapter is based on a report published by Amnesty International in January 2016.[8]

2. CIVIL SOCIETY AND THE DRAFTING OF THE MALABO PROTOCOL: A STORY OF EXCLUSION

Civil society has traditionally played a relatively active role in the development of AU human rights treaties and normative instruments. Two particular examples of civil society involvement in the formulation of human rights treaties in Africa stand out. First, civil society was instrumental in the initiation and formulation of the Protocol on the Establishment of the African Court on Human and Peoples' Rights. In particular, the International Commission of Jurists (ICJ), working in conjunction with other NGOs, produced

[8] Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded Court* (Index: AFR 01/3063/2016), January 2016, available at www.amnesty.org/en/documents/afr01/3063/2016/en/ (last visited October 11, 2016).

the first draft of the Protocol. It is this draft produced by ICJ that formed the basis of a meeting of government experts held in 1995.[9] Second, the Protocol on the Rights of Women in Africa (Maputo Protocol) is regarded as an initiative of civil society. Its origin can be traced back to a 1995 joint meeting between the African Commission on Human and Peoples' Rights (African Commission) and the Women in Law and Development in Africa (WILDAF), a regional NGO. Banda has addressed how input from civil society was received throughout the various stages of drafting of the Maputo Protocol.[10] In recent years, civil society has been engaged in the formulation of the Protocol on the Rights of Older Persons in Africa, Protocol on the Rights of Persons with Disabilities in Africa, AU Draft Transitional Justice Policy Framework, and the four General Comments thus far adopted by of the African Commission.

In what is clearly a retrogression, the process that led to the drafting and adoption of the Malabo Protocol did not include much scope for public debate or civil society consultation. Following the 2009 decision of the AU Assembly, where it requested the AU Commission, in consultation with the African Commission and the African Court of Human and Peoples' Rights (African Human Rights Court), to examine the implications of the ACJHR being empowered to try international crimes, the secretariat of the Pan African Lawyers Union (PALU) was contracted by the AU Commission in 2010 to study and provide recommendations on a legal instrument which would amend the Protocol on the ACJHR. PALU submitted its reports to the AU Commission in June and August 2010. Validation workshops were held in South Africa in August and November 2010 to discuss the draft prepared by PALU, but these discussions involved only representatives of the AU organs and Regional Economic Communities (RECs). There is no recorded evidence of any regional or national consultations with civil society up until the Protocol was adopted by the AU Assembly in 2014. As such, the drafting process has been described as one that lacked transparency and full participation of relevant stakeholders.[11] Given their exclusion in the process of drafting

[9] See Report of the Government Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc OAU/LEG/EXP/AFC/HPR/RPT(I)Rev.1.

[10] F. Banda, "Blazing a Trail: The African Protocol on Women's Rights Come into Force" (2006) 50 *Journal of African Law* 72, 73.

[11] M. du Plessis, "A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes", Blog of the European Journal of International Law, August 27, 2012, available at www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/ (last visited 11 October 2016).

of the Malabo Protocol, civil society had no formal avenues of engagement. They understandably resorted to raising concerns about proposed contents of the Protocol in press releases and open letters. In May 2012, a total of 47 African and international NGOs with a presence in Africa wrote a joint open letter to ministers of justice and attorneys general of African state parties to the Rome Statute asking them to carefully study and address a number of issues of concern arising from the proposal to expand the jurisdiction of the ACJHR to cover crimes under international law as well as transnational crimes.[12] In June 2015, after an immunity clause was introduced into the text that would eventually become the Malabo Protocol, several NGOs issued press statements calling for the immunity clause to be deleted.[13] From the record of the meetings held by government experts and ministers of foreign affairs to consider initial drafts of the Malabo Protocol, there is no indication that concerns raised by civil society were taken into account.

It is important to note that the failure to consult civil society in the drafting of the Malabo Protocol occurred against the background of an increasingly shrinking space for civil society involvement in the activities of the AU. It is particularly instructive that at the June 2014 summit in Malabo, no invitation was extended to civil society to participate in the session. Instead, the AU Assembly commenced a process that would eventually lead to the exclusion of civil society and developments partners in its June/July sessions or summits.[14] In June 2015, the AU Assembly adopted a decision that formalized the exclusion.[15] This decision and the emerging practice raises critical questions about the commitment of the AU to abide by its own objectives and principles as enshrined under the Constitutive Act. The Constitutive Act requires the AU to

[12] Joint Letter to the Justice Ministers and Attorneys General of the African State Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights, May 3, 2012, available at www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties (2012 Joint Open Letter).

[13] See, for example, Amnesty International, *Open letter to the heads of state and government of the African Union: Article 46A Bis of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Index: AFR 01/012/2014), June 20, 2014, available at: www.amnesty.org/en/documents/afr01/012/2014/en/ (last visited October 11, 2016); Human Rights Watch, *Statement regarding immunity for sitting officials before the expanded African Court of Justice and Human Rights*, November 13, 2014, available at www.hrw.org/news/2014/11/13statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and (last visited October 11, 2016).

[14] Decision on the Official Opening of the Ordinary Sessions of the Assembly, Assembly/AU/Dec.542(XXIII).

[15] Decision on Streamlining of the AU Summits and the Working Methods of the African Union, Assembly/AU/Dec.582(XXV).

function in a manner that ensures "participation of the African peoples in the activities of the Union."[16] Moreover, a key objective of the AU is to "promote democratic principles and institutions, popular participation and good governance."[17] The decision to exclude CSOs from the June/July summits is undoubtedly incompatible with these stated principles. It worsens an already worrying situation. As Moyo correctly points out:

> Although the AU and its organs provide for civil society involvement in their activities, very little engagement actually takes place. There is very little that the AU and its organs have done to make contact with citizens and CSOs, except for a few departments like the Gender Directorate. AU institutions set up for civil society participation remain weak, and at times they are unwilling to involve civil society.[18]

Outside of the AU summits, the formal and structured channel for civil society engagement with the AU is the Economic, Social and Cultural Council (ECOSOCC). One of its critical functions is to "promote the participation of African civil society in the implementation of the policies and programmes of the Union."[19] ECOSOCC is composed of 150 CSOs drawn from AU member states and the African diaspora. However, criteria for eligibility as a member of ECOSOCC is restrictive. In particular, in order to qualify for membership in ECOSOCC, a CSO must show that at least 50% of its basic resources are "derived from contributions of the members of the organization."[20] Given that the majority of CSOs in Africa depend on donor funding, only a handful of organizations across the continent meet the "50% requirement." Thus, although the rule was in theory intended to exclude "foreign" or "international organizations", in practice it excludes NGOs founded in and working exclusively in Africa as well.[21] That the AU requires CSOs to meet this criterion is ironic as the AU itself depends on donors, mostly European countries, to fund more than 70% of its budget.[22]

[16] AU Constitutive Act, Article 4(c).
[17] AU Constitutive Act, Article 3(g).
[18] B. Moyo, "Civil society and the African Union architecture: Institutional provisions and invented interfaces" available at http://bhekinkosimoyo.com/downloads/civil_society_and_the_african_union_architecture.pdf (last visited October 4, 2016).
[19] Statute of the Economic, Social and Cultural Council of the African Union, Article 2(3).
[20] Statute of the Economic, Social and Cultural Council of the African Union, Article 6(6).
[21] African Network on Debt and Development et al., *Towards a People-driven African Union: Current Obstacles and New Opportunities* (2007) 34.
[22] See Report of the High Level Panel on Alternative Sources of Financing the African Union, Assembly/18/(XIX) (2012).

While access to ECOSOCC is restrictive, civil society have long enjoyed a cordial and dynamic relationship with the African Commission.[23] This relationship has allowed CSOs to make immense contributions to the work of the African Commission, including in the area of standard-setting. As Viljoen observes, CSOs have been "crucial in the growth and consolidation of the Commission."[24] Lately, however, the AU Executive Council has issued directives requiring the African Commission to withdraw the observer status granted to specific NGOs. In particular, the Executive Council in June 2015 directed the African Commission to take into account in its work "the fundamental African values, identity and good traditions", and in this context, to withdraw the observer status granted to "NGOs who may attempt to impose values contrary to the African values."[25] The Executive Council singled out the Coalition of African Lesbians (CAL), an NGO registered in South Africa but with a working presence in several countries on the continent, and asked the African Commission to withdraw its observer status.[26] The Executive Council also asked the Commission to review its criteria for granting observer status to NGOs. In January 2016, it went further and asked the Commission to review the representation of "non-African individuals and groups" before it.[27] These directives raise questions about the independence and autonomy of the African Commission from AU's political organs.[28] More importantly, the directives signify a trend toward limiting civil society access to the AU in general and specifically to its human rights institutions.

[23] See A. Motala, "Non-Governmental Organizations in the African Human Rights System" in M. Evans & R. Murray (eds.) *The African Charter on Human and Peoples' Rights: The system in practice, 1986–2006* (2008) 246.

[24] F. Viljoen, *International human rights law in Africa* (2012) 383.

[25] Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII), para. 7.

[26] Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII), para. 7. Although it initially seemed to resist political pressure, the African Commission withdrew CAL's observer status in August 2018.

[27] Decision on the Activities of the African Commission on Human and Peoples' Rights (ACHPR), EX.CL/Dec.902(XXVIII) Rev 1, para. 7.

[28] See Centre for Human Rights, University of Pretoria (CHR) & The Coalition of African Lesbians (CAL), Request for Advisory Opinion No. 002/2015.

3. CHALLENGES IN STRENGTHENING OF THE CURRENT HUMAN RIGHTS COURT AND THE FUTURE HUMAN RIGHTS MANDATE

A. *Even More Restricted Access to Civil Society*

The expansion of the mandate of the ACJHR to include international crimes has impacted negatively on the ability of individuals and CSOs to access the ACJHR. Presently, the African Human Rights Court "may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the [African] Commission, and individuals to institute cases directly before it", and if the state against which the case is lodged has made a declaration allowing NGOs and individuals to file cases against it.[29] This provision has been criticized for its restrictive approach to limiting cases from NGOs and individuals, and which in part explains the rather limited docket so far of the African Human Rights Court.

The Amended ACJHR Statute is even more restrictive. It allows only "African individuals or African Non-governmental organizations with observer status with the African Union or its organs or institutions' to submit cases or applications before the ACJHR.[30] "African NGOs" are defined in the Protocol as "Non-governmental Organizations at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council."[31] Whether international NGOs would fall within this definition is debatable and concerning. "African individuals" are not defined in the preamble. In addition to potentially preventing foreign nationals and NGOs from accessing the Court, this personal jurisdiction or standing issue also risks having implications on the material jurisdiction of the Court in cases raising questions regarding extra-territorial obligations and violations.

The Amended ACJHR Statute further limits the range of actors who may request an advisory opinion from the ACJHR. At present, in addition to state parties and AU organs and institutions, "any African organization recognized by the OAU" may request an advisory opinion from the African Human Rights Court. "Any African organization recognised by the OAU" has been interpreted to include NGOs with observer status with the African Commission and several such NGOs have requested for an advisory opinion from the

[29] Protocol on the Establishment of the African Court on Human and Peoples' Rights, Articles 5 and 34(6).
[30] Amended ACJHR Statute, Article 30(f).
[31] Malabo Protocol, Article 1.

African Human Rights Court.[32] Article 53 of the Amended ACJHR Statute provides that:

> *The Court may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions or any other organ of the Union as may be authorized by the Assembly.*

In essence, only AU organs and institutions will be allowed to seek for an advisory opinion under the Malabo Protocol. NGOs have lost the access they enjoyed before the African Human Rights Court. With the capacity of CSOs to request for advisory opinions taken away, it is likely that the advisory role of the African Court will go into disuse and ultimately be rendered redundant. AU organs and institutions have not shown an interest and appetite to request advisory opinions from the African Court. Out of the 13 advisory requests received by the African Court as of this writing,[33] only one had been presented by an AU institution. The bulk of the rest were submitted by NGOs.

B. *Implications on the Existing Court/Human Rights Mandate of The New Court*

One of the concerns expressed by civil society, including in its 2012 joint letter,[34] is that the Malabo Protocol and the decision to expand the jurisdiction of the ACJHR to cover international crimes will impact on the operations and future of the African Human Rights Court.

First, the Amended ACJHR Statute reduces the number of judges who will be responsible for human rights issues at the ACJHR. The Human Rights Court has 11 judges at present. The Human Rights Section of the ACJHR will have only five judges with specific expertise in human rights. This will significantly and adversely impact the capacity of the Human Rights Section to expeditiously adjudicate human rights cases.

Second, although the Preamble to the Malabo Protocol notes "the steady growth of the African Court on Human and Peoples' Rights and the

[32] But see African Court on Human and Peoples' Rights, Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP), No. 001/2013, May 26, 2017. See also A. Jones. "Form Over Substance: The African Court's Restrictive Approach to NGO Standing in the SERAP Advisory Opinion" (2017) 17 *African Human Rights Law Journal* 321.

[33] See http://en.african-court.org/#advisory-opinions (last visited October 31, 2018).

[34] 2012 Joint Letter.

contribution it has made in protecting human and peoples' rights",[35] the Protocol does not provide for the transfer of judges and the registrar of the African Human Rights Court to the ACJHR. The Protocol provides that the terms and appointment of the current judges and registrar of the African Human Rights Court will terminate on the coming into force of the Malabo Protocol, although they will remain in office until the new judges are sworn in.[36] The Protocol also provides that the staff of the African Human Rights Court will be absorbed into the ACJHR but only for the remainder of their subsisting contracts.[37] This runs the risk of losing the institutional history, experience and expertise of the judges in the new Court and does not allow for continuity. It will be important to allow for some continuity because the new Court will be required to pick up the cases pending before the African Human Rights Court.[38]

On a positive note, the Malabo Protocol provides that the seat of the ACJHR would be the seat of the existing African Human Rights Court (Arusha, Tanzania).[39] This has the advantage of increasing the ability for the African Human Rights Court to leave a legacy in terms of human rights, as documentation will be available to the ACJHR. This is important because the potential exists that the legacy of the African Human Rights Court and any experience it has attained will be lost in the process of transition to a Court with a broader mandate.

C. *Implications and Challenges for the Civil Society Campaign on Universal Ratification of the Protocol on African Court on Human and Peoples' Rights*

The Malabo Protocol may also delay, or actually prevent, any new ratification of the African Human Rights Court Statute. A total of 25 African states have not ratified the African Protocol on the Establishment of an African Court on Human and Peoples' Rights.[40] A group of CSOs, under the umbrella of the African Coalition for an Effective African Court, have been engaged in a campaign for universal ratification of the Protocol.[41] However, with the

[35] Malabo Protocol, Preamble, para. 6.
[36] Malabo Protocol, Article 4 and 7(1).
[37] Malabo Protocol, Article 7(2).
[38] Malabo Protocol, Article 6.
[39] Amended ACJHR Statute, Article 25.
[40] For the list of countries that have ratified the African Human Rights Court Protocol see www.au.int/en/sites/default/files/treaties/7778-sl-achpr_1.pdf (last visited January 7, 2016).
[41] See www.africancourtcoalition.org/index.php?lang=en (last visited October 31, 2018).

expansion of the jurisdiction of the ACJHR to cover international crimes, those states which would have considered ratifying the African Human Rights Court Statute may reconsider their position. During the 2012 Meeting of Ministers of Justice and Attorneys General, state representatives proposed that "States should be allowed to choose which instrument or section of the Court to belong to",[42] an indication that some states were not willing to be party to a Court with an expanded jurisdiction covering international crimes. This proposal was not taken on board as the Legal Counsel explained that allowing states to pick which section of the Court to belong to was not advisable and would result in "many technical and practical difficulties based on the proposed number and deployment of judges within the Court."[43] Thus, in the end, the Malabo Protocol provides states with "an all-or-nothing option."[44] As a commentator observed when the first draft of the Amended ACJHR Protocol and Statute was adopted in 2012: "When it is faced with an all-or-nothing choice, a state that would be attuned to the protection of human rights or its obligations under the ICC Statute, may decide not to ratify the Amending Court Protocol at all, due to its reticence to accept a court that deals with international criminal justice issues."[45]

4. LEGAL STANDARDS, COMPETING OBLIGATIONS AND CHALLENGES OF DOMESTICATION

Throughout the drafting process and after the ACJHR Statute was adopted, civil society organizations raised some key concerns about certain aspects of the Protocol, including the immunity provision, the definition of several offenses under the Statute which might have human rights implications, including the crimes of unconstitutional change of government and terrorism, as well as concerns about domestication of the Statute in light of states' other obligations under international and regional treaties, particularly for AU member states who are also parties to the Rome Statute. The following section therefore focuses on issues raised by civil society with respect to legal standards, competing obligations and challenges of domestication that may arise

[42] Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, May 14–15, 2012, Addis Ababa, Ethiopia, Min/Legal/Rpt., para. 17(iv).

[43] Ibid., para. 18(ii).

[44] F Viljoen "AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol", available at http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/ (last visited January 7, 2016).

[45] Ibid.

upon operationalization of the Court, and suggests avenues for civil society engagement in addressing these concerns in order to strengthen the court.

A. *Immunity*

Civil society groups have been very vocal in opposing the immunity clause, which is considered to be the most controversial provision in the Amended ACJHR Statute. The relevant provision reads as follows[46]:

> *No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.*

This provision was approved despite the fact that during discussions, delegations at the Ministerial Meeting raised concerns regarding its conformity with international law, domestic laws of Member States and jurisprudence.[47] Delegations also underlined the challenges inherent in widening immunities, the lack of a precise definition of "senior state official" and the difficulty in providing an exhaustive list of persons who should be included in the category of senior state officials.[48] CSOs have also repeatedly raised concerns about this clause in the Malabo Protocol,[49] including in a joint letter signed by 141 organizations to Ministers of Justice and Attorneys General of African Union member states, published in May 2015.[50] In this letter, for example, Timothy Mtambo, Executive Director at Malawi's Centre for Human Rights and

[46] Malabo Protocol, Article 46A *bis*.

[47] The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, Malabo, Equatorial Guinea, June 20–24, 2014, EX.CL/846 (XXV), para 25.

[48] Ibid.

[49] See South African Litigation Centre, SALC in the News: Africa Should Reject Free Pass for Leaders, November 18, 2013, available at: www.southernafricalitigationcentre.org/2013/11/18/salc-in-the-news-icc-africa-should-reject-free-pass-for-leaders/ (last visited October 11, 2016); Kenya Human Rights Commission, African States: Reject Immunity for Leaders, August 25, 2014, available at www.khrc.or.ke/2015-03-04-10-37-01/press-releases/387-african-states-reject-immunity-for-leaders.html (last visited October 11, 2016). See also: W. Jordash and A. Tsunga, The Day AU Leaders Justified the Existence of the ICC!, August 6, 2014, available at: http://ilawyerblog.com/day-au-leaders-justified-existence-icc/ (last visited October 11, 2016).

[50] Human Rights Watch and others, Joint Civil Society Letter on the Draft Protocol on Amendments to the Statute of the African Court of Justice and Human Rights, May 5, 2014, available at www.hrw.org/news/2014/05/12/joint-civil-society-letter-draft-protocol-amendments-protocol-statute-african-court, (2014 Joint Letter).

Rehabilitation, raised the concern that "Granting immunity to sitting officials is retrogressive, and risks giving leaders license to commit crimes. Immunity also risks encouraging those accused of the crimes to cling to their positions to avoid facing the law."[51]

Under general customary international law serving Heads of State and Government and Senior State Officials enjoy immunity from criminal jurisdiction of a third state. However, there are exceptions to this general rule including that Heads of State and Government and Senior State Officials do not necessarily enjoy immunity from criminal proceedings initiated before international criminal courts such as the ACJHR. In this regard, article 27(1) of the Rome Statute) provides that:

> *This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*

Article 27(2) further provides that:

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

Other international criminal or hybrid courts have not provided immunity for heads of state or senior officials and this is reflected in their Statutes. The Special Court for Sierra Leone, in relation to Charles Taylor, for example, held that "[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[52]

In addition, the practice of the ACJHR will also deviate from the established practice of international criminal courts including the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR.

[51] Ibid.

[52] Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003–01-I, Appeals Chamber, Decision on Immunity from Jurisdiction (May 31, 2004), at para. 52. See also: Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004 (NS/RKM/1004/006), Article 56, which provides that "The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment."

The immunity clause will have serious implications for the fight against impunity for international crimes in Africa and for the legitimacy and credibility of the ACJHR. The clause will effectively prevent the investigation and prosecution of serving Heads of State and Government who use their position or authority to order, plan, finance or otherwise mastermind crimes against humanity, war crimes or acts of genocide. Experience has shown that on the African continent, as elsewhere, it is those in positions of power who typically abuse their authority and state resources to commit international crimes. The immunity clause essentially promotes and strengthens the culture of impunity that is already entrenched in most African countries. It rolls back the gains that have already been realized in the fight against impunity in some African countries.

It is also instructive that the immunity clause is at odds with and incompatible with the objectives and organizing principles of the AU. A key objective of the AU is the promotion and protection of human rights as contained in the African Charter and other human rights instruments. Article 4(h) of the AU Constitutive Act grants the AU the right to intervene if war crimes, crimes against humanity and acts of genocide are being committed in a member state. Article 4(m) requires the AU to respect human rights while article 4(o) requires it to ensure the sanctity of human life and to reject impunity. The immunity clause undermines these objectives and principles.

For the ACJHR, the immunity clause will pose serious risks to its integrity, legitimacy and credibility, issues of concern to several CSOs. The court will lack the capacity to address the scourge of war crimes, crimes against humanity and genocide that have afflicted the continent for decades now. As such, and contrary to what is stated in the preamble of the Malabo Protocol, the court will neither "complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples' rights" nor will it ensure accountability for these violations wherever they occur. Ultimately, the court will struggle to enjoy or harness the confidence and support of the African population and especially of the victims of gross violations of human rights.

As the strongly voiced concerns of CSOs concerning this provision and its implications on impunity in Africa were disregarded during the initial drafting process, the Statute should therefore be re-opened for amendment of Article 46Abis to ensure it complies with international standards. Civil society organizations should engage in sensitization activities regarding this aspect of the Protocol and continue to advocate that states either amend this provision or enter reservations with regards to this provision in the event that it is not amended.

B. *Vaguely Defined Crimes and the Challenges of Ensuring Respect for Human Rights Standards*

CSOs have also voiced concerns about the implications of vague/broadly defined crimes in the ACJHR Statute, and in particular, with respect to the crimes of terrorism and unconstitutional change of government.

The Malabo Protocol contains an extensive and ambitious list of crimes. Arguably, the list covers areas or crimes which have particular relevance to the African continent. However, some crimes included under the jurisdiction of the ACJHR are yet-to-be well articulated and established in international law, prominent among which is the crime of unconstitutional change of government. Unconstitutional change of government is a phenomenon that is considered as "one of the essential causes of insecurity, instability and violent conflict in Africa."[53]

Since 1999, the AU has adopted a number of decisions and declarations opposing unconstitutional change of government,[54] which eventually culminated in the adoption of the African Charter on Democracy, Elections and Governance ("ACDEG") in 2007 and its entry into force in 2012. The ACDEG provides a definition of unconstitutional change of government and provides for several punitive measures including sanctions, and trial by the "competent court of the Union."[55] The genesis of the crime of unconstitutional change of government was thus inherently political. However, while it is one thing for unconstitutional changes of government to be opposed by the AU at the political level, such phenomenon has not been widely prosecuted as a crime at the international level and it remains to be seen what effect the criminalization of this crime within the Malabo Protocol will have regionally.

Moreover, the definition of the crime of unconstitutional change of government was contentious throughout the drafting process. At the center of this controversy was whether to include popular uprising as a form of unconstitutional change of government. The concern of including popular uprising as constituting a crime of unconstitutional change of government was that this would result in criminalizing protest. In the end the issue of "popular

[53] African Charter on Democracy, Elections and Governance, Preamble, para. 6.

[54] 1999 Algiers Declaration on Unconstitutional Changes of Government (OAU Doc. AHG/Dec. 141 (XXXV) (1999); OAU Doc. AHG/Dec. 142 (XXXV), the 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government; OAU Doc. AHG/Dec. 5 (XXXVI) (2000); 2002 Declaration on the Principle Governing Democratic Elections in Africa OAU Doc. AHG/Dec. 1 (XXXVIII) (2002).

[55] ACDEG, Article 25.

uprising" was deleted from the definition adopted in Article 28E of the Malabo Protocol, clearly a positive development. However, an earlier draft of Article 28E had reportedly included a specific exception to the crime of unconstitutional change of government in the case of peaceful protests – proving that any act of a sovereign people peacefully exercising their inherent right which results in a change of government shall not constitute an offense under this article. It is unfortunate that such an exception was not retained in the final ACJHR Statute, as this would be a clearer and more explicit limitation on this crime in conformity with human rights obligations, including the rights of freedom of expression, association and assembly.[56]

Such an exception would have been particularly welcome given the broad formulation of the crime in Article 28E, which as currently drafted, raises serious concerns as to compliance with the principle of legality and may criminalize conduct constituting peaceful protest. For example, while a coup d'état against a democratically elected government is criminalized there is no definition of a "coup d'état" provided in the Statute nor specification that only violent coup d'états can be criminalized.[57] Consequently, while "popular uprising" is not explicitly criminalized, the crime of unconstitutional change of government under Article 28E is sufficiently broadly drafted that it still appears to leave open the possibility that peaceful protests that result in a change in government may be criminalized, such as for example, the Arab Spring protests that ultimately led to a changes of government in several Arab states.

As some commentators have indicated, this is to be contrasted with Article 28G on terrorism which contains an exception in the case of a "struggle waged by peoples according to the principles of international law for their liberation or self-determination." As argued by Du Plessis, the ACJHR Statute thus allows for such a struggle even when it results in death or serious injury (as per the definition of terrorism in this Article), but potentially criminalizes peaceful protests under the crime of "unconstitutional change of government."[58] It is therefore difficult to reconcile these two provisions.

[56] See also Daily Maverick, "AU Summit Conclusions: Number Ones look out for Number One, Again", July 4, 2014, available at www.dailymaverick.co.za/article/2014-07-04-au-summit-conclusions-number-ones-look-out-for-number-one-again/#.V86nSvmLTIU (last visited October 11, 2016).

[57] Further, there is no definition of "coup d'état" in the ACDEG, from where the crimes contained in Article 28D have been taken almost verbatim.

[58] See M. Duplessis, who makes this argument in "Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders", ISS Paper 278, November 2014, p. 4, available at: www.issafrica.org/uploads/Paper278.pdf (last visited October 11, 2016).

As argued by Du Plessis, it is also difficult to see how Article 28E can be reconciled with the immunity provision in Article 46A*bis*, as it would seem that many of the crimes listed in Article 28E could only be committed by heads of state or other senior state officials. The immunity provision renders the crime of "unconstitutional change of government" inoperative with respect to the majority of those who might in fact be prosecuted for it.[59]

Amnesty International and CSOs have also been particularly concerned about the definition of terrorism as adopted in Article 28G of the Amended ACJHR Statute.[60] There is no agreed definition of terrorism under international law. Definition of terrorism in regional instruments vary greatly, and Amnesty International has frequently criticized these definitions, including the definition of terrorism in the OAU Convention on the Prevention and Combating of Terrorism, from which the definition in Article 28G is largely derived, for being vague and overly broad, thus undermining the principle of legality. Amnesty International's research also demonstrates that many governments across the world invoke broad definitions of terrorism in order to repress political opposition, target human rights defenders, and harass and intimidate "suspect" religious and/or ethnic groups, and clamp down on legitimate exercise of freedom of expression, association, assembly and other human rights. The definition in the Malabo Protocol, may be used for similar purposes as it is overly broad.

For example, Article 28G provides that acts which may cause "damage to public or private property, natural resources, environmental or cultural heritage" can be criminalized as terrorist acts, without specifying, that such damage must be "serious" or "substantial", as does for example the UN Draft Comprehensive Terrorism Convention, the African Model Anti-Terrorism Law or in several of the international counter-terrorism conventions.[61] Nor are terms such as "property", "natural resources" or "environmental or cultural heritage" defined. Similarly, the article criminalizes "disruption to public services" without specifying that this must be a "serious" disruption. As Saul indicates in his Chapter on Terrorism in this volume, Article 28G further provides that any act which is a "violation of the laws of the African Union or a regional economic community recognized by the African Union", without specifying that these must be criminal laws, with the consequence that violation of many

[59] Ibid., p. 8.
[60] Malabo Protocol, Article 28G.
[61] Article 4(xxxix)(b), African Model Counter-Terrorism Law, endorsed by the 17th Ordinary Session of the Assembly of the Union, 2011, available at http://caert.org.dz/official-documents/african-model-law-en.pdf (African Model Anti-Terrorism Law).

regulatory. laws might be criminalized under this provision. Relatively minor acts could therefore constitute terrorist acts under Article 28G, including those which might result from peaceful protest. As Saul indicates, this is particularly worrying as there is also no "peaceful protest" exception for such acts (as there is in the African Model Anti-Terrorism Law).[62]

Moreover, while incitement is listed as a mode of liability, it is not defined or limited in any way in Article 28G (or elsewhere in the Statute),[63] whereas the Special Rapporteur on Human Rights and Terrorism has indicated that in order to limit infringements upon freedom of expression, incitement should only be criminalized if it "causes a danger that one or more such offenses may be committed."[64]

This challenge is compounded by the fact that Article 28G(A) partly defines the crime in question by referring to an open-ended list of offenses contained in a series of international, regional and domestic legal frameworks, including where such offenses are themselves ill or vaguely defined, thus adding to the confusion and likely overbroad nature of the crime and its arbitrary application. This raises serious concerns as to compliance with the principle of legality, a core general principle of law, enshrined, *inter alia*, in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which requires laws to be clear and accessible and for their application in practice to be sufficiently foreseeable, and with regards to criminalization, requires that the law must classify and describe offenses in precise and unambiguous language that narrowly defines the punishable behavior.[65]

Article 28G(B) therefore prevents individuals from ascertaining with sufficient certainty which conduct could constitute a criminal offense. As such, it raises significant concerns, including with regard to the principle of legality, and paves the way for arbitrary application in practice.

Engagement with civil society throughout the process of drafting the provisions on unconstitutional change of government and terrorism would likely have helped to make them stronger, less broad, and less prone to being used to

[62] Article 4(xl)(a), African Model Counter-Terrorism Law.

[63] Saul also raises the point that it is difficult to reconcile the modes of liability provided for Article 28G with the modes of liability that are provided for more generally in Article 28N of the Statute. See Chapter 15 in this volume.

[64] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/16/51, December 22, 2010.

[65] See, *inter alia*, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, December 9, 2014, UN Doc. A/HRC/28/28.

criminalize peaceful protest. The ACJHR Statute should therefore be re-opened for input and amendments, including by civil society into these and other problematically defined crimes.

C. *Implications on Domestic Legal Standards, Competing Obligations, and Harmonization of Laws*

States may face significant difficulties in domesticating the Statute of the ACJHR in light of competing obligations under international law, as well as in harmonizing currently existing domestic laws with the provisions of the Statute. In addition to specific issues in relation to conflicting obligations under the Rome Statute and the ACJHR with which states who are already party to the Rome Statute will have to contend (which are discussed more fully below), states may also face conflicting obligations if they are also parties, for example, to the 19 international counter-terrorism conventions, the United Nations Convention on Organised Crime and/or various other international instruments relating to drug trafficking, migrant smuggling and trafficking in persons, as well as regional treaties dealing with these crimes.

In the case of terrorism for example, Article 28C contains the controversial provision on "struggles for self-determination", derived from the OAU Convention on the Prevention and Combating of Terrorism, which provides that acts committed during struggles for self-determination should not be considered to be terrorist acts. There is no such exclusion under any of international counter-terrorism instruments. Therefore, as Saul indicates in his Chapter on terrorism in this volume, states would be subject to conflicting obligations because while they would have the obligation to criminalize these acts under international counter-terrorism treaties, they would be obliged in the domestic implementation of the ACJHR Statute to include this exception.[66]

Even where there are no competing obligations, a substantial amount of drafting and legislative work may be required within states to bring domestic laws in line with the Statute of the ACJHR and other international instruments to which they are party.

It is therefore critical for civil society organizations to engage in a process of sensitizing governments of the implications of ratifying the Malabo Protocol on domestic legal standards and on the difficulties of reconciling their obligations under the ACJHR with their obligations under other international and regional instruments.

[66] See Saul, Chapter 15 in this volume.

D. *Conflicts with Obligation of Member States to Rome Statute*

CSOs have also raised concerns that the establishment of an African Court with criminal jurisdiction may cause difficulties for states who are also party to the Rome Statute. Of the 55 member states comprising the AU, 33 are also state parties to the ICC. Therefore, the expansion of the jurisdiction of ACJHR to cover international crimes will likely have a number of consequences on those AU member states which would be at once have obligations toward the ACJHR and the ICC.

It is noteworthy that the Malabo Protocol contains no provisions detailing the ACJHR's relationship with the ICC, or at least how member states must deal with competing obligations which may arise in relation to the ACJHR. The Rome Statute does have certain provisions, regarding competing obligations, as they relate to cooperation with the ICC, contained in Articles 90 and 98. However, Article 90, which deals with competing requests for the surrender of a person from another state, does not provide for how a state party should deal with a competing request for surrender from another international court. Article 97 of the Rome Statute also provides for a consultation procedure which a state party must undertake if it identifies problems which may impede the execution of a cooperation request. Both the ICC and the ACJHR are creations of treaties and as such, neither has *prima facie* primacy over the other. However, it is clear that with the creation of the International Criminal Law Section within the ACJHR, those states which are party to both treaties will encounter the issues of overlapping jurisdictions and competing obligations owed to both the ACJHR and the ICC. In this scenario, the lack of discussion in the more recent Malabo Protocol on competing obligations is striking.

E. *Overlapping Jurisdiction and Competing Obligations*

It is clear that, in relation to jurisdiction and particularly the crimes which they will prosecute, the ICC and the ACJHR overlap on a number of crimes. This may lead to competing and overlapping obligations on member states, for example, in the event that the ACJHR and the ICC indict the same person and order his or her surrender. This may lead to state parties to both the Rome Statute and the Malabo Protocol having to choose which obligation they would fulfill and which they would breach. It is not defined within the Malabo Protocol which obligation will take priority and states parties to both instruments may find themselves in difficult legal situations if both courts hold that they have jurisdiction over a particular case. The issue of competing obligations would likely arise in relation to indictments, but may also arise

conceivably in relation to a number of other areas including competing cooperation requests. This may, for example, be in cases where both the ICC and ACJHR request specific assistance or documents.

F. *Domestic Implementing Legislation*

Under the Rome Statute system, and due to the principle of complementarity, state parties to the ICC are under a duty to enact domestic implementing legislation. This legislation should domesticate the Rome Statute crimes as well as provide for procedures of cooperating with the ICC.[67] The Malabo Protocol also provides that it is complementary to national jurisdictions,[68] and as such, those states party to the Protocol will also have to ensure that their domestic legislation is in line with the Protocol. It follows that the process of amending, updating or indeed adding further provisions into domestic legislation to incorporate the Malabo Protocol legislative requirements will need to be considered by states party to both the ICC and the ACJHR.

This may present a number of difficulties for those ICC states parties which have or are in the process of domesticating the Rome Statute. For example, the Malabo Protocol contains some variations in the definitions of Rome Statute crimes as well as a number of crimes which are not included in the Rome Statute. This may require a substantial amount of drafting and legislative work within current Rome Statute member states to bring domestic laws in line with the statutes of both the ICC and the ACJHR. This may even prove impossible if states are unable to domestically legislate definitional differences found in the Malabo protocol and Rome Statute systems. For example, the Kenyan International Crimes Act 2008 incorporates directly in its domestic implementing legislation the definitions of genocide, crimes against humanity and war crimes found in the Rome Statute.[69] Furthermore, states parties to the ICC are required to enact domestic legislation ensuring cooperation requests, including for arrest and surrender, are properly executed by state parties. A number of African state parties' domestic legislation provides for specific ICC related cooperation, this will also have to be adapted in order to also accommodate cooperation requests of the ACJHR.

[67] Rome Statute, Article 88.
[68] Malabo Protocol, Article 46H.
[69] See, Kenya International Crimes Act 2008 available at www.issafrica.org/anicj/uploads/Kenya_International_Crimes_Act_2008.pdf (last visited October 11, 2016).

G. *Double Financial Burden*

On a more pragmatic level, member states of both the Rome Statute and the ACJHR will have to contribute financially to both the ICC and the ACJHR, which may prove a heavy financial burden.

It is therefore critical for civil society organizations, particularly in member states which are also parties to the Rome Statute, to engage in a process of sensitizing governments on the potential difficulties of reconciling their obligations under the ACJHR with their obligations under the Rome Statute.

5. CONCLUSION AND WAY FORWARD

The exclusion of civil society from the process of formulating the Malabo Protocol marked a retrogression in AU's standard-setting practice. As a result of this exclusion, the Malabo Protocol has received a largely lukewarm reception among civil society, a situation which undermines any possible future engagement between civil society and the ACJHR. However, it is important to note that all efforts to bring an end to impunity for crimes under international law should be welcomed and CSOs should engage with the Malabo Protocol with this spirit. This engagement must be based on a thorough understanding of the provisions of the Malabo Protocol and its legal and institutional implications. Yet, there is currently a lack of information and awareness regarding the Malabo Protocol and its legislative and institutional implications. In order to successfully be able to advocate with governments regarding the Protocol, it is crucial that civil society is educated about the implications of the Protocol and is empowered to engage in both regional and national advocacy campaigns with governments regarding the ACJHR, and to propose amendments to certain provisions of the Statute.[70]

Similarly, before states consider ratification of the Protocol, it is crucial that they are sensitized regarding the legislative history of the Protocol (including

[70] Amnesty International has taken some steps towards such a sensitization including the publication of a study on the legal, financial and logistical implications of the Malabo Protocol, which has been widely disseminated to relevant stakeholders, member states, AU Organs and civil society. (See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (Index: AFR 01/3063/2016), January 22, 2016, available at www.amnesty.org/en/documents/afr01/3063/2016/en/ (last visited October 11, 2016). It is also planning regional consultations with civil society and the press regarding the Protocol within the broader context of international justice in Africa.

on controversies surrounding the issues of unconstitutional change of government and the immunities provision), on the specific provisions of the Protocol and concerns regarding such provisions, and on the institutional and other implications with respect to conflicting obligations in domesticating the Protocol, particularly for member states of the Rome Statute. When considering whether to ratify the Protocol, African Union member states should also be encouraged to consider whether to enter reservations to certain articles, and in particular, to Article 46A bis in the event that the provision is not amended to comply with international standards

On its part, and in order to ensure an effective court, the AU should prioritize the concerns arising from the expansion of the jurisdiction of the ACJHR to include crimes under international law and transnational crimes. Citizens and CSOs from across the continent should engage with the AU to ensure that the ACJHR is the most effective possible court and that if it is granted criminal jurisdiction that it has the strongest possible statute and institutional support to ensure that it is effective in bringing suspects to fair trials. CSOs must confront, however, some key dilemmas, as to whether to advocate with states to ratify the Statute in its current form, whether to suggest that States ratify the Protocol with reservations, or whether to advocate that the Protocol be re-opened for amendments in order to address some of the concerns that are identified above.

It is hoped that the AU will engage with civil society in the next steps of the process for the court's establishment, such as the drafting of the Rules of Procedure and Evidence and of the Elements of the Crimes for the Court, even though this will not be enough to remedy the failure to involve civil society in the more controversial earlier negotiations.

Moreover, while the Rules of Procedure and Evidence and Elements of the Crime can go some way toward clarifying certain procedural and substantive aspects of the ACJHR Statute, these instruments cannot remedy some of the central concerns identified above with respect to specific provisions of the ACJHR Statute including the immunity clause. It is therefore crucial that CSOs advocate for the reopening of the Protocol for key amendments that would help resolve these issues and make the ACJHR a stronger institution.

Pending the establishment of the ACJHR, civil society should continue to work to strengthen the African Court on Human and Peoples' Rights by submitting cases to the Court in order to build up its body of jurisprudence, and campaigning for the universal ratification of the Protocol on the Establishment of an African Court on Human and Peoples' Rights. On its part, the AU should reconsider the decision to exclude civil society from its June/July

summits as well as the stringent requirements for membership in the ECOSOCC. Active civil society participation in the activities of the AU, including standard-setting, will serve to strengthen the institution in addition to truly making it an organization guided by "the need to build a partnership between governments and all segments of civil society."[71]

[71] AU Constitutive Act, Preamble, para. 7.

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