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Criminal justice and accountability in Africa

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CRIMINAL JUSTICE AND ACCOUNTABILITY IN AFRICA

Edited by
Rashida Manjoo
Dominique Mystris
Mashood Baderin

CRIMINAL JUSTICE AND ACCOUNTABILITY IN AFRICA: REGIONAL AND NATIONAL DEVELOPMENTS

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Criminal justice and accountability in Africa: Regional and national developments

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Foreword

In the past thirty years the bulk of intrastate violent conflicts took place on the African continent. This has recently been exacerbated by the COVID-19 pandemic which led to a shift of patterns of conflict in Africa. In particular, COVID-19 legislation facilitated the suppression of citizens through the enforcement of lock-down measures, while otherwise conflict levels remained rather steady. If anything, conflicts were even slightly on the increase during the pandemic. In the first months of the outbreak of COVID-19, violent armed groups expanded their territories and inter-group clashes rose by an average rate of 25%. The effect of the pandemic was hence twofold. On the one hand, violence in Africa was perpetuated by states against their citizens, in particular to restrict movement, and, on the other hand, violence was used by armed groups to consolidate their positions.[1]

While it appears that the situation has hence been worsening since 2020, this trend is visible already since the 1990s and addressing conflict and post-conflict impacts are therefore ever more important. One way of tackling the problems – and the one being the centre of this volume in particular – is redressing violence in Africa through the law in its various forms. Formal mechanisms which are probably well-known to all international lawyers interested in the African continent were the International Criminal Tribunal for Rwanda (ICTR) which operated from 1994 to 2016 and the International Criminal Court (ICC). The latter saw the light of day in 1998, started operating in 2000 and has frequently dealt with cases arising from conflicts on the African continent.

Historically, Africa has a legacy of violence that has in many cases been redressed by transitional justice mechanisms, including truth commissions, tribunals or so-called 'traditional' mechanisms.[2] To understand the ways in which justice is more holistically achieved in

1 Clionadh Raleigh 'The pandemic has shifted patterns of conflict in Africa' Mail and Guardian (22 Jun 2020).

2 Susanne Buckley-Zistel, Teresa Koloma Beck, Friederike Mieth and Julia Viebach, 'Redressing violence in Sub-Saharan Africa' in Bruce A. Arrigo and Heather Y. Bersot (eds) The Routledge Handbook of International Crime and Justice Studies (Routledge, 2014) 471.

Africa, one needs to understand the various processes aimed at achieving it and, in particular, what it means for justice to be 'transitional' rather than just justice. 'Transitional justice' is not a static concept and has shifted considerably in the last 30 years with, most prominently, the ICTR in Africa, and the International Tribunal for the Former Yugoslavia (ICTY) in Europe, as well as with the ICC globally, which is without a doubt the most prominent transitional justice mechanism today.

Next to these important formal mechanisms exist countless informal ones. They encompass anything that a society can do to work through a conflict and promote peace, including changes in narrative, law, justice, culture, and the constant fight against inequalities.[3] At their heart, all transitional justice mechanisms, whether formal or informal rely on the premise that after a period of conflict follows a period of transition and that achieving justice in the latter is crucial for peace. In practice, transitional justice can use the power of international, hybrid or national war tribunals to achieve a form of formal justice, or it can reform key institutions that were involved in the conflict, such as police, military and security agencies. Transitional justice can also provide compensation to victims and eliminate corruption that led to or perpetuated the conflict. Truth can be a focus point through, for example, public discourse, but art and memory can also play a central part in changing a corrupt narrative.[4]

Considering how varied transitional justice can be it lends itself perfectly to interdisciplinary approaches, ranging from law to politics and criminology to art history. It is therefore astounding how rarely academic publications gather the various disciplines and their representatives to provide a more nuanced look at formal and informal transitional justice mechanisms. In particular, questions that could be exploited include how formal justice mechanisms, such as courts and tribunals, could be assisted by informal ones, such as cultural or political mechanisms and vice versa.

The present collection edited by Dominique Mystris, Rashida Manjoo and Mashood Baderin hence has to be applauded for providing a fresh, interdisciplinary and distinctly nuanced look at the ways transitional justice can be achieved on the African continent. The authors they gathered to provide an insight on the topic have backgrounds in various disciplines, including public international, Islamic, contract, international criminal and human rights law, political science, security studies, African studies, and criminology. The mix of perspectives is very important to gain new

3 Naomi Roth-Arriaza and Javier Mriezcurrena, Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice (Cambridge University Press, 2006) 2.

4 Buckley-Zistel, et al, (n2) 472.

insights on existing and evaluating past conflicts and frameworks to settle them. While the law is central to this publication, the focus is not solely on formal, but also on the informal ways and methods to address the issues.

The chapters in this volume vary considerably in their academic approaches but all discuss the difficulties of achieving peace and justice in Africa. Some chapters view the problems through a more theoretical lens and, for example, juxtapose legal idealism and legal realism to ensure effective criminal justice and accountability in Africa. While pertinent in particular to Baderin's chapter (Chapter 2), most other chapters equally grapple with the discrepancy between the law in the books or the 'positive law' and the law in practice as it applies to redressing violence in Africa.

To close the gap between law and practice various instruments are addressed throughout this publication besides the traditional (European) criminal justice systems. These systems might not work 'internationally' and the more alternatives are discussed, tested and applied the narrower the gap between law and practice might become. In this context, Chapter 3 (Szpak) discusses the role of indigenous justice in order to address the operational problems and gaps in the State justice systems in the framework of transitional justice. A combination of justice systems might be more appropriate in the African context to close the gap between law and practice. Equally, Chapter 4 (Verde) highlights the differences between the various concepts of law at play in the context of Africa though with a more prominent focus on the problems rather than viewing them as part of the solution.

Also in line with a focus on the variety of concepts of law, most chapters address the Malabo Protocol and the possibility for regional justice next to national and international concepts thereof. It could be argued that a regional African court could close the gap between the international 'law in the books' and the regional lack of justice in practice as it is commonly perceived. However, whether justice could be achieved is doubted by most authors in this volume, least because the challenges currently still seem to outweigh the uses. Chapter 5 (Mongella and Akpoghome) in particular highlights the major challenges as in the lack of political will; the immunity of heads of State; and the lack of capacity of the court. The chapter does, however, end on a positive note, stressing that with the necessary political will, Africa would be able to successfully fight impunity.

Chapter 6 (Mystris) goes even further in stressing the potential impact of a regional court for the African Union. According to Mystris, the International Criminal Law Section (ICLS) of the African Court of Justice and Human and Peoples' Rights 'is in a unique position to advance the

AU's institutional ideology, while promoting justice and accountability'. The gap between law and practice can in her view only be closed by developing a specific regional mechanism that addresses the unique regional (transnational and international) criminal justice problems in the context of Africa. The ICLS would hence play a complementary role to the ICC, while furthermore addressing region specific concerns and crimes as well as introducing corporate criminal liability. This chapter is particularly interesting to read in comparison to Chapter 3 (Szpak) on indigenous justice as both discuss 'complementarity' of justice through different institutions.

Chapter 7 (Inazumi) has clearly been chosen as the climax of this volume as it establishes the African Court as a potential model for other regions around the world. It is argued here that to achieve justice internationally - and many authors on the topic of transnational crime and justice would agree - national, regional, and international justice systems need to interact and together form a new comprehensive system in which regional criminal courts and the ICC work together to end impunity. Peace and justice hence rely on all criminal justice systems to work together, complementing each other.

While this multi-level governance model of criminal justice could be viewed as a rather utopian approach considering the debates on the Malabo protocol and the potential overlaps the establishment of an African regional court would create between various existing systems, a comparison with other regional developments might prove that it can become a reality at some stage. Against all expectations, in the European Union (EU) the European Public Prosecutors Office has recently started its operations, and while cases are still referred to national courts, it is a further milestone achieved in the development of regional criminal justice. It hence appears that progress is possible in the field even against the political odds. This volume, by comparing various approaches to the development of a multi-level governance and more innovative models of criminal justice makes without a doubt a contribution to furthering peace and justice on the African continent and beyond.

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1 Pursuing criminal justice and accountability in Africa: Regional and national developments

Dominique Mystris & Rashida Manjoo***

Abstract

Historically Africa has suffered from numerous conflicts which are typically addressed through international criminal law mechanisms and courts, but the need for a broader approach is both evident and demanded. The chapters in this publication, and this chapter in particular, highlight the background to the discussions and debates, as well as the subsequent developments. In addition, the novelty of this publication reflects a willingness of authors to engage in the multidisciplinary pursuit of larger ideas, beyond the current discourse on the perceptions of an anti-Africa bias by the ICC. This chapter provides an overview of the discussions and presentations emanating from the conference held in 2017 at Queen Mary University, London titled 'Criminal justice and accountability in Africa' and highlights a selection of papers presented in this volume. It also situates the developments within the larger discourse around international criminal justice over seven decades ago, starting with the establishment of the International Military Tribunal at Nuremberg in 1946, post-World War II.

1 Introduction

The purpose of this publication in general is to highlight the different perspectives of authors regarding developments in Africa on justice and accountability. This chapter pulls together the debates originating from the 2017 conference 'Criminal Justice and Accountability in Africa: National and regional developments', highlights the different approaches and mechanisms used to date, and what can be taken from them to advance justice and accountability. As the contributors to this publication grapple with national, regional and sub-regional examples and emerging practices,

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concerned with Criminal Justice and Accountability, the lack of a one size fits all approach becomes clear. While Africa has suffered from numerous conflicts which are typically addressed through international criminal law mechanisms and courts,[1] the need for a broader approach was evident throughout the discussions establishing the mechanisms.[2] The different legal perspectives and additional benefits from applying notions of transitional justice were shown to contribute positively. While within the African regional system, the complexities and nuances surrounding the proposed African criminal court were debated with both scepticism and optimism over a more regionally relevant and contextualised mechanism coming into existence.[3] Overall, international criminal justice has come a long way from the days of the Nuremberg and Tokyo Military Tribunals, with Africa contributing to the emerging practices.

As mentioned above, the background to this publication has its origins in a conference. The Centre of African Studies at SOAS and the Queen Mary University of London Criminal Justice Centre hosted a two-day conference in London on the topic of 'Criminal Justice and Accountability in Africa: National and regional developments' in October 2017. The catalyst for the conference was the various developments related to Africa in International Criminal Law (ICL) and transitional justice initiatives. This included the Habré judgment of the Extraordinary African Chamber in Senegal,[4] the adoption of the Protocol to establish the International Criminal Law Section (ICLS) of the African Court of Justice and Human and Peoples' Rights (Malabo Protocol),[5] and also the call for a hybrid court to be established in relation to the conflict in South Sudan.[6] The importance of these and other national and regional efforts lies in the fact that, in addition to the international system, regional courts, tribunals and

1 For example, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

2 See the discussion on the purpose of the International Criminal Tribunal for Rwanda, UN Security Council, Resolution 955 (1994): Establishment of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc S/RES/955 (1994) Preamble. In terms of the individual state beliefs see the views expressed by Russia and Pakistan, UNSC 3453rd Meeting, Tuesday 8 November 1994, UN Doc S/PV. 3453, 2 and 10 respectively; contrasted with the position of Czech Republic UNSC 3453rd Meeting, Tuesday 8 November 1994, UN Doc S/PV. 3453 6-7.

3 See Chapters 5-7.

4 *Ministère Public v Hissèin Habré* Extraordinary African Chambers, Judgment of 30 May 2016.

5 African Union, The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 2014).

6 As set out in the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS), Addis Ababa (12 September 2018).

forums that address individual criminal justice, also play a valuable role in contributing to justice and accountability goals.

Over the course of the two days the panels covered a variety of themes by panellists from Africa, Europe and Asia. In addition, PhD candidates acted as commentators on the presentations, thereby providing an opportunity for emerging researchers and scholars in the field. The keynote address was delivered by Gabriël Oosthuizen, Programme Director at the Institute for International Criminal Investigations, with his reflections and questions providing much food for thought. With his experience across the globe, and in seeing the 'barbarity perpetuated by our fellow human beings',[7] Mr Oosthuizen was cynical about international criminal justice efforts, and opposed to extending criminal jurisdiction to the African Court. However, he encouraged efforts to engage in ways to improve justice and accountability and learn from previous attempts, as 'the global tapestry of justice and accountability for international crimes, including its African threads, is evolving and becoming richer and more colourful by the day'.[8]

The richness of discussions was evident in each of the panels. Panel 1 focused on *Understanding criminal justice and accountability*, highlighting the different perspectives and approaches taken. Panel 2 placed *The African Criminal Court in context*, situating the African Union's effort in both global and regional political, legal and institutional contexts. Panel 3 highlighted *Hybrid courts: Impact, influence and lessons*, while Panel 4 explored issues of *Complementarity* between international courts and regional courts. The Panel on *Sexual and Gender Based Violence in the African Court* reinforced then normative and policy developments that have emerged and the developments in this field which cannot be overlooked when seeking justice and accountability. Finally, the conference concluded by considering *The International Criminal Law Section of the African Court: Thematic issues, Implementation and hurdles*, which picked up on many of the concerns raised by Mr Oosthuizen in the keynote address.[9]

The conference looked into the strengths and weaknesses of international criminal law as it has been applied in Africa, and the potential of regional mechanisms and responses. The main aim of the conference

7 G Oosthuizen 'Keynote address' at the 'Criminal justice and accountability in Africa: National and regional developments' Conference, 26 October 2017 (on file with editors).

8 Oosthuizen (n 7).

9 Examples being the financial capacity to establish and run such a court, the political will and track record of African states in pursuing accountability, and whether or not efforts would be better spent focusing on alternative mechanisms.

was to discuss if regional systems can contribute to the international system of criminal justice, and further advance accountability and justice. The discussions focused on regional initiatives and efforts to address criminal liability and end impunity; including through trials, courts and mechanisms, both proposed and established at the national level, as well as sub-regionally and regionally. While African systems were the main focus under discussion, conference participants reflected on the functioning and practices of other regional systems to see how justice and accountability are promoted, and the emerging practices that could help shape African approaches.

The discussions at the conference centred around the International Criminal Law Section of the proposed merged African Court of Justice and Human and Peoples' Rights and highlighted how the justice and accountability mechanisms and their constitutive instruments relate to other AU instruments and objectives, thereby bringing in a more creative interpretation and approach to strengthen the overall human rights system in Africa.

An important aim of the conference was to provide a forum for academics, especially emerging academics, to engage with trends in regional justice mechanisms in the quest to strengthen justice and accountability for international crimes. This edited collection provides a select few contributions emanating post the conference.[10] Overall, a developmental approach was taken with this collection to enable emerging academics to benefit from the conference participation and publication process. The value added from this approach, and also the contents of this publication, reflect a broader and more nuanced attitude to justice and accountability on the African continent.

2 The pursuit of justice and accountability in general

There have been decades of discussion over adequate responses to addressing international crimes and the issue of liability for the individuals who commit them.[11] Various responses have emerged over the years, including: the establishment by the United Nations (UN) of ad

10 Unfortunately, it was not possible to include all the presentations, due to delays in finalising a publisher and other factors beyond the control of the editors.

11 See CC Jalloh (ed) *The Sierra Leone Special Court and its legacy: The impact for Africa and international criminal law* (2014); HM Weinstein, LE Fletcher & P Vinck 'Stay the hand of justice: Whose priorities take priority?' in R Shaw & L Waldorf (eds) *Localizing transitional justice: Interventions and priorities after mass violence* (2010).

hoc tribunals (the International Criminal Tribunals for Yugoslavia[12] and Rwanda);[13] the UN created courts within national systems (among others the Special Court for Sierra Leone);[14] The Special Court for Lebanon;[15] the Extraordinary Chambers in the Courts of Cambodia);[16] and most notably, with states coming together in 1998 to establish the International Criminal Court (ICC).[17]

Despite the achievement of the UN ad hoc tribunals, UN courts, and the ICC, justice and accountability still elude many. These international courts and tribunals are not without their flaws,[18] and recently the ICC has been at the receiving end of backlash from certain African states and the African Union (AU).[19] While Burundi, the Gambia, and South Africa expressed their intention to withdraw from the ICC,[20] to date only Burundi has followed through.[21] The *implications* of African states withdrawing from the ICC were discussed at the conference and Harsh Mahaseth cautioned against such action – without assurance of adequate alternative mechanisms being in place, and identifying the weaknesses in

12 UN Security Council, Resolution 827: International Criminal Tribunal for the former Yugoslavia (ICTY), 25 May 1993, UN Doc S/RES/827 (1993).

13 UN Security Council Resolution 955 (n 2).

14 UN Security Council, Report of the planning mission on the establishment of the Special Court for Sierra Leone, 8 March 2002, UN Doc S/2002/246 (2002).

15 UN Security Council, Resolution 1757, 30 May 2007, UN Doc S/RES/1757 (2007).

16 Agreement Between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (27 October 2004).

17 UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, United Nations Treaty Series vol 2187, 1-38544 p 3.

18 For example, see, Jalloh (n 11); and MR Damaška 'The International Criminal Court: Between aspiration and achievement' (2009) 14 *UCLA Journal of International Law & Foreign Affairs* 19.

19 M Ssenyonjo 'The Rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African Leaders' (2013) 13 *International Criminal Law Review* 385; and H Richardson 'African grievances and the International Criminal Court: Issues of African equity under International Criminal Law' (2013) *Temple University Legal Studies Research Paper Series* 2013-24.

20 'Burundi to leave the ICC six months after probe announced' *BBC* 7 October 2016 https://www.bbc.com/news/world-africa-37585159 (accessed 4 February 2021); 'Gambia announces withdrawal from International Criminal Court' *Reuters* 26 October 2016 https://www.reuters.com/article/us-gambia-icc-idUSKCN12P335 (accessed 4 February 2021); and 'South Africa to quit International Criminal Court' *Aljazeera* 21 October 2016 https://www.aljazeera.com/news/2016/10/21/south-africa-to-quit-international-criminal-court (accessed 4 February 2021).

21 'Burundi first to leave International Criminal Court' *Aljazeera* 27 October 2017 https://www.aljazeera.com/news/2017/10/27/burundi-first-to-leave-international-criminal-court (accessed 4 February 2021).

the existing efforts of certain African states.[22] Similarly other participants, and also authors in this publication, note the flaws and challenges facing the African system of justice and accountability – but they also acknowledge the utility of a regional mechanism towards the goals of accountability. This publication thus moves the discourse away from a negative anti-Africa/ICC discourse and provides a more nuanced approach to justice and accountability.

While the tension between the ICC, AU and certain African states occupied a significant share of the debates, and was explored during the conference, it was not the main focus of the discussions. Instead the panels and debates explored the additional mechanisms which have already been tried and tested as well as those proposed in a regional and/or national setting. It is impossible, but also not the sole responsibility of the ICC,[23] to hold accountable the majority of individuals involved in international crimes. Thus, there is an opportunity in the current context for regional human rights systems to take ownership for setting normative standards and establishing mechanisms to ensure accountability and address impunity.

However, regional efforts cannot act in isolation of international efforts and the work of the ICC given the Court's mandate. By envisioning an ecosystem of courts supporting and complementing each other's efforts, instead of competing for cases and avoiding a duplication of cases and wasting resources, criminal justice and accountability could be enhanced. The lack of explicit reference to the ICC in the African Court's Statute, and the Rome Statute's explicit recognition of state prosecutions only,[24] does not prevent such an ecosystem from developing.

Conceptually, the idea of regional courts, tribunals and individual criminal justice are not new issues.[25] As the youngest regional human rights system, the African system is in a unique position to consider how it can evolve, while taking into account practices of older human rights regional systems. Over the years, African states, as well as other states and

22 Oral input by participant.

23 ICC OTP 'Policy Paper on the Interests of Justice' September 2007 at 7-8.

24 Article 17.

25 African states considered these issues during the establishment of the regional human rights system and more recently in the Report of the Decision of the Assembly of the Union to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Executive Council, Sixth Ordinary Session, 24-28 January 2005, Abuja, Nigeria, EX.CL/162, at 2.

the UN, have individually and collectively, grappled with how to address accountability and individual responsibility for international crimes.[26]

In a relatively short time span, there has been an increase in justice mechanisms (both permanent and ad hoc) seeking to address accountability for gross violations. In Africa, these continental led criminal justice mechanisms consist of the establishment of The Extraordinary African Chamber in Senegal,[27] The Special Criminal Court within the Central African Republic,[28] Military Courts in the Democratic Republic of Congo,[29] which are trying crimes related to the on-going conflict in the country, the adoption of the Protocol to establish The International Criminal Law Section of the African Court of Justice and Human Rights,[30] as well as calls for a hybrid court to be established in relation to the conflict in South Sudan.[31] These efforts emphasise the prominence of criminal courts and prosecutions.

When one thinks of international criminal justice, naturally thoughts go to criminal courts, and these efforts emphasise the prominence of criminal courts and prosecutions. Yet, these are not the only mechanisms and approaches which are, and should, be pursued. Chapters 3 and 6 include consideration of transitional justice and the benefit of adopting a broader understanding to justice beyond traditional criminal prosecutions, into the accountability and justice discussion, emphasising the lessons that emerge.

3 Overview of conference presentations

The opening theme of the conference was investigated by a panel reflecting on *Understanding criminal justice and transitional justice in Africa*, including an exploration of indigenous mechanisms and national prosecutions.

26 This was recently seen with the African Union's debates on how best to proceed with holding former Chadian Head of State Hissène Habré accountable, see African Union, Report of the Committee of Eminent African Jurists on the Case of Hissène Habré (May 2006).

27 As above.

28 *Loi 15/003 du 3 juin 2015 portant création, organisation et fonctionnement de la Cour pénale spéciale*, [Law 15/003 of 3 June 2015, Establishing the Organisation and Functioning of the Special Criminal Court].

29 For example, Acts 023-2002 of 18 November 2002 on the code judiciaire militaire (military justice code) and 024-2002 of 18 November 2002 on the code pénal militaire (military criminal code).

30 n 5.

31 n 6.

Agnieszka Szpak's Chapter 3 explores whether indigenous mechanisms present an opportunity to achieve transitional justice objectives while addressing the existing and potential gaps of criminal prosecutions, and the problems often associated with state-justice systems. By considering retributive and restorative justice, Szpak highlights the importance that truth plays in both. She argues that indigenous mechanisms can complement other justice processes, even when the mechanisms have been somewhat adapted and changed to reflect the nature of the crimes under consideration. From studying the *Gacaca* courts of Rwanda, the Burundian *bashinganthe* councils and Uganda's pursuit of *mato oput*, the chapter demonstrates the strengths and weaknesses of such mechanisms. One strength identified is a pattern of crimes to be identified in addition to determining individual guilt, whereas in a criminal prosecution individual guilt is the only outcome that can be expected. Overall, by understanding criminal justice as encompassing transitional justice and indigenous mechanisms, a multi-layered justice model, reflecting legal pluralism, is presented as preferable. The potential for taking into account the victim's voices, including those of the indigenous community as a whole, are regarded as important and it is argued that such an approach presents a better opportunity to achieve justice and accountability goals.

Rui Verde's Chapter 4 reflects on Portugal's attempts to prosecute Angolan Vice-President Manuel Vicente for the crimes of corruption, money laundering and document forgery. The chapter demonstrates how the concept of law and the theoretical approach to the rule of law taken by a state impacts the stance taken to criminal justice. The historical relationship between Portugal and its former colony, Angola, is undeniably a key dynamic in the issues explored in the chapter. The tension, and different perceptions, that exist between law as a political tool and a means to search for justice, are highlighted. Verde highlights how the distinct understanding and theoretical approach adopted by Angola, since independence, influences the view of Portugal's attempted prosecution. Consequently, he argues that the Angolan perspective created an environment whereby the role of justice is lacking in the discourse of the ruling party. The different theoretical approaches to the rule of law impact how justice is viewed and pursued, with the case study of Angola reflecting a concept of law which entangles politics with the law as an operational concept. This chapter serves as a reminder that international criminal justice is not a unified concept amongst states and politics is likely to be part of the process, despite the benefit of removal of such practices.

While national and international courts provide an opportunity to pursue justice, they can be limited in practice. However, hybrid courts are thought to have the potential to combine the positive aspects from

both international and national prosecutions.[32] The panel which focused on *Hybrid courts: Impact, influence and lessons* presented some perspectives on lessons learned from various processes. Marina Brilman's insight into the Cameroonian military jurisdiction over civilians reflected the concerns around military processes, while nevertheless acknowledging their contribution. Juan-Pablo Perez-Leon-Acevedo provided an analysis of the Extraordinary African Chambers in Senegal's victim reparations and what the Malabo Protocol Court, and other potential regional courts, could learn to improve their contribution to justice.

The panel on complementarity provided the opportunity to explore how both the ICC and other international courts could approach jurisdictional conflicts as well as the promotion of national and (sub) regional prosecutions. Patricia Hobbs presented on *Achieving the catalysing effect of complementarity through a rejection of Gabon's self-referral to the ICC* and why national prosecutions need to be genuinely taken up and the responsibility of states in pursuing accountability to be upheld. By using the complementarity approach adopted with the Malabo Protocol's Court, Dominique Mystris presented on *The potential space for regional courts to contribute to international criminal justice and accountability*. Some of these complementarity issues have been taken up and explored further by Mitsure Inazumi in Chapter 7.

Unfortunately, sexual and gender-based violence (SGBV) is often pervasive in conflict situations and contexts where international crimes occur.[33] As such, they remain a focus of prosecutorial efforts, albeit imperfectly,[34] with key decisions originating from international tribunals and courts' consideration of conflict situations in Africa. For example, the ICTR *Aakayesu* case[35] provided a precedent on the definition of rape as a crime against humanity. The SGBV aspects of justice and accountability were discussed under the theme *Sexual and Gender Based Violence in the African Court* to consider current efforts and regional approaches taken. Based on her experience and research in the field, Carla Ferstman, set out the normative and policy developments by presenting an *Overview of the SGBV field from an international and regional perspective.* The

32 M Kersten 'As the pendulum swings – The revival of the hybrid tribunal' in MJ Christensen & R Levi (eds) *International practices of criminal justice* (2017) 251-273.

33 UN Security Council, Report of the Secretary-General on Conflict-Related Sexual Violence, 3 June 2020, UN Doc S/2020/487 (2020).

34 Louise Chappell 'The politics of gender justice at the ICC: Legacies and legitimacy' *EJIL: Talk!* 19 December 2016 https://www.ejiltalk.org/the-politics-of-gender-justice-at-the-icc-legacies-and-legitimacy/ (accessed 4 February 2021).

35 *The Prosecutor v Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) 596-8.

International Criminal Tribunal for the Former Yugoslavia was also faced with addressing the widespread SGBV related crimes which occurred. However, it was not left solely to the Tribunal to investigate and prosecute such crimes, and the national level courts continue to work on such cases. Kirsten Campbell looked at the experience of prosecuting such crimes by providing insights into *SGBV crimes and Bosnian courts* and the practices and challenges that have emerged. Regarding national level efforts in Africa, Nastasja White set out some of the challenges that international attention and NGO influence can have on procedural rights and the right to a fair trial by looking at the prosecution of SGBV in the Democratic Republic of Congo.

Reflecting on the African human rights system, it was noted that during negotiations of the African Charter on Human and Peoples' Rights, international crimes as well as human rights violations were considered.[36] Ultimately, despite the recognition of the value that individual criminal responsibility has, it was never included. Instead, establishing the African Commission on Human and Peoples' Rights initially, and subsequently the African Court on Human and Peoples' Rights, have been a priority. However, until fairly recently, the question of criminal liability for gross violations of human rights has not had the same level of focus. When the prospect arose for a merger between the African Court on Human and Peoples' Rights and the African Court of Justice, then Nigerian President Obasanjo floated the idea for 'a division for cross-border criminal issues or whatever'.[37] But, a new direction for regional accountability for international crimes was nevertheless absent. The merged court decided upon by the AU Assembly did not include any criminal jurisdiction, be it transnational or international. It was not until 2014, with the adoption of the Malabo Protocol, that individual criminal liability was included. The Protocol includes core international crimes as well as more conventional transnational and treaty-based crimes.[38]

The proposed court, as set out in the Statute within the Malabo Protocol, was approached from two aspects in the conference discussion. These included *The African Regional Criminal Court in context* and an analysis of *The International Criminal Law Section of the African Court – Thematic issues, implementation and hurdles.*

36 F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 1. On the development of the African Human Rights system see CH Heyns *Human Rights Law in Africa* (1996).

37 Report of the Decision of the Assembly of the Union to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union (n 25) 2.

38 Article 28A-L.

Gabriël Oosthuizen, the keynote speaker warned that

> we should not be bamboozled, we should not give legitimacy and oxygen to ideas, processes and mechanisms that would divert our attention from real, or more realistic, efforts and pathways to secure justice and accountability.[39]

The panellists presented on the pros and cons of an African continental criminal court, addressing some of the issues raised by the keynote speaker.

Drawing on his experience, Oosthuizen explained his hesitation and current lack of support for the African Court because of the slow number of ratifications to the Malabo Protocol;[40] scepticism and lack of clarity on who was driving the idea; why efforts to strengthen existing national and sub-regional courts and mechanisms have not been focused on; the secrecy surrounding the drafting of the Protocol; the immunity clause and the lack of reference to the ICC; the lack of political will to pursue national prosecutions by African states when they are withdrawing from the ICC and decrying the abuse of universal jurisdiction; and, finally, the lack of opposition expressed at the time of drafting by those civil society organisation who presently oppose the Court.[41]

The views expressed by Oosthuizen resonated with participants and panellists grappled with the questions raised. For example, Chapter 5 addresses the pros and cons of the proposed African Criminal Court with Lillian Mongella and Theresa Akpoghome arguing that the Court is a welcome addition to the continental system from the perspective of addressing certain pervasive crimes which the ICC is not mandated to address,[42] and other international courts have failed to include within their jurisdiction. Additionally, the prospect of a court sitting within the continent and, potentially, closer to victims and those most affected is another positive development, according to these authors.

Notwithstanding, concerns remain.[43] For example, the immunity provision raises concerns for Mongella and Akpoghome, and others who call for the AU to remove Heads of State who commit the crimes specified under the Court's jurisdiction and which negate the impact of

39 Oosthuizen (n 7).

40 There are currently no ratifications. https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (accessed 18 May 2022).

41 Oosthuizen (n 7).

42 Article 5 of the Rome Statute sets out the crimes under the Court's jurisdiction.

43 For example, Amnesty International 'Malabo Protocol: Legal and institutional implications of the merged and expanded African Court' (2016).

the provision. Furthermore, the authors in Chapter 5 argue that African leaders have demonstrated the political will to address international crimes. Both African and non-African states 'sweep past atrocities under the carpet',[44] regarding immunity for Heads of State, and this reinforces the critique. For international and regional courts to succeed, there needs to be substantive political will and support from both member and non-member states alike. If not, the possibility of states undermining and making such courts redundant is high.

Emphasising the relevance of political will as a crucial aspect for successful prosecutions, Maria Garcia-Casas provided a perspective on *Dealing with the crime of Unconstitutional Change of Government in times of transition* to the discussion on the final day of the conference. The issue of unconstitutional changes of government is important to the AU and its members. Yet, the crime as articulated in the Malabo Protocol statute, potentially conflicts with the AU's transitional justice policy and the organisation's stated encouragement of amnesties to get combatants to surrender and disarm as well as to encourage peaceful transfers of power. This is further complicated by the political nature and roots of the crime of unconstitutional change of government in times of transition and the challenges this poses for judges.

The majority of the literature on the International Criminal Law Section of the African Court focus on the so-called anti-ICC context of the court.[45] Reflecting on views about the initial reluctance to include individual criminal liability within the regional human rights system, questions have been raised as to what has happened to change the AU and African states' approach.[46] Chapter 5 and 6 show that while the experience of the ICC and its engagement with the African continent has played a role in changing the landscape, it is simplistic to attribute this as the sole reason. Other possible aspects include: there is an expansion of the categories of crimes considered 'international' under the ICLS jurisdiction, which reflects a more African focus; elements of transitional justice are evident in some of the mechanisms aligning with AU peace and security objectives more generally; and, the potential to include these mechanisms into the broader African Peace and Security Architecture provide a unique opportunity to strengthen an often criticised regional system which is in need of strengthening.

44 Oosthuizen (n 7).

45 M du Plessis 'A New Regional International Criminal Court for Africa?' (2012) 25 *South African Journal of Criminal Justice* 286 and Amnesty International (n 43).

46 See Chapters 4 and 5.

In Chapter 6, Mystris acknowledges the imperfections within the Malabo Protocol's Court, and situates the African criminal court within the AU's institutional framework. This moves the discussion of the ICLS to being more than a competitor of the ICC, framing its understanding within a more holistic approach and as a consequence of being part of a regional organisation's judicial organ and not a standalone court. Within the AU's agenda, peace and security is central and this is reflected in its policies and official approaches which links peace, justice and reconciliation. By considering the organisation's policies and documents related to justice, the chapter identifies where the Court's aims and objectives match those of the AU more generally. It is argued that by situating the International Criminal Law Section within the African Peace and Security Architecture, it provides the more holistic understanding on both the court and organisation's objectives while simultaneously advancing the institutional ideology and potentially ICL and transitional justice.

The final chapter, 'The positive implications of the Malabo Protocol and the African Court: The exercise of "judicial" self-determination by African states and the possibility of the new complementary system with the ICC', addresses the historical significance of the AU and member states' attempt to establish their own continental criminal court. Mitsue Inazumi views such efforts as being the 'Africanisation' of international criminal law and AU members exerting their judicial self-determination. While Africa has been said to be the receiver of International Law, Inazumi's perspective shifts this to one where the continent's potential as an active contributor is realised. The author asserts that the ability for this to fully materialise is contingent on preventing the political manipulation and abuse of the court as a means by which to protect certain individuals from prosecution. This is not a uniquely African problem as international criminal law has experienced political influence across the board,[47] ranging from attempts to prevent prosecutions of state officials to preventing cases being investigated and coming under an international court's jurisdiction.

While the extensive list of crimes included in the Malabo Protocol has been criticised, participants also considered their importance as they reflect the needs of the continent and the significance that accompanies such a list, including corporate criminal responsibility. During the conference, Taygeti Michalakea explored the notion of *Corporate accountability and transitional justice* and the challenges and potential advancements that accompany it. The need to address corporate accountability for international and other crimes is widely documented, and such actors

47 F Mégret 'The politics of international criminal justice' (2002) 13 *European Journal of International Law* 1261.

contribute to the commission of crimes in a number of African conflict situations, and creating instability.[48]

4 Conclusion

The development of international criminal justice over the past seven decades, started with the establishment of the International Military Tribunal at Nuremberg (hereafter Nuremberg Tribunal) in 1946, post-World War II.[49] There are contrasting views about the motivations and value added regarding justice and accountability emanating from this tribunal. For example, Mutua argues that 'Nuremberg was a patchwork of political convenience, the arrogance of military victory over defeat, and the ascendancy of American, Anglo-Saxon hegemony over the globe'.[50] While acknowledging that legal prosecutions embrace the rule of law, Minow on the other hand, argues that retroactivity, politicisation, and selectivity are part of the Nuremberg trials, and a danger which tarnishes the rule of law ideals that one pursues in the quest for justice and accountability.[51] She notes that

> the Nuremberg and Tokyo trials were condemned by many as travesties of justice, the spoils of the victors of war, and the selective prosecution of individuals for acts more properly attributable to government themselves.[52]

However, Cassese argues that the Nuremberg Tribunal planted the seeds on the need for a system of justice which holds individuals accountable for gross human rights violations; prevents the usage of state sovereignty as a shield; and creates a new *nomos* based on the supremacy of international law over domestic law, while respecting the rule of law.[53] The codification of the Nuremberg principles, including through the Genocide Convention,[54]

48 H van der Wilt 'Corporate criminal responsibility for international crimes: Exploring the possibilities' (2013) 12 *Chinese Journal of International Law* 43.

49 Established by the Charter of the International Military Tribunal for the Far East at Tokyo, 19 January 1946 (Reprinted in 4 Treaties and Other Agreements of the United States of America 27 (1946)).

50 M Mutua 'From Nuremberg to the Rwanda Tribunal: Justice or retribution?' (2000) 6 *Buffalo Human Rights Law Review* 77 at 79.

51 M Minow *Between vengeance and forgiveness: Facing history after genocide and mass violence* (1999) 31.

52 Minow (n 51) 27.

53 A Cassese 'Reflections on international criminal justice' (2011) 9 *Journal of International Criminal Justice* 271 at 272.

54 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol 78, p 277

The Hague[55] and Geneva Conventions,[56] and proposals for a permanent criminal court, are indicators of political will to address the challenges of impunity for gross violations of human rights.

Despite many atrocities over the decades since WW2, and debates and discussions on the need to develop the field of international criminal justice since Nuremberg, to address justice and accountability imperatives at the regional and international levels, the lack of substantive attention remained until the 1990s. The subsequent creation of Tribunals for the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, and Lebanon, among others, indicates a willingness to address the gap in international accountability mechanisms, after decades of inaction for gross human rights violations. The adoption by the United Nations of the Rome Statute for the International Criminal Court in 1998, is a further step in developing international criminal justice. The attempts by the UN to dispense justice at the international level are not perfect and do not necessarily provide justice, satisfaction, and non-repetition of gross human rights violations – but they do 'represent the possibility of legal responses, rather than responses grounded in sheer power politics or military aggression'.[57]

The ad hoc Tribunals have provided valuable precedents and lessons learned, and this has contributed to the normative framework of the Rome Statute, its rules and procedures, and subsequent policy developments within the ICC. These developments in turn have influenced and shaped national and regional level initiatives, including the African Court and the development of criminal justice. The ad hoc Tribunals have not escaped critiques and include the following views: that the Yugoslavia tribunal 'seems to be a political response rather than an embrace of the rule of law';[58] that the Rwanda Tribunal 'serves to deflect responsibility, to assuage the conscience of states which were unwilling to stop the genocide, or to legitimize the Tutsi regime of Paul Kagame, Rwanda's strongman';[59] that the 'haphazard creation of war crimes tribunals is selective and subject to the whims of states';[60] and that they 'have been hampered by logistical, structural and political considerations with lofty mandates tempered by

55 UNESCO, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 216.

56 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug 1949, 75 UNTS 287

57 Minow (n 51) 27.

58 Minow (n 51) 37.

59 Mutua (n 50) 78.

60 T Meron 'International criminalization of atrocities' (1995) 89 *American Journal of International Law* 554.

the political contexts in which they were set and the climates in which they operate'.[61] There is no doubt that many critiques will be articulated about the African Court and its functioning, including the development of norms within the International Criminal Law Section.

Africa's drive for regional justice mechanisms and ownership is not unique. Other regions are also searching for means through which to address their accountability needs and thus it is through consideration of these various approaches that a picture can emerge as to the potential benefits and pitfalls of regional approaches, as a whole, to justice and accountability. Mutua asserts

> Despite its contribution to the international criminalisation of internal atrocities, Nuremberg serves as the model of the triumph of convenience over principle, the subordination of justice to politics, and the arrogance of might over morality. Nuremberg gave future generations a basis for talking about accountability for the most horrible crimes; but it also emphasized the cynicism of power.[62]

This view reinforces some of the discussions around the integrity, legitimacy and independence of the African Court in general and the International Criminal Law Section in particular. As discussed above, there are conceptual and practical issues of concern regarding the effective functioning of the Court, but there is also a sense of optimism about a new justice and accountability mechanism within the African regional human rights system.

The conference, and this edited collection, demonstrate that Africa has offered a lot to our understanding of justice and the pursuit of accountability, from both a traditional ICL approach and that of transitional justice. African states appear to be engaging more and more in international criminal matters through their own approaches, national mechanisms and the regional systems, thereby avoiding the use of the ICC as the primary mechanism. Partly this is related to the existence of crimes committed before the international court existed and therefore are beyond the scope of the court's jurisdiction. This might also be related to the ICC's own jurisdiction as a court of last resort, or it could be because some African states are unhappy with the ICC and are attempting to find alternative methods to achieve accountability. Whatever the cause, African responses and mechanisms are emerging, with the potential to develop a regional approach to transitional justice and international criminal law,

61 Mutua (n 50) 87.

62 Mutua (n 50) 82.

including through a body of transnational law, a dedicated court system, and jurisprudence that will inform and shape national level accountability mechanisms. This publication contributes to the justice and accountability discussions, based on realistic notions that acknowledge the context and challenges that face the African continent. However, there is also a sense of hope that a new judicial mechanism is needed and that it can contribute to addressing the impunity gap. Thus, further research that continues to monitor developments is essential. In addition, advocacy to ensure the integrity of the implementation of the Treaty will be necessary.

In conclusion, as noted by Cassese:

> Criminal justice is among the most civilised responses to such violence. It channels the hatred and yearning for bloody revenge into collective institutions that are entrusted with even-handedly appraising the accusations. If well founded, they assuage the victims' demands by punishing the culprit. Thus, criminal justice addresses the need to satisfy both private and collective interests. It merges the private desire for an eye for an eye justice with the public need to prevent and repress any serious breach of public order and community values. In this way, criminal justice contributes potently to social peace.[63]

63 Cassese (n 53) 271.

2 International criminal justice and accountability in Africa: Balancing legal idealism and legal realism

*Mashood A Baderin**

Abstract

This chapter argues the need for a balance between legal idealism and legal realism in the pursuit of international criminal justice and accountability in Africa with reference to the relationship between African States and the International Criminal Court (ICC). The analysis begins with a contextualisation of international criminal justice and the need for it, followed by a contextualisation of the nature of accountability in criminal justice and its complexities. It then engages with the criticisms of the ICC's engagement with Africa before ultimately arguing for a balance between legal idealism and legal realism with regard to the relationship between Africa and the ICC. In its conclusion, the chapter calls on African states to ratify the 2014 Malabo Protocol to activate the International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights as a fundamental regional alternative for an effective international criminal justice and accountability mechanism in Africa.

1 Introduction

This chapter engages contextually with the general theme of this book, 'Criminal Justice and Accountability in Africa'. It advocates for a balance between legal idealism and legal realism to ensure effective criminal justice and accountability in Africa. In legal theory, idealism relates to the 'ought' in law, that is, a conceptualisation of the ideal rule at the basis of positive law, while realism relates to the 'is', that is, appreciation of a factual account of the law, namely facing the facts. It is obvious that the concept of criminal justice in Africa, as explored in this volume, relates contextually to international criminal justice because the crimes in question are designated 'international crimes' due to their acknowledged heinous nature internationally.

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Consequent to different atrocious war crimes experienced in the past century and the legal complexities encountered in bringing the perpetrators to justice, the International Criminal Court (ICC) was created in 1998 as a realist permanent judicial institution for pursuing international criminal justice and accountability in respect of certain crimes designated and acknowledged as international crimes globally. However, the Court's engagement with Africa has been characterised by idealist legal and political controversies that have questioned its veracity and resulted in a tense relationship between the Court and some African states and the African Union (AU). While the critical need for effective criminal justice and accountability in Africa is reflected in most of the subsequent chapters in this book, the introductory chapter has rightly highlighted the need to move 'the discourse away from a negative anti-Africa/ICC discourse and provide a more nuanced approach to justice and accountability' on the continent.[1] Nevertheless, being the only purposely established permanent and functional judicial institution of international criminal justice currently available, the ICC's engagement with Africa remains an essential part, if not the crux, of the debate on criminal justice and accountability in Africa, and therefore a necessary catalyst in this analysis.

It is against this background that this chapter aims to advocate for the need to achieve a balance between legal idealism and legal realism in the pursuit of criminal justice and accountability in Africa with reference to the ICC. The analysis begins with a contextualisation of international criminal justice and the need for it, followed by a contextualisation of the nature of accountability in criminal justice and its complexities. It then engages with the different perspectives on the criticisms of the ICC's engagement with Africa before ultimately arguing for a balance between legal idealism and legal realism with regard to the relationship between the ICC and Africa. It closes with some brief concluding remarks based on the preceding analysis. Essentially, the chapter argues strongly on the need for African states to ratify the 2014 Malabo Protocol to activate the International Criminal Law Section (ICLS) of the African Court of Justice and Human and Peoples' Rights (ACJHPR) as a fundamental regional alternative for an effective international criminal justice and accountability mechanism in Africa.

2 Contextualising international criminal justice and the need for it

The idea of international criminal justice is relatively new and it is underpinned by the recognised need for international responsiveness to

1 See Chapter 1, Part 2.

'the most serious crimes of concern to the international community as a whole'.[2] The Preamble of the Rome Statute of the ICC notes that during the last century, 'millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity' the continuance of which 'threaten the peace, security and well-being of the world' and which 'must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'[3] for that purpose. Consequently, certain atrocities are designated today as international crimes for which perpetrators must be brought to justice and made accountable, based largely on the perception that they 'are so heinous that they offend the interest of all humanity, and, indeed, imperil civilization itself'[4] and also have the tendency of constituting a threat to international peace and security beyond the immediate jurisdictions within which they were committed. The former UN Secretary General, Kofi Annan, observed in his 2004 report on the rule of law and transitional justice in conflict and post-conflict societies that one of the main objectives of establishing international criminal tribunals is to bring to justice 'those responsible for serious violations of human rights and humanitarian law, [and] putting an end to such violations and preventing their recurrence, securing justice and dignity for victims'.[5]

Despite this worthy objective, the concept of international criminal law and justice was, in its early days, considered by sceptics as an epitome of idealism in international relations and an affront to state sovereignty.[6] The concept was confronted with realist substantive and procedural arguments contesting its practicality within an international system based on the consent of states. First, there was the perceived difficulty of creating an international agreement on what would be accepted as international crimes and, second, the challenge of securing international agreement

2 Article 5(1) of the UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, United Nations Treaty Series vol 2187, 1-38544 p 3.

3 Rome Statute (n 2) Preambular paras 2-4.

4 LN Sadat 'Competing and overlapping jurisdiction' in MC Bassiouni (ed) *International Criminal Law* (2008) 201 at 207.

5 UN Security Council, Report of the Secretary-General 'The rule of law and transitional justice in conflict and post-conflict societies' 23 August 2004, UN Doc S/2004/616 (2004) para 38 http://www.legal-tools.org/doc/77bebf/ (accessed 20 August 2021).

6 See eg, RA Friedlander 'The foundations of International Criminal Law: A present-day inquiry' (1983) 15 *Case Western Reserve Journal of International Law* 13; and R Cryer 'International Criminal Law vs state sovereignty: Another round?' (2006) 16 *The European Journal of International Law* 979 at 980, noting that: 'Generally, international criminal law scholars see sovereignty as the enemy. It is seen as the sibling of realpolitik, thwarting international criminal justice at every turn'.

about the procedure for prosecuting and punishing such international crimes. For example, in his 2010 article titled 'Some objections to the International Criminal Court',[7] Alfred Rubin had observed that there were underlying inconsistencies between the intended operations of the ICC and the international order, arguing that the ICC, as an institution of international criminal justice, 'cannot work as envisaged without massive changes in the international legal order [but that] those changes cannot be accomplished without losses that nobody realistically expects and only few really wanted'. In his view, the creation of the ICC assumed there was such a thing as International Criminal Law, begging the questions: 'But what is its substance? Who exercises law-making authority for the international legal community? Who has the legal authority to interpret the law once supposedly found?'[8] These questions, he argued, arise from the fact that criminal law is different from civil claims with the traditional position being that crimes are not 'defined by international law as such' but rather 'by the municipal laws of many states and in a few cases by international tribunals set up by victor states in an exercise of positive law making' with 'the tribunal's new rules [being] "accepted" under one rationale or another, by the states in which the accused were nationals'. One rationale was that 'if all or nearly all "civilised" states define particular acts as violating their municipal criminal laws, then those acts violate "international law"'. Another rationale was that 'some acts violate "general principles of law recognized by civilized states," and thus violate general international law'.[9] Thus, from a realist perspective, the rationale of international criminal law is very much tied to its acceptance in divergent municipal orders based on shared human values, the violations of which will be frowned upon by all.

Consequently, the virtue of international criminal justice is essentially linked to the need to redress violations of shared human ideals legally protected by the rules of International Humanitarian Law (IHL), which protect human dignity by regulating and putting constraints on the conduct of warfare, the rules of International Human Rights Law (IHRL), which promote the protection of human dignity, and International Criminal Law (ICL), which prohibits and prescribes punishments for certain agreed core crimes under international law. These three specialised areas of international law constitute the three pillars of international criminal justice, as they together provide the substantive basis for the system. Thus, for example, the crime of genocide, crimes against humanity, war crimes,

7 AP Rubin 'Some objections to the International Criminal Court' (2000) 12 *Peace Review* 45.

8 Rubin (n 7) 45.

9 Rubin (n 7) 46.

and the crime of aggression, are all proscribed under article 5 of the ICC Rome Statute as punishable substantive international crimes that violate core norms of both IHL and IHRL. The acknowledgement of these crimes as 'international crimes' mainly depicts them as crimes that deeply shock the conscience of all humanity,[10] but does not necessarily mean that they can only be tried by international courts or tribunals. Such crimes are committed within states by both state and non-state actors during armed conflicts or insurgencies and, thus, the perpetrators should ideally be tried and brought to justice locally within the respective jurisdictions of the states in which they were committed. In reality, however, the perpetrators of such crimes are often not brought to justice by the state in whose jurisdiction they were committed, either due to lack of local capacity to prosecute or due to outright impunity on the part of the implicated state. Thus prompting the need for international responsiveness in bringing the perpetrators to justice before international courts or tribunals created for that purpose as a deterrence to such crimes and to ensure the maintenance of international peace and security. In this context, 'international' responsiveness would include 'regional' responsiveness as is acknowledged under the concept of 'regional arrangements' in article 52 of the UN Charter. This article provides, inter alia, that nothing in the 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', and that the UN Security Council (UNSC) shall encourage the settlement of local disputes through such regional arrangements by respective states.

This obviously encourages a complementary relationship between universal and regional efforts for ensuring and maintaining international peace and security, with preference given to regional efforts in that regard. Giving precedence to regional efforts is very sensible because the UN or other universal mechanisms are, practically, often too far removed from the location of local disputes and incidents that might impact on international peace and security. Thus, the reasonable expectation is that regional initiatives and mechanisms should be able to deal with such situations more effectively due to their relative local proximity. In following that approach, the concept of complementarity in ensuring accountability in international criminal justice is reflected in the ICC's jurisdiction as acknowledged in the Rome Statute.[11] However, the concept of complementarity under the Rome Statute specifically subjects the ICC's jurisdiction to national jurisdictions without specific mention of regional

10 See eg, MM deGuzman *Shocking the conscience of humanity: Gravity and the legitimacy of International Criminal Law* (2020).

11 See Preambular para 10 and art 17 of the Rome Statute (n 2).

jurisdiction. This is reflected in Preambular paragraph 10 of the Rome Statute which provides that the ICC 'shall be complementary to national criminal jurisdictions' and restated substantively in article 17(1) of the Statute. In relation to the identified importance of regional responsiveness to international criminal justice, this apparently raises the legal question about the jurisdictional relationship between the ICC and regional courts or tribunals set up for that purpose, such as the ICLS of the ACJHPR created by the AU through the Malabo Protocol adopted in 2014. Addressing this question, Miles Jackson has argued reasonably that 'a genuine criminal prosecution by a lawfully constituted regional tribunal means that the "case is being prosecuted by a State which has jurisdiction over it" for the purposes of Article 17(1)(a)' of the Rome Statute. He argued further that '[t]his conclusion follows from the proper understanding of the legal relationship between states and regional tribunals and the contextualized application of the principles of treaty interpretation … is consistent with the values underlying the central principle of complementarity and … makes sense as a matter of policy'.[12]

Over time, the moral need for international criminal justice has become universally accepted and legally solidified, through both customary international law and treaty law, as a necessary initiative spearheaded by the international community. However, the implementational obligation is primarily placed on states, with necessary regional and international responsiveness required only where an implicated state fails to fulfil that primary implementational obligation due to lack of capacity or due to obvious impunity.

Evidently, there have been a large number of past and ongoing conflicts and insurgencies in different parts of Africa such as Uganda, Sudan, Liberia, Sierra Leone, the Democratic Republic of Congo, Ethiopia, Mali and Nigeria, amongst others, in which atrocious crimes have been committed by both state and non-state actors, without local accountability. Thus, it is submitted here that instead of the practice of creating ad hoc tribunals for addressing the situation, a permanent African regional court for bringing perpetrators to justice in cases where the implicated African states have failed to do so would be more effective for both accountability and deterrence. While the ideal would be for perpetrators of such atrocities to be brought to justice by the states in which the atrocities were committed, a permanent African regional court would have the moral legitimacy and legal proximity to provide necessary regional complementary responsiveness for trying such perpetrators,

12 See eg, M Jackson 'Regional complementarity: The Rome Statute and Public International Law' (2016) 14 *Journal of International Criminal Justice* 1061 at 1062.

where states have failed to do so. This need for regional responsiveness, when necessary, has been idealised with the adoption of the 2014 Malabo Protocol conferring the ACJHPR with complementary international criminal jurisdiction to try persons for the crime of genocide, crimes against humanity, war crimes and the crime of aggression amongst others, which would be effective when the Protocol goes into force 30 days after ratification by 15 AU member states pursuant to article 11 of the Protocol.[13] However, the international criminal jurisdiction of the ACJHPR is made complementary not only to national courts, but also to the courts of the sub-Regional Economic Communities where specifically provided for.[14] When the Malabo Protocol eventually enters into force, as this chapter strongly advocates, it will take precedence over the ICC in Africa, and it is only in the absence of regional complementary responsiveness by the ACJHPR that the ICC should step up to prevent the perpetuation of impunity due to lack of state or regional action to ensure necessary accountability.

3 Contextualising accountability in criminal justice and its complexities

While the ultimate goal of international criminal justice is to ensure accountability as a means of curbing impunity and deterring future atrocities, this is usually pursued reactively through post-conflict retributive justice in the form of judicial trials to punish perpetrators and provide redress for victims after the commission of heinous crimes. This reflects retributive accountability and courts are the most essential institutions for realising it, thus the international community has, in cooperation with states, spearheaded the creation of different courts/tribunals for that purpose at different times. These efforts have been complex and have evolved over time, often challenged as an affront to state sovereignty. The Nuremberg and Tokyo trials after World War II in 1945 and 1946 are usually referenced as the starting point of creating formal tribunals for pursuing international criminal justice and accountability in contemporary times. Andrew Novak notes that the Nuremberg and Tokyo trials 'were the first attempts to criminalize aggressive war and abuses

13 African Union, The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 2014) (Malabo Protocol). Currently the Protocol has 15 signatories with the last signature made on 2 April 2019 by Togo, but there has been no single ratification of the Protocol to date. See the status of ratification of the Malabo Protocol at: https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (accessed 20 August 2021).

14 Art 46H(1), Statute of the African Court of Justice and Human Rights annexed to the Malabo Protocol.

against civilian populations'.[15] The Charter of the Nuremberg Tribunal was the first formal legal basis for offences considered prohibited under international criminal law, listing crimes against peace, war crimes and crimes against humanity and complicity in committing them as crimes punishable under international law. This was followed by the establishment of the International Criminal Tribunal of the Former Yugoslavia (ICTY) through UN Security Council Resolution 827 of 1993[16] to prosecute persons responsible for war crimes committed during the conflicts in the Balkans in the 1990s, and the International Criminal Tribunal for Rwanda (ICTR) also established through UN Security Council Resolution 955 of 1994[17] to prosecute persons responsible for genocide and other serious violations of IHL committed in Rwanda and neighbouring states, between 1 January 1994 and 31 December 1994, and ultimately the establishment of the ICC through the Rome Statute of 1998. With reference to Africa, the Special Court for Sierra Leone (SCSL) was created in 2002 after the ICC, pursuant to an agreement between the UN and the Government of Sierra Leone, connoting respect for the sovereignty of Sierra Leone. While the ICTY, ICTR and SCSL were established under Chapter VII of the UN Charter on behalf of the international community, they were ad hoc and non-permanent institutions unlike the ICC which was established as a permanent court by a multilateral treaty adopted through international cooperation, with most African countries as state parties. The ICTR had jurisdiction

> to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994[18]

and the SCSL had jurisdiction 'to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'.[19] Other ad hoc tribunals established to address African situations, such as the Extraordinary African Chambers within the courts

15 A Novak *The International Criminal Court: An introduction* (2015) at 8.

16 UN Security Council, Resolution 827: International Criminal Tribunal for the former Yugoslavia (ICTY), 25 May 1993, UN Doc S/RES/827 (1993).

17 UN Security Council, Resolution 955 (1994): Establishment of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc S/RES/955 (1994).

18 Art 1 of the UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994).

19 Art 1 of the UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002).

of Senegal established in 2012 to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990, are mentioned in subsequent chapters of this volume.

Considering the historical context of ICL and looking at the Preambles of all the special tribunals mentioned above, it is obvious that the objective of international criminal justice is to ensure that, in default of state action, perpetrators of war crimes are appropriately brought to justice through them and made accountable for their atrocities after the fact, to serve as future deterrence.[20] But apart from that traditional reactive retributive accountability, it is important to also appreciate the concept of proactive preventive accountability, as it has been debated whether international criminal trials have really succeeded in serving as a deterrent against future atrocities as intended.[21] Thus, Farhad Malekian has noted that:

> When we talk of the principles of international criminal justice, we do not necessarily mean only the judgments that may be delivered by international criminal courts, but also the living structures of international criminal law as it exists in the international relations of states.[22]

Similarly Richard Goldstone, the former Chief Prosecutor for both the ICTY and ICTR, has noted that while '[c]riminal prosecution is the most common form of justice, [it] is, however, not the only form, nor necessarily the most appropriate form in every case'.[23] This highlights the need for a more encompassing approach to accountability in international criminal justice, especially in Africa. Proactive preventive accountability is encouraged under both IHL and IHRL through the international obligation placed on states to widely disseminate and teach the rules of IHL amongst their populace in time of peace, even before the occurrence of armed conflicts, as provided, for example, in article 144 of the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, that:

20 See the Preambular statements of United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), 8 August 1945, 82 UNTC 280; and UNSC Resolution 827 (n 16).

21 C Jenks & G Acquaviva 'Debate: The role of International Criminal Justice in fostering compliance with International Humanitarian Law' (2014) 96 *International Review of the Red Cross* 775; J Schense & L Carter *Two steps forward one step back: The deterrent effect of international criminal tribunals* (2016).

22 F Malekian *Jurisprudence of International Criminal Justice* (2014) at 1.

23 R Goldstone 'Justice as a tool for peace-making: Truth Commissions and International Criminal Tribunals' (1995) 28 *New York University Journal of International Law and Politics* 485 at 491-503.

> 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 programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.[24]

This obligation to widely disseminate the knowledge of IHL rules is preventive in nature and is based on the belief that familiarising the populace about the IHL rules 'is essential for their effective application and … helps inculcate principles of humanity that limit violence and preserve peace'.[25]

With respect to IHRL, a similar provision can be found, for example in article 10 of the 1994 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[26] which provides that:

> Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.[27]

The International Committee of the Red Cross (ICRC) considers the obligation to disseminate the rules of IHL as a rule of customary international law binding on all states.[28] This places the responsibility of preventive accountability in international criminal justice on the relevant organs of the state such as the leadership and rank and file of the military to avoid the prohibited atrocities during warfare and in peacetime. While many African states may have incorporated the rules of IHL into the training and operational codes of conduct of their armed

24 There are similar provisions in art 48 of International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; and art 127 of International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, amongst others.

25 ICRC 'The obligation to disseminate International Humanitarian Law: Factsheet' *Legal Factsheet* 28 February 2003 https://www.icrc.org/en/document/obligation-disseminate-international-humanitarian-law-factsheet (accessed 19 May 2022).

26 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol 1465, p 85.

27 There are similar provisions in art 48 of the Second Geneva Convention (n 24); and art 127 of the Third Geneva Convention (n 24), amongst others.

28 ICRC (n 24).

forces, its effective use as a means of preventive accountability by most African states may be called to question in practice. For example, in a statement issued on 12 December 2020 by the former ICC Prosecutor, Fatou Bensouda, on the conclusion of preliminary investigations on alleged crimes committed during armed conflict involving the Nigerian security forces and the Boko Haram group from 2009 and 2011 onwards, she noted that while 'the vast majority of criminality within the situation [in Nigeria] is attributable to non-state actors', there was a 'reasonable basis to believe that members of the Nigerian Security Forces (NSF) have [also] committed … acts constituting crimes against humanity and war crimes'.[29] This evidences the need for African states to ensure that the obligation to disseminate the knowledge of IHL rules amongst the entire population, and including it in the training of their military, should not be a mere abstract exercise but aimed at inculcating preventive accountability to stem the violation of those rules by state security forces during armed conflicts and insurgencies.

On the other hand, a 2014 ICRC report documented the combined use of traditional practices and Shari'ah law called *Biri-ma-geydo* (literally meaning 'spared from the spear') in Somalia as a form of preventive accountability measure through local radio broadcasts to disseminate parallel principles of Somali customary code of war and IHL rules to the populace. The report noted that '[t]hese systems are complementary and share the same basic impulse to maintain a certain humanity even at the height of conflict', concluding that the use of 'traditional law alongside IHL is helpful in reaching [the] objective to protect those affected by the conflict in Somalia'.[30] This use of relevant Somali customary principles in parallel with IHL rules for preventive accountability should be encouraged and emulated in other African states. The importance of inculcating preventive accountability measures in international criminal justice is reflected in the former UN Secretary General, Kofi Annan's, observation that 'in matters of justice and the rule of law, an ounce of prevention is worth significantly more than a pound of cure [and that] prevention is the first imperative of justice'.[31]

29 ICC 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria' (11 December 2020) https://www.icc-cpi.int/Pages/item.aspx?name=201211-prosecutor-statement (accessed on 20 August 2021).

30 ICRC 'Somalia: Using traditional law in dialogues with armed groups' (10 November 2014) https://www.icrc.org/en/document/somalia-using-traditional-law-dialogues-armed-groups (accessed 20 August 2021).

31 UNSC (n 5) para 4.

Reference must also be made to the concept of restorative accountability such as Truth and Reconciliation Commissions, especially in relation to transitional justice in post-conflict situations both in the modern context, such as was used in post-apartheid South Africa, and in traditional contexts such as the *Gacaca* process used in post-genocide Rwanda as a form of restorative accountability to promote reconciliation during those post-conflict periods. Similar to the use of the *Biri-ma-geydo* customary system in Somalia for preventive accountability in international criminal justice, the successful use of the *Gacaca* customary process in Rwanda in parallel with the ICTR trials has been applauded as evidence of the relevance of traditional inputs into international criminal justice with particular reference to Africa,[32] despite some identified shortcomings in the process.[33] While the Rwandan *Gacaca* system is the most well-known example of an African customary input into international criminal justice, other such possible African traditional restorative accountability processes that can positively complement modern formal criminal justice processes to strengthen accountability in international criminal justice in Africa are identified in Chapter 3 of this volume.

However, such traditional approaches have been criticised as not necessarily meeting international criminal justice standards fully.[34] According to Gideon Boas, the problems with attempts 'to marry the retributive with the restorative is that the forensic requirements of war crimes trials are in some respect incompatible with restorative approaches'.[35] The balance that was struck in resolving those apparent problems in Rwanda was that the *Gacaca* courts 'were not permitted to try serious offenders, but rather property or other minor offences'[36] while the ICTR and the national courts focused on the more serious offences. Based on his extensive field research conducted on the *Gacaca* system in Rwanda, Phil Clark reasonably concluded that:

> The gacaca experience highlights that major innovations, including melding customary and modern law, can yield substantial benefits for the populace, provided those who create and oversee such processes can navigate inevitable tensions between issue of elite control and popular ownership, and between punitive and reconciliatory objects. Gacaca may therefore inspire further

32 See P Clark *The Gacaca Courts: Post-genocide justice and reconciliation in Rwanda* (2010).

33 See HRW 'Justice compromised: The legacy of Rwanda's community-based Gacaca Courts' (31 May 2011).

34 HRW (n 33).

35 G Boas 'What is international criminal justice' in G Boas, WA Schabas & MP Scharf (eds) *International criminal justice: Legitimacy and coherence* (2012) 1-24 at 13.

36 Boas (n 35) 16.

innovation in transitional societies, although the challenges of gacaca's hybridity must also be recognised in this regard.[37]

4 Perspectives on the criticisms of the ICC's engagement with Africa

In exercising its mandate as a permanent judicial institution of international criminal justice, the ICC has been criticised variously, particularly by African political leaders, as inappropriately targeting African states. This was precipitated by the fact that the very first trial by the court and all the cases investigated and prosecuted by the Court in the first ten years of its operation were exclusively on situations in Africa.[38] The criticisms mainly accuse the ICC of discrimination against Africa in its choice of cases to investigate and prosecute, while shutting its eyes to similar or more heinous situations outside of Africa. In essence, the ICC has been perceived as discriminatingly targeting politically weak African states, while ignoring atrocities involving more powerful Western states and thus some accuse it as being an institution representing a new form of imperialism and neo-colonialism by the powerful Western states against the less powerful African states. The AU also saw the indictments and attempt of the Court to prosecute two sitting African heads of state, former President Omar al-Bashir of Sudan and former Prime Minister Saif Al-Islam Gaddafi of Libya, as a violation of the doctrine of head of state immunity under international law, and an afront against the sovereignty of the two African states.

Similar to most international law questions, the criticisms are entangled between legal and political sensitivities, which is often difficult to separate. While the investigation and prosecution of cases by the ICC is clearly a legal matter regulated by the provisions of the Rome Statute, the process of selecting which crimes to investigate and prosecute cannot be immune from international political manipulations, especially with regard to Security Council referrals due to politically biased usage of the veto by the five permanent members, which are then blamed on the ICC. Thus, the criticisms require a delicate balance between the legal and the political to determine whether or not the Court could be said to be acting illegitimately in the selection of cases. There have been different perspectives on this, based on the facts.

37 Clark (n 32) 354.

38 See eg A Arieff et al 'International Criminal Court Cases in Africa: Status and policy issues' CRS Report for Congress (22 July 2011).

From the perspective of promoting the need for accountability in international criminal justice, the allegations of the ICC's bias against Africa have been challenged by some commentators as misplaced or unfounded. For example, based on a moral, legal and sociological assessment of the allegations, Margeret deGuzman noted that the evidentiary basis for the claims was weak, leading her to conclude that 'the ICC's focus on Africa is neither legally nor morally inappropriate'.[39] William Gumede has also argued that the criticism of the ICC by African political leaders is 'not necessarily because of the lopsided global power in international law … but because they fear they will be prosecuted for their crimes against their own people,[40] while Kai Ambos has identified that the ICC 'enjoys broad support among the African civil society'[41] in contrast to the political leaders.

From the perspective of bias in the selection of cases, Richard Goldstone has argued that the perception of the Court's bias against Africa

> is aggravated by the fact that egregious war crimes have been committed in non-African states and have not come to the ICC … The failure certainly justifies the perception that the international community is treating the investigation of serious war crimes in an unequal and unfair way.[42]

Mark Kersten has similarly noted in that regard that the view that the ICC is specifically targeting Africa 'is a difficult impression to fight against due to its lack of attention to alleged crimes committed by individuals from powerful governments outside the continent.'[43]

And from the perspective of external intervention in Africa, Phil Clark viewed the ICC

39 MM deGuzman 'Is the ICC targeting Africa inappropriately? A moral, legal and sociological assessment' in RH Steinberg *Contemporary issues facing the International Criminal Court* (2016) 333 at 333.

40 W Gumede 'The International Criminal Court and accountability in Africa' (2018) https://blogs.lse.ac.uk/africaatlse/2018/01/31/the-international-criminal-court-and-accountability-in-africa/ (last accessed 20 August 2021).

41 K Ambos 'Expanding the focus of the "African Criminal Court"' in WA Schabas, Y Mcdermott & M Hayes (eds) *The Ashgate Research Companion to International Criminal Law: Critical perspectives* (2013) 499 at 509.

42 R Goldstone 'The ICC and Africa' in S Weill, KT Seelinger & KB Carlson (eds) *The President on trial: Prosecuting Hissène Habré* (2020) 400 at 402-403.

43 M Kersten 'Constructive engagement in the Africa-ICC relationship' The Wayamo Foundation Policy Report (2018) 8.

> as the latest in a long line of international actors that have intervened in Africa including European colonial powers, the World Bank and International Monetary Fund … and multilateral peacekeeping missions ... [but which] … has failed to learn lessons from these actors' difficult entanglements in Africa.[44]

He critiqued the court as an institution caught between 'complementarity' and 'distance' in its engagement with Africa noting inter alia that:

> [T]he ICC's 'distance' from the African societies in which it intervenes has been damaging, both to the Court and to local polities. Failing to wrestle sufficiently with national politics and the expressed needs of local communities, while showing insufficient deference to national and community-level responses to mass conflict, the ICC has produced a range of negative effects for African societies.

Despite the varied perspectives of the criticisms levelled against the ICC by African political leaders and the AU, its OTP continues to receive article 15 communications[45] from individuals, groups and civil society organisations from within Africa giving information about alleged violations of international criminal law in different African states to the Court. For example, the OTP's 2018 Report on Preliminary Examination Activities indicated that the Court received 35 of these communications from Guinea, 169 from Nigeria, and 18 from Gabon[46] requesting investigations on situations in those states. This certainly indicates that as the only Court of last resort on international criminal justice, the ICC would continue to be relevant to international criminal justice and accountability in Africa, until, perhaps, the Malabo Protocol enters into force and provides an African regional alternative for addressing international criminal law situations in African states.

In digesting the different perspectives of the criticisms, it is important to appreciate Mark Kersten's cautious observation on the need to avoid the tendency to dichotomously build a picture of

44 P Clark *Distant justice: The impact of the International Criminal Court on African politics* (2018) 11.

45 Article 15(1) of the Rome Statute provides that: 'The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court'.

46 ICC 'Report on Preliminary Examination Activities 2018' Office of the Prosecutor (5 December 2018) https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf (accessed 20 August 2021).

> a barbaric Africa characterised predominantly by dictators seeking impunity, juxtaposed against a benevolent ICC acting on behalf of all victims. Viewing the ICC-Africa relationship in this way serves neither to advance international criminal justice, nor to further an understanding of the relationship between the Court and the continent [in a positive way].[47]

This then brings us to the proposition of balancing between idealism and realism in criminal justice and accountability with regard to the relationship between the ICC and Africa.

5 Achieving balance between idealism and realism

As stated at the beginning of this chapter, idealism relates to the 'ought' in legal theory, demanding strict adherence to the ideal rule at the basis of positive law, which in the current case is the ideals of international criminal justice, while realism relates to the 'is', demanding appreciation of factual circumstances in the application of the law, which relates to 'facing the fact' in applying the law. Laurence Burgorgue-Larsen has noted that in normative fields such as law, politics and policy:

> Idealism and Realism always trigger a violent pendulum movement. If ideals dominate, policy goals may not be reached; worse, they could be distorted. If only Realism … informs policy development and implementation, it could appear harmfully cynical and damage normative progress.[48]

And from an international relations perspective, Vítor Ramon Fernandes has rightly noted that

> both realism and idealism are two responses to the creation and maintenance of international order, that is, how States relate in international society … [but] not mutually exclusive and can coexist [albeit] in constant tension with one another.[49]

Thus, balancing between the two for the purpose of achieving 'idealistic realism' or 'realistic idealism', in necessary situations, is imperative for achieving policy goals effectively in international law and relations.

47 Kersten (n 43) 6.

48 L Burgorgue-Larsen 'Between idealism and realism: A few comparative reflections and proposals on the appointment process of the Inter-American Commission and Court of Human Rights members' (2015) 5 *Notre Dame Journal of International and Comparative Law* 29 at 29.

49 VR Fernandes 'Idealism and realism in international relations: An ontological debate' (2017) 7 *JANUS.net E-Journal of International Relations* 14 at 14.

From the contextual analysis provided in this chapter, it is clear that the substantive ideals of international criminal justice and accountability are to curb atrocities such as the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, amongst others, and to respect human dignity during conflicts and in peacetime as guaranteed under IHL, IHRL and ICL. This is a laudable idealism that no state today would resolutely deny, and it is binding either through customary international law or treaty obligations. Even non-state actors are bound by it and are expected to comply with it as has been judicially confirmed by different international tribunals.[50] Evidently, it is in the accountability procedure for alleged violations of the substantive law on international criminal justice that the conflict between idealism and realism becomes apparent and requires necessary balancing.

As has been analysed earlier, accountability for international criminal justice is structured upon three ascending idealistic levels, namely, the primary ideal level, which requires state responsiveness; the secondary ideal level, which requires regional responsiveness; and the tertiary ideal level, which requires international responsiveness to violations of international criminal law. Realism informs how the pursuit of accountability shifts from the primary ideal level through to the tertiary ideal level while aiming for 'idealistic realism' or 'realistic idealism', that is, what is realistically ideal in a particular circumstance for ensuring accountability.

The primary ideal level is that states have the primary obligation of bringing violators of the substantive law to justice within their respective jurisdictions, and where the state fails to do so, the obligation shifts to the secondary ideal level, whereby relevant regional institutions assume the secondary obligation, and failing that, the ICC as the international court of last resort assumes the tertiary obligation of international responsiveness. Thus, idealism expects that no international criminal law cases, or a very few that may be by UNSC referrals, should end up at the ICC at all, because in an ideal world all the cases would have been dealt with effectively either at the national or regional levels of accountability respectively. However, realism evidences that African states do not usually undertake the primary obligation of effectively investigating and prosecuting violators of the substantive laws of international criminal justice, necessitating the shifting of the obligation to the secondary ideal

50 WA Qureshi 'Applicability of International Humanitarian Law to non-state actors' (2019) 17 *Santa Clara Journal of International Law* art 3. See also *Military and Paramilitary Activities in and against Nicaragua case*, Merits, ICJ Judgment, 1986, paras 218-219; *Tadić* Decision on the Defence Motion on Jurisdiction, ICTY Judgment 1995, para 98; *Akayesu* Trial Judgment, 1998, ICTR paras 608-609; and *Naletilić* and *Martinović* Trial Judgment, 2003, ICTY, para 228.

level of regional responsiveness. It is the realisation of the need to fulfil the secondary ideal level of responsiveness that the AU adopted the Malabo Protocol creating the ICLS of the ACJHPR, which is a commendable demonstration of collective political will by the AU with regard to the idealistic process of accountability in international criminal justice at the regional level.

Regretfully, however, eight years after the adoption of the Malabo Protocol the AU member states have failed to demonstrate the required individual political will to adopt and bring the Protocol into force to activate the ICLS of the ACJHPR and thereby fulfil the implementational ideal towards achieving African regional responsiveness in situations where states fail to bring perpetrators to justice at the primary ideal level. Article 11 of the Protocol requires ratification by 15 AU member states before the Protocol can enter into force. Currently only 15 of the 54 member states have signed but no single state has ratified the Protocol to date. Consequently, the reality is that this inhibits the idealism of regional responsiveness when necessary in Africa. Thus, in balancing between idealism and realism in the absence of an African regional responsiveness, there are only two obvious alternative choices to make. The first alternative would be to abandon accountability in such situations, which will amount to 'cynical realism', and would, in the words of Laurence Burgorgue-Larsen, be 'harmfully cynical and [thereby] damage [the] normative progress' of international criminal justice and accountability in Africa. The second alternative would be for the ICC to step up to discharge the tertiary ideal level of international responsiveness as the international Court of last resort created for that purpose, which will amount to 'idealistic realism' or 'realistic idealism' and thereby achieve the ideal policy goals of international criminal justice and accountability based on the practical reality of the situation.

It is submitted that by failing to demonstrate the necessary political will at both the primary and secondary ideal levels of accountability, African states would lack the legal and moral justification to oppose the ICC from exercising its complementary jurisdiction at the tertiary ideal level as the Court of last resort for international criminal justice and accountability as legitimised by the Rome Statute. An African philosophical maxim of the Yoruba people says: *Bi akò bá rígún, à fàkàlà* ṣẹbọ meaning, in order to fulfil a required ideal, 'one can use a hornbill for sacrifice if one cannot find a vulture',[51] that is, making do with an available effective substitute to achieve one's objective in the absence of a first ideal. To overcome that situation, the political leaders of each member state of the AU have the

51 O Owomoyela *Yoruba Proverbs* (2005) No 1406, at 156.

moral and legal responsibility to mobilise the individual political will of their respective states and ratify the Malabo Protocol to bring the ICLS of the ACJHPR into being and thereby divest the ICC of the possibility of exercising international responsiveness in deference to the jurisdiction of the ACJHPR in situations where any African state in question fails to exercise their primary obligation at the first ideal level of international criminal justice and accountability when the need arises. That will enable African states to apply 'African Solutions to African Problems' (ASAP), a catchphrase developed to bolster African solidarity after the Rwandan genocide towards the end of the last century. Incidentally, the acronym ASAP also means 'as soon as possible', so the sooner the ratification is achieved the better for international criminal justice and accountability in Africa.

Mark Kersten has rightly noted that despite all the time, effort and energy spent so far on addressing the problematic relationship between Africa and the ICC, 'it cannot be said today that the problems at the heart of this relationship have been resolved'.[52] It is submitted that until African states summon their individual political will to ratify the Malabo Protocol to activate the ICLS of the ACJHPR, the problem at the heart of international criminal justice and accountability in Africa would not be resolved.

6 Concluding remarks

The main objective of this book and the conference leading to it is to highlight the need for an effective international criminal justice and accountability system in Africa in view of the many atrocities that have been witnessed and still ongoing both during conflicts and in peacetime in different parts of the continent. As was expressed by the participants at the conference and reflected variously in the chapters of this book, it is time for African leaders and the populace to step up in the spirit of African unity and the universal respect for human dignity to make every effort to improve international criminal justice and accountability in Africa. In doing that all three aspects of accountability discussed in this chapter, namely retributive, preventive and restorative accountability, must be explored and enhanced.

This chapter has deliberately focused specifically on what Africa needs to do to improve its own situation in international criminal justice and accountability, rather than what the ICC and the international community need to do in that regard. To reiterate, it is strongly advocated that the one

52 Kersten (n 43) 4.

internal step that can completely change the dynamics of international criminal justice and accountability in Africa and resolve the current uneasy calm in the relationship between the ICC and Africa, is for African states to summon up their political will to bring the Malabo Protocol into force and thereby activate the ICLS of the ACJHPR. African states need to take this seriously and history will surely vindicate the first 15 African states that take the lead in making that objective a reality. Thus, this chapter provides the premise for urging African civil society organisations to intensify their persuasion and lobbying of African states towards the ratification of the Malabo Protocol, in the spirit of ASAP,[53] as soon as possible.

I will end this chapter metaphorically, with a paraphrase of Neil Armstrong's famous statement when he first stepped on the moon on 20 July 1969, that, in relation to criminal justice and accountability in Africa, the ratification of the Malabo Protocol to activate the ICLS of the ACJHR will be 'one small step for African states, [but] one giant leap for the African people' and for humanity generally.

53 African Solutions 'African Solutions to African Problems' https://www.africansolutions.org/ (accessed 19 May 2022).

3 INDIGENOUS AND TRIBAL MECHANISMS OF TRANSITIONAL JUSTICE: FILLING THE GAPS IN FORMAL JUSTICE SYSTEMS?

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> It is our conviction … that the wrongs committed in a particular country are best dealt with by those who are familiar with their root causes and the parties involved – those, in other words, who have suffered directly and have issued pleas for help to political leaders who are not always able to provide answers to the challenges at hand.[1]

Abstract

Transitional justice is resorted to in the framework of transition from armed conflict to peace and from authoritarian regimes to the democratic ones. In order to fill the existing or potential gaps or address the problems of state justice systems, indigenous instruments of justice may be utilised to reach the aims of transitional justice. As such they may be treated as complementary to other transitional justice mechanisms. The aim of the article is to find a new perspective for a better understanding of the complementary role of the indigenous justice in order to address the operational problems and gaps in the state justice systems in the framework of transitional justice. The overall aim of the paper is to answer the question whether such indigenous justice instruments are capable of filling the gaps in state/formal justice systems or addressing the operational problems of formal justice systems.

1 Introduction

The term 'transitional justice' embraces punishment of the perpetrators of serious crimes, revealing the truth about such crimes, compensation for the victims, reform of the oppressive institutions and reconciliation. Transitional justice is resorted to in the framework of transition from armed conflict to peace and from authoritarian regimes to democratic

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1 A Naniwe-Kaburahe 'The institutions of Bashingantahe in Burundi' in L Huyse & M Salter (eds) *Traditional justice and reconciliation after violent conflict: Learning from African experiences* (2008) 174.

ones in order to hold the perpetrators of serious human rights and international humanitarian law violations accountable and to contribute to the reconciliation of divided communities. Societies in transition have two alternatives with regard to human rights violations and international crimes: retributive justice and restorative justice. The former one includes punishing perpetrators by way of criminal trials and the latter extrajudicial (non-penal) attitude emphasising the need for revealing the truth, for example before truth commissions or other appropriate bodies and achieving reconciliation. In each of these options revealing the truth about past crimes is a necessary step to building sustainable peace and reconciliation.[2]

Transitional justice mechanisms include criminal trials before national, international or hybrid criminal courts or tribunals,[3] truth and reconciliation commissions,[4] vetting procedures and reparation schemes. It involves complex strategies that must take into account consequences of the past events but must also be forward-looking in order to prevent armed conflicts from recurring. According to one view, transitional justice is a framework of settling the past human rights violations as an element of broader political transformation. Hence, it is a combination of judicial and extrajudicial strategies such as those enumerated above.[5] Judicial and

2 MJ Mullenbach 'Reconstructing strife-torn societies: Third-party peacebuilding in intrastate disputes' in TD Mason & JD Meernik (eds) *Conflict prevention and peacebuilding in post-war societies: Sustaining the Peace* (2006) 57-59; L Hovil & JR Quinn 'Peace first, justice later: Traditional justice in Northern Uganda' Refugee Law Project Working Paper 17 (2005) 11 https://www.refugeelawproject.org/files/working_papers/RLP.WP17.pdf (accessed 8 August 2019).

3 One can list International Criminal Tribunals for the former Yugoslavia (1993), International Criminal Tribunals for Rwanda (1994), International Criminal Court (1998), Special Court for Sierra Leone (2002), Extraordinary Criminal Chambers in the Courts of Cambodia (2003), Special Panels for Serious Crimes in East Timor (2000), and Special Tribunal for Lebanon (2007).

4 Such as, for example, South Africa's Truth and Reconciliation Commission (1995), Truth Commission for El Salvador (1992-1993), Guatemala's Historical Clarification Commission (1997-1999), Truth and Reconciliation Commission for Sierra Leone (2002-2004), Commission for Reception, Truth and Reconciliation in East Timor (2002-2005), and Truth and Reconciliation Commission for Liberia (2006-2009). Some of the truth commissions deal with violations of indigenous peoples' rights, for example the Guatemalan Commission for Historical Clarification (1997-1999) in its work also concentrated on the sufferings of the Mayan peoples, that was the result of an internal armed conflict from 1960-1996. In its report the Commission concluded that the state committed genocide against the indigenous peoples of Maya (see 'Guatemala: Memory of silence – Tz-Inil Na.Ab-Al: Report of the Commission for Historical Clarification: Conclusions and recommendations' (1999) paras 108-123, https://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf (accessed 1 August 2019).

5 M Komosa *Komisja prawdy: Mechanizm odpowiedzialności za naruszenie praw człowieka*

non-judicial processes are interlinked and one does not replace the other;[6] they are rather complementary.

In order to fill the existing or potential gaps or address the problems of state justice systems, indigenous (which in this paper is used synonymously with traditional, tribal or customary justice) instruments of justice may be utilised to reach the aims of transitional justice. As such they may be treated as complementary to other transitional justice mechanisms. Indigenous justice mechanisms may also be used to confront the legacy of the colonisation of indigenous peoples. As stated in the 'Study by the Expert Mechanism on the Rights of Indigenous Peoples' of 30 July 2013, transitional justice in the case of indigenous peoples

> includes human rights violations arising in situations of conflict, where indigenous peoples often figure prominently among victimized populations, as well as grievances associated with indigenous peoples' loss of sovereignty, lands, territories and resources and breaches of treaties, agreements and other constructive arrangements between indigenous peoples and States, as well as their collective experiences of colonization.[7]

The paper will concentrate on the issue of transitional justice and indigenous/tribal/traditional mechanisms in this regard. Its aim is to find a new perspective for a better understanding of the complementary role of indigenous justice in order to address the operational problems and gaps in the state or formal justice systems in the framework of transitional justice. I will begin with the rights of indigenous and tribal peoples and then continue with the indigenous transitional justice and its mechanisms. Examples such as Rwandan *gacaca* courts, *mato oput* in Uganda or *bashingantahe* councils in Burundi will be mentioned. Specific features and strengths and weaknesses of those mechanisms will be analysed. The above-mentioned examples fit into the notion of legal pluralism which may be defined as a coexistence of state and non-state forms of adjudication.[8]

(2014) 31.

6 Human Rights Council 'Access to justice in the promotion and protection of the rights of indigenous peoples: Study by the Expert Mechanism on the Rights of Indigenous Peoples' 30 July 2013, UN Doc A/HRC/24/50 (2013) para 84.

7 Study by the Expert Mechanism on the Rights of Indigenous Peoples (n 6) 79.

8 L Huyse 'Introduction: Tradition-based approaches in peacemaking, transitional justice and reconciliation policies' in Huyse & Salter (n 1) 8. See also: TW Wourji 'Coexistance between the formal and informal justice systems in Ethiopia: Challenges and prospects' (2012) 5 *African Journal of Legal Studies* 269; S Ciftci & D Howard-Wagner 'Integrating indigenous justice into alternative dispute resolution practices: A case study of the Aboriginal Care Circle Pilot Program in Nowra' (2012) 16 *Australian Indigenous Law Review* 81; and B Baker 'Where formal and informal justice meet: Ethiopia's justice pluralism' (2013) 21 *African Journal of International and*

In this paper I will concentrate only on those instruments that may be applicable to confronting the atrocities committed by authoritarian regimes and in the course of armed conflicts, excluding rituals such as the Acholi rite of *nyono-tong gweno* (stepping on the egg), *moyo kum* (cleansing the body), *moyo piny* (cleansing of an area) or *gomo tong* (bending the spear).[9] The overall aim of the paper is to answer the question whether such traditional justice instruments are capable of filling the gaps in state justice systems or addressing the operational problems of formal justice systems. In what kind of situations and under what conditions may they be used? Can such mechanisms contribute to genuine reconciliation in case of genocide and crimes against humanity? Is their application in conformity with international human rights standards, especially the fair trial guarantees? In the concluding remarks a model of complementarity or hybrid model of transitional justice will be proposed that includes indigenous instruments.

2 The notion of indigenous transitional justice

The UN Declaration on the Rights of Indigenous Peoples (2007) provides in article 5 that

> [i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[10]

Articles 34 and 35 add that indigenous peoples have the right to promote, develop and maintain their juridical systems and customs. This should however happen 'in accordance with international human rights standards'.[11]

Comparative Law 202.

9 JO Latigo 'Northern Uganda: Tradition-based practices in the Acholi region' in Huyse & Salter (n 1) 105-106.

10 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295 http://research.un.org/en/docs/ga/quick/regular/61 (accessed 8 August 2019).

11 UN Declaration on the Rights of Indigenous Peoples (n 10). Art 34 states: 'Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards' and according to Art 35: 'Indigenous peoples have the right to determine the responsibilities of individuals to their communities'.

ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries similarly emphasises the need for indigenous peoples to have the right to maintain their own customs and institutions in compatibility with international human rights standards. In case there is a conflict between a national legal system and indigenous legal system, an appropriate procedure should be established (article 8(2)). In this respect autonomy of indigenous peoples should be constantly taken into account. Article 8(1) prescribes that when applying national laws to the indigenous peoples, to include the latter's customs and customary law. Article 9 is even more explicit when it provides that:

> To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. 2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.[12]

All of those rights of indigenous peoples and obligations of states have been reiterated in the 'Study by the Expert Mechanism on the Rights of Indigenous Peoples' where it was stressed that transitional justice 'should be adapted to ensure cultural appropriateness and consistency with customary legal practices and concepts concerning justice and conflict resolution'.[13] The Study rightly claims that the indigenous justice instruments will enrich the transitional justice procedures. Especially when transitional justice has to confront genocide, crimes against humanity or war crimes committed against the indigenous peoples, their customary practices should be included.[14] In the 'Report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' of 2004 there was also a significant statement that

> due regard must be given to indigenous and informal traditions for administering justice or settling disputes to help them to continue their often

12 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (accessed 9 August 2019).

13 Study by the Expert Mechanism on the Rights of Indigenous Peoples (n 6) para 85.

14 As above.

vital role and to do so in conformity with both international standards and local tradition.[15]

An indigenous/tribal justice system may be defined as 'an accumulation of historical practices, locally defined and applied by the whole community, guided by a distinct world vision and holistically organized (rather than atomized into isolated subject areas)', in other words 'non-state justice systems which have existed, although not without change, since pre-colonial times and are generally found in rural areas'.[16]

Similar terms to indigenous justice include traditional, customary, informal, non-state justice. In this paper they will be treated as synonymous due to their many similarities that will be mentioned below (such as flexibility, informality, and easy accessibility).[17] Usually at the other end of the spectrum is state justice, also classified as formal or official justice. The latter is organised and controlled by the state. Within this model one can also localise the international justice instruments such as international criminal tribunals and courts which are created by states or international organisations being a forum for cooperation of states (for example the ICTR, ICTY, and ICC).[18]

Indigenous and tribal communities have since time immemorial governed themselves in their own way, different from the Western (American-European) approach. They have their own practices, customs, institutions, including justice systems. Indigenous peoples maintained their own social and political order that governed their relationships, also with other nations, and social control that was sufficient to keep the society together. As will be evidenced by the forthcoming examples, the characteristic features of indigenous justice include:

- Disputes are resolved by political, hereditary or spiritual entities who act as arbitrators or mediators and are appointed by and from within the indigenous community and not by the state organs (the elders);

15 The UN Secretary General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 23 August 2004, UN Doc S/2004/616 (2004) para 36.

16 Penal Reform International *Access to justice in sub-Saharan Africa: The role of traditional and informal justice systems* (2000) 11. See also: B Connolly 'No-State justice systems and the state: Proposals for a recognition typology' (2005-2006) 38 *Connecticut Law Review* 241; Huyse (n 8) 7.

17 Authors of the *Traditional justice and reconciliation after violent conflict: Learning from African experiences* in Conclusions use the terms 'indigenous' and 'traditional' interchangeably.

18 For more details on terminology see Penal Reform International (n 16) 11-12.

- Disputes and crimes are treated as a community issue which means that they pertain to the whole community and cannot be considered only at a bilateral level. They are very often treated differently compared to the Western justice systems as 'a misbehaviour which requires teaching or an illness which requires healing'.[19] For those reasons restorative results are emphasised.
- Decisions are made after discussions, consultations and establishing the truth;
- There is a high degree of public participation;
- The aim of the indigenous justice instruments is not only to punish the perpetrator but to bring back peace and harmony (social order) to the individual and social relationships as well as to achieve reconciliation.
- The process is – as a rule[20] – voluntary, however the decisions are usually enforced by social pressure.[21] Their enforcement is strengthened by the rituals and ceremonies aimed at reintegration and reconciliation which should be regarded as a complementary element of the traditional justice system.[22]
- The indigenous process is informal, there are no positive written rules (except for *gacaca* courts) and no legal representation. The rules of procedure are flexible.[23]

With reference to the definition of indigenous justice one may notice that by some, indigenous justice systems were dismissed as primitive, but by others they were praised as a centuries-old expression of the collective communal wisdom.[24] This issue is developed in the section on weaknesses of indigenous justice mechanisms below.

Some of indigenous justice instruments were preserved although they naturally evolved through the interactions with the European and colonial states' culture and as a result were modified, partly also, to meet the new challenges and circumstances.[25] For those reasons some commentators

19 Hovil & Quinn (n 2) 12; Huyse (n 8) 14.

20 For example, in the *gacaca* courts public participation was initially voluntary but later on the procedure was modified and state control and forced public participation was introduced: Huyse (n 8) 16.

21 See also: Penal Reform International (n 16) 33.

22 Latigo (n 9) 117-118.

23 P McAuliffe 'Romanticization versus integration? Indigenous justice in rule of law reconstruction and transitional justice discourse' (2013) 5 *Goettingen Journal of International Law* 41 at 49-50. See also Connolly (n 16) 241-242.

24 Connolly (n 16) 245.

25 MLM Fletcher 'The Supreme Court's legal culture war against tribal law' (2007) 2 *Intercultural Human Rights Law Review* 93 at 94; 'Chapter 2: Indigenous law – Truth, reconciliation, and access to justice' in *The Final Report of the Truth and*

question the indigenous or traditional character of some instruments like the *gacaca* courts called – due to its changed character – new *gacaca*. But one should remember that tradition is the result of a

> historical process of superimposition and mixing of components. What is often referred to as the customary layer is usually made of a large plurality of customs that have been interacting with each other in the course of historical events as experienced by the local population[26].

This statement confirms that such practices evolve and are shaped by the changing political, social and cultural circumstances in order to meet the modern challenges. Even though one calls the indigenous justice mechanisms like *gacaca* 'an invented tradition … loosely modeled on an existing institution'[27] one must still keep in mind their roots and remember that they are clearly indigenous but evolved with time. In other words, their underlying principles have not been much affected.[28] I believe that – despite all of those modifications – *gacaca* courts may still be termed an indigenous/traditional (community-based) or hybrid mechanism rooted in indigenous customs, a mechanism that is dynamic and still evolving (it cannot be frozen in time), capable of meeting the extraordinary challenges of confronting genocide committed on such a massive scale as in Rwanda. Extraordinary problems require extraordinary solutions. Naturally not all traditional mechanisms are indigenous unless one claims that for example all Rwandans are in fact indigenous peoples.[29]

Apart from the transition from authoritarian regime or from war the need to use indigenous justice instruments in the context of transition may arise in the case of confronting the legacy of colonialism and in order to repair the harm done to the indigenous peoples. Indigenous legal instruments may be used in the framework of transitional justice to heal the relations with indigenous peoples. Indigenous justice mechanisms

Reconciliation Commission of Canada: Canada's Residential Schools – Reconciliation, Volume 6 (2015) 45 http://www.trc.ca/websites/trcinstitution/index.php?p=890 (accessed 9 August 2019); T Nhlapo 'Indigenous law and gender in South Africa: Taking human rights and cultural diversity seriously' (1995) 13 *Third World Legal Studies* 49 at 53.

26 Connolly (n 16) 245.

27 B Ingelaere 'The *Gacaca* courts in Rwanda' in Huyse & Salter (n 1) 32.

28 In the same way B Ingelaere & D Kohlhagen 'Situating social imaginaries in transitional justice: The Bushingantahe in Burundi' (2012) 6 *International Journal of Transitional Justice* 40 at 42.

29 See for example 'The forest peoples of Africa: Land rights in context' C Kidd & J Kenrick who in their publication *Land rights and the forest peoples of Africa: Historical, legal and anthropological perspectives* (2009) 4 claim that: 'All Africans are clearly indigenous'.

should be exercised in the transitional justice framework especially when the crimes or breaches affected the indigenous communities. For example, in the case of Canada, where the Truth and Reconciliation Commission in its Final Report concluded that totality of policies towards indigenous peoples, including the residential schools (which amounted to cultural genocide), forced sterilisations of indigenous women and killings comprised not only cultural but also physical genocide.[30]

The most known indigenous or traditional instrument is *gacaca* in Rwanda. *Gacaca* is centuries old African tradition inherent in the indigenous culture. As will be shown below, it evolved but is still rooted in the indigenous justice mechanisms.[31] *Gacaca* literally means courts on the grass as they were held outdoors.[32] This is still one of the distinct features of *gacaca* that hearings are conducted in the communal places and the level of public participation is high (even though at some point it was enforced under the threat of punishment). *Gacaca* courts were created on the basis of the Organic Law on the Organisation of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed since 1 October 1990 issued in 1996 and the Organic Law Setting Up *Gacaca* Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between 1 October 1993 and 31 December 1994, issued in 2000.[33] After some changes introduced to the original Organic Law of 1996 finally the suspects were divided into three categories depending on the seriousness of their crimes.[34] The motives for resorting to the *gacaca*

30 *Summary of the Final Report of the Final Report of the Truth and Reconciliation Commission of Canada: Honouring the truth, reconciling for the future* (2015) 1-5 http://www.trc.ca/websites/trcinstitution/index.php?p=890 (accessed 9 August 2019); P Palmater 'Canada 150 is a celebration of Indigenous genocide' (2017) https://nowtoronto.com/news/canada-s-150th-a-celebration-of-indigenous-genocide/ (accessed 8 August 2019).

31 E Daly 'Between punitive and reconstructive justice: The *Gacaca* Courts in Rwanda' (2002) 34 *New York University Journal of International Law and Politics* 355 at 378.

32 P Clark 'Hybridity, holism, and "traditional" justice: The case of the *Gacaca* courts in post-genocide Rwanda' (2007) 39 *George Washington International Law Review* 765 at 779.

33 Clark (n 32) 781 & 783.

34 Category 1 comprised persons who were planners, organisers, inciters, supervisors and ringleaders of the genocide and crimes against humanity and their accomplices as well as persons that acted with the zeal or excessive cruelty or committed sexual crimes such as rape or acts of sexual torture or who desecrated/dehumanised dead bodies. Category 2 covered persons who were the killers or who committed other acts that caused death, injuries and their accomplices. Finally, category 3 included persons who committed offences against property. Category 2 and 3 were to be adjudicated by the *gacaca* courts and category 1 by the national courts. It is worth mentioning that the picture was made up by another instrument namely ICTR that tried the persons

courts comprised an extraordinary situation when after the 1994 genocide in Rwanda around 120 000 suspects were held in prisons intended to house only around 45 000 inmates and Rwandan judicial system totally collapsed – the courts infrastructure was destroyed and many lawyers and judges killed or suspected of acts of genocide or other crimes. As Erin Daly noted there were only five judges in the entire Rwanda and only 50 practicing lawyers.[35] As a result, *gacaca* courts were given a task of trying the lower-level suspects and in this way also contributing to reducing the population of the prisons by fast processing of the genocide cases (reducing the backlog of cases).[36] Other more important tasks included establishing the truth, eradicating the culture of impunity and reconciliation.[37] For those reasons, one of the commentators described *gacaca* as 'the search for internal solutions to internal problems'.[38]

Initially *gacaca* was not designed to address such complex issues as genocide and other atrocities. This was rather a traditional civil justice (dispute settlement) form modified and extended to criminal justice.[39] The punishments meted out by the *gacaca* courts depended on the severity of the act, the fact of cooperation of the suspect with the *gacaca* court and the plea bargaining (confessions of the suspects resulted in lighter penalties). Punishment embraced prison sentences (with the highest possible sentence of 30 years' imprisonment), community service and compensation. It was also possible to commute prison terms to community service.[40] Prison sentences are clear evidence of the retributive approach of *gacaca*, whereas the community service and compensation indicate its restorative role (their aim is to bring the perpetrators back to the community). Prison sentences are often regarded as contrary to indigenous customs as 'only the Government will benefit from putting the man to some labour [in prison]. There is no benefit to his [the injured man's] wife and children, let alone the rest of us who are his relations'.[41] Due to the plea-bargaining and community service perpetrators were able to reintegrate with the community on a larger and faster scale.[42]

responsible for the most serious international crimes: Clark (n 32) 790-791.

35 Clark (n 32) 776-777; Daly (n 31) 367-368.

36 See also: Daly (n 31) 356; Ingelaere (n 27) 34. At that rate, it would take more than 200 years to process all the genocide cases through the national courts system: Daly (n 31) at 370.

37 Ingelaere (n 27) 38.

38 Clark (n 32) 817.

39 Daly (n 31) 371.

40 Clark (n 32) 794.

41 Penal Reform International (n 16) 9.

42 Clark (n 32) 833.

What is of importance, the *gacaca* courts pursued not only legal objectives, but also non-legal combining a retributive approach with a restorative one, among the latter reconciliation and truth seeking.[43] As Phil Clark wrote, 'reconciliation involves rebuilding fractured individual and common relationships after the conflict, with a view toward encouraging meaningful interaction and cooperation among former antagonists'.[44] For reconciliation to be achieved the truth about the past events and atrocities must be revealed and the fate of the victims come to light. Hence, the reconciliation is backward and forward-oriented. It permits building a bridge from the violent past to the peaceful and harmonious, although not necessarily easy, future. Right to the truth is envisioned in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2005,[45] where it is construed as an element of the satisfaction, and in the International Convention for the Protection of All Persons from Enforced Disappearance (the latter being legally binding).[46] This right means that all the people (the community) have the right to know about past abuses, human rights violations and international crimes, as well as the reasons or motives of such violations. Especially, the victims and their families are entitled to know the circumstances of such acts, and in the case of the death a relative or a loved person or his/her disappearance, the family members have a right to know the details of the death or the fate of the disappeared persons and of the identity of the perpetrator. In order to achieve that effect every state has to have an independent and effective judicial system or some non-judicial instrument such as a truth commission.[47] The latter are especially fit for that task as they identify patterns of crimes and not only the individual guilt as is done during the trial.[48] The right to the truth

43 Clark (n 32) 768.

44 Clark (n 32) 770.

45 Arts 22(b) and 24 of the UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, UN Doc A/RES/60/147 (2006) http://research.un.org/en/docs/ga/quick/regular/60 (accessed 8 August 2019).

46 UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006. Art 24 of the Convention provides: 'Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard' http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx (accessed 8 August 2019).

47 Study by the Expert Mechanism on the Rights of Indigenous Peoples (n 6) para 83.

48 Huyse (n 8) 5.

is reflected in all the indigenous justice mechanisms that are designed for truth-seeking.

The *gacaca* process is significant for another reason – it may be classified as a hybrid justice model (internal hybridity), including elements of a state justice system and so called 'negotiated justice model'. The former embraces most of all the criminal hearings and trials conducted according to a prescribed procedure, and the latter is achieved mostly through communal discussions of the acts of the perpetrators and evidence of their crimes. The *gacaca* proceedings may be construed as a dialogue during which all the community members publicly discuss their experiences. The issue of guilt and punishment becomes in this way a communal issue.[49] *Gacaca* clearly combines those two aspects, especially that *gacaca* courts have been officially authorised by the state and incorporated into the official state justice system. As already mentioned some commentators raise arguments that as such *gacaca* is no longer an indigenous or traditional justice mechanism but one must remember that indigenous customs, traditions, practices or institutions are not static, but dynamic, constantly evolving and in a way adapting to changing circumstances. All this in order to meet the specific needs of the post-genocide justice.[50] Such a proposal still expressly indicates the indigenous or traditional roots of the *gacaca* which cannot be wiped out by the evolution or modernisation of the concept. For similar reasons Erin Daly and Brynna Connolly use the term 'new *gacaca*'.[51] *Gacaca* courts are simply dynamic and evolving hybrid indigenous transitional justice instruments joining traditional and modern elements.[52]

Another mechanism of indigenous justice is that of Burundian *bashingantahe* councils that are based on the *ubushingantahe* concept, the latter term meaning 'the traditional authority structure by which Burundian society sought to resolve local conflicts and disputes'.[53] The latter requires 'a set of personal virtues, including a sense of equity and justice, a concern for truth, a righteous self-esteem. A hard-working character, [in other words] integrity'.[54] *Bashingantahe* councils (understood as an institution

49 Clark (n 32) 774 & 811.

50 Clark (n 32) 776.

51 Daly (n 31) 356; Connolly (n 16) 269.

52 Clark (n 32) 787-788.

53 E Scheye *Local justice and security development in Burundi: Workplace associations as a pathway ahead* (2011) 16.

54 A Nindorera 'Ubushingantahe as a base for political transformation in Burundi' Working Paper 102, Consortium on Gender, Security, and Human Rights (2003) 1.

– a council) have their roots in pre-colonial Burundi.[55] Their main task is to prevent conflicts and mediate between people in conflicts. Actually, their tasks are threefold: mediation, reconciliation and arbitration (in this last regard the decision is binding; there is a possibility of appeal to courts). Any decision of a *bashingantahe* council is made after hearing the parties to the dispute and establishing the truth. All the decisions are made in the shared feeling of reconciliation and arbitration. Hence, this mechanism fits into the restorative justice rather than retributive one.[56] Here, the parties to the dispute also encompass the victims and the accused in a criminal case since indigenous justice generally does not clearly distinguish between civil and criminal cases and respective procedures applicable.[57] Despite the *Arusha Accords* of the 2000's attempts to revitalise the *bashingantahe* councils by incorporating them into the judicial system, in 2005 the government of Burundi finally eliminated them from the judicial system. Their jurisdiction and prerogatives were systematically degraded. The status of *bashingantahe* councils today is that of a non-state actors whose role is to be an 'instrument of peace and social cohesion'[58] and their role to achieve that may still be termed as 'fundamental'.[59] This shows that 'the *bashingantahe* institution has not yet been accepted as a vital component of dealing with the legacy of an almost continuous and brutal conflict',[60] although mostly by political elites. There are today about 100 000 *bashingantahe* (men and women) in Burundi.[61]

An indigenous or tribal mechanism that may be used in transitional justice also debated in the literature is that of *mato oput* in Uganda. *Mato oput* is an indigenous Acholi justice instrument that is based on forgiveness and reconciliation, and as such of a restorative nature.[62] *Mato oput* literally means 'drinking the bitter herb' and in a nutshell it is a clan- and family-centered ceremony aimed at reconciliation that is conducted in the following phases: acknowledgment of the wrong done and responsibility for that, compensation by the wrongdoer and in the end sharing a

55 Nindorera (n 54) 12; Ingelaere & Kohlhagen (n 28) 43.

56 Nindorera (n 54) 16; Naniwe-Kaburahe (n 1) 156.

57 Penal Reform International (n 16) 12.

58 Nindorera (n 54) 17; Ingelaere & Kohlhagen (n 28) 40-41, 46.

59 Ingelaere & Kohlhagen (n 28) 46; S Vandeginste 'Transitional justice for Burundi: A long and winding road' in K Ambos, J Large & M Wierda (eds) *Building a future on peace and justice: Studies on transitional justice, peace and development – The Nuremberg Declaration on Peace and Justice* (2008) 418.

60 Naniwe-Kaburahe (n 1) 18.

61 Naniwe-Kaburahe (n 1) 162.

62 P Tom 'The Acholi traditional approach to justice and the war in Northern Uganda' (2006) http://www.beyondintractability.org/casestudy/tom-acholi (accessed 8 August 2019).

drink symbolising a bitter past and peace between the offender and the victims(s).[63] *Mato oput* is popular among the Acholi people as the majority of them are aware of the fact that very often perpetrators of the crimes in Uganda that fought, for example, for the Lord's Resistance Army, were forcibly abducted and forced to participate in combat and commit heinous international crimes. In this case perpetrators were at the same time victims which especially pertains to the child soldiers.[64] Barney Afako, writing about the underlying reasons for resort to *mato oput*, points out circumstances such as complexities of the armed conflict in Uganda, the massive amount of victims and the lack of formal justice system capable of dealing with violence committed in the course of the conflict which

> [c]ombined with a profound weariness with the war and the suffering it has caused … create[d] a moral empathy with the perpetrators and an acknowledgement that the formal justice system is not sufficiently nuanced to make the necessary distinctions between legal and moral guilt.[65]

It is worth stressing that in its original shape *mato oput* was not designed to adjudicate over war crimes or crimes against humanity but over intentional or accidental killings of individuals.[66] But with extending its scope of application it could be able to meet the new challenges although not without difficulties. Examples of *mato oput* and Uganda as well as of *gacaca* and Rwandan genocide present the opportunity to rediscover and revitalise the indigenous transitional justice instruments.[67] Such a revival or modernisation combining traditional features with some modern positive elements constitutes condition for the preservation of indigenous justice mechanisms.[68] What is important, *mato oput* was envisaged

63 B Afako 'Reconciliation and justice: "Mato oput" and the Amnesty Act' (2002) 67 http://www.c-r.org/accord-article/reconciliation-and-justice-%E2%80%98mato-oput%E2%80%99-and-amnesty-act-2002 (accessed 8 August 2019). For more details on the course of *mato oput*, see Tom (n 62). See also: Latigo (n 9) 106. However, the unprecedented scale of the conflict and killings makes the use of indigenous traditional instruments like *mato oput* problematic. The clan/family of the perpetrator is unable to compensate the victim as very often the victim does not know the perpetrator. See also *mato oput* in photos, Justice and Reconciliation Project '*Mato oput* ceremony' 10 May 2010 http://www.justiceandreconciliation.org/media/photos/2010/701/ (accessed 9 August 2019).

64 Afako (n 63).

65 Afako (n 63) 67. See also Hovil & Quinn (n 2) 24. On the strengths and weakness of *mato oput* see Latigo (n 9) 112-114.

66 Latigo (n 9) 114; Naniwe-Kaburahe (n 1) 185.

67 For more on the Acholi traditional justice system, see Huyse (n 8) 102-119.

68 Naniwe-Kaburahe (n 1) 173. For more examples of indigenous justice mechanisms that may be used in the transitional justice framework see the Navajos' custom *of naat'aanii* (a traditional leader that presides over peacemaker courts): Hovil & Quinn (n 2) 7;

in the Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army (Juba, Sudan, 29 June 2007).[69]

As the above examples show, indigenous justice mechanisms are capable of performing different tasks within the transitional justice framework. They may be used to deal with conflicts at the group, community and regional level and may serve various functions such as adjudication, arbitration, mediation, reconciliation and compensation. What is characteristic for indigenous justice is the blurring of boundaries between restorative and retributive justice.[70] State justice systems are hierarchical: an entity with power and authority makes the decisions on the basis of established legal rules and in conformity with certain procedure. In indigenous justice systems the parties to a dispute or a case are in more equal positions. This system is rather horizontal based on and aimed at preserving the social relationships and cultural values. This rather resembles the mechanism of Western mediation or arbitration.[71]

3 Strengths and weaknesses of indigenous justice mechanisms

What is common to all indigenous and tribal peoples is their understanding of justice. They believe that the aim of justice is to restore peace and harmony within the community by achieving reconciliation of the perpetrator of a crime or a harm with the victim and community at large.

B Tobin *Indigenous peoples, customary law and human rights: Why living law matters* (2015) 66-68; LK Gaines & R LeRoy Miller *Criminal justice in action: The core* (2008) 265; and East Timorese indigenous justice instruments such as that of *uma lisan:* M Tilman 'Customary social order and authority in the contemporary East Timorese village: Persistence and transformation' (2012) 11 *Local-Global: Identity, Security, Community* 192 at 192-199.

69 Article 3.1 states that: 'Traditional justice mechanisms, such as … *Mato Oput, as* practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation' Letter dated 16 July 2007 from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council, S/2007/435. On *mato oput* see also: C Baguma 'When the traditional justice system is the best suited approach to conflict management: The Acholi Mato Oput, Joseph Kony, and the Lord's Resistance Army (LRA) In Uganda' (2012) 7 *Journal of Global Initiatives: Policy, Pedagogy, Perspective* 31; MO Ensor 'Drinking the bitter roots: Gendered youth, transitional justice and reconciliation across the South Sudan-Uganda Border' (2013) 3 *African Conflict and Peacebuilding Review* 171; D-N Tshimba 'Beyond the *Mato Oput* Tradition: Embedded contestations in transitional justice for postmassacre Pajong, Northern Uganda' (2015) 2 *Journal of African Conflicts and Peace Studies* 62.

70 Hovil & Quinn (n 2) 38.

71 As above.

According to the Western approach, justice is aimed at controlling actions that violate legal rules and are considered harmful to the society.[72] The aim of Western justice is to in a way validate the broken rules and to repair the broken human and social relationships. The emphasis is placed on the breached legal norm rather than the welfare of the victim and individual/social relations. In the indigenous justice systems victims are at the centre of decision making and final solution cannot be settled unless the victim, as well as the offender, agree to it. In the formal justice systems the victim is usually only a witness in the criminal case.[73] Keeping in mind the above examined examples and considerations one may attempt to point to the strengths and weaknesses of resorting to the indigenous/tribal justice mechanisms in the context of transitional justice.

3.1 Strengths

There are the following strengths or advantages of resorting to indigenous justice mechanisms:

- A high level of public participation (sometimes regarded as a weakness when treated as a form of mob justice or justice administered by the traumatised and divided population).[74] As Erin Daly rightly claimed in 2002: 'Rwandans of all stations will literally be defining justice for the post-genocide society rather than having it defined for and imposed on them'.[75] This, in turn, is linked to another strength of communal ownership – resorting to the traditional instruments allows the community to have the sense of communal ownership, real influence on doing justice.[76] The participatory character of such proceedings also contributes to the education of the whole community.[77]
- It helps to discover the truth, and as a consequence, it helps the survivors or the relatives of the deceased victims to handle their emotions of anger and loss and to understand what happened, in the end contributing to reconciliation.[78] Apart from establishment of truth, reconciliation, retribution and compensation, indigenous transitional justice instruments also have such benefits as strengthening of the communities and

72 HS Laforme 'The justice system in Canada: Does it work for Aboriginal people?' (2005) 4 *Indigenous Law Journal* 4.

73 Penal Reform International (n 16) 23.

74 Clark (n 32) 795-796, 808; Huyse (n 8) 37.

75 Daly (n 31) 376.

76 Connolly (n 16) 243.

77 Connolly (n 16) 244.

78 Clark (n 32) 797.

empowering the populations, thus giving them an (already-mentioned) sense of communal ownership and promotion of the democratic values.[79]

- Indigenous justice mechanisms may contribute to reconciliation and communal stability as the perpetrators – after revealing the truth, acknowledging their crimes, expressing remorse and apology and compensating the victim – may return to the community and their own families. This also prevents the families of the perpetrator from falling apart. Still as Padraig McAuliffe warns, search for communal stability may favour the interests of the community over the interests of the victims.[80] On the other hand as Brynna Connolly adds, indigenous or tribal justice systems may be 'the most appropriate option for local communities whose members must continue to live closely with their neighbors, particularly when the infraction is relatively minor'.[81] Yet, in the case of transitional justice the infractions are usually serious, still this does not undermine this argument.
- Indigenous justice systems may benefit from a higher degree of legitimacy as they reflect the norms and values recognised for ages by the communities affected by the atrocities that are being confronted in the transitional justice framework.[82]
- It is relatively cheap (judges or persons taking part in indigenous processes are not paid, there is no need for the expensive services of lawyers); and more accessible because of its proximity, informality, flexibility and lower costs, which is also linked to public participation.[83] Such indigenous justice proceedings are accessible even in highly rural areas and they are conducted in local languages,[84] which additionally contributes to their accessibility.[85]

3.2 Weaknesses

With regard to the weaknesses perhaps one should begin with a statement that lists of such weaknesses are usually formulated from the Western

79 Daly (n 31) 376; A Wierczyńska 'Consolidating democracy through transitional justice: Rwanda's *Gacaca* courts' (2004) 79 *New York University Law Review* 1934 at 1962.

80 McAuliffe (n 23) 69.

81 Connolly (n 16) 243-244.

82 Connolly (n 16) 244; Scheye (n 56) 18.

83 McAuliffe (n 23) 24.

84 Connolly (n 16) 243.

85 For more details on the strengths of the indigenous justice systems see Penal Reform International (n 17) 126-127. See also: Human Rights Council, Study by the Expert Mechanism on the Rights of Indigenous Peoples: Access to justice in the promotion and protection of the rights of indigenous peoples – Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and

point of view on the rule of law.[86] The UN General Assembly in numerous resolutions also recognised 'the importance of restoring confidence in the rule of law as a key element of transitional justice'.[87] In Resolution 67/1 it acknowledged that informal justice mechanisms play a positive role in dispute resolution but only when they are used in accordance with international human rights law. It also stressed that 'everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms' (paragraph 15). In paragraph 21 of the same resolution the General Assembly stressed the

> importance of a comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures to ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law.[88]

Despite my Western origins, which I will do my best to put aside, I humbly agree with the statement that it is impossible to describe and sometimes understand indigenous (customary) legal systems by using Western concepts.[89] This article, however, constitutes an attempt to understand indigenous justice better and deeper. Keeping this in mind the most common and harshest weaknesses listed are the following:

- Such mechanisms are regarded as a form of 'mob justice' where the rights of the accused are sacrificed at the altar of expeditious and cheap prosecution of the perpetrators.[90]

persons with disabilities, 7 August 2014, UN Doc A/HRC/27/65 (2014) para 20.

86 L Huyse 'Conclusions and recommendations' in L Huyse & M Salter (n 1) 191.

87 See for example: UN General Assembly, Resolution 66/102: The rule of law at the national and international levels, 13 January 2012, UN Doc A/RES/66/102 (2012) para 10; UN General Assembly, Resolution 67/97: The rule of law at the national and international levels, 14 January 2013, UN Doc A/RES/67/97 (2013) para 12; UN General Assembly, Resolution 68/116: The rule of law at the national and international levels, 18 December 2013, UN Doc A/RES/68/116 (2013) para 12; UN General Assembly, Resolution 69/123: The rule of law at the national and international levels, 18 December 2104, UN Doc A/RES/69/123 (2014) para 13.

88 UN General Assembly, Resolution 67/1: Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, 30 November 2012, UN Doc A/RES/67/1 (2012).

89 D Bunikowski & P Dillon 'Arguments from cultural ecology and legal pluralism for recognising indigenous customary law in the Arctic' in L Heinämäki & TM Herrmann (eds) *Experiencing and protecting sacred natural sites of Sámi and other indigenous peoples: The Sacred Arctic* (2017) 42.

90 Clark (n 32) 767.

- They may violate individual rights such as fair trial guarantees or women's rights. For example, in the *gacaca* courts, which are the most formalised of the above-mentioned mechanisms, there is no legal assistance available. This was the result of the above-mentioned lack of lawyers participating in the proceedings. The legal resources were scarce and this in turn would lead to the unequal access to legal advice.[91] On the other hand there is usually a right of appeal from the decisions of such informal mechanisms, for example in the case of the *gacaca* courts there is an appeal to the higher jurisdiction within *gacaca*.[92] There were also doubts whether the plea-bargaining would encourage false confessions in order to reduce the severity of the penalty.[93] The right to appeal to the state system may also be one of the possible forms of oversight with regard to the decisions of the indigenous mechanisms, the other being some form of incorporation or recognition of the indigenous justice systems into the state justice system to which I will return below.[94] But as Brynna Connolly rightly noted, '[n]umerous [state] justice systems suffer from many of the same problems of gender or ethnic bias of which the [non-state justice systems] are accused. [Naturally, there are differences between state and non-state justice systems but] these differences are of degree rather than kind'.[95]
- Some of those mechanisms are selective, for example *gacaca* courts did not try cases of crimes committed by the Rwandan Patriotic Front.[96] But nor did the ICTR.

91 Daly (n 31) 368.

92 Clark (n 32) 795, 821; McAuliffe (n 23) 53; Amnesty International 'Rwanda: *Gacaca* – A Question of Justice' (2002) 34-40 https://www.amnesty.org/en/documents/afr47/007/2002/en/ (accessed 8 August 2019); K Roth, A Des Forges & H Cobban 'Justice or therapy' (2002) *Boston Review* http://bostonreview.net/archives/BR27.3/rothdesForges.html (accessed 8 August 2019).

93 Daly (n 31) 382. With reference to the fair trial guarantees in the Acholi traditional justice instrument see Hovil & Quinn (n 2) 42.

94 Connolly (n 16) 246, 248.

95 Connolly (n 16) 257. On the other hand, there contrary opinions expressed pointing to the fairness of the indigenous justice instruments such that '[o]ne can go so far as to say that in an African tribunal the individual probably had a better guarantee of procedural fairness than in a Western court, for African tribunals sought a reconciliation of the parties approved by the community. Because reconciliation required a slow but thorough examination of any grievance, litigants had every opportunity to voice their complaints in a sympathetic environment. By comparison, the highly professionalized Western mode of dispute processing is calculated to alienate and confuse litigants' Penal Reform International (n 16) 139. With regard to ethnic bias or prejudice, Ingelaere & Kohlhagen (n 28) 51, add that for example in Burundi both Hutu and Tutsi were included in the composition of *bashingantahe* councils. Also no ethnic prejudice was observed at the local level during the proceedings. Quite contrary, many of the *bashingantahe* played an important role in preventing and mitigating ethnic violence.

96 Clark (n 32) 806. For more details on the weaknesses of the indigenous justice systems

4 Concluding remarks and proposed transitional justice model

The desirable future model of transitional justice should include indigenous practices contributing to creating a hybrid or complementary model that combines different justice systems or, as called by Stephen C Roach, a multilayered justice model. Such a model fits into the growing trend that advocates for legal pluralism mentioned in the introduction. This legal pluralism means that 'two or more legal systems coexist in the same social field'.[97] As Dawid Bunikowski and Patrick Dillon argue:

> In the case of legal pluralism, all rules that can be taken into consideration in a given case are *legitimate*, they are 'equally' important. Legitimacy may come from a legal system; more typically it is vested in traditions, long-standing customs, beliefs, or religion. In the words of the Italian philosopher of law Francesco Viola, legal pluralism is not 'plurality *in the* order' but '*of the* orders'.[98]

In accordance with the trend of legal pluralism, transitional justice must be construed in a holistic and integral manner, embracing state justice systems, indigenous justice systems as well as various political, social and legal instruments and all this in order to strengthen the possibilities of achieving the intended aims. The balance between them must be established but the scales must be tilted slightly more towards indigenous justice instruments than it is today. As the given examples – mainly from Africa – show, the use of indigenous justice mechanisms is increasingly popular and not only for the classical dispute resolution but in the framework of transitional justice as a response to international crimes such as genocide, crimes against humanity and war crimes. The goals of the transitional justice may be multiple and not only limited to punishing the perpetrators although it might be difficult to imagine successful transitional justice without some form of responsibility of the perpetrators, but does it have to criminal? In my belief the perspective of the victims is crucial here and their voice should be decisive. The voice of indigenous communities should be taken into account. Such a voice may be expressed through the indigenous channels of justice.[99] Views and opinions of international non-

see Penal Reform International (n 16) 27-128.

97 Clark (n 32) 765.

98 Bunikowski & Dillon (n 89) 41.

99 As a cultural leader in Uganda said: 'Kony being convicted and taking him to The Hague, that is taking him to heaven. His cell will have air conditioning, a TV, he will be eating chicken, beef. He will be given a chance to work in the jail and earn something.

governmental organisations such as Amnesty International or Human Rights Watch criticising indigenous justice mechanisms[100] are shaped by the Western attitude to justice that does not necessarily have to be superior to the indigenous or traditional justice concepts. In this framework *gacaca* or similar instruments suffer from lack of formal criminal justice features but it should be kept in mind that such instruments are rather non-legal or not entirely legal and their equally important goal is reconciliation. The state justice model and indigenous instruments should be regarded as complementary and supplementary. Depending on the will of the population, especially taking into account the voices and needs of the victims, such a hybrid transitional justice model may have retributive, deterrent and restorative outcomes. The dominant outcome will vary. The fact is that in the real-life transitional justice framework elements of both justice systems – state and indigenous – are/may be necessary in order to achieve the intended goals. This again shows that in practice the best model is for those systems to complement each other. Here again *gacaca* may be given as an example of a combination of those two extremes.[101]

For a complementary and holistic model to work efficiently it is indispensable to overcome the sense of resistance to non-state forms of justice that – to a certain extent – are and have to be outside the state control. On the other hand, those that opt for or support a legal-pluralist model need 'to overcome an aversion to state influence on indigenous justice'.[102] Such complementarity may be achieved, firstly, by way of incorporation of the indigenous justice system into the state system. Formal or official incorporation or partial incorporation, like in the case of *gacaca*, has some benefits but also causes or may cause some problems. The outcome may benefit from such values as impartiality, uniformity of the law and legitimacy accompanying the state-justice system, but on the other hand it inevitably leads to indigenous justice losing some of its informality, flexibility, dynamism and voluntary character. This marriage of both of those forms of justice also demands from states a higher level of sensibility to indigenous justice customs and institutions and also co-operation to strategically and sustainably delineate 'the blurry lines

I'd rather he be here and see what he has done. Let him talk to the person he has ordered the lips to be cut off. Let him talk and hear. The Acholi mechanisms must be allowed to run their course first, so that peace can be brought about. Only if at that stage there is a complainant who wants to take Kony to court should legal action be taken' – quote from Hovil & Quinn (n 2) 13.

100 Hovil & Quinn (n 2) 49.

101 Huyse (n 8) 6.

102 Huyse (n 8) 54.

between formal and informal law'.[103] Due to those doubts and fears many commentators claim that those two systems should remain separate and independent from each other.[104] Separation however is not to mean

> the insulation of community courts from supervision or accountability. A system of regional (or provincial) ombudsmen should be established to oversee the work of community forums and to enforce uniform standards.[105]

Secondly, the complementary function of the indigenous and state justice systems may also be achieved by way of their coexistence similar to the model adopted by the USA towards the Native justice system. It exists along the state justice system with its jurisdiction clearly delineated. The rule is that the jurisdiction of those two systems is divided and neither system may encroach upon the jurisdiction of the other. It may partly resemble the independence of different state justice systems.[106] This indicates that a better solution would be parallel independence with some links to the state justice system like the right to appeal to state courts. However, some parts of the indigenous justice should probably stay outside the state's control.[107] Hence, indigenous justice mechanisms should not be a part of state justice systems but rather a part of the official transitional justice strategy.

Another idea is to introduce some sort of labour division: the most serious crimes should be adjudicated by the national courts (or in some cases international tribunals like the ICC) while the less serious crimes could be dealt with by the indigenous justice system. On the other hand, the international criminal tribunals are distant and not directly accessible. One should take into account the needs and opinions of the victims and other sectors of the society. For example 'in East Timor 69 per cent of people would use local justice and 13 per cent the formal system for theft, while 91 per cent recognize the formal system as the appropriate mechanism for murder trials'.[108] Ordinary Rwandans prefer the *gacaca* courts over the national courts and the ICTR.[109] In Burundi, 73 per cent

103 Huyse (n 8) 56. For more on the possible way of recognising indigenous or informal justice systems, see also Connolly (n 16) 239-294.

104 Connolly (n 16) 247; Penal Reform International (n 16) 129.

105 Penal Reform International (n 16) 98.

106 Connolly (n 16) 248-249. See also Tribal-State Judicial Consortium 'Tribal Courts: What you should know about Tribal Courts' https://tribalstate.nmcourts.gov/tribal-courts.aspx (accessed 8 August 2019).

107 Penal Reform International (n 16) 135.

108 McAuliffe (n 24) 72.

109 Ingelaere (n 27) 51.

of those interviewed gave a positive evaluation of the work already done by *bashingantahe*.[110]

Consequently, we need 'holistic, multi-faceted responses to atrocity as a spectrum of mutually supportive mechanisms harmonizing as many perspectives as possible'.[111] And to state briefly as this issue deserves another article and has actually been examined in the legal literature, one should consider the idea that indigenous mechanisms described above are compatible with the basic mitigated human rights (for example fair trial guarantees) and are to be treated as complementary within the meaning of article17 of the ICC Statute and, consequently, have priority. As provocatively argued by James Ojera Latigo, in the present state of international justice:

> [I]t is morally and politically wrong to create new institutions that carry forward the inequities of the past and impose them on marginalized communities such as the Acholi in complete disregard of their norms and institutions – which are, moreover, often based on sounder ethical principles than those of a positivistic, secular system[112].

Moreover, those two systems may borrow from each other what is at the moment needed and helpful. This in turn reflects and contributes to constant evolution of the indigenous justice systems. Despite the need for

110 Naniwe-Kaburahe (n 1) 168.

111 McAuliffe (n 23) 63.

112 Latigo (n 9) 101. For more details on the principle of complementarity in the ICC Statute see P Seils *Handbook on complementarity. An introduction to the role of national courts and the ICC in prosecuting international crimes* (2016) https://www.ictj.org/sites/default/files/subsites/complementarity-icc/ (accessed 9 August 2019). On the complementarity principle in the context of indigenous justice see I Eberechi 'Who will save these endangered species? Evaluating the implications of the principle of complementarity on the traditional African conflict resolutions mechanisms' (2012) 20 *African Journal of International and Comparative Law* 22; SC Roach 'Multilayered justice in Northern Uganda: ICC intervention and local procedures of accountability' (2013) 13 *International Criminal Law Review* 249 (the author argues that 'closer and more effective ties between the ICC and local procedures of justice can be developed. This is not to say that local procedures of justice can and will substitute for the ICC and vice versa. Nor that the ICC will prosecute below the top brass in this country, namely, Joseph Kony and his top commanders, two of whom are now dead. Rather, it is to say that the revival of the *mato oput* (ancient) procedure in 2000 represents a plausible and timely opportunity to advance an effective multilayered model of justice'at 250. As rightly claimed in Hovil & Quinn (n 2) 36: 'Why is it that so-called international standards – obviously a collection of cultural norms from a select group of nations – are being used as benchmarks, when the inverse might actually be ideal? That is, some of the questions arising from the on-going conflict in northern Uganda and other transitional situations should inform current international law, rather than constantly having to bend these complex situations to fit international standards'.

indigenous justice systems to remain largely independent it does not mean that they do not deserve governmental support, quite the contrary – as part of the cultural heritage of humankind they should be preserved as much as possible.[113] National governments should support the revival of and assist in the implementation of indigenous reconciliation and justice mechanisms, for example by providing additional compensation needed to conduct indigenous/traditional rituals on a larger scale.[114] This funding should respect the cultural and social traditions of indigenous peoples with the simultaneous (sometimes mitigated) respect for human rights, with special emphasis on the rights of women (who have been marginalised).

In the hybrid model, the indigenous justice system must be adjusted where there is such a need and it must respect international human rights because only in this way will a fair and stable legal system and social order be preserved.[115] However, when regarding the mutual relations between Western forms of justice and human rights on one hand and indigenous justice on the other, one must remember about the autonomy of indigenous peoples and their right to self-determination which should be treated as an important interpretative principle and an instrument shaping the perspective towards indigenous peoples. This could lead to less formalistic and more modified implementation of, for example, fair trial guarantees without undermining the indigenous laws. A patronising attitude should be avoided. Indigenous sovereignty existed long before the colonial or dominant authorities and societies took power. As Padraig McAuliffe argues, in the transitional context human rights concerns should be ameliorated to some extent.[116] In other words, '[i]n that fusion, a clear commitment to human rights … must be matched by a demonstrated commitment to cultural diversity as well'.[117]

The role and impact of traditional or indigenous mechanisms in post-conflict societies consists most of all of their filling some gaps in state justice systems, such as dissatisfaction with the formal justice system, decontextualisation of instruments that are not able to meet the challenges of transitional justice (no 'one size fits all' formula) and breakdown of formal justice systems (like in Rwanda or failed states like Somalia) or the inability of the formal justice system to deal with the intricate distinctions between moral and legal guilt (as with the Uganda's child soldiers). Criminal trials only recognise criminal guilt but not the moral or political

113 Latigo (n 9) 147.

114 Roach (n 112) 253.

115 McAuliffe (n 23) 61.

116 McAuliffe (n 23) 79.

117 Nhlapo (n 25) 63.

responsibility and do not identify the wider political context of violence. *Gacaca*, for example, was a response to the failure of the state institutions to provide accountability and reconciliation. In Burundi *bashingantahe* could serve social cohesion and allow for recovery of stability after the conflict. 'More importantly, traditional mechanisms can act as interim instruments in cases where an official transitional justice policy is absent, delayed or crippled by political constraints'.[118] Indigenous justice instruments also provide some justice and security in areas where state justice systems cannot (for example distant rural areas). Moreover, state justice systems do not always sufficiently contribute to reconciliation so the 'pursuit of national reconciliation today should include establishing an appropriate and effective African [or more broadly indigenous] traditional system of restorative justice as an alternative option to a Western justice system'.[119]

Not all of those instruments succeeded entirely or at all. For example, *bashingantahe* councils succeeded in several communities contributing to reconciliation, but failed in the majority of the others. Similar doubts were raised with reference to *gacaca* courts in Rwanda.[120] So there is much to improve. Hence, the answer to the question about the contribution to reconciliation is more complicated than just 'yes' or 'no'. Indigenous justice mechanisms when applied with the political will and support from the state as well as in accordance with the customs and traditions of indigenous communities as well as the mitigated human rights standards may definitely contribute to reconciliation as one of the aims of transitional justice. Also their healing potential should not be dismissed.

For all the above reasons, particularly taking into account the strengths of indigenous legal practices, such practices should be rediscovered, revitalised and recognised. Indigenous justice systems are bottom up alternatives to formal justice frequently regarded as imposed by the colonisers. As Padraig McAuliffe eloquently summarises, '[t]hrough the process of integrating indigenous justice with the formal system, justice sector reformers endeavor to "build mutually beneficial linkages between the system … to harness the positive aspects of each system and mitigate the negatives"'.[121]

To conclude, all the justice systems should be part of the same whole and they should complement each other in a synergistic way, utilising the positives of them both and minimising or eliminating the negatives.

118 Huyse (n 89) 190; Tobin (n 68) 73-74.

119 Latigo (n 9) 111.

120 Huyse (n 8) 12.

121 McAuliffe (n 23) 44.

Indigenous justice is different from but not inferior to state justice systems and should be a part, distinct but still a part, of the justice systems. The indigenous legal customs are part of the human culture or even human heritage that should not be lost, that must not be lost. Dawid Bunikowski and Patrick Dillon claim that '[c]ustoms, religious beliefs, traditions, rules, social morality are often better regulators of human behaviour than state law'.[122] Indigenous instruments are enduring and express the common wisdom of the generations of indigenous peoples and as such should gain even more attention. Recent years are proof of growing support in favour of combining customary models of justice with Western models of justice to form a kind of legal pluralism, in which both customary and state laws are accepted.[123] What should also be noted is that in order to secure indigenous rights, including the right to self-determination, it is necessary to 'build a bridge between "your legal regimes and ours"', as stated by Alejandro Argumendo, a Quechua activist in 1993.[124]

122 Bunikowski & Dillon (n 89) at 42.

123 Hovil & Quinn (n 2) 49.

124 Tobin (n 68) 72.

4 Postcolonialism and sovereignty v international justice: The case of Angola

*Rui Verde**

Abstract

In February 2017, the Portuguese prosecution service (Ministério Público) criminally charged Angola's Vice-President of the Republic, Manuel Vicente. This process led to a dispute between Angola and Portugal that highlighted issues such as the strength of constitutional immunities in relation to corruption, the role of sovereignty in a post-colonial context and the clash of different concepts of law. This contribution focuses on confrontation between postcolonial sovereignty and international justice, highlighting the decrease in the scope of immunities in relation to corruption, the affirmation of African judicial sovereignty in the sense of wanting to judge its own cases, distrusting international justice and the permanent dangers of the privatisation of sovereignty. In the end, this text is concerned in balancing sovereignty and justice with respect to corruption in a postcolonial context. Beyond legal discussions, this contribution concludes that, in the end, when it comes to law and international relations, political facts are often more determinative than legal prescriptions.

1 Introduction

In February 2017, the Portuguese prosecution service (Ministério Público) charged Angola's Vice-President of the Republic, Manuel Vicente, and several Portuguese co-defendants, with several crimes, mostly of corruption and money laundering in Portugal.[1] The case is of particular interest because at the time, a former colonial power (Portugal) was suing in its courts an important leader of its former colony (Angola) for corruption.[2] This case has an international dimension in the sense that it involves a foreign jurisdiction, the justice of Portugal, trying to place an Angolan authority on trial in a foreign country, Portugal.[3]

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1 *Ministério Público (The Portuguese Prosecution Office) v Manuel Vicente* 333/14.9TELSB, Lisbon Criminal Courts.

2 Manuel Vicente, when charged, was Vice President of the Republic of Angola.

3 The Case 333/14.99TELSB was held at the Lisbon Court.

The progression of the case raised especially important questions, such as the scope of immunities, the inquiry if corruption is a crime which according to international law, the strengths of which immunities are fading, as well the debate on whether international justice is biased when referring to Africa. Most of all, the case confronts Angola's own concept of law, which played an important role in its attitude and what Achille Mbembe described as the 'privatisation of sovereignty'.[4]

As mentioned the purpose of this contribution concerns balancing sovereignty and justice with respect to corruption in a postcolonial context. It will start by describing the case that involved the then Vice-President of the Republic of Angola in Portuguese justice, emphasising the discussion about his immunities (part 2), then it will discuss the clash between justice and sovereignty in a postcolonial context (part 3). In the following sections, it will address the relevance of corruption and the privatisation of sovereignty in legal cases involving senior figures of the state and conclude by the prevalence of politics over law (parts 4-6).

2 The charges against the vice-president of Angola and his immunities

The criminal case against Angola's vice-president started in 2017, when the Portuguese Public Prosecution Office (Ministério Público) charged him and various co-defendants with having committed several crimes.[5] The former colonial power, Portugal, produced charges against the incumbent at the time,[6] Vice-President of the Republic, Manuel Vicente, on grounds that he had perpetrated crimes of active corruption in aggravated form, money laundering and document forgery.[7] Specifically, the core of the indictment describes Vicente as a corruptor of Portuguese public prosecutor Orlando Figueira, who is suspected of favouring Vicente's interests in two judicial cases.[8]

At the time, the Portuguese judiciary authorities expected to give official notice of the charges to Manuel Vicente by means of a *letter*

4 A Mbembe *On the postcolony* (2001) 78.

5 Detailed below.

6 February 2017.

7 For a full description of the indictment, see L Rosa 'O que levou à acusação de corrupção contra Manuel Vicente?' ('What led to the corruption charge against Manuel Vicente?') *Observador* 21 February 2017 http://observador.pt/especiais/o-que-levou-a-acusacao-de-corrupcao-contra-manuel-vicente/ (accessed 25 September 2017).

8 As above.

rogatory addressed to the Angolan judiciary authorities.[9] Nevertheless, the Angolan authorities refused to comply, so it was not possible to give official notice of the indictment personally to Vicente.[1011] The Angolan authorities found that Portugal's request for assistance offended the Constitution of the country, since Angolan law granted Manuel Vicente, as vice-president, the right to immunity in and out of functions.[12] Such a status, the Angolans argued, is absolute.[13] That is, it is equally valid in any international criminal jurisdiction.[14]

Absolute immunity, the Angolan authorities argue, derives from the immunity accorded to the President of the Republic – to whom the Angolan Constitution of 2010 confers a lifelong immunity for acts practiced in the exercise of their functions (*ratione materiae*), apart from the crime of bribery and treason and five years of provisional suspension of inquiries regarding acts unconnected with his duties (*ratione personae)* after holding office.[15] The Angolan judicial authorities considered that Vicente could just respond to the Supreme Court of Angola and only after 2022, since the Angolan Constitution gives the same presidential special prerogatives to the Vice-President of the Republic.[16]

The Angolan judicial authorities also claim that, according to a 2011 resolution of the Institute of International Law, these immunities have legal validity in international criminal jurisdictions. Additionally, in refusing to comply with the *letter rogatory* sent by Portugal, Angola invoked the Convention on Mutual Assistance in Criminal Matters between the States of the Community of Portuguese-Speaking Countries and violation of the fundamental principle of the international law of sovereign equality between states.[17] In closing its response, the Angolan judicial authorities suggested the Portuguese judiciary consider the possibility of transferring

9 As above.

10 L Rosa 'Angola recusa notificar Manuel Vicente da acusação de corrupção' ('Angola refuses to notify Manuel Vicente of corruption accusation') *Observador* 23 August 2017 http://observador.pt/2017/08/23/angola-recusa-notificar-manuel-vicente-da-acusacao-de-corrupcao/ (accessed 26 September 2017).

11 See Case 333/14.9TELSB at the Lisbon Criminal Court.

12 Article 131 of the Angolan Constitution.

13 Rosa (n 10).

14 As above.

15 As above.

16 That argumentation is faulty vis-à-vis Angola's law, but that is not the point to discuss here.

17 Rosa (n 10).

the suit against Manuel Vicente to the Angolan jurisdiction, so it would be resolved in the country.[18]

The response of the Angolan authorities unequivocally poses the question regarding the scope of the immunities guaranteed to its vice president by the country's Constitution and the protection accorded by international law.[19] Under international law, one state owes to another the obligation not to entertain criminal proceedings against leading official political figures and certain office holders.[20] This means that a state may be compelled not to pursue cases against certain figures from foreign states. This is a standard of international law.[21] Such immunity from criminal jurisdiction is usually split into two categories: immunities *ratione personae* or personal immunity, and immunities *ratione materiae* or functional immunity.[22] Functional immunity shields public officials from incurring responsibility for actions performed in respect of their official function and in their official capacity on behalf of a state or its organs'.[23] It is justified 'in the idea that the official activities of state organs are performed on behalf of the state and in accordance with the principles of state sovereignty'[24] and implies that a 'state official with functional immunity enjoys such immunity for the duration of his tenure in office and cannot be prosecuted for official acts conducted during that period'.[25] In the current case, immunity *ratione materiae* would be relevant if Manuel Vicente's possible criminal acts were made in his official capacity as Vice-President of the Republic. None of this happened. In fact, the case refers merely to events that occurred before, when Vicente was CEO of Sonangol (Angolan oil company) and not Vice-President of the Republic. Moreover, it is alleged that the imputed acts were committed in his capacity as a private citizen. Therefore, the immunity ascribed to Vicente was *ratione personae* as a holder of a state constitutional job. Although the Portuguese suit continued after Manuel Vicente's departure as Vice-President, the Angolan Constitution gave him immunity *ratione personae* as former holder of the job.

18 As above.

19 As above.

20 R O'Keefe *International Criminal Law* (2017) 406.

21 As above.

22 As above.

23 R Venter & M Bradley *Heads of state in violation of the law: A typology of the responsibility framework and its effectiveness from a domestic, regional and international perspective* (2020) 71-72.

24 As above.

25 As above.

Personal immunity 'is attached exclusively to individuals holding a particular office, for instance heads of state or diplomats. Personal immunity has been described as absolute immunity in that it bars every act of the official, private or otherwise, from prosecution in a foreign jurisdiction'.[26] Consequently, Angola's refusal was bound in an immunity *ratione persona*.[27]

Angola's response and Portugal's rejection to consider any immunity raises the debate about the possibility of excluding some crimes, particularly corruption, from the immunity scope. Usually, these include genocide, crimes against humanity and war crimes.[28] In a way, this begs the question about the present international status of corruption and money laundering immunities.

The International Law Commission Special Rapporteur on Immunity advanced several crimes for which she expected that immunity was not granted. In her fifth report on immunity of state officials from foreign criminal jurisdiction, Concepción Escobar Hernández argued that:[29]

> [T]aking into account judicial practice and the fact that the suppression of corruption at the national and international levels constitutes a key objective of international cooperation, it might be appropriate to include in the draft articles a provision that expressly defines corruption as a limitation or exception to the immunity of state officials from foreign criminal jurisdiction.

The special rapporteur mentions that it is nebulous to characterise any corrupt act as *ratione materiae*.[30] In fact, possible corrupt official acts are performed for private benefit, creating, therefore, a grey area between what is official and private. For this reason, it cannot be affirmed that the legal reasoning leading to the exclusion of corruption from immunities does not apply to every act of corruption that the government official practices when in office, be it in a private or official capacity. Accordingly, in what concerns corruption, the distinction between immunity *ratione materiae* and *personae* ends up being problematic and needs a legal clarification.[31] This conclusion is based on the arguments of Concepción Escobar Hernández

26 Venter & Bradley (n 23) 72.

27 This is my deduction, not an official affirmation, as the public statements never used this terminology.

28 Venter & Bradley (n 23) 75.

29 C Escobar-Hernández 'Fifth report on immunity of state officials from foreign criminal jurisdiction, International Law Commission' (2016) 90-91.

30 As above.

31 As above.

on the difficulties of distinguishing between acts derived from the exercise of the function for private purposes and private acts practiced during the time in which the official function is exercised.[32]

Especially in cases such as Angola's, where the immunity *ratione personae* is broadly invoked protecting official and private acts and legal regimes did not differ too much, the distinction becomes challenging. Therefore, based on the evolution of the legal debate regarding corruption and its nature, the notion was introduced in International Law Commission discussions that the crime of corruption could not benefit from any immunity, except in specific cases of immunity *ratione personae.*[33] This definition overcame the difficulty of qualifying corruption as a public or private act when performed within the framework of official functions.[34] In this context, it is important to highlight the decision held *a propos* of the Fifth Report mentioned above, emphasising that in 2017 the International Law Commission provisionally adopted draft article 7(b) of the Immunity of State officials from foreign criminal jurisdiction in which it is established that immunity shall not apply to crimes of corruption except persons who enjoy immunity *ratione personae* during their term of office.[35]

At the debate regarding the article, the special rapporteur explained that she had:

> [C]oncluded that it had not been possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the report concluded that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction were extant in the context of immunity *ratione materiae*.[36]

Interestingly enough, she clarified one detail: 'that the enjoyment of immunity *ratione personae* was time-bound, which meant that the *limitations and exceptions to immunity would apply* to the troika[37] *once they had left office*'[38] (my emphasis). Consequently, the immunity of *ratione personae* extension

32 As above.

33 UN General Assembly, Report of the International Law Commission: Sixty-ninth session (1 May-2 June and 3 July-4 August 2017) UN Doc A/72/10 (2017).

34 As above.

35 Report of the International Law Commission (n 33) 164.

36 Report of the International Law Commission (n 33) 166.

37 Heads of State, Heads of Government and Ministers for Foreign Affairs.

38 Report of the International Law Commission (n 33) 167.

beyond the term of office that the Angolan Constitution provides for is not protected or guaranteed by this proposal of international law codification.[39]

In the same debate, the intervention of the Portuguese representative, Ms Galvão Teles, deserves a mention. In relation to corruption, she argued that corrupt acts could not be considered acts 'performed in an official capacity and should therefore not fall under the scope of immunity *ratione materiae*'[40] and to clarify the matter, such acts should be included in the draft of article 7, which effectively occurred. Additionally, she made what could be read as an oblique reference to Vicente's case when quoting the special rapporteur:[41]

> A situation where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime, stands alone in this regard as a special case. It would appear that in such a situation there are sufficient grounds to talk of an absence of immunity.

It could be a reference to the Vicente case, as everything about it occurred in Portugal and the Portuguese authorities did not give him immunity. However, he had entered the country as an ordinary citizen with the consent of the Portuguese authorities and was no longer there.[42] Nevertheless, it could be argued that if Vicente entered Portuguese territory as a citizen without special immunities and committed a crime, he would be unable to subsequently invoke any immunity referring to the facts.

In the end, the discussion about international law developments and debates regarding corruption shows that it should not be considered protected by an immunity *ratione materiae,* and regarding an immunity *ratione personae,* the rationale of any law should be just to enforce this safeguard during tenure.[43] If domestic law prolongs such immunity, such a step should not be accepted by the international order and other foreign legislations.

39 See arts 127 and 131 of the Angolan Constitution.

40 International Law Commission, Sixty-ninth session (first part): Provisional summary record of the 3361st meeting, 14 June 2017, UN Doc A/CN.4/SR.3361 (2017) 10.

41 ILC (n 40) 10.

42 Vicente used to make many private visits to Portugal, without any objection of entry and exit by the authorities.

43 Author´s conclusion.

There is an additional argument regarding the exclusion of corruption from immunity protection that can be found in the Statute of Rome applied by the International Criminal Court in The Hague. The International Criminal Court was established to try certain typical crimes detailed in its founding rule. These crimes are as follows: genocide, war crimes, crimes against humanity and crimes of aggression. These are crimes linked to violence and war. The plundering of a country's natural wealth, money laundering in the international financial system, national and international corruption and other similar situations, at the outset, do not fall within the literal provisions of the Statute. However, a more detailed analysis of its norms makes it possible to come up with a hypothesis. This hypothesis is supported by article 7(1)(k) of the Rome Statute. This article considers as a crime: 'Other inhumane acts of a similar character, intentionally causing great suffering or serious harm to physical integrity or to mental or physical health'. Article 7(1)(k) is what is called a residual provision, which indicates that the list of acts expressly indicated in the previous articles is not closed. This standard reflects the feeling that it is not possible to create a definitive list of crimes and allows the consideration of severe cases of corruption. Ben Bloom states that: 'As a general principle, grand corruption meets the Article 7(1)(k) requirements for great harm and suffering'.[44] So, there is a possibility that very serious corruption is included in the catalogue of crimes considered by the Rome Statute.

Obviously, Manuel Vicente's case in Portugal was not one of grand corruption, so this line of reasoning does not apply to the concrete case, but it weakens Vicente's overall position. The Portuguese authorities were, at first, impervious to the legal arguments of Angola about immunity,[45] contending that the legal question was about private acts committed in a Portuguese territory involving Portuguese actors, echoing the reasoning of the country's representative at the International Law Commission referenced above.

3 Sovereignty and international jurisdiction

Angola's argument to avoid Manuel Vicente's trial in Lisbon relied on the sovereign powers of the country and refused any claim to universal justice.[46] To preserve independent sovereignty and defend itself from colonial/postcolonial incursions, the Angolan government was adamant

44 B Bloom 'Criminalizing kleptocracy? The ICC as a viable tool in the fight against grand corruption' (2014) 29 *American University International Law Review* 627 at 656.

45 There were no official statements, but the simple fact that the judicial process continued proves the claim.

46 Author´s argument.

not to adopt any global law beyond the traditional forms that guarantee and enhance national sovereignty. For that reason, Angola was hesitant to ratify the Protocol to The African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[47] Adding to their resistance was the fact that the so-called Southern African Development Community (SADC) Tribunal, which is sometimes considered a regional court in which Angola participated, had ceased to exist, a process in which Angola was active. The Tribunal was de facto suspended at the 2010 SADC Summit – a decision in which Angola played a leading role. The same Summit also adopted the notion that a new tribunal should be created although its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between member states.[48] That means that Angola did not want to be part of any international court with sweeping powers. Obviously, Angola was not part of the International Criminal Court (ICC). In February 2017, the Angolan Foreign Minister stated:

> [The ICC] is not compatible with the interests of the countries, particularly for Africans, who have, in general, been victims of this court. We have examples of cases of people who have been arrested, even when they were not in the slightest bit guilty. For this reason, this court is not considered to be a court for African people.[49]

This was the prevalent approach in Angola. The authorities expressed defiance and distrust of international or human rights justice and adhered only to international/regional courts established to solve problems between countries and with reduced scope of intervention, such as the International Court of Justice where in contentious cases only states can appear before the court and no jurisdiction to try persons accused of war crimes or crimes against humanity exists.[50]

47 Angola only signed it on 22 January 2007, according to information updated on 16 January 2017 by the African Union.

48 See 'Communiqué of the 30th Jubilee Summit of SADC heads of state and government' (SADC, 17 August 2010). http://www.sadc.int/files/3613/5341/5517/SADC_Jubillee_Summit_Communique.pdf.pdf (accessed 28 September 2017).

49 G Chikoti 'Angola advocates the replacement of the ICC with the African Court of Justice' (*Embaixada de Angola no Reino da Bélgica, Grão Ducado do Luxemburgo e Missão junto da União Europeia*) 10 February 2017 http://www.angolaembassy.be/angola-advocates-the-replacement-of-the-icc-with-the-african-court-of-justice/ (accessed 28 September 2017).

50 As above.

Regarding Vicente's case, official notes from the Angolan government that accompanied its legal positions were incisive in protecting sovereignty. The Angolan government warned that:

> [T]he Portuguese authorities embark on a manifestly political route that translates into an unfriendly act incompatible with the spirit and the letter of equal relations, the only ones that can guide the development of friendship and cooperation between the two mutually respectful sovereign states.[51]

Another note from the Ministry of Foreign Affairs of Angola aimed to 'vehemently protest and repudiate this procedure practiced by Portuguese judicial bodies, which it considers to be an unfriendly act that damages Angolan sovereignty'.[52] Again, it was claimed that the vice-president of Angola 'enjoys immunity under international law and the Angolan Constitution' and can only respond to the Angolan justice system. The diplomatic note added that:

> The Angolan State, to safeguard its sovereignty, national independence, and dignity, reserves the right to adopt in its defence pertinent and necessary … in view of the continuous illegal international act practiced by the Portuguese Republic. [53]

The idea of sovereignty promoted by the Angolan authorities is linked to a postcolonial approach that seeks to find similarities between legal globalisation/regional integration and colonialism. This is grounded on the thesis of scholars such as Siba N'Zatioula Grovogui, according to whom some determinative aspects, such as its dependence on Western culture and the way international law was structured to preserve Western hegemony in the international order, contribute to denying the universal applicability of international law.[54] Naturally, when Angolans authorities invoke 'international law' they are thinking about a different content from the one developed after World War II with its emphasis on fundamental rights and worldwide application.[55]

51 Note from the Mirex-Minister of Foreign Affairs to the Republic of Portugal leaked to press, Luís Claro, Angola. Luanda ameaça romper relações diplomáticas com Portugal, I (Lisboa, 26 September 2017) 2.

52 As above.

53 As above.

54 SN Grovogui *Sovereigns, quasi sovereigns, and Africans: Race and self-determination in International Law* (1996) 1-9.

55 For a good description of post-World War II international law with an emphasis on peaceful understanding and fundamental rights different from previous Grotian international law, which was based on the use of force, see OO Hathaway & S Shapiro *The internationalists: How a radical plan to outlaw war remade the world* (2017).

The reasoning behind this Angolan legal thinking could be summarised as follows: In the past, colonialism opposed the ideal of a civilised Western law to multiple local customs, considered tribal, barbaric, archaic and outdated. Today, in the former colonial states, law appears as autonomous, objective, impartial, impersonal and universal – an heir to the modern conception of universal reason, the Enlightenment Agenda, portrayed in theories that postulate the untouchability of private property rights, the subordination of law to markets and the contraction of the political sphere. Nevertheless, this is the former colonial hegemonic law under new vestments, now globalised under false pretences. It is not only created to be exported but must be exported in order to maintain the predominance of former colonies.

The doubts about Western law are reinforced as global theorists argue for the understanding of the term the 'Other' as key to the imaginary in which this case progresses, using the words of Achille Mbembe,[56] as it is a fundamental concept of postcolonialism.[57] The 'Other' is considered to be the African sub-human whom the Europeans dominated and colonised.[58] The basic idea was that Europeans created an imaginary 'Other' that allowed its domination.[59] This kind of framework originated a reversal. The previously nominated 'Others', after independence adopted such a duality, inverting it, and now the Europeans were represented as something to avoid.[60] It is important to further develop this notion. First, the Europeans created an imaginary of the 'Other' African considering him the animal that should be subjugated or treated with sympathy, once a Hegelian or Bergsonian attitude was taken,[61] and thus adopting a dualist thinking-Me-Other and developing a narrative to justify such a relationship of domination.[62] Afterwards, the newly independent regimes inverted the imaginary, transforming the Europeans as the 'Other' that should be impeded to continue to control African affairs. As Alpana Roy [63] writes, referring to postcolonial theories, 'The ideological effects of colonial laws continue to have contemporary relevance as they continue to be used as an instrument of control in this postcolonial world'. Law, such as the Western

56 Mbembe (n 4) 25.

57 A Roy 'Postcolonial theory and law: A critical introduction' (2008) 29 *Adelaide Law Review* 315 at 321; and B Ashcroft, G Griffiths & H Tiffin *Post-colonial studies: The key concepts* (2000) at 169-171.

58 As above.

59 As above.

60 As above.

61 Mbembe (n 4) 26-27.

62 As above.

63 Roy (n 57) 319.

conception of the rule of law, manages to present itself convincingly as universal, to impose itself and to marginalise other local conceptions as outdated. Peter Fitzpatrick annotates the unwillingness of liberal law to take a view from other positions, which promotes substantive inequality.[64]

Angola was referring to a neo-neo colonialism or judicial neo-colonialism that takes the shape of Western countries trying to impose their values through international courts and justice,[65] as echoed in the words of Mahmood Mamdani, who considered the ICC a Western court established to try African crimes against humanity turned into an assertation of neo-colonial dominance. Mamdani went further to note that: 'The absence of formal political accountability has led to the informal politicisation of the ICC. No one should be surprised that the United States used its position as the leading power in the Security Council to advance its bid to capture the ICC'.[66]

The relationship of African Union (AU) members to the ICC and Western claims of universal jurisdiction have been controversial. Martin Mennecke emphasises that:

> This dispute goes back to 2008, when the AU for the first time called on European states to stop an 'abuse' of this principle.[67] The debate referred to bias and selectivity, bordering on neocolonialism.[68]

African states additionally ascertained that universal jurisdiction cases violate core rules of international law.[69] Since then, the African Union and the European Union (EU) have tried to reach some consensus about the balance between the pursuit of justice against leaders that depleted and destroyed African countries and the enablement of state sovereignty.[70] In 2016, a certain harmony was put in practice through the trial of former Chadian President Hissène Habré, before the Extraordinary African Chambers in Senegal.[71] The AU hailed it, stating that '[t]he judgment is a

64 P Fitzpatrick *The mythology of modern law* (1992) 107-117.

65 R Schuerch *The International Criminal Court at the mercy of powerful states: An assessment of the neo-colonialism claim made by African stakeholders* (2017) 3.

66 M Mamdani 'Darfur, ICC and the new humanitarian order' *Pambazuka News* 17 September 2008 https://www.pambazuka.org/governance/darfur-icc-and-new-humanitarian-order (accessed 26 September 2017).

67 M Mennecke *The African Union and universal jurisdiction* (2017).

68 Mennecke (n 67) 10.

69 As above.

70 As above.

71 *Hissène Habré v Republic of Senegal* ECOWAS Judgment ECW/CCJ/JUD/06/10

vivid demonstration that the AU does not condone impunity and human rights violations'.[72] The African court decision was unprecedented and included two firsts: the first time that an African court with the support of the AU tried and convicted a former ruler for crimes against humanity;[73] and the first time that the courts of one African country have prosecuted the former ruler of another African country.[74]

This decision, somehow, is the result of the tensions originated by Western insistence on prosecuting African leaders through international courts, which led to an escalation of accusations between the AU and EU and culminated in the constitution of an advisory Technical Ad Hoc Expert Group covering both the AU and EU.[75] This group produced an Expert Report on the Principle of Universal Jurisdiction.[76] Although some authors considered the report as conducing to 'little obvious avail',[77] it can be said that it represented a turning point in the AU's attitude that culminated with the Habré trial. The truth is that after the report, the AU went on to draft an AU Model Law on Universal Jurisdiction and embarked on several steps to create an African system of human rights justice.[78]

The basic principles that can be extracted from these developments are that the AU admits the necessity to put some officials of member countries on trial, but such events should be made in Africa by Africans. Broad fundamental rights jurisdiction and fight against corruption, yes, but regionally enforced. This kind of argument was present in the responses of the Angolan government to Portugal. Angola considered the possibility of submitting Vicente to a trial, but in Luanda, not in Lisbon.[79]

However, initially, the Portuguese position did not change.[80] The Portuguese courts continued to want to try Vicente, not least because they considered that he would never be tried in Luanda due to a previous

(18 November 2010).

72 AU Press Releases 'AU welcomes the judgment of an unprecedented trial of Hissène Habré' (1 June 2016).

73 Author's argument.

74 As above.

75 African Union 'AU-EU technical ad hoc expert group on the principle of universal jurisdiction: Report' (2009).

76 As above.

77 O'Keefe (n 20) 372.

78 Mennecke (n 67) 18.

79 As above.

80 No official statement. The procedure continued without interruptions.

Angolan Amnesty Law that extinguished the punishment of his crimes.[81] Consequently, justice would never be done. Responding to the Angolan pressure, in a first instance, the Portuguese government adopted a formal speech saying that the executive respected the separation of powers and judicial independence, so it was not going to violate those basic constitutional tenets and interfere.[82]

Therefore, the file continued its path in Portuguese courts. The first court session was scheduled for January 2018. However, as will be detailed below, on this date the part of the judicial process concerning Manuel Vicente was separated and did not proceed together in the Portuguese courts with the other defendants from that time onwards. It was sent to Luanda where it remains to date, with no resolution.

4 Beyond legal arguments: Corruption in Angola and the privatisation of sovereignty

The legal arguments cannot be detached from events. The fact is that the case resulted from the context of the widespread corruption of Angola's elite class. Vicente's suit was linked to the worldwide perception of the Angolan elites as a corrupt group.

Tom Burgis has perfectly described the dealings of Vicente when he was chairman of Sonangol, noting that, on his watch, at least '$4.2 billion was completely unaccounted for'.[83] The same author portrayed Angola clearly as a corrupt country.[84] Ricardo Soares de Oliveira also spoke of the 'rentier ambition' of the Angolan presidency and the role that Sonangol has played in managing sophisticated operations through offshore accounts in which large sums of money have typically gone unaccounted for, running what amounts to a parallel budget without the oversight of Angolan institutions and behaving in an aggressively monopolistic manner that detracts genuine entrepreneurs from investing, while cornering appetising business opportunities for regime cronies.[85] The important point is that the assertions of Burgis or Soares de Oliveira correspond to the general present perception of the Angolan government and leadership as very

81 Lei n.º 11/16, de 12 de Agosto (Amnesty Act 2016).

82 A Lusa 'Costa manifesta empenho em prosseguir 'cooperação política e económica' com Angola' *Público* (Lisboa, 24 February 2017) 4.

83 T Burgis *The looting machine* (2015) 12.

84 Burgis (n 83) 9-28.

85 RS De Oliveira 'Business success, Angola-style: Postcolonial politics and the rise and rise of Sonangol' (2007) 45 *Journal of Modern African Studies* 595 at 619.

corrupt.[86] At the same time, the Portuguese judiciary have embarked on a campaign of 'judicial activism' fighting corruption, in some ways following the path of Brazil's Sergio Moro, or Italy's Di Pietro.[87] A former prime minister of Portugal, José Sócrates, has been detained and is under investigation, with the same thing happening to former powerful bankers and important national personalities from sports to members of the police.[88] Accordingly, Vicente's case appears in this context of judicial activism against corruption. The Portuguese judiciary felt a certain moral legitimacy to follow the case.

After independence, the African regimes embarked on their majority in authoritarian experiences that ended in corrupt governments. Ali Mazrui speaks of a democracide that happened in Africa.[89] The models of colonisation were adapted and maintained for imposing unfair regimes in several African countries, and instead of revolution, 'a situation of extreme material scarcity, uncertainty, and inertia' was established.[90]

Using Mbembe's framework helps to explain the realities in which Angola's leadership was functioning.[91] Mbembe describes the main features that could be found in most postcolonial African societies.[92] The first one is a *regime d'exception*, which implies the privatisation of sovereignty. The Cameroonian author writes that such a regime departed from common law:

> This departure from the principle of a single law for all went hand in hand with the delegation of private rights to individuals and companies and the constitution by those individuals and companies of a form of sovereignty drawing some features from royal power itself.[93]

The second *commandement* involves a regime of privileges and immunities, a third characteristic being the lack of distinction between ruling and

86 'Transparency International Index 2016 puts Angola in 164th place where 176th is the most corrupt' Confer Transparency International (2016). Transparency International 'Corruption perceptions index 2016' (25 January 2017) https://www.transparency.org/news/feature/corruption_perceptions_index_2016 (accessed 26 September 2017).

87 R Verde *Juízes: o novo poder* (2015) 20-30.

88 As above.

89 A Mazrui 'Democracide: Who killed democracy in Africa? Clues of the past, concerns of the future' in A Mazrui & F Wiafe-Amoako (eds) *African institutions: Challenges to political, social and economic foundations of Africa's development* (2016).

90 Mbembe (n 4) 24.

91 As above.

92 Mbembe (n 4) 29.

93 As above.

civilising, implying that coercion and corruption were justified forms of exercising power.[94]

If it is true that those characteristics were first imposed through the colonial process, in fact they were adopted by postcolonial regimes, which also relied on developing a dominant state. Thus, the road was paved to create an 'unprecedented privatisation of public prerogatives' and the socialisation of arbitrariness, constituting those two features the 'cement of postcolonial African authoritarian regimes'.[95]

Obviously, the Portuguese judiciary authorities were mindful of their function to fight against corruption and were afraid that Vicente was using the benefits of constitutional immunity to protect his private acts; in fact, making the perfect example of Mbembe's privatisation of sovereignty.

5 Politics and Angola's concept of law

Legally, both positions were entrenched. Portugal insisted on pursuing Vicente's trial in Lisbon, arguing that he committed the possible crime in Portugal as a private citizen affecting Portuguese interests and allowing the judiciary to carry out its own anti-corruption agenda. Contrarily, Angola refused any collaboration with Portugal in the matter, insisting that the former colonial power's request violated the country's sovereignty and Vicente's constitutional immunities. It was a clear remnant of the colonial past.

Although employing legal arguments, Angola simultaneously maintained strong political pressure on the Portuguese government. First, it took two symbolic political steps. The first was to postpone 'sine die' the visit to Angola of the Portuguese Minister of Justice, Francisca Van Dunem. At the same time, the official visit of Portuguese Prime Minister António Costa to Angola was also suspended.[96] After the inauguration of the new President of the Republic of Angola, João Lourenço, and the departure of Manuel Vicente as vice-president, Angola's political pressure mounted. Obviously, the new president wanted to make the issue an affirmation of national sovereignty.[97] António Costa, the Portuguese Prime-Minister, was not invited to the inauguration and at his inaugural

94 As above.

95 As above.

96 'Adiada visita a Angola de Francisca Van Dunem' ('Francisca Van Dunem's visit to Angola postponed') *Arquivos* 23 February 2017 https://arquivos.rtp.pt/conteudos/adiada-visita-a-angola-de-francisca-van-dunem/ (accessed 27 March 2021).

97 Author's argument.

speech,[98] Lourenço 'forgot' to mention Portugal as one of the main strategic partners of Angola, mentioning the United Kingdom, the United States and Spain, when the only president from European countries present was the Portuguese President.[99] That was humiliating for Portugal.

The Angolan perspective discloses a different concept of law and a diverse view of international relations, beyond, naturally, the feeling that the country was being unduly treated by the former colonial power. Angola's governmental elites' legal culture is bound by an understanding of the law as an operational concept of the political field, so they do not accept that there is no political agenda behind the Portuguese attitude.[100]

It would not be out of place to associate this view with the notion of critical theory in law that emerged in the late 1960s, with support for the ideologies of Karl Marx.[101] Law then began to be seen as an area capable of generating real and profound social changes through the political attitudes of its applicators.[102] That is the school of thought that deeply influenced Angolan elites, which received, simultaneously, Marxist concepts of law from their studies in the Soviet Union, and the Portuguese adapted Marxist concepts from their studies in Lisbon and Coimbra.[103]

Regarding legal history and culture, the relevant point to emphasise is that the structural approach, from Angolan leadership to law and the rule of law, is Marxist, which has a concrete meaning for the questions of justice.[104] The ideas of the rule of law or of the impartiality of justice were not imbedded in the legal discourse. Engels thought the rule of law was an idealised expression of bourgeois society,[105] and generally, Marxist theorists thought of law as another instrument of the dominant classes, so law did not have the meaning of neutrality or balanced resolution of matters. On the contrary, it was another controlling technique. That

98 J Lourenço Discurso Pronunciado pelo Dr João Lourenço, na Cerimónia de Investidura como Presidente da República de Angola (Copy of the Inauguration Speech 26 September 2017). Personal archives of the author.

99 As above.

100 R Verde *Angola at the crossroads: Between kleptocracy and development* (2021) 11.

101 I Ward *Introduction to critical legal theory* (2004).

102 As above.

103 A Pita 'A recepção do marxismo pelos intelectuais portugueses' Centro de Estudos Sociais (1989).

104 'Marx's critique of law, justice, and morality' in M Tabak *Dialectics of human nature in Marx's Philosophy* (2012) Chap 5, 107.

105 F Engels 'Letter to C Schmidt (October 27, 1890)' in K Marx & F Engels *Selected works* (1970).

view was fairly widespread among Angolan intellectuals.[106] Adding to that, the rule of law was seen as a hindrance to the military, social and economic aims of the newly established state. Agostinho Neto, the first President of the People's Republic of Angola,[107] when confronted in 1977 with a possible coup from within his party, the People's Movement for the Liberation of Angola (MPLA), was adamant, saying: 'Let's not waste time with law trials', and, following this remark, a severe and deadly repression occurred.[108]

This is a first point: Angolan leadership *Weltanschauung* considered law as an instrument of the dominant power and not a quest for justice.[109] This presents a different cultural concept from the one that is observed nowadays in Portugal and generally in the Western world. The above-mentioned perception is at the background of the Angolan government's rejection of the Portuguese indictment. In this view, the legal system is the result of the power relations that are established in each society and not an independent system with its own rules and methods.

The other origin of the rejection is much easier to explain. The MPLA won the war against Portugal and then won the war against the National Union for the Total Independence of Angola (UNITA), so Portugal has no right to interfere with Angola and its leaders, which are sovereign and immune. Angola is a relatively young country, having achieved independence only in 1975, after a 13-year war with its colonial power Portugal. After independence, the country embarked on a prolonged civil war till 2002.[110] One of the liberation movements that fought in the independence war, the MPLA,[111] assumed central political power in 1975, never to leave it. It has governed since without interruption, first within a dictatorial Marxist framework, and after 1992 in a formal democratic arrangement. In August 2017, the MPLA won, again, the general elections with 61.7 per cent of the votes.[112]

106 Agostinho Neto, poet and first President of the Republic, and several prominent members of MPLA such as Lúcio Lara, Carlos Dilolwa, Iko Carreira and António Jacinto.

107 As it was called then. Now it is just the Republic of Angola.

108 J Reis *Angola: 27 de Maio – Memórias de um Sobrevivente* (2017) 20.

109 Author´s argument based on the previous paragraphs.

110 For a summarised and balanced approach of Angola's history, see D Birmingham *A short history of modern Angola* (2015). Regarding the civil war, see J Pearce's *Political identity and conflict in Central Angola 1975–2002* (2015).

111 MPLA-Movimento Popular de Libertação de Angola (People's Movement for the Liberation of Angola).

112 'CNE divulga resultados finais das eleições gerais de 23 de Agosto' *CNE* 7 September 2017 http://www.cne.ao/noticias.cfm?id=746 (accessed 25 September 2017).

This is the second aspect to emphasise: the factual political legitimacy of MPLA's power comes from victories in war, first against Portugal, then against UNITA. Only after those military victories did the MPLA go on to win elections peacefully (2008, 2012 and 2017) and to write a Constitution (2010).[113] Therefore, there is an element of sheer power at the background of Angola's governmental structure. As Ricardo Soares de Oliveira observes: 'Through the old-fashioned medium of destroying the enemy, the ruling party achieved an uncompromising mastery over Angola'.[114]

In the end, Angola thought that what was at stake was a question of political power, law being just one of the strands to be considered.

6 Postcolonialism, sovereignty, justice, and the case decision (so far …)

What began as a legal case turned out to be an intense political dispute between the two countries. Angola was adamant that it was not a question of justice, but of its own sovereignty, and that Portugal was using legal mystifications to wield power against its former African colony.[115] Portugal maintained that it was searching for justice, and that to corrupt a Portuguese judiciary official in Portugal was a very serious matter, alleging, regarding the political aspects, that the government was powerless to intervene within the legal system.[116]

However, this history is not typical of neo-colonialism,[117] not in its old form as continuous economic dominance of the colonial power over the new country, nor in what can be called a new neo-colonialism or 'neo-neo colonialism' of judicial intervention as described above. It is a more complex situation that should be duly framed, as the 'strong' country is not the former colonial power and the 'weak' country is not the previous colony. In some ways, there is a predominance in the relationship of Angola due to the financial capacity of its leadership, although that is counterbalanced by the know-how and expertise that Portugal still offers to Angola in several fields from engineering to law.

Opposition parties argue that the elections were not free and fair, and never have been. The matter will not be discussed in this paper, as, in fact, it deserves a thoroughly independent analysis.

113 Verde (n 100) 27.

114 RS de Oliveira *Magnificent and beggar land: Angola since the civil war* (2015) 5.

115 This is the summary of the positions described in the text.

116 As above.

117 For traditional neo-colonialism, see S Amin *Neo-colonialism in West Africa* 1st ed (1973).

The position of Portugal since the independence of its African colonies has been a weak one. In fact, after losing its colonies in 1975, the country went almost bankrupt three times[118] and is deeply indebted. Therefore, it needs constant financing, and among the biggest financers of the Portuguese economy are Angolans. Some prominence of Angola over Portugal is shown by Angola's opposition parties, who are always accusing Portugal of 'squatting' as concerns Angolan power.[119] David Birmingham rightly emphasises that Portugal became dependent on Angola's investment and migration to survive its economic and financial crisis after 2008.[120] Thus, in this situation it is difficult to foresee any seed of neo-neo-colonialism.

Consequently, due to its financial and economic dependence, Portugal deferred to Angola in the end. In January 2018, after almost a year of contentious relations between the two countries, at the beginning of the trial phase, the Portuguese judge separated the file against Vicente from the other co-defendants, pursuing the case only against the Portuguese.[121] Those, after some months on trial, were condemned to time in prison in December 2018.[122]

Vicente, now alone in a detached judicial file, immediately appealed against the decision to submit him to judgment in Portugal to the Lisbon Appeal Court.[123] After some not very discreet pronunciations of preoccupation from the Portuguese government regarding the negative impacts the case was having on the bilateral relationship,[124] the Court of Appeal of Lisbon decided in May 2018 to send the file to Luanda.

118 JC Neves *As 10 Questões da Recuperação* (2013) 25.

119 'MPLA está a chantagear Portugal' ('MPLA is blackmailing Portugal') *Jornal8* 2 8 February 2017 https://jornalf8.net/2017/mpla-esta-chantagear-portugal/ (accessed 27 March 2021).

120 Birmingham (n 110) 185.

121 IP Machado 'Portugal: caso Manuel Vicente separado da Operação Fizz' ('Portugal: Manuel Vicente case separated from Operation Fizz') *RFI* 22 January 2018 https://www.rfi.fr/pt/angola/20180122-portugal-caso-manuel-vicente-separado-da-operacao-fizz (accessed 27 March 2021).

122 LUSA 'Operação Fizz. Orlando Figueira e Paulo Blanco condenados por corrupção e branqueamento' ('Operation Fizz. Orlando Figueira and Paulo Blanco convicted of corruption and money laundering') 7 December 2018 https://24.sapo.pt/atualidade/artigos/operacao-fizz-orlando-figueira-e-paulo-blanco-condenados-por-corrupcao-e-branqueamento (accessed 27 March 2021).

123 S Simões 'Tribunal da Relação decide enviar processo de Manuel Vicente para Angola' ('Court of Appeal decides to send Manuel Vicente's case to Angola') *Observador* 10 May 2018 https://observador.pt/2018/05/10/relacao-decide-enviar-processo-de-manuel-vicente-para-angola/ (accessed 27-03-2021).

124 Changing the previous tone of declaring the matter to be a purely judicial one.

Therefore, Vicente and Angola's government won the day. He was not to be tried in Lisbon, but in Luanda. When the process arrived in Luanda, however, it stalled.[125] Angola's authorities are, apparently, waiting for the end of his immunity *ratione personae*, which will occur in 2022.[126] Most probably after that, Angola's courts will declare that Vicente is covered by the 2016 amnesty law and so the legal process will end, without any consequence. Since May 2018, the case was wrapped in a mantle of silence that continues until today (March 2021), and no development has occurred in Luanda`s courts.

7 Conclusions

The purpose of this chapter was to balance and evaluate the tensions that occurred between postcolonial sovereignty and the demands of international justice, in what concerns the fight against corruption. In the case of the corruption charges against Manuel Vicente, described in this chapter, a former colonial power was suing the Vice-President of the formerly colonised country for criminal offences. The evolution of the case demonstrated that after an initial stand-off, the sovereign pressure of Angola to protect its leader was superior to any objective application of the rule of law.

The first observation was that there is a trend in international law to limit the immunities regarding corruption. The most influential thinking considers that no immunity *ratione materiae* should be given to corrupt acts, just a limited immunity *ratione personae* during tenure, this ending exactly at the moment the office holder departs from her/his functions.

A second observation is linked to the simultaneous reaffirmation of African sovereignties. Recognising the existence of a corruption problem, Africa, in this case Angola, following the African Union policy, understands that it is up to its judicial system and not distant European countries to judge its offenders. There is, thus, a strong streak towards the solution of African legal matters by African institutions. In the case under scrutiny, to enforce such a policy, Angola did not just use legal arguments, it interweaved strong political ones, and demonstrated its own understanding of law as something politically orientated. In the end, politics were more important than law. Angola won the contention, as Portugal decided to send the case to Luanda.

125 Public and notorious fact.

126 Article 131 of the Angolan Constitution.

It remains to be seen if and when Angolan leadership speaks about sovereignty, they are speaking about 'private sovereignty', while immunities refer to the ones they consider attached to their private endeavours. It could be said that the case under enquiry is an exemplary case of the privatisation of public prerogatives, since the indicted acts of Vicente are not public acts, but strictly private ones, and he used the full machinery of government to defend himself.

Angola's sovereignty has been strengthened by this case. Only by 2022 will it be known if justice is also served.

5 Criminal jurisdiction in the African Court of Justice and Human and Peoples' Rights: Does the African mechanism have the prospect of fighting impunity?

Lillian Mihayo Mongella & Theresa Akpoghome***

Abstract

The African Court of Justice and Human and Peoples' Rights (ACJHPR) is a regional court for Africa with a mandate, among other things, to adjudicate on human rights issues within the continent and to interpret the Constitutive Act of the African Union (AU). The Court is a result of a merger of the Court of Justice of the African Union and the African Court on Human and Peoples' Rights through the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the AU Assembly on 1 July 2008. At the 23rd ordinary session of the AU Assembly held in Malabo-Equatorial Guinea, the AU heads of state and government adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights conferring jurisdiction upon the Court over a number of international and transnational crimes. This chapter thus endeavours to scrutinise the jurisdiction conferred upon the ACJHPR over these crimes. The authors are of the view that there are a number of challenges posing a threat to the effectiveness of the Court in exercising its jurisdiction. These challenges include: lack of political will to make the court operational; the immunity accorded to the heads of state and other senior state officials which shall render the fight against impunity futile; and the capacity of the Court to effectively perform its functions given the number and nature of crimes to be prosecuted and the financial position of the Court. The chapter notes that although these challenges exist, with a proper articulation of action and the necessary political will, Africa will be making its mark in the fight against impunity.

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1 Introduction

On 27 June 2014, the African Union (AU) heads of state and government sitting at the 23rd ordinary session of the Assembly 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).[1] The Malabo Protocol extends the jurisdiction of the yet to be operational, African Court of Justice and Human and Peoples' Rights (ACJHPR) to try crimes under international law and transnational crimes in Africa.[2] The Malabo Protocol adds the International Criminal Law Section, to the ACJHPR originally planned two sections, being the General Affairs Section and Human Rights Section.[3] As per the Protocol, this third section shall have jurisdiction to try a total of 14 crimes being: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercernarism, corruption, money laundering, trafficking in person, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.[4] The move to establish this section within the ACJHPR is a positive step as it shall serve as a regional court addressing a number of crimes not within the jurisdiction of the International Criminal Court (ICC), to which most African states are a party.[5] Furthermore, it will enable African states to pool their resources and address crimes that states fail to prosecute due to a lack of capacity within their national jurisdictions.[6]

1 African Union, The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 2014) (Malabo Protocol). See African Peacebuilding Network 'Article 46A bis: Implications for peace, justice, and reconciliation in Africa' *Kujenga-Amani* 21 October 2014 https://www.kujenga-amani.ssrc.org/2014/10/21/article-46a-bis-implications-peace-justice-and-reconciliation-in-africa/ (accessed 4 August 2021).

2 Articles 28A-28M, Malabo Protocol. See also Amnesty International 'Malabo Protocol: Legal and institutional implications of the merged and expanded African Court' (2016) https://www.amnesty.org (accessed 4 August 2021).

3 Articles 16(1)(2) and 19 of the Malabo Protocol

4 Article 28A of the Statute of the African Court of Justice and Human and Peoples' Rights, annexed to the Malabo Protocol.

5 ICC 'State parties to the Rome Statute' https://www.asp.icc-cpi.int/en_menus/asp/states/parties/pages/the/states/parties/to/the/rome/statute/aspx (accessed 5 August 2021).

6 DL Tehindrazanarivelo 'The fight against impunity and the arrest warrants' in M Kohen, R Kolb & DL Tehindrazanarivelo (eds) *Perspectives of international law in the 21st Century* (2012) 401.

Despite establishing this Court, the question asked in this chapter is: 'Does the African mechanism have the prospect of fighting impunity within the continent?' This chapter examines the question by addressing the positive aspects and challenges surrounding the establishment and operation of this International Criminal Law Section. These challenges include the lack of political will to operationalise the court as the pace of signature and ratification of the Malabo Protocol by member states is slow. Second, the immunity accorded to heads of state and other senior state officials renders the fight against impunity futile. Research shows that state officials, including heads of states, particularly in conflict zones commit international crimes.[7] Thus, granting immunity defeats the major purpose of an international criminal court, which is to prosecute those who cannot be easily prosecuted in national jurisdictions.[8] What's more, when such leaders remain in power for life their victims shall never have justice. Last, but not least, the Court's capacity to effectively perform its functions, given the number and nature of crimes to be prosecuted, requires a significant amount of funds. This is a burden to the member states rendering the functioning of the Court ineffective. This is largely because most of the member states are financially committed to other institutions in the AU and also the ICC.

2 The route to criminal jurisdiction in the African Court of Justice and Human and Peoples' Rights

In Africa, a number of judicial mechanisms at the international, regional and national level have dealt with international crimes committed under dictatorial regimes and during internal armed conflicts. Following the 1994 genocide in Rwanda, the UNSC honoured the request by the Rwandan Government and set up the International Criminal Tribunal for Rwanda (ICTR).[9] The ICTR had jurisdiction to try individual perpetrators for genocide and other violations of international humanitarian law committed in the territory of Rwanda and neighbouring states between 1 January 1994 and 31 December 1994.[10] Additionally, hybrid tribunals have been established and designed to combine both international and national features. These include the Specialised Court for Sierra Leone (SCSL) which was established under an agreement between the United Nations

7 R Pedretti *Immunity of heads of state and state officials for international crimes* (2015) 30-428; A Arieff et al *International Criminal Court cases in Africa: Status and policy issues* (2010) 1-30.

8 Pedretti (n 7) 30-428.

9 UN Security Council, Resolution 955: Establishment of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc S/RES/955 (1994).

10 Article 1 of the UN Security Council, Statute of theInternational Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994.

and the Government of Sierra Leone[11] to try perpetrators of international crimes during the ten years of brutal civil war.[12] At the national level, some African states have tried perpetrators of international crimes in their national jurisdictions. A good example is Senegal which, together with the African Union, established the Extraordinary African Chambers in Senegal (EACS).[13] This Court was established within the local court system in Senegal and tried the former Chadian president Hissène Habré for crimes against humanity, torture and war crimes committed during his reign between 1982 and 1990.[14] Other states have included international crimes in their national penal laws.[15] Uganda for example, has even gone further to create an International Crimes Division within its High Court to adjudicate upon international crimes.[16] This was established particularly to deal with atrocities committed in the war in northern Uganda, especially by LRA fighters.[17] In furthering the same spirit of fighting impunity, African heads of state and government reached a unanimous decision to extend the jurisdiction of the African Court of Justice and Human and Peoples' Rights to entertain international and transnational crimes.[18]

2.1 The African Court of Justice and Human Rights

This regional judicial organ is an outcome of a merger of the Court of Justice of the African Union and the African Court on Human and Peoples' Rights by the Protocol on the Statute of the African Court of

11 UN Security Council, Resolution 1315: Establishment of a Special Court for Sierra Leone, 14 August 2000, UN Doc S/RES/1315 (2000).

12 Global Policy 'Special Court for Sierra-Leone' https://www.globalpolicy.org/international.justice/international-criminal-tribunals-and-special-courts/special-court-for-sierra-leone.html (accessed 2 June 2021).

13 'Statute of the Extraordinary African Chambers within the Courts of Senegal created to Prosecute International Crimes committed in Chad between 7 June 1982 and 1 December 1990' *Human Rights Watch* 2 September 2013 http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers (accessed 27 May 2022).

14 Human Rights Watch 'Hissène Habré and the Senegalese courts: A memo for international donors' (December 2007) Vol 1 https://www.hrw.org/legacy/backgrounder/africa/habre1207/ (accessed 4 June 2021).

15 Central African Republic Hybrid Tribunal, the Special Court for Sierra-Leone, The Extraordinary Chambers in the Courts of Cambodia, the Extraordinary African Chambers in Senegal, Specialised Mixed Chamber in DRC, Specialist Chamber in Kosovo and the International Crimes Division in the High Court of Uganda.

16 SMH Nouwen, *Complementarity in the line of fire: The catalysing effect of the International Criminal Court in Uganda and Sudan* (2013) 179-190.

17 As above.

18 AU Assembly, Decision on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction DOC Assembly/AU/3(XII), AU Doc Assembly/AU/Dec.213(XII) (2008).

Justice and Human Rights,[19] adopted on 1 July 2008 at the 11th Ordinary Session of the Assembly of the Union in Sharm El-Sheikh, Egypt.[20] The idea to establish the ACJHPR was introduced by Olusegun Obasanjo, then President of the Federal Republic of Nigeria and AU Assembly Chairperson, to reduce costs and duplication of institutions within the AU given the growing number of institutions and associated financial burdens.[21]

The Protocol and Statute requires a deposit of 15 instruments of ratification and shall enter into force 30 days after the last deposit.[22] As of 9 June 2021 there were 33 signatures, eight ratifications and eight deposits out of the 55 member states.[23]

2.2 Criminal jurisdiction within the African Court of Justice and Human Rights: Process and motivation

2.2.1 The process

The idea to have an African Court with the mandate to prosecute international crimes is traced back to the apartheid regime in South Africa whereby some of the African states sought to prosecute the atrocities committed in this era.[24] During the drafting of the African Charter on Human and Peoples' Rights, a proposal to have an African court with mandate to prosecute gross violations of human rights constituting international crimes, particularly crimes against humanity was submitted by the Republic of Guinea.[25] The Guinean proposal seemed to have been motivated by a desire to condemn the gross human rights violations taking

19 Chapter I of the African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008.

20 Protocol on the Statute of the African Court of Justice and Human Rights.

21 African Court Coalition http://www.africancourtcoalition.org (accessed 12 June 2021).

22 Article 9 of the ACJHR Protocol.

23 States that have ratified and deposited their instruments of ratification are: Angola, Benin, Burkina Faso, Congo, Gambia, Libya, Liberia, and Mali https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf (accessed 18 June 2020).

24 *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* 2016 (3) SA 317 (SCA) paras 60, 76-82, 85 and 102. See also A Abass, 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 933 at 937.

25 C Jalloh, KM Clarke & VO Nmehielle 'Introduction: Origins and issues of the African Court of Justice and Human and Peoples' Rights' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: Developments and challenges* (2019) 4-5.

place in South Africa under a ruthless apartheid regime at the time.[26] The proposal was not successful and the experts were also not convinced that African states were ready for a human rights court.[27] They therefore recommended the establishment of the human rights commission, while urging the return to the idea of a court capable of issuing binding decisions in the future.[28] This idea of having a court that would issue binding decisions was revived at the time Africans were waiting for the required signatures for the ACJHR.[29] During this period, the AU heads of state and government came up with a decision to extend the jurisdiction of the ACJHR to adjudicate upon international crimes.[30]

> In February 2009 in Addis Ababa, the Assembly of the 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'.[31]

This decision was commended and adopted as a recommendation by the AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction in its report of 15 April 2009.[32] In January 2010 the AU Assembly gave directions requiring a report and draft protocol to be prepared.[33]

To comply with the Assembly directions, the AU Commission in February 2010 appointed the Pan African Lawyers Union (PALU) as its consultant to undertake this task. It took PALU four months to complete the task and come up with a draft report and protocol where after it was submitted to the AU Commission in June 2010.[34] The Office of the Legal Counsel of the AU Commission reviewed the report and the draft protocol

26 As above.

27 As above.

28 Jalloh, Clarke & Nmehielle (n 25). See Abass (n 24). See also UN General Assembly, The policies of apartheid of the Government of the Republic of South Africa, 16 December 1966, UN Doc A/RES/2202 (1966).

29 Jalloh, Clarke & Nmehielle (n 25) 4.

30 Jalloh, Clarke & Nmehielle (n 25) 8

31 AU (n 18).

32 AU 'AU-EU technical ad hoc expert group on the principle of universal jurisdiction: Report' (15 April 2009) 11https://reliefweb.int/sites/reliefweb.int/files/resources/3D8556E1F0245F524925762C00229665-Full_Report.pdf (accessed 20 July 2020).

33 Abass (n 24) 934.

34 D Deya 'The future of African court: Progress, prospects, challenges – So what are you going to do?' https://www.lawyersofafrica.org (accessed 19 July 2020).

and issued directives to PALU.[35] PALU worked on the directives and submitted a reviewed report and draft protocol in July 2010.[36] Between August and November 2010 two validation meetings were organised by the AU Commission in Midrand South Africa and various AU organs and institutions and Regional Economic Communities discussed the report and draft protocol, making recommendations.[37] During a summit meeting held in Malabo, Equatorial Guinea between 30 June and 1 July 2011, the AU Assembly requested the AU Commission to speed up the implementation of its previous decision to extend criminal jurisdiction to the ACJHR.[38] This request was made following concerns by the AU Assembly on the indictments and prosecution of African leaders by the ICC.[39] In this meeting the AU Assembly expressed deep concerns on the dishonouring of its requests to the United Nations Security Council (UNSC) to defer the ICC indictment on Sudanese President Al Bashir and the investigation and prosecution of Kenyan leaders following the 2008 post-election violence.[40] The Assembly was also concerned about the ICC indictment against Colonel Qadhafi and the manner in which the prosecution was handling the Libya situation which complicated the efforts of finding a negotiated political solution to the crisis in the country.[41] In January 2012, the AU Assembly sitting in its 18th ordinary session called upon the AU Commission to slot on the agenda of the forthcoming meeting of Ministers of Justice and Attorneys General on Legal Matters, the Progress Report of the Commission on the Implementation of the Assembly Decision on the International Criminal Court for further inputs.[42] The Ministers of Justice and Attorneys General endorsed the draft Protocol extending jurisdiction to the ACJHR in May 2012.[43]

Despite the expectation of the Protocol being adopted by the AU Assembly in July 2012,[44] it was not. Instead, the AU Commission in

35 As above.

36 As above.

37 As above.

38 AU Assembly, Decision on the implementation of the Assembly decisions on the International Criminal Court Doc.EX.CL1670 (XIX), AU Doc Assembly/AU/Dec.366 (XVII).

39 AU (n 38) para 2.

40 AU (n 38) para 3.

41 As above.

42 AU Assembly, Decision on the progress report of the commission on the implementation of the Assembly decisions on the international criminal court (ICC) Doc.EX.CL/710 (XX), AU Doc Assembly/AU/Dec.397(XVIII).

43 Min/Legal/ACJHR-PAP/3(II) Rev.1.5. Extracted from Abass (n 24) 934.

44 Abass (n 24).

collaboration with the African Court of Human and Peoples' Rights were requested to prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the African Court on Human and Peoples' Rights.[45]

The Assembly also stressed the 'need for the AU to adopt a definition of the crime of unconstitutional change of government'.[46] It thus requested the AU Commission in collaboration with the AU Commission on International Law and the African Court on Human and Peoples' Rights, to submit the definition for consideration by the policy organs at the next summit scheduled in January 2013.[47] Accordingly, the AU Commission convened an experts' meeting on 19 and 20 December 2012 in Arusha, Tanzania.[48] Among the issues hotly debated was 'whether popular uprising would constitute a crime of unconstitutional change of government'.[49] After a long debate the experts did not materially amend article 28E of the draft Protocol providing for unconstitutional change of government, but resolved to revise the contents of the definition by adding a subparagraph reading:

> Where the Peace and Security Council of the African Union determines that the change of government through popular uprising is not an unconstitutional change of government, the Court shall not be seized of the matter.[50]

On the financial and structural implications the experts simply concluded that the expenses would not be too high: there would only be additional expenses in the expanded structure and operation of the Court.[51]

However, the AU Executive Council were not satisfied with these recommendations and in January 2013 the Council requested the Commission in collaboration with the AU Peace and Security Council,

45 AU Assembly, Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Doc Assembly/AU/13(XIX)a, AU Doc Assembly/AU/Dec.427(XIX).

46 AU (n 45) para 3.

47 As above.

48 A Abass, 'The proposed international criminal jurisdiction for The African Court: Some problematical aspects', (2013) 60 *Netherlands International Law Review* 27 at 39-40.

49 Deya (n 34).

50 Report on the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implications, AfCHPR/LEGAL/Doc.3. Extracted from Amnesty International (n 2). See also Abass (n 48).

51 Report on the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implications (n 50).

to reflect further on the issue of 'popular uprisings in all its dimensions' and the appropriate mechanism for determining the legitimacy of such uprisings.[52] The AU Commission was also required to submit another report on the structural and financial implications on expansion of the jurisdiction of the Court to entertain international crimes.[53]

In October 2013 the AU Assembly requested the AU Commission in collaboration with all stakeholders to speed up the process of extending criminal jurisdiction of the ACJHR.[54] This decision appears to have been a result of the UN Security Council's refusal to consider the request made by Kenya, and supported by the AU, to defer the proceedings pending at the ICC against the Kenyan President and his Deputy.[55] In May 2014 the AU Specialised Technical Committee (STC) on Justice and Legal Affairs held a meeting in Addis Ababa, Ethiopia, to consider the 2012 Draft Protocol and deliberate on two major issues.[56] First, to resolve the definition of unconstitutional change of government pending since 2012 and second, to reflect on issues concerning immunities of heads of state from criminal prosecution.[57] The STC in fact inserted a new provision into the Protocol granting immunity to heads of state and government and senior state officials.[58]

After these developments, the Protocol was eventually adopted by the AU Assembly in June 2014 sitting at its 23rd Ordinary Session in Malabo, Equatorial Guinea. The Protocol awaits ratification by at least 15 member states to enter into force.[59]

2.2.2 Motivation

There are some factors that led to the expansion of the jurisdiction of the ACJHR. One being the fact that the urge to punish human rights violations and other atrocities falling under international crimes stayed

52 As above.

53 Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/Dec.766 (XXII). Extracted from, Amnesty International (n 2).

54 AU Assembly, Decision on the progress report of the Commission on the Implementation of the Decisions on the International Criminal Court Doc Assembly/AU/13(XXII), AU Doc Assembly/AU/Dec.493(XXII) para 13.

55 As above.

56 Amnesty International (n 2) 11.

57 As above.

58 As above.

59 Article 11 of the Malabo Protocol.

alive in African states. This is evidenced in article 4(h) of the African Union Constitutive Act whereby the Union is given the right to intervene in a member state in respect of grave circumstances, being war crimes, genocide and crimes against humanity.[60] The objectives of the African Peace and Security Architecture, which include conflict prevention, peace building and post conflict reconstruction and development, promotion of democratic practices, good governance and respect for human rights, also manifest the desire and readiness of African states to fight international crimes.[61]

Some scholars argue that the indictments issued by the national courts in some European states and the ICC against African state officials also fuelled the desire by the AU heads of state to put into action the idea they had for a long time to empower the African Court with criminal jurisdiction.[62] The courts in Belgium, France, Spain and the United Kingdom had issued a number of indictments for crimes against humanity, war crimes, genocide, corruption and torture. These include: an indictment against the former President of Mauritania, Maaouya Ould Sid'Ahmend Taya in France in 2005; an indictment against Rwandan state and military officials in 2007 by a French court for alleged roles in the 1994 genocide; an indictment against the Rwandan Chief of Protocol, Ms Rose Kabuye who was arrested during her visit in Germany in 2008 and extradited to France; and indictments issued in 2009 by a court in Paris against five sitting presidents – Denis Sasso Nguesso of Congo, Teodoro Obiang Nguema of Equatorial Guinea, Omar Bongo of Gabon, Blaise Compaoré of Burkina Faso, and Eduardo Dos Santos of Angola – on allegations of corruption.[63]

60 African Union, Constitutive Act of the African Union, Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government, 11 July 2000, Lome, Togo.

61 African Union: 'The Peace and Security Council', https://www.au.int/en/psc (accessed 5 August 2021).

62 CB Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1068 https://doi.org/10.1093/jicj/mqr053 (accessed 9 July 2020). P Apiko & F Agga, 'The International Criminal Court, Africa and the African Union: The way forward', European Centre for Development Policy Management (ECDPM) Discussion Paper 201 (November 2016) https://www.ecdpm.org/dp201_the_international-criminal-court_africa_and_the_african-union-apiko-aggad(0).pdf (accessed 30 June 2020). See also D Deya 'Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crimes' International Criminal Justice, Openspace Issue 2, February 2012 http://www.osisa.org/openspace/regional/african-court-worth-wait (accessed 6 July 2020).

63 CB Murungu (n 62) 1069-1071.

The indictment of Hissène Habré in Belgium also triggered the AU to consider an international criminal court in the region.[64] When Habré was indicted, he was living in Senegal and thus Senegal was required to extradite him to Belgium.[65] Senegal did not honour this request and instead turned to the AU.[66] The AU requested the Committee of Eminent African Jurists to study the extradition request by Belgium and give recommendations on how to handle Habré's case and how future international crimes can be dealt with in the continent.[67] The AU ruled that, as per article 3(h), 4(h) and 4(o) of the Constitutive Act of the Union the trial of Hissène Habré falls under its competence.[68] However, since the AU had no legal organ competent to try Hissène Habré, it mandated Senegal to try him in its competent national courts on behalf of Africa.[69]

The indictments by the ICC against sitting African heads of state, President Omar Al Bashir of Sudan,[70] and President Uhuru Kenyatta of Kenya together with his deputy William Rutto,[71] intensified the desire of extending criminal jurisdiction to the ACJHR. On several occasions the AU condemned the ICC on its indictments against these leaders and called upon the UN Security Council to defer such cases under article 16 of the Rome Statute.[72] Additionally, the AU has expressed its disappointment towards the UN Security Council's refusal to defer the cases.[73] Article 16 of the Rome statute mandates the UN Security Council to defer investigations or proceedings before the ICC for a renewable period of twelve months, through a resolution adopted under Chapter VII of the UN Charter. The

64 'Habré Case: Q & A on "Belgium v Senegal"' *Human Rights Watch News* 29 March 2012 https://www.hrw.org/news/2012/03/29/habre-case-qa-belgium (accessed 7 August 2021).

65 GA Knoops, *An Introduction to the law of international criminal tribunals: A comparative study* Second Revised Edition (2014) 73.

66 As above.

67 AU Assembly, Decision on the Hissène Habré case and the African Union (Doc. Assembly/AU/8(VI) Add.9, AU Doc Assembly/Au/Dec.103 (VI).

68 AU Assembly, Decision on the Hissène Habré case and the African Union, Doc Assembly/AU/3(VII), AU Doc Assembly/AU/Dec.127(VII).

69 As above.

70 Murungu (62). See KT Oropo 'From Kenyatta to Al-Bashir: Africa's Struggle with ICC' *The Guardian* 21 June 2015 https://guardian.ng/politics/from-kenyatta-to-al-bashir=africas-struggle-with-icc (accessed 7 August 2021).

71 Murungu (n 62); Oropo (n 70). See too A Uwazuruike, 'The AU's Journey to an African Criminal Court: A regional perspective', *Global Affairs* (2021) https://www.doi.org/10.1080/23340460.2021.1959375?src= (accessed 7 August 2021).

72 Assembly/AU/Dec.292(XV), Assembly/AU/Dec.397(XVIII), Assembly/AU/Dec.482(XXI).

73 As above.

AU's argument has always been that the indictments destabilise the peace processes in the respected states and, given the situation faced by citizens in conflict zones, peace should take precedence over prosecutions.[74] In its decisions regarding the situation of African leaders facing charges at the ICC, the AU Assembly considered it an abuse of the principle of universal jurisdiction and either insisted that the AU Commission completes the process of extending the criminal jurisdiction to the ACJHR[75] or find ways of strengthening African mechanisms to deal with African problems and challenges.[76] This in fact signifies that fighting back against the ICC was one of the major reasons behind the extended criminal jurisdiction. Other commentators argue that the extended jurisdiction is a mechanism to shield African leaders alleged of committing international crimes from facing prosecution.[77] The authors are of the view that such belief can be based on two main facts: the first is that African leaders have insisted on immunity of serving leaders while pressing on the deferrals from the ICC for the cases referred to it by the UNSC against indicted leaders;[78] and the fact that the Malabo Protocol accords immunity from prosecution to serving heads of state and government.[79]

2.3 Analysis of the Malabo Protocol and its annexed Statute

This section discusses the provisions of the Protocol that impact on the fight against impunity which are different from those of other international criminal statutes such as the ICC and ICTR. However, for a better appreciation of the discussion on the Malabo Protocol, one has to be conversant with other relevant and interrelated regional instruments: The Protocol to the ACHPR on the Establishment of the ACHPR; the Protocol of the Court of Justice of the African Union and the Protocol on the Statute of the ACJHPR. At some points in the discussions reference shall be made to these instruments.

74 As above.

75 Assembly/AU/Dec.292 (XV).

76 Assembly/AU/Dec.397(XVIII), Assembly/AU/Dec.482(XXI).

77 Murungu (n 62), see also CJ Mashamba 'Merging the African Human Rights Court with the African Court of Justice and extending its jurisdiction to try international crimes: Prospects and challenges' (2017) 1 *Journal of the Tanganyika Law Society* 55.

78 Assembly/AU/Dec.397(XVIII), Assembly/AU/Dec.482(XXI).

79 Article 46A bis of the Annexed Statute to the Malabo Protocol.

2.3.1 Structure of the Court

The Malabo Protocol has added a third section to the African Court being the International Criminal Law Section.[80] This Section shall be competent to adjudicate on all crimes enshrined in article 28A to 28M of the Statute annexed to the Malabo Protocol. The addition of this section would have an impact on the budget of the Court as more funds have to be allocated to the Court to cater for the additional expenses related to the activities of the International Criminal Law Section and the added organs. The Section is designed to have three Chambers: the Pre-Trial Chamber constituted by a quorum of one judge, the Trial Chamber constituted by a quorum of three judges and the Appellate Chamber constituted by a quorum of five judges.[81] The Statute of the African Court of Justice and Human Rights changed the composition of judges to 16 judges,[82] from 11 judges initially provided under the Protocol to the ACHPR on the Establishment of an ACJHPR.[83] The Malabo Protocol did not increase the number of judges even with the expanded jurisdiction.[84] The retention of the same number of judges and the addition of a new section of the Court entails that the same judges shall have more work to do.[85] This shall necessitate an increase in the budget of the Court as the sessions of the court shall also increase.

The Malabo Protocol has also increased the organs of the Court and modified the composition of the Office of the Registrar.[86] Apart from the Presidency, Vice-Presidency and the Registry established under the Statute of the ACJHR,[87] there is an addition of two more organs: the Office of the Prosecutor[88] and the Defence Office headed by a Principal Defender.[89] The Office of the Prosecutor comprises the Prosecutor and two Deputy

80 Article 6 of the Annexed Statute to the Malabo Protocol.

81 Articles 10 and 16(2) of the Annexed Statute to the Malabo Protocol.

82 Article 3(1).

83 Article 11.

84 Malabo Protocol, arts 21 and 16 of the Amended Statute of the African Court of Justice and Human and Peoples' Rights.

85 The ACJHR has a total of 16 Judges, and it seems that five out of this number will be assigned to the General Affairs Section and five to the Human and Peoples' Rights Section. The remaining six judges will be assigned to the Criminal Law Section. The six judges who must be competent in international criminal law will have real challenges in carrying out their task because it would almost be impossible to find a blend of judges with experience and competence in all the fourteen crimes covered under the criminal jurisdiction of the court.

86 Article 22B of the Malabo Protocol.

87 Article 22.

88 Article 22A.

89 Article 22C.

Prosecutors and the Prosecutor is empowered to appoint other officers to assist in the functions of the Office.[90] The Registry comprises the Registrar and three Assistant Registrars.[91] In addition, two units: a Victim and Witness Unit and a Detention Management Unit shall be set up by the Registrar within the Registry.[92] The personnel needed and the activities to be carried out in all these organs, ranging from investigations, prosecution, handling of witnesses, and detaining the accused, shall increase the financial burden of the Court.

2.3.2 Sources of law

Article 31(1)(a)-(f) of the Malabo Protocol articulates the sources of law thus: the Constitutive Act; international treaties, of general or particular content, which have been ratified by the contesting states; international custom, as evidence of a general practice accepted as law; general principles of law recognised either universally or by African states; as subsidiary means for the determination of the rules of law, judicial decisions, the writings of the most highly qualified publicists but also the regulations, directives and decisions of the AU; and any other law relevant to the case under consideration. Furthermore, article 31(2) provides that the sources above will not prejudice the power of the court to decide a case *ex aequo et bono* if the parties agree to it. A careful examination of article 31(1)-(2) would reveal that it is very similar to that of the ICJ in article 38(1)-(2) of the ICJ statute.[93]

The Malabo Protocol provides that the ACJHPR must have regard to the Constitutive Act.[94] This is rational as the Constitutive Act is the constituent instrument of the AU. It is observed that the Constitutive Act must not be applied in disregard of article 103 of the UN Charter which recognises the primacy of the Charter over other international legal instruments. Consequently, in the face of conflict between the AU Protocol and the UN Charter, the UN Charter would prevail.[95] The international

90 Article 22A(1, 8 & 9).

91 Article 22B(1).

92 Article 22B(9).

93 United Nations, Statute of the International Court of Justice, 18 April 1946, http://www.icj_statute_e.pdf (accessed 15 June 2020).

94 Article 31(a).

95 See *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, where the UK House of Lords held that an incompatible provision of the ECHR had to give way to mandatory UN Security Council resolutions in accordance with the UN Charter's primacy. See also GJ Naldi & KD Magliveras 'The African Court of Justice and human rights: A judicial curate's egg' (2012) 9 *International Organization Law Review* 383 at 425.

treaties referred to in article 31 of the Protocol must of necessity include all treaties ratified and adopted under the umbrella of the OAU/AU, other UN treaties that have been ratified and other treaties in addition to the multilateral human rights instruments.[96] Article 31 also includes customary laws that relate to human rights[97] which accommodate the relevant rules of j*us cogens,*[98] judicial decisions,[99] general principles of law and any other law that may be relevant to the case.

It is observed that the ACJHPR will have an unlimited discretion to determine the source(s) of law it would refer to and this should be put to good use although this may have its challenges especially where the ACJHPR fails to properly apply these laws in settling disputes brought before it. It is trite to note that the Court is directed to take cognisance of the general principles of law accepted in Africa. This, however, does not suggest that regional customary laws should be excluded; these principles could include a right to development and second and third generation human rights.[100] It appears that the ACJHPR would not have any valid reason not to rely on the general principles of law that are recognised and accepted by only certain member states, but not by the entire African Continent, if the circumstances permit.[101]

2.3.3 Jurisdiction of the Court

The Malabo Protocol grants the African Court original and appellate jurisdiction and extends the jurisdiction to entertain international and transnational crimes.[102] The jurisdiction is however complementary to: the African Commission on Human and Peoples' Rights (African Commission) protection mandate;[103] and national courts; and, where

96 *Purohit and Moore v The Gambia*, African Commission on Human and Peoples' Rights, (Communication No 241/2001), 16th Activity Report 2002/2003, Annex VII, para 76

97 See *Zimbabwe Human Rights NGO Forum v Zimbabwe, African Commission on Human and Peoples' Rights* (Communication 245/2002) 21st Activity Report 2005-2006, para 180. Customs should be as expressed by the Universal Declaration of Human Rights (UDHR) 1948.

98 For example, the prohibition on Torture. See *Prosecutor v Furundzija* (1999) *International Legal Materials* 317 para 153.

99 Article 46(1) of Malabo Protocol does not recognise the principle of judicial precedent as judicial decisions have no binding force except as between the parties to the case. But to maintain certainty in the law, the Court may have to make reference to its earlier decisions.

100 Naldi & Magliveras (n 95) 426.

101 As above.

102 Article 3 of the Malabo Protocol.

103 Article 4 of the Malabo Protocol.

specifically provided for, Regional Economic Communities' courts for international and transnational crimes.[104] As for the African Human Rights Commission the African Court shall admit cases referred to it by this institution.[105] With respect to the Regional Economic Communities' courts, the African Court can admit a case where the REC has failed to prosecute.[106] Regarding national courts, article 46H(2) provides conditions for determining whether a case is admissible,:

(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; and
(d) The case is not of sufficient gravity to justify further action by the Court.

Article 46H(3) provides for the criteria to be used to determine whether a state is unwilling to investigate or prosecute. The Court, having regard to the principles of due process recognised under international law, is required to consider whether one or more of the following exists:

(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 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.

In case of inability to investigate or prosecute the Court is required to consider whether

104 Article 46H(1) of the Annexed Statute to the Malabo Protocol.

105 Article 30(b) of the Malabo Protocol.

106 Article 46H(1).

> 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.[107]

The Court shall only exercise jurisdiction with respect to crimes committed after the entry into force of the Protocol and Statute.[108] Where a state accedes to the Protocol and Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Protocol and Statute for that particular state.[109]

Just like the Rome Statute of the ICC, the Malabo Protocol does not oust the jurisdiction of national legal systems in entertaining crimes enshrined in the Protocol where they have the ability and willingness to do so.[110] This is in fact the essence of having an international criminal court whereby the international community assists incapable individual states in bringing offenders of serious crimes to justice and hence accords justice to the victims of such crimes.

The provision of article 46H of the Malabo Protocol sets out the complementary relationship in a fashion that is similar to what is obtained in the ICC Statute.[111] The intendment of article 46H is that the African Court can accept a case, not only after the national court of an indicted party has proved 'unwilling' or 'unable' to prosecute, but also after a REC court that had jurisdiction has also failed to prosecute that person.[112] Under the complementarity rule of the ICC, once a national court has failed the twin criteria, the case becomes admissible but a 'double failure' must be achieved before a case will be admissible in the African Court. Not only will the national court fail, the REC must also fail for the twin standard to be achieved.[113] Adding the REC's under the article 46H provision is confusing as most African states are members of more than one REC. The problem of which REC should be considered for purpose of the complementarity rule when a dispute is to be submitted remains in cases of multiple memberships by the state of the accused person. It is also important to note that where national courts may be accessible

107 Aticle 46H(4) of the Annexed Statute to the Malabo Protocol.

108 Article 46E(1).

109 Article 46E of the Annexed Statute to the Malabo Protocol.

110 Article 46H(2)(a)-(d) of the Malabo Protocol.

111 Article 17 of the Rome Statute of the ICC.

112 Abass (n 48) 944.

113 As above.

to individuals, regional mechanisms are not automatically accessible to individuals and this has further worsened the situation.[114]

The interpretation of the Malabo Protocol in this regard is that regional courts should have jurisdiction but this is not the case. Regional courts have received backlash for exercising jurisdiction over human rights cases brought before it. In 2009, the ECOWAS Court was portrayed in a bad light for exercising its human rights jurisdiction in a case involving the government of Gambia.[115] The 2005 Supplementary Protocol gave the ECOWAS Court jurisdiction to entertain human rights cases.[116] Article 9 specifically provides for individuals to approach the court when their rights have been infringed and this applies to all private individuals in the 15 West African countries.[117] This they can do without exhausting local remedies.

Alter et al noted that the first human rights suit was filed in 2007 by an NGO, the Media Foundation for West Africa, on behalf of a Gambian journalist who had been detained and allegedly tortured for publishing articles that were critical of the government.[118] The suit generated negative reactions.[119] The Gambian government did not file documents and did not appear in court despite several requests.[120] In 2008 the ECOWAS Court reached a decision in the case and ordered the Gambian government to release the journalist from detention and to pay him $100 000.[121] Although this was a landmark judgment, for exposing cases of repression of journalists it received unprecedented negative publicity, nevertheless the Gambia was requested to comply fully with the decision of the ECOWAS Court's judgment.[122]

114 As above.

115 KJ Alter, JT Gathii & LR Helfer 'Backlash against International Courts in West, East and Southern Africa: Causes and consequences'(2016) 27 *The European Journal of International Law* 393.

116 As above.

117 See Supplementary Protocol A/SP.1/01/05 amending the Preamble and Articles 1, 2, 9, and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Protocol (2005 Supplementary Protocol) (2005) https://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf (accessed 13 June 2021).

118 As above.

119 Alter, Gathii & Hefer (n 115).

120 As above.

121 *Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008).

122 T Rhodes 'Six senators call for Ebrima Manneh's immediate release'Committee to Protect Journalists (23 April 2009) https://www.cpj.org/2009/04/six-senators-call-for-ebrima-mannehs-immediate-rel/amp/ (accessed 8 August 2021).

The second case before the ECOWAS Court concerned the detention and torture of Musa Saidykhan, another journalist who pursued his case from the safety of exile.[123] In this case the Gambian government responded to the suit with both legal and political arguments in addition to the claim that the suit was 'an affront to the Gambian sovereignty'.[124] The Court was not moved by the government's claim and went ahead to publish an interim ruling in 2009 rejecting the government's objections.[125] The resultant effect of the failure to defeat the suit, was the Gambian President Jammeh re-strategising by working with ECOWAS to challenge the jurisdiction of the Court to entertain human rights cases. In 2009 September, the Gambia submitted an official request to the ECOWAS Commission, the sub-regional Secretariat, asking that the 2005 Supplementary Protocol be revised.[126]

The East African Community (EAC) was re-established in 1999 with renewed commitment on sub regional integration and cooperation of states, the private sector and the East African people.[127] The judicial arm of the EAC has a similar history. The EACJ replaced the East African Court of Appeal which ceased to be operational in 1977. The EACJ, which launched in 2001, has the responsibility of interpreting and applying EAC treaties and other community texts.[128] The EAC's jurisdiction over human rights has been very controversial. This is because the EAC's treaty expressly provides that the EACJ shall have a human rights jurisdiction 'as will be determined by the [EAC] Council at a suitable subsequent date' once member states 'conclude a protocol to operationalize the extended jurisdiction'.[129]

This means that the EACJ unlike its ECOWAS counterpart does not have jurisdiction to hear cases involving human rights abuses without the adoption of the Protocol by member states. Unfortunately, the EACJ cases are mostly human rights based in addition to cases involving violations of the rule of law and social justice, despite the non-adoption

123 *Saidykhan v The Gambia* ECW/CCJ/RUL/05/09 (30 June 2009). See 'ECOWAS torture case against the Gambia nears end' *Afrol News* http://www.afrol.com/articles/36623 (accessed 8 August 2021).

124 *Saidykhan* (n 123) para 11.

125 *Saidykhan* (n123) para 17.

126 Alter, Gathii & Helfer (n 115) 297.

127 Alter, Gathii & Helfer (n 115) 300.

128 Treaty for the Establishment of the East African Community (EAC Treaty) 1999. 2144 UNTS 255, art 27(1).

129 Decisions of the East African Court of Justice (EACJ) https://www.eacj.org/?page_Ibid=2414 (accessed 13 June 2021).

of the Protocol.[130] This has been a source of concern to member states of the EAC. The EACJ recognises that it is not a human rights tribunal but has always asserted its power to interpret EAC legal instruments relating to human rights.[131] The Attorney General of Kenya on 7 December 2006 chaired the meeting of the Attorney-Generals of the EAC to finalise the draft amendment to the EAC treaty.[132] On the 8 December 2006, the draft amendment was approved by the Council of Ministers.[133] Uganda, Tanzania and Kenya adopted the amendment and in May 2007, it came into force. This amendment changed the structure, jurisdiction and access rules of the EACJ.[134]

The South African Development Community (SADC) was established in the early 1990's.[135] After the SADC Tribunal ruled in favour of white farmers in dispute over land seizures, Zimbabwe prevailed upon SADC member states to suspend the tribunal and strip its power to entertain complaints from private litigants and this to a reasonable extent was successful.[136] Following the trend in the REC's discussed above, one wonders how effective the complementarity principle of the ACJHRs as enshrined in article 46H would be. With the hurdles already put in place in the REC's, it can be concluded that Africa is not ready to fight impunity in the region.

Again, Mystris noted that at present none of the REC have criminal jurisdiction.[137] There is no known REC which has successfully adopted international crimes into its court's jurisdiction.[138] The learned author noted that the EACJ was rumoured to be extending its jurisdiction to include individual criminal responsibility but that is yet to happen.[139] The author further proposes, and rightly so, that if the REC introduce criminal

130 EAC Treaty, arts 6(d) (fundamental principles) and 7(2) (operational principles).

131 Alter, Gathii & Helfer (n 115) 301.

132 Report of the Extraordinary Meeting of the Attorneys General on the Proposed Amendment of the Treaty for the Establishment of the East African Community, Reference EAC/AG/EX/2006, 7 December 2006, para 2.0. See Alter, Gathii & Helfer (n 115) 304.

133 Report of the Extraordinary Meeting of the Council of EAC Ministers, 7-8 December 2006.

134 Alter, Gathii & Helfer (n 115) 304.

135 Alter, Gathii & Helfer (n 115) 306.

136 Alter, Gathii & Helfer (n 115) 306-314.

137 D Mystris *An African Criminal Court: The AU's rethinking of international criminal justice* (2020) 223.

138 As above.

139 As above.

jurisdiction, there is a possibility of having a proliferation of courts to try international crimes with overlapping state membership as a result of the overlapping membership of states within the REC's.[140] This has the effect of negating the broadening of accountability thereby encouraging additional mechanisms to pursue prosecutions, opening the ICL mechanism up to delays and/or obstructing its ability to exercise jurisdiction.[141] The adoption of memorandums of understanding (MOUs) or formal policies on cooperation and the interpretation of the admissibility criteria can minimise the challenge of several courts having criminal jurisdiction. Again, if there are more courts working collaboratively, international criminal law (ICL) will be improved as prosecutions will increase. This will impact on retribution, deterrence, peace and security.[142]

2.3.4 Criminal responsibility and modes of responsibility

Criminal responsibility

The Protocol provides for two categories of criminal responsibility: individual responsibility and corporate responsibility. Article 46B provides for individual criminal responsibility. Just like the ICTR and ICTY, the Statute of the ACJHPR formulates this principle in line with the long established principle of the Nuremburg tribunal.[143] As such, a person guilty of committing a crime under the Statute shall be held individually responsible for the crime. Furthermore, an accused shall not be relieved of criminal responsibility, or his punishment mitigated, by virtue of his official position.[144] A superior shall be responsible for acts of their subordinate if they knew or had reason to know that the subordinate was about to or had committed such acts, and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the subordinate.[145] While an accused's criminal responsibility is not relieved due to acting pursuant to government or superior orders, the Court may consider the fact in mitigation of punishment if justice requires so.[146]

The Statute gives the Court jurisdiction over legal persons excluding states and provides for corporate responsibility under article 46C of the Statute. This is a new development and is a principle that has yet to find

140 Mystris (n 137) 224. See Abass (n48).

141 Mystris (n 137) 224.

142 As above.

143 Mashamba (n 77) 42.

144 Mashamba (n 77) 42. See also art 46B of the Statute Annexed to the Malabo Protocol.

145 Mashamba (n 77) 42.

146 As above.

its way to the international level.[147] The intention to commit an offence by a corporation may be established by proving that the act constituting the offence is within the policy of the corporation.[148] A policy may be attributed where it provides the most reasonable explanation of the conduct of that corporation.[149] The knowledge of the commission of an offence may be established by proving that the actual or constructive knowledge of the relevant information was possessed within the corporation.[150] Knowledge may be said to have been possessed within a corporation even where the relevant information is divided between corporate personnel.[151] Natural persons within a corporation who are perpetrators or accomplices in the same crimes shall as well be criminally responsible.[152]

The Malabo Protocol in fact is very progressive as it is the first instrument to bring corporate responsibility into an international criminal court. The trend of international courts, that is, the ICC, ICTR and ICTY has been to deal only with individual criminal responsibility.[153] During negotiations on the Rome Statute attempts to give a mandate to the ICC over corporations were made but this did not go through. This is because the criminal justice system regarding corporate criminal responsibility differs from one jurisdiction to another.[154] For example during the Kampala Review Conference in 2010, this was brought as an agenda item, but could not be thoroughly discussed as the debate on the crime of aggression preoccupied the sessions.[155]

Thus article 46C of the Statute annexed to the Malabo Protocol shall bring justice to the victims of international crimes committed by corporations, which cannot be taken to the ICC. Additionally, since the jurisdiction of the African Court is complementary to national jurisdictions it will assist national jurisdictions in establishing accountability mechanisms for corporations responsible for the commission of international crimes as

147 Mashamba (n 77) 43.

148 Art 46C(2) of the Malabo Protocol.

149 Art 46C(3) of the Malabo Protocol.

150 Article 46C(4) of the Malabo Protocol.

151 Article 46C(5) of the Malabo Protocol.

152 Article 46C(6) of the Malabo Protocol.

153 Article 25(1) of the Rome Statute, art 5 of the ICTR Statute and art 6 of the ICTY Statute.

154 KO Mrabure & A Abhulimhen-Iyoha 'A comparative analysis of corporate criminal liability in Nigeria and other jurisdictions' (2020)11 *Beijing Law Review* 429 https://www.scirp.org/pdf/blr_2020042114144981.pdf (accessed 18 June 2021).

155 Mashamba (n 77) 43-47.

most of the criminal justice systems at national level do not recognise corporate criminal responsibility.[156]

The Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Activities provides that:

> State parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, domiciled or operating within their territory or jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships.[157]

This is a solid foundation mandating the states to have in place 'a comprehensive and adequate system' of legal liability for 'human rights abuses'. The instrument further reveals that the states have the authority to provide measures under their domestic laws to establish the criminal or functionally equivalent legal liability for legal or natural persons conducting business activities including foreign corporations for acts of omission that constitute attempt, participation or complicity in a criminal offence as contained in this instrument and as defined in the domestic criminal code of a state.[158]

The lack of uniformity in the administration of criminal justice in various jurisdictions has its own challenges. The standard required in proving criminal cases is higher than that of civil cases as criminal cases are established on proof beyond reasonable doubt. Therefore, the authors are of the view that there will be challenges in conducting investigations in order to obtain evidence to prove the offences committed by companies outside the African territory if the Malabo Protocol does not apply extraterritorially or in the absence of 'universal jurisdiction'. Another challenge would be in situation where companies operate within African states which have not ratified the Malabo Protocol and do not have corporate criminal responsibility within their jurisdictions. In this case, African nations are advised to amend their criminal legislations in this regard or alternatively improve the torts laws operational in their

156 As above.

157 Article 8(1) of OEIGWG Chairmanship, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Activities, Second Revised Draft, 06 August 2020 (Draft Legally Binding Instrument).

158 Article 8(11) of the Draft Legally Binding Instrument.

territories in order to ensure accountability of corporations operating within their territories.

Fortunately, a major component of the Draft Legally Binding Instrument is the provision of legal liability under article 8. This provides a good foundation to effectively address the accountability and liability gaps that would arise from the complex structures of corporate organisations and their supply chains that are dominating the global economy.[159] Additionally, the instrument provides for the duty of due diligence for legal and natural persons conducting businesses and this entails the duty to prevent other legal and natural persons from causing or contributing to human rights abuses.[160] It went further to note that the

> human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a legal or natural person as laid down in Article 8.7.[161]

The Draft Legally Binding Instrument also ensures that the rights-holders have effective access to remedies. It provides that jurisdiction established under the article shall be 'obligatory' and that courts should not decline jurisdiction on the basis of *forum non conveniens*.[162] This provision is critical as it would prove extremely valuable in expanding access to justice for right-holders. Multinational corporations will no longer be able to raise this doctrine in order to evade prosecution and accountability, which in most cases has been a major set-back for those seeking remedies. Article 9(4) provides that courts have jurisdiction over non-domiciled legal or natural persons 'if the claim is closely connected with a claim against' a domiciled entity. This would enable joint litigation against parent and subsidiary companies. And where there is no other effective forum guaranteeing a fair trial and there is sufficiently close connection to the forum, the court of the state party concerned shall have jurisdiction over non-domiciled entities.[163] Article 10 is a very critical provision as it ensures that barriers to access to justice can be removed in practice. One major constraint to states will be the inability to rely on the instrument given the requirement

159 One important priority for trade unions is that the Draft Legally Binding Instrument ensures that transnational corporate entities are held accountable for violations of human rights occurring through their operations and activities irrespective of how they were created, owned or controlled.

160 Article 8(7) of the Draft Legally Binding Instrument.

161 Article 8(8) of the Draft Legally Binding Instrument.

162 Article 9(3) of the Draft Legally Binding Instrument.

163 Article 9(5) of the Draft Legally Binding Instrument.

that it can only be used by state parties. African states are encouraged to become parties to this instrument as it would help strengthen the legal capacity at the national level in this regard and also help to ensure that the complementarity principle is achieved.

Modes of responsibility

Article 28N provides for the ways in which a person can fall under criminal responsibility. The provision is more or less a replica of the ICTR[164] and ICTY[165] Statutes. It specifically enlists the actions that can amount to commission of crimes under the Statute which include: inciting, instigating, organising, directing, facilitating, financing, counselling, or participating as a principal, co-principal, agent or accomplice in commission of the offence; and aiding, abetting or attempting to commit an offence. Accessories before or after an offence, collaborators and conspirators to the commission of offences under the Statute are also included under the article. Although article 28N has provided modes of responsibility, this article lacks clarity and specificity required to keep the trials moving and provides workable platforms for the effective adjudication of the crimes within the jurisdiction of the Court.[166] If article 28N remains in its current form, the ACJHPR will face difficult challenges in respect of many of the proposed new modes of liability, including their application to a range of old crimes such as genocide, crimes against humanity or new ones such as corruption and piracy and new types of entities such as legal persons (corporations) and their impact on future trials.[167] The AU's approach to modes of liability in article 28N of the Malabo Protocol, is ambitious and innovative, especially with regards to the addition of new modes of liability that provide an expanded range of ways that crimes may be committed.[168] It is yet unknown whether these additions will produce sufficiently specific or certain modes of liability to facilitate effective or more efficient prosecutions.[169] Modes of liability are principles which are used to link the accused with particular actions, criminals with other criminals, past decisions with consequences, either foreseen or unforeseen

164 Article 6(1) of the ICTR Statute.

165 Article 7(1) of the ICTY Statute.

166 W Jordach QC & N Bracq 'Modes of liability and individual criminal responsibility' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in Context* (2019) https://www.cambridge.org/core/books/african-court-of-justice-and-human-and-peoples-rights-in-context/modes-of-liability-and-individual-criminal-responsibility/0457552E16ED54264A9B7CC84F1CC689/core-reader (accessed 17 June 2021).

167 As above.

168 As above.

169 As above.

and punishment with moral desert.[170] In essence the modes of liability listed under article 28N must be clearly and specifically defined if they would serve any purpose in the practical setting of a courtroom and if not the ACJHPR will face a lot of challenges in applying them. Some of the challenges with the provision may be as a result of drafting errors like the absence of a clear difference between principal and accessory liability, the other problem may originate from practical missteps that include the introduction of a range of new modes of liability such as organising, directing, facilitating, financing and counselling which 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.[171]

2.3.5 Immunity from prosecution

Article 46A bis of the Statute annexed to the Malabo Protocol grants immunity from prosecution to heads of state and senior state officials:

> No charged 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.

The immunity as it stands in the provision is not absolute, that is, it only lasts for a period when the one is serving in office, the heads of state and government and the senior officials can be prosecuted when they get out of office.

This provision on functional immunity has raised a lot of concern since its adoption, not without cause.[172] The immunity clause of the ACJHR is at variance with international law jurisprudence as all the courts discussed

170 JD Ohlin 'Second-order linking principles: Combining vertical and horizontal modes of liability' (2012) 25 Leiden Journal of International Law 771 at 772.

171 Jordach & Bracq (n 166).

172 Apiko & Aggad (n 62)4; International Justice Resource Centre 'African Union approves immunity for government officials in amendment to African Court of Justice and Human Rights' (2 July 2014) http://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/ (accessed 16 June 2021); Jalloh, Clarke & Nmehielle (n 25) 29-36; Pedretti (n 7) 30-428; Deya (n 34); Amnesty International (n 50) 26-27; Abass (n 48) 41-42; M du Plessis 'Implications of the AU's decision to give the African Court jurisdiction over international crimes' Institute for Security Studies (ISS), Paper 235 (June 2012) 9 https://www.issafrica.org/publications/papers/ (accessed 16 June 2020).

in this paper had jettisoned official immunity for international crimes. For instance, article 6(2) of the statute of the SCSL provides that:

> 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.

In line with the above provision the SC-SL in *Prosecutor v Charles Taylor* held that 'the principle seems now established that sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court'.[173] International law does not recognise immunity enjoyed by individuals who have committed international crimes. They are made to face trials and if convicted serve the sentence. We noted earlier, that this principle could be traced to Nuremberg,[174] although it is believed it started before Nuremberg.[175]

Where does this leave the African Court on its quest to tackle impunity in the region? If serving heads of state in Africa who committed crimes cannot be tried on grounds of immunity, is there a possibility that they would ever be tried when article 46E(1) of the Malabo Protocol shows that the Court will not have retrospective jurisdiction. This is important because, crimes that were committed before the coming into force of the Rome Statute are inadmissible in the ICC because of the issue of retrospective jurisdiction.[176] In the situation at hand, the ICC is still relevant in Africa as the Rome Statute does not recognise immunity and the crimes are within the jurisdiction of the ICC. If the tenure of the present heads of states and government already indicted for international crimes end before the court becomes operational, they would not be held accountable for their crimes in Africa. While customary international law recognises that serving heads of state and government and senior state officials enjoy immunity from criminal jurisdiction of a third state, it admits no exception when the criminal proceeding is before an international criminal court.[177]

The position adopted by the African Union for its proposed Court is a clear shift from the established norms of other international courts and

173 Case SCSL-2003-01-1. Appeals Chamber, Decision on Immunity from Jurisdiction (31 May 2004) para 52

174 Article 6(a)(b)(c) of the United Nations, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), 8 August 1945

175 Article 227-230 of the Versailles Peace Treaty of June 1919.

176 Article 24 of the Rome Statute of the ICC.

177 Amnesty International (n 50), 26-27.

tribunals as highlighted in this chapter. This is a clear indication that the legitimacy and credibility of the proposed Court is in doubt. This clause will hinder progress in respect of the investigations and prosecution of incumbent African heads of state and senior government officials who abuse their office by using same to plan, order, and instigate international crimes in Africa. If this clause becomes effective, then impunity will engulf the African continent and the efforts of other tribunals in Africa towards fighting impunity will be lost.

It is trite to note that the immunity clause is also at variance with the objectives and organising principles of the African Union. A major objective of the Union is to protect and promote human rights as enshrined in the Charter of the Union.[178] The authors of this contribution have already noted the commitment of the Union in respect of article 4(h) of the Constitutive Act for war crimes, genocide and crimes against humanity. The Constitutive Act of the African Union mandates the AU to respect human rights[179] and sanctity of human life, condemn and reject impunity and political assassinations.[180] These laudable objectives and principles of the AU would be weakened by the immunity clause.

Article 46A bis grants immunity to serving heads of state/government and senior state officials based on their functions. An acceptable interpretation of this would be that no criminal proceeding can be commenced against a sitting head of state/government official until they leave office. This chapter is of the view that the immunity clause should also consider national legislations as some national laws do not recognise the immunity of heads of state and government officials.

What exactly is the purpose of immunity? It has been canvassed that removal of immunity will open doors for litigation which would distract the officials from carrying out their functions.[181] On the other hand, immunity shields government officials from prosecution and many in Africa perpetuate their terms in office and continue to commit heinous crimes using their offices. It is the view of the authors that the immunity clause in the Malabo Protocol should be looked at again as it is surrounded by controversy and the argument that impunity in Africa may never end

178 Article 4(m) of the Constitutive Act of the AU.

179 As above.

180 Article 4(o) of the Constitutive Act of the AU.

181 S Fabamise 'Constitutional immunity clause and the fight against corruption in Nigeria' (2017) 8 *The Journal of Sustainable Development Law and Policy* 155 https://www.ajol.info/index.php/jsdlp/article/view/163328 (accessed 19 June 2021).

may find justification on this ground. The Rome Statue does not recognise immunity based on officials capacity as noted above.[182]

2.3.6 Victim participation, compensation and reparations

Under article 45 victims of international crimes are given an opportunity to participate in the proceedings to obtain compensation or reparations. The Statute directs the Court to establish in the Rules of the Court principles relating to reparations to victims, including restitution, compensation and rehabilitation.[183] The Court is empowered to determine the scope and extent of any damage, loss or injury to or in respect of the victim in its decision, but it will have to state the principles on which it acts upon.[184] The Court can do so upon request by the victim or a representative of the victim or, under exceptional circumstances, on its own motion. With respect to its international criminal jurisdiction, the Court is empowered to make orders directly against a convicted person specifying appropriate reparations to, or in respect of victims including restitution, compensation and rehabilitation.[185] The Court may invite the convicted person or representative, the victim or representative, or other interested persons or states to make representations before it makes an order for reparations.[186]

This kind of development on reparations to victims of crimes under international criminal courts was brought by the Rome Statute of the ICC,[187] thus article 45 is in line with the ICC Statute. This is unlike the ICTR Statute where victims were required to resort to national courts for reparation claims,[188] something which has left victims of the Rwandan genocide without justice in terms of reparations against perpetrators tried in the Tribunal.[189] Reparations to victims are a very crucial part in the justice process. By making repairs victims see that their suffering has been acknowledged, therefore having such a justice process in the African Court is highly commendable.

182 Article 27 of the Rome Statute of the ICC, also art 7(2) of the ICTY.

183 Article 45 of the Malabo Protocol.

184 As above.

185 As above.

186 As above.

187 Article 75 of the Rome Statute.

188 Article 106 of the ICTR Rules of Procedure and Evidence.

189 LM Mongella *The right to compensation for victims of internal armed conflicts in East Africa: A case study of genocide victims in Rwanda* (2014) 155-175.

2.3.7 Rights of the accused person

Under article 46A(1-3), the Statute annexed to the Malabo Protocol clearly provides for the rights of the accused person. Under this provision, all accused persons are to be given equal treatment before the Court and are entitled to a fair and public hearing, subject to orders made by the Court in protecting victims and witnesses. The accused shall as well be presumed innocent until proven guilty whereby the standard of proof is beyond reasonable doubt.

In line with the above mentioned rights, article 46A(4) of the Statute provides for the minimum guarantees entitled to an accused person. These include: to be informed promptly and in detail of the nature and cause of the charge in the language he/she understands; to be accorded adequate time and facilities to prepare his/her defence and to have a legal representative; and to be tried without undue delay.

Article 46M of the Statute directs the AU Assembly to establish a 'Trust Fund' within the jurisdiction of the Court for the purposes of legal aid and assistance provision and also for the benefit of victims of crimes and human rights violations and their families. Apart from the contribution of member states in funding the Trust Fund, article 46M (2) of the Malabo Protocol empowers the Court to order money and other property collected through fines or forfeiture to be transferred to the Trust Fund. Amnesty International observes that:

> [A] Trust Fund which may be used for the benefit of the victims has a clear precursor in the case of the ICC's Trust Fund for Victims, which can be used principally to provide reparations to victims of international crimes.[190] The management and maintenance of such fund at the ICC has required a full time secretariat. In relation to the use of a trust fund for legal aid, whilst the use of a trust fund-presumably to be funded voluntarily – may serve to provide some resource for the benefit of the defence, it must be recalled that the right to a paid defence and equality of arms are fundamental aspects to a fair trial.[191]

It is not clear whether or not a trust fund for legal aid at the ACJHPR will be able to serve this purpose. Again, the use of the trust fund for legal aid and for the benefit of the victims raises questions of how the funds would be held and disbursed, since it would be serving different and presumably

190 Amnesty International (n 2) 22-23.

191 As above.

conflicting purposes.[192] The victim can also represent themselves in person or through an agent.[193] As much as an accused person is brought to court, he/she/they is innocent until proven guilty and convicted by the court as such. Thus, the provisions of article 46A and M safeguard this right of the accused which is also protected under various national and international instruments.

3 Does the African mechanism have the prospect of fighting impunity? Positive aspects and challenges

The extension of criminal jurisdiction to the African Court has been associated with a mixture of feelings from commentators regarding whether the fight against impunity can successfully be achieved on the continent.[194] The major concerns about the successful existence of the Court are the willingness of the political leaders, the immunity given to these leaders and the financial capacity to effectively run the Court.[195] Considering all these concerns, can Africans really hope for a brighter future in fighting impunity under the African Court? In striving to answer this question, this part analyses the positive aspects of the criminal jurisdiction and the challenges towards the effective operation of the Court.

3.1 Positive aspects of the extended criminal jurisdiction

There are a number of positive aspects in the extension of the criminal jurisdiction. These include: the AU exercising its right to fight impunity, prosecuting international crimes which occurred in Africa in an African setup and bringing the fight against impunity closer to the African people, which would accord them the opportunity to participate in the process, particularly the victims. It will encourage forum shopping, enabling the actors to select the forum that best suits their interest either the ICC or the regional court. This will affect cases referred to the ICC by the Security Council if the ACJHPR works successfully but if it fails for any reason to prosecute those that have committed human rights violations, the ICC would still have jurisdiction to try the cases. Where litigants are not

192 As above.

193 Article 36(6) as amended by art 18 of the Malabo Protocol.

194 Deya (n 34), Abass (n 48), Murungu (n 62) & Mashamba (n 77).

195 Amnesty International observed that most African States, 33, are members of the ICC and if they were also to sign up to the Malabo Protocol, they will have to contribute financially to both the ICC and the ACJHR and this may be a heavy financial burden for the states. The EU also expressed concerns on the effectiveness of the Court due to the inclusion of immunity clause for Heads of States and senior government officials.

satisfied with the proceedings at the ACJHPR, they can resort to the ICC. Domestic trials will be enhanced as the right of primacy will be exercised.

3.1.1 Exercising its right to fight impunity under the Constitutive Act

Among the principles governing the functions of the AU is the fight against impunity. Categorically, under article 4(h) of the AU Constitutive Act, the AU is given the right to fight impunity, particularly over international crimes. Article 4(h) specifically lists one of the principles being:

> [T]he 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.

Likewise, under article 4(o) the AU condemns and rejects impunity. In all its decisions regarding the ICC or the extension of criminal jurisdiction to the African Court, the AU has reiterated its commitment to fight impunity.[196] Most individual African states have fulfilled this commitment by ratifying the Rome Statute or acceding to it. Some of them, particularly Uganda, have even established specific international crimes divisions in their national court systems.[197] Uganda, however, has faced criticism that the prosecutions have been directed to members of the Lord's Resistance Army (LRA) only, leaving out members of the government armed forces who are also alleged to have committed atrocities against civilians. Nevertheless, to the authors' view, despite these criticisms, the establishment of the international crimes division is a positive step in the fight against impunity regardless of who started to be prosecuted. The authors believe that since the legal mechanism is in place, perpetrators from the other side can face justice in future.

As a regional body, the AU further showed its commitment to fight impunity when it passed a decision mandating Senegal to prosecute Hissène Habré in its national courts, contributed funding for the Court and urged member states and other stakeholders to contribute towards funding the Court.[198] Therefore, the act of extending criminal jurisdiction to the African Court signifies the continuation of the AU's commitment to fight impunity by offering a permanent mechanism.

196 Assembly/AU/Dec.292(XV), Assembly/AU/Dec.397(XVIII), Assembly/AU/Dec.482(XXI).

197 L Moffett *Justice for victims before the International Criminal Court* (2014) 224.

198 AU Assembly, Decision on the Hissène Habré Case, Doc Assembly/AU/9(XVI), AU Doc Assembly/AU/Dec.340 (XVI).

3.1.2 Solving African problems in an African setup

In spite of the fact that international and transnational crimes have been committed, or can be committed, in any continent, the peculiarity of these crimes in Africa stems from its prevalence and the lack of accountability. The peculiarity is evidenced in the prevalence, magnitude and nature of the commission of the crimes.[199] Examples include: the horrible events of the 1994 Rwandan Genocide, believed never to have been witnessed in the world since the holocaust in Nazi Germany;[200] the amputation of limbs and lips in northern Uganda is beyond imagination;[201] the raping of women and girls as a weapon of war and the manner in which it is committed, particularly in the Democratic Republic of Congo (DRC) has never been witnessed anywhere in the world and has led to the country being labelled the 'rape capital of the world';[202] the abduction by Boko Haram of 276 school girls in Chibok-Bornu State, Nigeria and the atrocities suffered by these girls shocked the world with various national and international actors raising alarm;[203] recruitment of child soldiers has been rampant in African conflicts compared to other continents;[204] and the looting of natural resources has affected a number of African states by fuelling and intensifying civil wars.[205] Countries such as Angola, the Central African Republic, the DRC, Ivory Coast, Liberia, the Republic of Congo and Sierra Leone have suffered, and some are still suffering, due to being blessed with natural resources.[206]

While a few of the perpetrators in the above mentioned scenarios have been prosecuted or indicted by the ICC,[207] it would have been more

199 A Abass 'Historical and political background to the Malabo Protocol' in G Werle & M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2016) 18.

200 A Smeulers & F Grünfeld *International crimes and other gross human rights violations: A multi- and interdisciplinary textbook* (2011) at xiii.

201 SR Whyte, L Meinert & J Obika 'Untying wrongs in Northern Uganda' in WC Olsen & WEA van Beek (eds) *Evil in Africa: Encounters with the everyday* (2016) 43-58.

202 UE Yang *The third world: Where is it? Forgotten corners of the world – But we have life and space* (2011) 131.

203 E Ezedani *Boko Haram Chibok girls and all matters Nigeria security* (2015) 1-8.

204 C Ryan *Children of war: Child soldiers as victims and participants in the Sudan civil war* (2012) 1.

205 A Alao *Natural resources and conflict in Africa: The tragedy of endowment* (2007) 4-9. See also M Ross 'The natural resource curse: How wealth can make you poor' in I Bannon & P Collier (eds) *Natural resources and violent conflict: Options and actions* (2003) 17-42.

206 As above.

207 *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06, *The Prosecutor v Joseph Konyi and Vincent Otti* ICC-02/04-01/05, *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06.

impactful where victims could easily follow up the justice process and feel connected to it. This is because for one to see that the suffering resulting from crimes has been considered, justice should not only be done, but should be seen and felt to be done, specifically by victims. Moreover, the trend before the ICC and the ad hoc tribunals has been to deal with few offenders, and particularly high profile individuals.[208] It is believed that in the African Court the number of perpetrators indicted to face justice could be greater. This is because of the additional number of crimes which in reality have caused suffering to the people in Africa, particularly the crime of unconstitutional change of government.

The crime of unconstitutional change of government is a serious problem in Africa, being one of the main sources of civil wars.[209] Since the crime is not within the mandate of the ICC it is an obligation of the AU to find mechanisms of dealing with it.[210] Under article 25(5) of the African Charter on Democracy, Elections and Governance, African states are empowered with discretion to create a competent court to try those responsible for unconstitutional change of government. The African Court shall therefore serve this purpose.

3.1.3 Crimes not within the jurisdiction of the ICC

Apart from the core international crimes of genocide,[211] war crimes,[212] crimes against humanity[213] and the crime of aggression,[214] the Malabo Protocol has empowered the African Court to try ten other crimes: the crime of unconstitutional change of government;[215] piracy;[216] terrorism;[217] mercenarism;[218] corruption;[219] money laundering;[220] trafficking in

208 Some of the high profile ICC cases include: Sudanese President Omar Al-Bashir, Lord's Resistance Army Commander Joseph Kony, former Ivory Coast President Laurent Gbagbo and son of former Libyan President Moammar Gadhafi, Saif al-Islam Gadhafi.

209 Abass (n 199).

210 As above.

211 Article 28B of the Statute Annexed to the Malabo Protocol.

212 Article 28D of the Statute Annexed to the Malabo Protocol.

213 Article 28C of the Statute Annexed to the Malabo Protocol.

214 Article 28M of the Statute Annexed to the Malabo Protocol.

215 Article 28E of the Statute Annexed to the Malabo Protocol.

216 Article 28F of the Statute Annexed to the Malabo Protocol.

217 Article 28G of the Statute Annexed to the Malabo Protocol.

218 Article 28H of the Statute Annexed to the Malabo Protocol.

219 Article 28I of the Statute Annexed to the Malabo Protocol.

220 Article 28I bis of the Statute Annexed to the Malabo Protocol.

person;[221] trafficking in drugs;[222] trafficking in hazardous wastes;[223] and illicit exploitation of natural resources.[224] All are serious crimes having troubled African states and the continent for a long time, playing a great role in destabilising peace and security and the economy within the continent. Some of these crimes are transnational in nature. Article 2 of the United Nations Convention Against Transnational Organised Crime[225] defines a crime as transnational if:

> (a) it is committed in more than one state; (b) it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; (c) it is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state; or (d) it is committed in one state but has substantial effects in another state.[226]

Thus, it becomes imperative for Africa to combine resources and efforts to deal with such offences at a regional level.

3.1.4 Forum shopping

Sirleaf notes that one of the advantages of a regional system is that it encourages forum shopping where actors would strive to select the forum that best suits their interests.[227] This he emphasised is a result of the fact that there are different rules of access to membership and participation in international institutions.[228] African state parties will have an opportunity to choose between the ICC and the regional court. This would not hinder the ICC Prosecutor from exercising her powers to initiate investigation but will definitely dampen the enthusiasm of African countries towards the ICC.[229] If the regional court is viable, it will also affect the referral of non-state African parties by the UNSC.

221 Article 28J of the Statute Annexed to the Malabo Protocol.

222 Article 28K of the Statute Annexed to the Malabo Protocol.

223 Article 28L of the Statute Annexed to the Malabo Protocol.

224 Article 28L bis of the Statute Annexed to the Malabo Protocol.

225 UN General Assembly, United Nations Convention against Transnational Organised Crime: Resolution adopted by the General Assembly, 8 January 2001, UN Doc A/RES/55/25 (2001).

226 See also, article 1(x) of the African Union Non-Aggression and Common Defence Pact, adopted by the Fourth Ordinary Session of the Assembly, held in Abuja, Nigeria, on Monday, 31 January 2005.

227 M Sirleaf 'Regionalism, regime complexes and international criminal justice' (2016) 54 *Columbia Journal of Transnational Law* 759.

228 As above.

229 Sirleaf (n 227) 760.

3.1.5 Synergy between ICC and the ACJHPR

Another benefit would be that the ICC and the regional court could synergise thereby allowing the ICC to focus on very serious crimes while the regional court will attend to less complex and everyday crimes within the same country.[230] In the CAR for instance, the government noted that the national justice system was too weak to handle large scale atrocities during recent crises so in 2014, it referred the situation that had occurred since 2012 to the ICC.[231] The interim governments also set up specialised courts inside the national justice system to prosecute crimes that were not likely to be selected by the ICC[232] and were committed since 2003. This practice in the CAR has shown that the regional court and the ICC could work together in demanding accountability by sharing their roles considering the geographic, historical and cultural bonds existing between states. Again, decisions of a regional court are likely to be accepted with less – or no – resistance than a pronouncement from an international court.[233]

3.1.6 Enhancement of domestic trials

The Regional Criminal Court proposed in the Malabo Protocol will enhance national/domestic trials as states will be encouraged to develop their national criminal law to enable them try some crimes which hither to they have been unable to effectively carry out. This is due to the fact that the national courts would have the first bite at the pie of prosecution and they would fail at this assignment if the domestic criminal law is not comprehensive to enable the trials. State parties would be under an obligation to enact domestic implementing legislation. The legislation would domesticate the Malabo Protocol crimes. This would mean a review of domestic criminal laws to bring them in line with the provisions of the Statute of the regional court thereby giving primacy to national courts in line with the principle of complementarity and they can only resort to the regional court when they are unable to prosecute the cases. It

230 G Mattioli–Zeltner 'Taking justice to a new level: The Special Criminal Court in the Central African Republic' *Jurist* 9 July 2005 https://www.justiceinfo.net/en/1283-taking-justice-to-a-new-level-the-special-criminal-court-in-the-central-african-republic.html (accessed 11 July 2020).

231 As above.

232 As above. This is the first time that national international crimes have created a hybrid court to try serious international crimes committed in their own country and to work alongside the ICC.

233 Sirleaf (n 227).

will also afford Africa the opportunity to investigate and prosecute mass crimes in the region.[234]

3.2 Challenges facing the fight against impunity in the African Court

3.2.1 Political will

By 'political will' we mean the commitment by key decision makers to take necessary steps to achieve the desired goals or to implement the laws and policies set out for a particular function. Whether African leaders have the political will to make the Court function effectively is doubtful. It should be recalled that for the Court to become operational it needs a deposit of 15 instruments of ratification,[235] yet the trend of ratifying instruments since the establishment of the African Court on Human and Peoples' Rights is extremely disappointing. The Protocol to the African Charter on Establishment of the African Court on Human and Peoples' Rights was adopted in June 1998 and entered into force on 25 January 2004, taking almost six years to become operational. Additionally, for citizens and NGOs with observer status before the African Commission on Human and Peoples' Rights to file a case, states are required to sign a Declaration accepting the jurisdiction of the Court. To date only ten states have signed the Declaration: Benin, Burkina Faso, The Gambia, Ghana, Ivory Coast, Malawi, Mali, Rwanda, Tanzania and The Republic of Tunisia.[236] Luckily these states shall not need to sign new Declarations with the coming of the Malabo Protocol thereby automatically permitting citizens from these states to approach the Court whenever they are faced with matters needing determination by the Court.[237]

Rwanda who had previously signed the declaration withdrew in February 2016 and prayed for suspension of all matters against her

234 M Mahdi 'Africa's International Crimes Court is still a pipe dream' *Reliefweb*15 October 2019 https://www.reliefweb .int/report/world/africa-s-international-crimes-court-still-pipe-dream (accessed 8 July 2020).

235 Article 11(1) of the Malabo Protocol.

236 African Court on Human and Peoples' Rights 'African Court Coalition Discussions: State withdrawals from article 34(6) of the African Court Protocol – A publication of the Coalition for an Effective African Court on Human and Peoples' Rights' Official Bulletin Volume 1, May 2020 http://www.african-court.org and https://www.acc-publication_volume-1_2020_eng/ (accessed 13 June 2020). Within a space of four years 2016-2020, four countries (Benin, Cote D'Ivoire, Rwanda and Tanzania) have withdrawn the article 36(4) Declaration leaving only six member states (Burkina Faso, Ghana, Mali, Malawi, The Gambia and Tunisia).

237 Article 8(3) of the Protocol on the Statute of the African Court of Justice and Human Rights.

pending in the Court.[238] The withdrawal was filed at the time Rwanda was facing several cases including that filed by Ms Victoire Ingabire who contested against President Kagame in the 2014 elections and was later detained and charged with genocide ideology, among other charges, in the Rwandan court.[239] This made it look like a mechanism by Rwanda to fight this particular case even though Rwandan officials claim that it was just a coincidence as the aim was to prevent the 1994 genocide perpetrators from using the African Court to escape justice for their crimes.[240] The act of Rwanda withdrawing the declaration is further proof of the lack of political will by some African leaders. This assertion can also be backed up by notifications of withdrawal from the ICC by countries like Burundi, South Africa and The Gambia.[241] The Gambia and South Africa reversed their withdrawals.[242] Only Burundi has withdrawn and its withdrawal took effect in October 2017.[243] These acts of withdrawing show that African states are not willing to be taken to court. The authors are of the view that if leaders protect the states from being taken to court then definitely they will protect themselves from being taken to court to face criminal charges.

Similarly, the merger Protocol on the Statute of the ACJHR was adopted in July 2008, with only six states having ratified it: Benin, Burkina Faso, Congo, Libya, Liberia and Mali.[244] Seven years since the adoption of the Malabo Protocol only fifteen of the 55 member states have signed: Benin, Chad, Comoros, Congo, Equatorial Guinea, Ghana, Guinea Bissau, Guinea, Kenya, Mauritania, Mozambique, Sierra Leone, Sao Tome & Principe, Togo and Uganda.[245] The Malabo Protocol's rate of

238 In the Matter of *Ingabire Victoire Umuhoza v Republic of Rwanda* (Application 003/2014) [2018] AFCHPR 5 (7 December 2018).

239 As above.

240 As above.

241 M Ssenyonjo 'State withdrawals from the Rome Statute of the International Criminal Court: South Africa, Burundi, and The Gambia' in CC Jalloh & I Bantekas (eds) *The International Criminal Court and Africa* (2017) 214-218.

242 E Keppler 'Gambia rejoins ICC: South Africa, Burundi now outliers on exit' HRW 17 February 2017 https://www.hrw.org/news/2017/02/17/gambiarejoins-icc (accessed 20 June 2020). See EY Omorogbe 'The crisis of International Criminal Law in Africa: A regional regime in response?' (2019) 66 Netherland International Law Review 287 at 296.

243 As above. See BBC News 'Burundi leaves International Criminal Court amid row' *BBC News* 7 October 2017 http://www.bbc.com/news/world-africa-41775951.amp (accessed 10 June 2020).

244 AU 'OAU/AU Treaties, Conventions, Protocols & Charters' https://au.int/en/treaties/status (accessed 20 July 2020).

245 J Chella 'A Review of the Malabo Protocol on the Statute of the African Court of Justice and Human Rights, Part I-Jurisdiction over international crimes https://www.ilareporter.org.au/2021/01/a-review-of-the-malabo-protocol-on-the-statute-of-

ratification does not match the enthusiasm AU leaders exerted during the process of drafting the Protocol and the Statute thereto.

The fact AU leaders were disappointed with the ICC's indictments against some sitting heads of state also creates doubts as to their true commitment in fighting impunity. It appears that at the time of signing the Rome Statute the AU leaders had an intention of it being applicable to other persons, particularly the rebels while themselves getting away free with impunity when they commit international crimes.[246] The same spirit is seen in the Malabo Protocol where the leaders have been shielded by the immunity provision.

3.2.2 Immunity of leaders from prosecution

The question of immunity has become the centre of attraction whenever the Malabo Protocol is being discussed;[247] due to the controversy it brings in the fight against impunity whereby it appears to shield leaders from prosecution. Immunity for leaders defeats the essence of having an international criminal court. International criminal courts are specifically designed to complement national jurisdictions, coming into play when it is impossible to try international crimes at the national level due to incapacity or unwillingness. African leaders commit international crimes within their own and other countries. For example, the trial and conviction of Charles Taylor in the Specialised Court for Sierra Leone;[248] Rwandan state officials before the ICTR;[249] Hissène Habré in Senegal;[250] and Jean Pierre Bemba before the ICC.[251] Even where such individuals

the-african-court-of-justice-and-human-rights-part-i-jurisdiction-over-international-crimes-jessie-chella (accessed 14 June 2022).

246 LS Sunga 'Has the ICC unfairly targeted Africa or has Africa unfairly targeted the International Criminal Court?' in T Mariniello (ed) *The International Criminal Court in search of its purpose and identity* (2015) 171.

247 Deya (n 34), Murungu (n 62), Mashamba (n 77) and Abass (n 48).

248 Charles Taylor was convicted in April 2012 on 11 charges arising from war crimes, crimes against humanity, and other serious violations of international humanitarian law, committed from 30 November 1996 to 18 January 2002 during the course of Sierra Leone's civil war. See Open Justice Initiative 'The trial of Charles Taylor before the Special Court for Sierra-Leone: The appeal judgment' (September 2013) https://www.justiceinitiative.org/publications/trial-charles-taylor-special-court-sierra-leone-appeal-judgment (accessed 18 June 2021).

249 UN 'The ICTR in Brief: 93 individuals indicted by the ICTR' https://www.unictr.irmct.org/en/tribunal (accessed 16 June 2021).

250 'Senegal/Chad: Court upholds Habré conviction' *HRW News* 27 April 2017 http://www.hrw.org/news/2017/04/27/senegal/chad-court-upholds-habre-conviction (accessed 17 July 2020).

251 *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08 (21 March 2016). He was

have not directly participated in the perpetration of the crimes, they can be held responsible under command responsibility for failing to take action against subordinates who commit such crimes or to prevent them.[252] In most states, leaders are protected from prosecution under their national constitutions for crimes committed while in office. While some countries, like Tanzania, go further and grant the head of state immunity from prosecution even after he leaves office.[253] Under these circumstances national courts are incapable of dealing with such crimes, thus it becomes imperative for an international criminal court to come into play.

Immunity is granted to heads of state or government, ministers or responsible government officials/senior state officials.[254] Initially the Malabo Protocol provided immunity to senior state officials without providing a description of what amounted to 'senior state official'. This became a subject of criticism among scholars. Amendments were thereafter made to article 46A bis to the Statute annexed to the Malabo Protocol. The amendment prohibits charges to be commenced or continued before the African 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.[255]

Still an exhaustive list of 'senior state officials based on their functions' could not be provided in this amendment considering the difficulty in coming out with an exhaustive list. It was therefore resolved to leave it to the Court to interpret and determine who qualifies as a senior state official on a case by case basis, taking into consideration their functions in accordance with international law.[256] The jurisprudence on this area shall therefore keep growing as the cases are being taken to the Court.

acquitted by the Appeals Chamber of the ICC on 8 June 2018 on charges of war crimes and crimes against humanity, thereby bringing the case to a close.

252 For example, *The Prosecutor v Jean Paul Akayesu*, ICTR-96-4-T (2 September 1998); and *Gombo* (n 251).

253 Article 46 of the United Republic of Tanzania Constitution, 1977.

254 Executive Council of the African Union 'The Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorney General-Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights: Revisions up to Tuesday 15th May 2012 (Exp/Min/IV/Rev.7)' EX.CL/731 (XXI) Addis Ababa (Ethiopia), 9-13 July 2012.

255 Executive Council of the African Union 'The Report, the Draft Legal Instruments and Recommendations of the Specialised Technical Committee on Justice and Legal Affairs' EX.CL/846(XXV), Malabo (Equatorial Guinea), 20-24 June 2014.

256 As above.

As noted earlier, the immunity granted under article 46A bis is not absolute. Heads of state and government and senior state officials are only protected while in office. However, one should not forget that Africa is a continent where a number of leaders strive to remain in power for life. Africa has witnessed 14 attempts to change state constitutions to extend the term limits to accommodate sitting presidents to hold onto power. Successful attempts include: Burkina Faso, Burundi, Chad, Congo-Brazzaville, the DRC, Gabon, Guinea, Rwanda, Togo and Uganda, while the unsuccessful attempts occurred in Zambia, Malawi and Nigeria.[257] In states such as Burkina Faso, the DRC and Burundi, the process of changing the constitutions culminated in civil unrest.[258] Judging by this trend, it is obvious that granting immunity under the Malabo Protocol shall encourage leaders who know they could be held responsible for international crimes to cling to power.

Under international law heads of state and senior state officials are also accorded immunity on acts done in their official capacity on behalf of their states.[259] However, the scope of what amounts to 'senior official' has not been precisely stated. The International Court of Justice (ICJ) in the Arrest Warrant Case[260] when referring to officials entitled to immunity referred to high ranking officials 'such as heads of state, heads of government and ministers for foreign affairs'.[261] The ICJ included ministers for foreign affairs because it was entertaining a case involving such a minister and was concerned by the fact that ministers for foreign affairs travel frequently on activities representing their states. However, the phrase 'such as...' used by the ICJ entailed that other categories of senior officials could be added. In another case on Armed Activities in the Territory of the Congo[262] the ICJ included minister for justice in the category of senior officials. In the Arrest Warrant Case, the ICJ was deciding on a situation where a state official was subjected to the jurisdiction of a foreign state.[263] The position is different under international criminal courts whereby generally, heads of

257 AT Hengari 'Presidential term limits: A new African foreign policy challenge' SAIIA Policy Briefing 138, June 2015 https://saiia.org.za/research/presidential-term-limits-a-new-african-foreign-policy-challenge/(accessed 14 June 2020).

258 As above.

259 As above.

260 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium),* International Court of Justice (ICJ) (14 February 2002), extracted from J Foakes *The position of heads of state and senior officials in International Law* (2014) 128.

261 As above.

262 As above.

263 Foakes (n 260).

states and other state officials do not enjoy immunity from prosecution.[264] The function of the International Criminal Law Section of the African Court shall not be different from that of the ICC, ITCY and ICTR, that is, to complement national jurisdictions where prosecutions cannot take place under such national jurisdictions. As pointed out earlier, most national jurisdictions fail to prosecute the heads of state and other senior state officials, hence making it relevant to have the criminal jurisdiction in the African Court. The immunity in the Malabo Protocol should therefore be removed as it defeats the main essence of establishing an international criminal court.

3.2.3 Numerous crimes and funding

The list of crimes enshrined under the Malabo Protocol is rather ambitious. Some of the crimes cannot be attributed to international criminal law. For instance, despite the effects it creates on states, a crime such as corruption is seen not to be serious to the extent of warranting intervention of an international criminal court. Such crime can effectively be dealt with under national jurisdictions.[265] National jurisdictions need to be strengthened to handle such cases effectively. Where such crimes become transnational the culprit could be tried in the state which has experienced the effects of the crimes or he/she could be extradited to the state where the crime was committed. The strengthening of the national criminal justice systems should go along with strengthening the laws in mutual assistance in criminal matters as well as on extradition laws and agreements between states.

Prosecuting international crimes has huge financial and time implications, for example, the process involved in collecting evidence is very costly. Additionally, the International Criminal Law Section shall have several offices, that is, the Pre-Trial Chamber, the Trial Chamber, the Appellate Chamber, and the Office of the Prosecutor and the Defence Office. All these offices are staffed by different personnel who have to be paid salaries and other remunerations, thus increasing the expenses.[266] The number of crimes under the jurisdiction of the Court increases the expenses in terms of conducting investigations in countries where the crimes are committed, detention of the accused persons who have to be taken care of and in handling of witnesses. Experience from other international courts reveals how expensive it is to handle international crimes. The case of

264 Article 27 of the Rome Statute of the ICC; art 7(2) of the ICTY Statute; and art 6(2) of the ICTR Statute.

265 Mashamba (n 77) 53-54.

266 Abass (n 199) 24.

Charles Taylor in the Specialised Court for Sierra Leone, for example, cost more than USD 50 million, almost exceeding the annual budget of the African Court on Human and Peoples' Rights.[267]

At the national level the handling of international crimes has also proved very expensive and time consuming. The gathering of relevant evidence and the battle on legal issues consumes time and money. The defence would usually bring up legal issues on preliminary points with an intention of discontinuing the trial process. For instance, *Uganda v Kwoyelo Thomas*[268] before the International Crimes Division (ICD) of the Ugandan High Court has been in court since 2011. Among the issues delaying the finalisation of the case are a number of preliminary objections including: the entitlement to amnesty as per the Ugandan Amnesty Law; the legality of Justice Susan Okalany presiding over the trial, as she was not specifically appointed to the ICD; and the legality of the pre-trial proceedings held in the absence of approved rules of procedure.[269] While the Constitutional Court ruled that Kwoyelo had a right to be granted amnesty, this decision was reversed by the Supreme Court on appeal by the Director of Public Prosecutions (DPP) in April 2014.[270] Following the Supreme Court's decision the case proceeded to the ICD.[271]

Financial resources are also a problem in facilitating effectiveness in the trail process. Due to a financial deficit, counsel was not allocated and Kwoyelo had to stay in prison for one year without trial.[272] The case of Kwoyelo demonstrates how expensive and time consuming a single criminal case can be. It also demonstrates how financial inability of a state can hinder the effective prosecution of international and transnational crimes. In fact, it brings up concerns that if Uganda has failed to prosecute this single case in its national court due to lack of finances, how can it

267 As above.

268 HCT-00-ICD, Case 02/10.

269 LO Ogora 'Landmark ruling on victim participation in the case of Thomas Kwoyelo' *International Justice Monitor* 4 October 2016 https://www.ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo/ (accessed 19 July 2020). Also KT Seelinger 'Uganda's case of Thomas Kwoyelo: Customary international law on trial' Report, May 2017 http://www.californialawreview.org/cutomary-international-law-on-trial (accessed 19 July 2020). Also K McNamara 'Seeking justice in Ugandan courts: Amnesty and the case of Thomas Kwoyelo' (2013) 12 *Washington University Global Studies Law Review* 653 http://www.openscholarship.wustl.edu/law_globalstudies/vol12/iss3/19 (accessed 19 July 2020).

270 As above.

271 S Oola 'In the shadow of Kwoyelo's Trial' in C de Vos, S Kendall & C Stahn *Contested justice: The politics and practice of International Criminal Court interventions* (2015) 163-164.

272 W Jordash QC & MR Crowe (eds) 'Evidentiary challenges for the defence' in E Van Sliedregt & S Vasiliev *Pluralism in international criminal law* (2014) 281.

contribute to the budget of the African Court to try numerous cases that shall be instituted? The authors believe that the situation in Uganda is a situation facing many African states, something which creates doubts on the ability of these states to effectively finance the activities of the African Court.[273]

Deriving experience from the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, Phan says it is quite a difficult issue for developing countries to provide enough funds to run the courts due to poor resources and dependence on donors in funding even the existing Human Rights Court.[274] While the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights states that the expenses of the Court, including emoluments and allowances for judges and the budget of its registry, shall be borne by the Organisation of African Unity (OAU) (now AU),[275] it is not clear under the Malabo Protocol as to how the expenses of the Court shall be catered for.[276]

The AU however endeavours to financially sustain its own institutions including the African Court. In the Kigali Financing Decision, the AU resolved for member states to contribute 0.2 per cent of their import levy to finance the Union.[277] The challenge is that some of the member states do not pay their yearly contribution.[278] In 2018 the AU strengthened its sanctions regime to ensure member states meet their financial obligations. The new sanction regime provides for short and long term measures against member states defaulting to pay either partly or fully their assessed contributions. The time ranges from six months to two years. The sanctions are categorised into cautionary, intermediate and comprehensive.[279] With

273 MM Gil & A Bandone 'Policy briefing: Human rights protection mechanisms in Africa: Strong potential, weak capacity' Directorate-General for External Policies: Policy Department (February 2013) https://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491487/EXPO-DROI_SP (2013)491487_EN.pdf (accessed 13 June 2021).

274 HD Phan *A selective approach to establishing a human rights mechanism in Southeast Asia: The case for a Southeast Asian court of human rights* (2012) 221.

275 Article 32.

276 Abass (n 199).

277 AU 'FAQs (Frequently Asked Questions) about financing of The Union: What is financing of the Union' https://au.int/sites/default/files/pages/35739-file-faqs_on_financing_of_the_union.pdf (accessed 31 July 2020).

278 AU 'Sustainable financing' https://au.int/en/aureforms/financing (accessed 31 July 2020).

279 'African Union strengthens its sanction regime for non-payment of dues' *AU Press Release* 7 November 2018 https://au.int/en/pressreleases/20181127/African-union-strengthens-its-sanctions-regime-non-payment-dues (accessed 31 July 2020).

all this positive progress, the AU is still incapable of fully funding its total budget. For example, the budget adopted for the year 2020 is at US$647.3 million. The AU only fully funds the operating budget set at US$157.2 million. The programme budget set at US$216.9 million is funded by the AU at 41 per cent and 59 per cent is solicited from international partners. The same applies to peace support operations whereby the AU member states fund 38 per cent and 61 per cent comes from international partners.[280]

It is encouraging to see that at the very least the operational budget is fully met by the AU member states. This shall enable the core business of the Court to proceed. However, the authors are of the view that all 55 AU member states should fully honour their obligations to pay their contributions to achieve the goals for establishing the Court. Having a budget is one thing and actual funding of the budget is another. If some of the member states continue failing to meet their financial obligations the prosecution of crimes under the jurisdiction of the Court shall not be realised. The AU should also endeavour to fully fund the programme budget. This is because the programme budget is equally important for the sustainability of the Court as it caters for, among other things, infrastructure and skills development. Sometimes the budget is not fully paid. This can be seen on the 2019 budget of the African Court which was set at US$13 992 891.[281] In this, US$13 045 445 (93.23 per cent) was to come from the member states while US$947 445 (6.77 per cent) was to come from international partners. By 31 December 2019 only US$12 757 670, which is 91.2 per cent of the budget was executed. Member states funded US$7 603 978 and international partners funded US$529 096.[282] It should be noted that when the criminal jurisdiction becomes operational the budget of the Court shall definitely increase. If the trend in underfunding continues, is shall be difficult for the Court to effectively prosecute the numerous crimes enshrined in the Malabo Protocol.

3.2.4 Prosecutors independence

For a successful discharge of the office, the Prosecutor must enjoy independence to the greatest extent possible. The Malabo Protocol provides that 'the office of the prosecutor may initiate investigation *proprio motu* on the basis of information on crimes within the jurisdiction

280 'African Union sustainable funding strategy gains momentum' *AU Newsletter* 28 May 2022 https://au.int/ar/node/37145 (accessed 31 July 2020)

281 Executive Council 'Activity Report of the African Court on Human and Peoples' Rights (ACHPR) 1 January-31 December 2019' EX.CL/1204(XXXVI), 06-07 February 2020, Addis Ababa Ethiopia.

282 As above.

of the court'.[283] This provision is strengthened by the provision of article 22(6) which guarantees the independence of the prosecutor. It provides that the office of the prosecutor shall be responsible for the investigation and prosecution of the crimes specified in the 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.[284] Bringing the above provisions into operation, it seems in essence, that the Prosecutor's ability to initiate prosecution as prescribed above in article 46A(1), should be free of any political influences from the organs of the AU. One begins to wonder what the extent of this independence is, if the Prosecutor and his deputy are to be elected by the Assembly from amongst candidates who shall be nationals of state parties nominated by states parties.[285] Where the Prosecutor and Deputy Prosecutor are elected by the Assembly, can their independence be guaranteed, as they will most likely be answerable to their appointers? The matter is made worse in the face of the fact that their remuneration and conditions of service will be determined by the Assembly on the recommendations of the Court through the Executive Council.[286] This completely brings the office of the Prosecutor under the control of the Assembly. This type of scenario applies in national judiciaries and has stifled the independence of the judiciary at the national level in some African states. The judiciary is tied to the apron strings of the executive as it appoints judicial officers and determines the budgetary allocations to the judiciary.[287] The office of the Prosecutor should have a budget managed by it without undue interference from the Assembly. The Prosecutors office must not only be said to be independent but must be seen to be so in all respects.

3.2.5 Relationship with the ICC

On one side of the divide, it would seem un-imaginable that the proposed ACJHPR will not have any relationship with the ICC. The EU representative at the African Judicial Dialogue noted this when he said that 'the Malabo Protocol lacks complementarity with the ICC'.[288]

283 Article 46G(1) of the Malabo Protocol.

284 Article 22A(2) of the Malabo Protocol.

285 Article 22A(2) of the Malabo Protocol

286 Article 22A(10) of the Malabo Protocol

287 This has been the situation in Nigeria. In 2020, the President, General Muhammadu Buhari (Rtd) decided to grant financial autonomy to the Nigerian judiciary and this has not gone down well with the federating states/units. The judiciary in Nigeria has been on strike for over two months in 2021 for the non-implementation of financial autonomy by the federating states.

288 Amnesty International (n 190) 31.

It is also unfortunate when we consider the fact that 33 African states are members of the ICC and the AU expects that these states will sign up to the Malabo Protocol. If it so happens, it would raise jurisdictional issues. The ACJHPR would want member states to institute action for crimes which happen in the region of the Court as part of the 'African Solution Mechanism' but these states are also members of the Rome Statute, resulting in potential conflicts of obligations or duties. The Malabo Protocol did not provide for its relationship with the ICC. This may be so because African states may not want a court that would appear inferior to the ICC. In order to solve this, the AU called for the massive withdrawal of African states from the ICC.[289] Interestingly, the Rome Statute made provision for ICC's cooperation with regional institutions[290] and there is a possibility of the ICC seeking cooperation and information with the ACJHR at least in theory.

On the other side of the divide is the point that there could be synergy between the two courts. There is also the advantage of forum shopping by states since most African states are still members of the ICC. One possible way of resolving this will be to emphasise that cooperation with ICC would be between two coexisting and equal courts. To achieve this, the AU and the ICC must have an agreement on cooperation on issues of mutual recognition of judicial decisions or pronouncements emanating from the courts. They must also agree that parties to the suit must not be allowed to institute proceedings in both courts when the subject matter and the parties are the same and the case had already been filed and pending before one of the courts (*lis pendens*). Another area of cooperation would be in the area of exchange of information and judicial dialogue. The Malabo Protocol has made provision to 'seek 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'.[291] The proposed Court may rely on this provision if it desires to establish a working relationship with the ICC. This will obviously depend on a broader relationship between the AU and the ICC. Currently, that relationship is at its lowest ebb. The AU had rejected the proposal from the ICC to open a *liason* office in Addis Ababa in 2010.[292] These processes if

289 AU Assembly, 28th Ordinary Session, Decision on the International Criminal Court (ICC) Doc. EX. CL/1006 (XXX), AU (30-31 January 2017) https://www.au.int/web/sites/default/files/decisions/32520-sc19553_e_original_assembly_decisions_621-641_xxviii.pdf (accessed 6 July 2020).

290 Articles 54(3)(c) and 87(6) of the Rome Statute of the ICC.

291 Article 46L(3) of the Malabo Protocol.

292 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

followed would greatly enhance the cooperation and effectiveness of both courts especially the regional court.

4 Conclusion

The atrocities that Africans have suffered and witnessed during armed conflicts and under dictatorial regimes need to be ameliorated through a judicial organ. As such a regional international criminal court that shall be closer to the people appears to be crucial. The kinds of crimes under the jurisdiction of the African Court, particularly of 'unconstitutional change of government' pose serious problems in Africa. Such crimes do not fall under the jurisdiction of the ICC to which most African states are state parties. Thus, it was a thoughtful act for the AU to create a mechanism to deal with such crimes. However, taking into account the existing challenges, this article concludes that there is less hope as to whether Africa as a region shall be able to effectively fight impunity through the regional Court. This is because African leaders have not exerted true and convincing commitment in the fight against impunity.

The fact that seven years have elapsed since the Malabo Protocol was adopted in June 2014 and none of the states has ratified it creates doubts as to the seriousness of the leaders in making the Court operational. The question of immunity erodes the major essence of having an international criminal court which is to prosecute those who cannot be easily prosecuted at national level. Immunity can lead some leaders not adhering to the rule of law and committing atrocities and clinging to power out of fear of prosecution. A crime like that of aggression cannot under normal circumstances be committed without the head of state or senior state official's involvement as it involves armed invasion on the sovereignty of another state. Thus, when such a crime is committed there might be no prosecutions at all because the perpetrators are protected under immunity.[293] If such challenges continue to exist, prospects for a brighter future on fighting impunity in Africa shall never be realised. To overcome this problem the authors recommend that the AU should reinforce and streamline its practice of removing errant heads of state from power like it did with Charles Taylor in corroboration with ECOWAS. The AU should also ensure that member states within their states have a good succession plan to prevent a descent into lawlessness like the situation that occurred

(XV), para 8.

293 Kenyans for Peace with Truth & Justice 'Granting Presidents immunity is wrong' http://www.kptj.africog.org (accessed 20 June 2020).

in Libya when Muammar Gadhafi was ousted and in Somalia when Siad Barre left.

6 Understanding African justice mechanisms as part of the African peace and security architecture: Moving beyond an anti-ICC understanding

*Dominique Mystris**

Abstract

This chapter explores the rationale for establishing an African criminal court, its mandate and approach to justice and accountability. As the judicial organ of the African Union (AU), the International Criminal Law Section (ICLS) of the African Court of Justice and Human and Peoples' Rights is in a unique position to advance the AU's institutional ideology, while promoting justice and accountability. To understand the true aim and objectives of the ICLS, it needs to be viewed within the context of the AU's African Peace and Security Architecture (APSA), otherwise an incorrect understanding of the court as merely anti-ICC is advanced. While the ICLS is to play a similar, complementary, role to the ICC, it goes further by seeking to address region specific concerns and crimes and introduces corporate criminal liability. The centrality of peace and security in the AU's agenda and the link to justice and reconciliation is reflected in the ICLS and should be the initial point of analysis and understanding.

1 Introduction

The African Union's (AU) decision to expand the jurisdiction of the merged African Court of Justice and Human and Peoples' Rights to include individual criminal liability for international crimes,[1] once again brought the debate surrounding the influence of politics over international law's development into the spotlight. Many observers were quick to denounce the action of the AU as a response to tensions with the International Criminal Court (ICC) and its pursuit of criminal justice

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1 African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 2014) (Malabo Protocol).

against sitting African heads of state.[2] Yet the true picture is not as simple. African states are subject to the greatest number of international criminal justice initiatives of any region, either imposed by the UN, requested by the relevant state and established through agreement with the UN, or through ICC membership. The ICC's largest grouping of members are African states, with numerous African situations and cases before the Court,[3] and its first judgment was against an African.[4] As both the international community and African states sought mechanisms through which to address the international crimes committed, Africa has been the location of two of International Criminal Law's (ICL) important institutional developments: the second United Nations Security Council established international tribunal – the International Criminal Tribunal for Rwanda; and the first 'hybrid' court – the Special Court for Sierra Leone. Therefore, African states have not shied away from involvement in international mechanisms, as well as more regional efforts to address international crimes. The extent of compliance with international law and institutions by some African states, however, may be questioned.[5]

This chapter will show that the International Criminal Law Section (ICLS) of the African Court of Justice and Human and Peoples' Rights

2 CB Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067; M du Plessis 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights jurisdiction over international crimes' *EJIL: Talk!* 27 August 2012 http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/ (accessed 3 October 2017); M du Plessis 'A new regional international criminal court for Africa?' (2012) 25 *South African Journal of Criminal Justice* 286 at 289; Amnesty International 'Malabo Protocol: Legal and institutional implications of the merged and expanded African court' (2016).

3 Currently there are open investigations into the Central African Republic; Central African Republic II; Côte d'Ivoire; Darfur, Sudan; Democratic Republic of the Congo; Republic of Kenya; Libya; Mali and Uganda. With preliminary examinations into Gabo, Guinea and Nigeria.

4 *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 guilty verdict decided on 14 March 2012.

5 For example, Rwanda's tense relationship with the ICTR at times and compliance of certain African ICC member states failing to arrest Sudanese President Al Bashir during official visits to the respective countries. See Decision Pursuant to art 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, §23; Sudanese President Omar al Bashir, see C Gaffey 'South Africa loses appeal over Sudan President Al-Bashir arrest warrant' *Newsweek* 15 March 2016 http://europe.newsweek.com/south-africa-omar-al-bashir-darfur-genocide-appeal-436928?rm=eu (accessed 03 January 2017); T Sterling 'ICC refers Uganda, Djibouti to UN for failure to arrest Sudan's Al-Bashir' *Reuters* 12 July 2016 http://www.reuters.com/article/us-warcrimes-sudan-un-idUSKCN0ZS245 (accessed 03 January 2017).

(ACJHPR), is not merely an anti-ICC response, it is more nuanced.[6] To truly understand the approach and rationale for the ICLS, and how it fits into the institutional aims of the AU, an understanding of the centrality of the peace and security agenda and regional linkages to accountability is necessary. This helps explain the expansive jurisdiction and the modes of liability – in particular, criminal corporate liability. By placing the Court into the wider context of AU and African ideological and policy objectives, its role as the judicial organ becomes clear. AU policy documents and reports reflect a broader approach of transitional justice than purely retributive justice.[7] By situating the Court within the African Peace and Security Architecture (APSA) the ability to advance AU institutional aims and objects, while simultaneously furthering its own judicial aims, is possible. Without such an understanding a limited perspective and context is adopted. The Court has the potential to further criminal justice at the continental and regional level. Whereas if one only sees the ICLS as a response to the ICC, it obscures a holistic understanding of what potential there is for advancing peace and security and ending impunity in Africa.

Despite being adopted in 2014 by the AU Assembly, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol),[8] and thus the ICLS, has yet to enter into force. This does not diminish the importance of this chapter's analysis. The ICC is not the only possible mechanism through which ICL can be addressed, regional developments can advance ICL and the ICLS' relevance for accountability should not be dismissed.[9] A better understanding of what African states and the AU are proposing can improve the discourse and debate on Africa's engagement with the ICC and their own judicial organ.

2 The place of the ACJHPR's International Criminal Law Section within the AU

The ACJHPR is the result of merging two distinct courts: the African Court of Justice (ACJ), specifically mentioned in the African Union's

6 The Malabo Protocol changes the name to the African Court of Justice and Human and Peoples' Rights, as 'Peoples' was omitted from the merger protocol.

7 African Union 'Transitional Justice Policy' (February 2019) (Transitional Justice Policy) https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf (accessed 26 August 2019).

8 Named after the capital city in Equatorial Guinea where the Protocol was adopted.

9 See A Abass 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 933.

Constitutive Act,[10] considered as the 'principal judicial organ of the Union';[11] and the African Court on Human and Peoples' Rights (ACtHPR), established by the 1998 Protocol on the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Following the decision to merge the two courts,[12] there was a clear replacement of the ACJ as the AU's judicial organ with the ACtJHR.[13] With the Malabo Protocol, the AU's merged judicial organ was structured into three distinct sections: General Affairs; Human and Peoples' Rights; and International Criminal Law. Thus, the ICLS' place within the AU is as part of the organisation's judicial organ.

3 The International Criminal Law Section's rationale & objective

Consultation of the Court's founding instrument, negotiations and surrounding debates help illuminate its aims and objective. Unlike with the ICC Rome Conference and UN negotiations, the AU does not provide transcripts or in-depth, detailed meeting notes. Nevertheless, the available documents provide enough information to determine the purpose and overall aim envisioned.[14] The Malabo Protocol itself sets out the aims and

10 Article 5(1)(d) and art 18 of the AU's Constitutive Act.

11 Article 2 of the Protocol of the Court of Justice of the African Union.

12 See the following for the decisions to merge the two separate courts by the AU Assembly, Assembly/AU/Dec.45 (III) Third Ordinary Session, 6-8 July 2004, Addis Ababa, Ethiopia, Assembly/AU/Dec.83(V) Fifth Ordinary Session, 4-5 July 2005, Sirte, Libya.

13 Article 1 of the Protocol on the Statute of the African Court of Justice and Human Rights.

14 African Union Assembly, Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Decision Assembly/AU/Dec. 427 (XIX); Executive Council of the African Union, Report of the Meeting of Ministers of Justice And/Or Attorneys General on Legal Matters 14 and 15 May 2012, Addis Ababa, Ethiopia Min/Legal/Rpt. (part of EX.CL/731 (XXI))l; January 2012 Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL.Dec. 766(XXII); Doc.PRC/Rpt(XXV), EX.CL.Dec. 766(XXII); Executive Council of the African Union, Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General – Draft Protocol on Amendments to the AfCtJHR EX.CL/773(XXII); Executive Council of the African Union, Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General – Draft Protocol on Amendments to the AfCtJHR EX.CL/773(XXII), Annexed Financial Report.; Executive Council of the 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; EX.CL/773 (XXII) Annex 2 Rev; Executive Council of the African Union, The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs EX.CL/846(XXV) Rev.1.

objectives of the ACJHPR, and as the ICLS constitutes one of the three main jurisdictions of the African Court, these aims and objectives are applicable to the section and should guide its work. Such an understanding is possible by applying article 31(2) of the Vienna Convention rules on treaty interpretation.

As part of the ACJHPR the ICLS is to play a 'pivotal role' in advancing the AU's institutional aims and direction,[15] strengthening commitments to peace and security, and 'promot[ing] justice and human and peoples' rights'.[16] This is framed in the broader context of helping secure 'political and socio-economic integration and development of the Continent with a view to realizing the ultimate objective of a United States of Africa'.[17] The Court is given a preventative and deterrent role through supporting the work of 'national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples' rights', and to 'ensure accountability' where such violations occur.[18]

From the above, the Court's aim is to fight impunity and address human rights and other violations, while promoting justice. Yet, the meaning of justice is left undefined. Typically, where a judicial treaty speaks of justice, the logical understanding would be criminal justice. However, given the AU's increasing use of transitional justice approaches and organisational conceptualisation of justice, the ICLS is likely to have a greater role. While the ICLS has retributive aspects in its penal nature and is to act as a deterrent, reconciliation is also given a prominent position due to the peace and security approach of the AU.[19] If the ICLS is to advance the AU's institutional aims and directions, we need to be clear about what those aims and directions are. The following section explores the AU's institutional ideology to identify its overall aims to help understand the role of the ICLS in achieving them.

4 The African Union's ideology and the centrality of peace and security

Given the requirement for the Court to promote sustained peace, security and stability, while simultaneously promoting justice and human rights,[20] there is an ideological link missing which needs to be addressed. One

15 Preamble of the Malabo Protocol.

16 As above.

17 As above.

18 As above.

19 See section 3 below.

20 Preamble of the Malabo Protocol.

of the key rationales for the establishment of the AU was to address the peace and security challenges across the continent, which its predecessor organisation, the Organisation of African Unity (OAU), was unable to.[21] Or, as Murithi explained, it is within this context that one should view the AU and what it is trying to achieve,[22] making it necessary to explore the institutional approach and conceptualisation of peace and security initiatives, to find out how and why criminal prosecutions are included and how they can contribute to the regional and international systems. A comprehensive study of the historical evolution of the AU is beyond the scope of this chapter, instead, a brief overview is presented to contextualise the priorities and approaches adopted by the AU to help situate the raison d'être of the ICLS.

The AU was established to address the inadequacies of its predecessor organisation. The OAU was partly based on the rationale of uniting the continent in its fight against colonialism, and later the apartheid systems in Southern Africa and South Africa.[23] The driving force behind this unification was a commitment to Pan-Africanism which sees African solidarity as the key to development and growth on the continent.[24] According to Abass, this link to anti-colonialism and desire to help African states achieve independence sustained its credibility 'yet, its unifocal commitment to that goal inexorably masked the growing culture of repression and violations of Africans' human rights in most independent African countries'.[25] As the OAU was ill-equipped to deal with the numerous conflicts that erupted across the continent following independence, the Mechanism for Conflict Prevention, Management and Resolution was set up but, for a variety of reasons, was hampered from being able to provide any real response of note to the gross human rights violations and conflicts.[26] Due to states' disillusionment with the OAU's inability to address continental security challenges and the reliance on the international community's help, which was not always forthcoming, alternatives were sought. A rethinking of the priorities for the continental organisation led to the decision to replace the OAU.

21 Preamble of the AU's Constitutive Act

22 T Murithi 'The role of the African Peace and Security Architecture in the implementation of article 4(h)' in D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2014) 141-2.

23 Article II(1) of the OAU Charter.

24 As above.

25 A Abass 'African Peace and Security Architecture and the protection of human security' in A Abass (ed) *Protecting human security in Africa* (2010) 249.

26 M Muyangwa & MA Vogt 'An assessment of the OAU Mechanism for Conflict Prevention, Management and Resolution, 1993-2000' *International Peace Academy* (2000).

Numerous proposals were put forward including for a United States of Africa, similar to the United States of America, championed by Muammar Gadaffi.[27] However, there were various concerns over the proposal and the required relinquishment of sovereignty, particularly as many states had only recently re-gained their independence. Instead, an agreement was reached to set up an organisation, still guided by Pan-Africanism, for which the purpose was to create greater unity and solidarity amongst African States and people while simultaneously 'defend[ing] the sovereignty, territorial integrity and independence of its Member States'.[28] Therefore, 'the AU may be considered as the contemporary repository of the ideals of the Pan-African movement'.[29]

Established by treaty in 2000, the AU was officially inaugurated in 2002 to 'take up the multifaceted challenges that confront our continent and peoples'.[30] Given that decolonisation was no longer of central concern,[31] the AU concentrated on peace and security and its associated matters.[32] This approach continues to drive the organisation today as it is understood that development is contingent on peace and stability. The organisation links peace, security and stability to socio-economic conditions, and tries to utilise the associated measures and initiatives to reinforce each other. The result is a broader understanding and conceptualisation of what is encompassed by peace, security and justice. Furthermore, the importance placed on sovereignty and independence helps contextualise the strong push-back by the AU and African states to perceived intervention by outside States.[33]

27 It should be noted that Pan-Africanism and the notion of a united Africa predates 1999 (see the writings of former Ghanaian President Kwame Nkrumah, as well as those of WEB du Bois) but in terms of what form the replacement organisation of the OAU should take, it was Gadaffi who proposed a United States of Africa during the Sirte Summit in 1999.

28 Article 3(b) of the AU's Constitutive Act.

29 AA Yusuf *Pan-Africanism and International Law* (2014) 48.

30 Preamble of the AU's Constitutive Act.

31 Although there were internal disputes about succession – Sudan and Morocco and Western Sahara.

32 Preamble and art 3 of the AU's Constitutive Act sets out the AU's objectives.

33 Decision on the implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction. Decision Assembly/AU/Dec. 213 (XII), 4 February 2009, adopted by the Assembly at its 12th Ordinary Session, Addis Ababa, Ethiopia, February 2009.

4.1 The African Union's concept of justice and accountability

African states and the AU continually commit themselves to fighting impunity.[34] Yet, many question the authenticity of the commitment, especially through the adoption of the Malabo Protocol.[35] This chapter argues that this scepticism demonstrates an inadequate understanding of the organisational aims, objectives and programmes of the AU and its conceptualisation of justice, reconciliation, peace and security. However, it does not disregard all concerns over the genuineness of certain states to end impunity. A more accurate depiction is that the AU and states are not resistant to criminal prosecutions, rather it is a matter of timing. This is reflected in the debates surrounding the arrest warrant issued against Omar al Bashir and the referral of Libya to the ICC.[36] Due to the varied issues surrounding conflict resolution and post-conflict reconstruction, judicial measures can further complicate such dynamics.[37] While not excusing the inadequate and sometimes stalled efforts of the AU,[38] one should not forget that the AU is a young institution still finding its identity while operating with limited capacity and capability to address a plethora of justice and peace and security issues. At the same time, the organisation is trying to work within the international system alongside the often (real and perceived) marginalisation of their efforts and preferred approaches.[39]

34 Preamble of the AU's Constitutive Act; Preamble of the Malabo Protocol.

35 S Allison 'AU members decide this week on whether leaders accused of serious crimes by the African Court will get immunity' *ISS* 24 June 2014 https://issafrica.org/iss-today/think-again-at-the-new-african-court-will-power-mean-impunity (accessed 20 June 2017).

36 Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Addis Ababa, July 1-3, 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, at 5; C Jalloh, D Akande & M du Plessis 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 5; M Ssenyonjo 'The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders' (2013) 13 *International Criminal Law Review* 385 at 395.

37 Interview with an African State Official on 11 November 2015.

38 PD Williams 'Keeping the peace in Africa: Why "African" solutions are not enough' (2008) 22 *Ethics & International Affairs* 309.

39 I Lamloum 'African mediators in Libya as NATO hits tanks' *The Age* 10 April 2011 http://www.theage.com.au//breaking-news-world/african-mediators-in-libya-as-nato-hits-tanks-20110410-1d9ip.html (accessed 21 April 2017); D Tladi 'Security Council, the use of force and regime change: Libya and Cote d'Ivoire' (2012) 37 *South African Yearbook of International Law* 22; MC Bassiouni 'The NATO campaign: An analysis of the 2011 Intervention' in MC Bassiouni (ed) *Libya: From repression to revolution: A record of armed conflict and international law violations 2011-2013* (2013); M Kersten 'Between justice and politics: The ICC's intervention in Libya' in C De Vos, S Kendall & C Stahn (eds) *Contested justice: The politics and practice of*

When it comes to justice, the AU's view is that legitimate justice on the continent necessitates African ownership and requires more than criminal prosecutions and retribution to be achieved.[40]

Over the years, a number of key AU reports have sought to develop a conceptual approach to justice as a direct result of conflicts, accountability initiatives and developments at the national, continental and international level. These include: The Report of the African Union High-Level Panel on Darfur (Mbeki Report);[41] Policy on Post-Conflict Reconstruction and Development (PCRD policy);[42] Panel of the Wise Impunity Report (Impunity Report);[43] and the African Transitional Justice Policy.[44] While none are legally binding instruments under international law, their value is in the persuasive nature of their recommendations, as well as evidencing the policy and institutional approach taken. As part of the AU structure, and as the ICLS has a 'pivotal role' in advancing the institutional aims, these documents should be read alongside the Malabo Protocol aims and objectives as they make up part of the background and context to establishing the ICLS.[45] Thereby a more complete picture as to its intended aims, objectives and approach to criminal justice will be achieved.

From studying the AU policy documents and report, it appears that the organisation adopts an approach broader than retributive criminal prosecutions, preferring to adopt a Transitional Justice approach. Which is described as,

> the ways countries emerging from periods of conflict and repression address large scale or systematic human rights violations so numerous and so serious

International Criminal Court interventions (2015).

40 African Union *Report of the African Union: High Level Panel on Darfur (AUPD)* AU Doc PSC/AHG/2(CCVII) (29 October 2009) 20 (Mbeki Report) http://www.africalegalaid.com/download/human_rights_instruments_and_treaties_in_africa/Report_of_the_African_Union_High_Level_Panel_on_Darfur_The_Quest_for_Peace_Justice_and_Reconcilation_October_2009.pdf (accessed 30 June 2017); Author interviews of African State and AU Officials May-June 2015.

41 As above.

42 African Union *Policy on post-conflict reconstruction and development* (PCRD policy) http://www.peaceau.org/uploads/pcrd-policy-framwowork-eng.pdf (accessed 30 June 2017).

43 African Union Panel of the Wise 'Peace, justice and reconciliation in Africa: Opportunities and challenges in the fight against impunity' (2013) (Impunity Report) https://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_peacejusticeafrica.pdf (accessed 30 June 2017).

44 Transitional Justice Policy (n 7).

45 Article 31 of the United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol 1155, p 331 on the Interpretation of Treaties.

> that the normal justice system will not be able to provide an adequate response.[46]

To put it differently transitional justice is 'an umbrella term for approaches to deal with the past in the aftermath of violent conflict or dictatorial regimes'.[47] The key feature being its context-specific approach. There may not have originally been a specific transitional justice theoretical framework, but this has not stopped the term and overall concept being utilised in numerous situations of gross violations of human rights. The purpose and focus may be context-dependent, but there are key aims found throughout including: 1) the recognition of the dignity of individuals; 2) the redress and acknowledgement of human rights and other such violations; and 3) the aim to prevent them happening again.[48]

Other scholars have expanded upon this and state that transitional justice must provide: truth; a public platform for victims; accountability and punishment; the rule of law; compensation for victims; institutional reform; long-term development; and reconciliation and public deliberation.[49] These are generally compatible with the purpose and aims of criminal prosecutions. However, the one key feature that transitional justice accounts for which ICL and international criminal justice generally do not, is the ability to delay prosecutions and utilise alternative methods through which to achieve its aims and purpose. The approach adopted focuses on four aspects, which are not seen as alternatives: criminal prosecutions, truth seeking initiatives, reparations and reform of law and related institutions. One of the strengths of transitional justice is its call for the analysis of the political, legal and social conditions before determining what is appropriate and at what stage. It seeks to move away from the cookie cutter approach, seeks the broadest inclusion possible and at times it may be 'the most meaningful [way] of redressing massive human rights violations [that] do not fit with conventional concepts of accountability'.[50]

For the AU, it is a requirement that for justice to contribute to peace and security it needs a broader conceptualisation than under strict ICL approaches. This is most likely a response to experiences to date where, despite being a stated aim of the Special Court for Sierra Leone and the

46 International Centre for Transitional Justice 'What is transitional justice?' https://www.ictj.org/what-transitional-justice (accessed 31 January 2017).

47 S Buckley-Zistel et al 'Transitional justice theories: an introduction' in S Buckley-Zistel et al (eds) *Transitional justice theories* (2014) 1.

48 International Centre for Transitional Justice (n 46).

49 D Crocker as cited by S Buckley-Zistel et al (n 47) 4-5.

50 International Centre for Transitional Justice (n 46).

International Criminal Tribunal for Rwanda, reconciliation was ultimately never fully realised.[51] Instead, a more holistic approach of interlinking reconciliation and peace as concepts is used to achieve the broader scope. The AU has linked peace and security to justice and reconciliation,[52] with the requirement for all three emphasised repeatedly by the AU, but at no time have they directly advocated for impunity. In the PCRD policy, human rights, justice and reconciliation are joined and justice is defined as the fair application of the law which is accessible to all, achieved by a capable, appropriate and efficient system.[53] The policy further grants ownership to the respective state's population by requiring that the society itself determines the decision on whether restorative and/or retributive justice should be pursued.[54] The imperative being for a context-based approach.[55] The Mbeki Report, provides the linkages through its categorising peace, justice and reconciliation as the 'three principal pillars to the resolution of this [the Darfur] crisis'.[56] For the AU, justice is not only criminal prosecutions, it requires a balanced approach to peace, justice and reconciliation.[57] This is particularly relevant for understanding how the organisation is building its institutional capacity to address justice, peace and security. Ultimately, balancing justice with reconciliation and peace is preferred, even in situations where compromises and trade-offs are required.[58] For those instances where reconciliation was privileged over prosecutions, it was not with the intended aim of advancing impunity, but rather strengthening the institutions that will help reduce impunity in the long term.[59]

For the Panel of the Wise, accountability policies and approaches are a way to 'entrench African values in international accountability mechanisms; and harmonize the global search for peace, justice and

51 Preamble of UN Security Council, Security Council resolution 955 (1994): Establishment of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc S/RES/955 (1994); in terms of the individual state beliefs see the views expressed by Russia and Pakistan, UNSC 3453rd Meeting, Tuesday 8 November 1994, UN Doc S/PV. 3453 2 and 10 respectively; contrasted with the position of Czech Republic UNSC 3453rd Meeting, Tuesday 8 November 1994, UN Doc S/PV. 3453 6-7; Preamble of the UN Security Council, Resolution 1315 (2000): Establishment of a Special Court for Sierra Leone, 14 August 2000, UN Doc S/RES/1315 (2000).

52 Mbeki Report (n 40) 2.

53 PCRD policy (n 42) 25-6.

54 PCRD policy (n 42) 24.

55 As above.

56 Mbeki Report (n 40) 3.

57 Mbeki Report (n 40) 85.

58 Transitional Justice Policy (n 7) 38.

59 Impunity Report (n 43) 3.

reconciliation'.[60] While acknowledging the institutions created to address reconciliation and justice are challenges for Africa, they should adopt African principles and norms when in line with international and Regional Economic Communities' (RECs) human rights treaties.[61] The advocating for African norms and principles in efforts to end impunity is a response to the increase in external actors and institutions mediating efforts to address justice and reconciliation, 'some of which are not perceived to be fair, impartial, and just'.[62]

The importance of addressing the underlying causes of conflict is also evident throughout the main policy documents related to peace, security and justice.[63] This aims at addressing socio-economic issues and rights as far as they are linked to the conflict and overall peace and stability.[64] It also seeks to reinforce the AU's function to promote 'social justice to ensure balanced economic development'.[65] This move away from retributive justice is concretised through linking reconciliation with accountability and responsibility, but again this is not done at the expense of the fight against impunity. Whenever there are national transitional justice processes, and African norms applied, both must adhere to regional and international norms and standards.

Alongside the above is the constant reference to ownership at the local, national, regional and continental levels. This speaks to the AU and African State's perception that, despite being in the frontline during conflicts, it is unable to take a lead or have its approaches deferred to, despite this being an institutional aim.[66] The AU is not oblivious to its limitations and capacity constraints, and as identified by Paul Williams, the type of ownership wanted is not that of the 'controlling authority but more akin to having a stake in the program'.[67] He bases this on reference

60 Impunity Report (n 43) 63.

61 Impunity Report (n 43) 61-62.

62 Impunity Report (n 43) 62. For an example see PD Schmitt 'France, Africa, and the ICC: The neocolonialist critique and the crisis of institutional legitimacy' in KM Clarke, AS Knottnerus & E de Volder (eds) *Africa and the ICC: Perceptions of justice* (2016).

63 Transitional Justice Policy (n 7) 10(ii), 23, 33 48, 53(iii); PCRD policy (n 42) viii; Mbeki Report (n 40) 23.

64 Transitional Justice Policy (n 7) 67-70.

65 Article 4(n) of the AU's Constitutive Act.

66 Article 3(d) of the AU's Constitutive Act, placing the AU at the forefront of conflict and peace and security management and promoting and defending African common positions; art 2(1) African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (July 2002) (PSC Protocol).

67 Williams (n 38) 315.

to external actor's partnerships in the impunity, justice and transitional justice policies.[68] The AU seeks to rectify their frustration with the lack of ownership by utilising the Pan-Africanism ideology of its heritage.[69]

Lastly, accountability is accepted as a national and international law obligation, but the understanding of it goes beyond the prosecution and investigation of serious crimes.[70] There is no one size fits all approach, instead preference is for a cognisant response to the needs and aspirations of national assessments and citizen participation while remaining in compliance with international standards.[71] Yet, while acknowledging legal obligations these should not be at the expense of creating complementary sequencing mechanisms.[72] This is to balance transitional justice goals and obligations with the broader policy objectives such as ending the conflict, restoring public order, and pursuing inclusive development.[73]

The AU has quite rightly found that peace, justice and reconciliation are interlinked and cannot be separated in post-conflict situations. As demonstrated above, this has coloured the understanding and policy approach of the institution's organs and bodies. This underlying assumption is reflected in the Peace and Security Council's (PSC) observation that for durable peace to be realised there needs to be both accountability and reconciliation.[74] Moreover, the AU is seeking to address peace, security and stability throughout the continent to promote progress in its economic and social development.[75] There is a desire being demonstrated by the AU and its initiatives to address a wide variety of factors and problems to promote stability. This includes peace and security through democratic good governance and the rule of law.

Overall, the AU notion of justice and accountability falls into a transitional justice approach, whereby it goes beyond retribution to a more holistic, balanced approach where justice and reconciliation are prioritised. While accountability is not a choice but a national and international obligation, it does not prevent alternative complementary sequenced

68 As above.

69 This frustration was evident in the interviews with State and AU officials between May-June 2015.

70 Transitional Justice Policy (n 7) 77, also see 17 and 19.

71 Transitional Justice Policy (n 7) 19, 33, 77.

72 Transitional Justice Policy (n 7) 38.

73 As above.

74 Mbeki Report (n 40) 2.

75 African Union 'Agenda 2063: The Africa we want' http://archive.au.int/assets/images/agenda2063.pdf (accessed 30 June 2017).

processes. Peace and security is linked to justice and reconciliation to facilitate a contextualised approach in addressing the direct crimes and underlying causes of conflict. Furthermore, ownership and African values and norms (in conformity with international law) are promoted, where the needs and aspirations of the state and citizens are realised through active citizen participation in the process.

Thus, the AU organs, bodies and associated programmes and structures through which to address impunity and justice are logically more than judicial mechanisms. The PSC Protocol grants the 'primary responsibility for promoting peace, security and stability in Africa',[76] to the AU. This should be read in terms of the principle of subsidiarity as it refers specifically to the relationship between the AU and the Regional Economic Community and Regional Mechanisms (REC/RMs).[77] Yet international law requires states and regional organisations to comply with United Nations Charter (UNCh) obligations and the UNSC has primacy over the maintenance of international peace and security.[78] As article 16 of the PSC Protocol sets out the relationship between the AU and the REC/RMs, one can either adopt the reasoning of Abass: that the AU is not seeking to conflict with the primacy for peace and security afforded to the UNSC under article 24(1) of the UNCh;[79] or more accurately look to article 17 of the PSC Protocol which recognises UNSC primacy. Thus, contextualising the PSC primacy imposes a hierarchy between the PSC and the REC/RMs only, as reflected in the memorandum of understanding on cooperation between the AU and REC/RMs.[80] This is possible due to the organisations' independent legal personality and ability to conclude agreements provided they do not conflict with international law, most obviously with article 24(1) of the UNCh. Accordingly, as membership of the highest decision-making bodies within REC/RMs and AU are held by heads of state and government, they are legally permitted to agree to such a hierarchy. Bringing in PSC Protocol articles 16, 17 and the Preamble enables the provisions to be legally sound and not in conflict with the

76 Article 16 of the PSC Protocol (n 66). This was reiterated in art IV(2) in the Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa.

77 Article 16 of the PSC Protocol (n 66), Relationship with Regional Mechanisms for Conflict Prevention, Management and Resolution.

78 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI chap VIII deals with regional organisations, and art 24 grants the UNSC 'primary responsibility for the maintenance of international peace and security'.

79 Abass (n 25) 257.

80 Article IV(iii) and (iv), and art XX(i).

UNCh. Consequently, limiting the focus of the AU's work on justice, and by focusing solely on the regional court in isolation from the greater peace and security work of the AU, is misrepresentative of the initiative and also of continental developments. This argument requires exploration of the African Peace and Security Architecture (APSA) and the African Governance Architecture, to help explain what the potential role and impact the ICLS could have.

4.2 The African Governance Architecture

The African Governance Architecture (AGA) is based on the African Charter on Democracy, Elections and Governance (ACDEG). The AGA complements APSA as the 'policy approach aimed at defining the necessary norms, institutions and processes that facilitate policy and programme convergence on Governance amongst AU Member States to accelerate deeper integration'.[81] It has five thematic areas, one of which includes transitional justice mechanisms. However, due to the AGA's underdevelopment when compared to the APSA, no further consideration will be given to it..[82]

4.3 The African Peace and Security Architecture

Unlike the AGA, APSA is a lot more developed and explored in the literature. The five pillars[83] of the APSA are: the Peace and Security Council (PSC),[84] the Commission,[85] the Panel of the Wise (PoW),[86] the

81 AU 'Framework of the African Governance Architecture' https://au.int/en/aga (accessed 28 June 2017).

82 The AGA only entered in to force in February 2012.

83 The classification of the pillars is based on how the AU itself differentiates between the pillars of APSA and other bodies and mechanisms which are considered components of APSA. The author's reliance on this classification, and the exclusion of the AU Assembly, is based on the following reasoning: the PSC can take, and does take, decisions (and sits) at the head of state level twice a year as per art 8(2) PSC Protocol (which does happen in practice). The decisions the Assembly makes (during the twice-yearly summits) on PSC matters in reality is related to the report of the PSC where it rubber stamps all the decisions and recommendations that had been made by the PSC at all levels. This is also reflected by the fact the PSC is a 'standing-decision making organ' (art 2(1) PSC Protocol (n 66)) and is permitted to sit at the heads of state level itself. While the Assembly is the one body mandated to take art 4(h) decisions for example, this does not mean it is a pillar of APSA.

84 Article 6 of the PSC Protocol (n 66) sets out its functions, and art 7 PSC Protocol lays out its power.

85 Article 10.

86 Article 11.

Continental Early Warning System (CEWS),[87] the African Standby Force (ASF),[88] and the Peace Fund.[89] APSA's focus is 'built around structures, objectives, principles and values, as well as decision-making processes relating to the prevention, management and resolution of crises and conflicts, post-conflict reconstruction and development'.[90] This is an extensive mandate requiring a broad approach as reflected in the notion of justice and the overlap with peace and reconciliation.

Despite lacking inclusion in the AU's Constitutive Act, the APSA has gained prominence through the prolific work of the PSC pursuant to article 5(2) of the AU's Constitutive Act. The Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol) was adopted and within which the current APSA mechanisms emerged.[91] The PSC Protocol was the culmination of concerns over the increasing number of conflicts and the negative impact this has on socio-economic development and the aspiration of African states to 'enhance our capacity to address the scourge of conflict … and to ensure that Africa, through the African Union, plays a central role in … peace, security and stability'.[92] As the collective security arrangement and 'standing decision-making organ for the prevention, management and resolution of conflicts', the PSC's work is key to addressing impunity.[93]

Given that the conceptualisation of justice is broader than prosecutions only, and the links to reconciliation and peace, the work of the ICLS will inevitably be part of APSA and the PSC's efforts. In fact, it will be shown that for the ICLS to effectively contribute to justice and to understand its evolution and potential, it is paramount to place it within APSA due to the supporting role the court can play.

To help APSA 'promote peace, security and stability' within Africa, roadmaps have been adopted.[94] The focus of the next section will be

87 Article 12.

88 Article 13.

89 Article 21.

90 African Union 'African Peace and Security Architecture: African Union's blue print for the promotion of peace, security and stability in Africa' http://www.peaceau.org/uploads/african-peace-and-security-architecture-apsa-final.pdf (accessed 28 June 2017).

91 Article 2. This protocol also provides the legal basis for APSA.

92 Preamble of the PSC Protocol (n 66).

93 Article 2 of the PSC Protocol (n 66).

94 'African Peace and Security Architecture Roadmap 2011-2013' and 'African Peace and Security Architecture Roadmap 2016-2020' (APSA Roadmap 2016-2020).

on the latest 2016-2020 roadmap and any future reference to the APSA Roadmap will relate to this, unless otherwise specified.

4.3.1 African Peace and Security Architecture Roadmap 2016-2020

The APSA Roadmap reflects the position that peace, security and development are linked which has permeated throughout the AU's approach and policies. Most recently Agenda 2063 aims to transform the socio-economic situation of Africa,[95] while the PCRD is used by the Roadmap to conceptually link justice and place it within APSA.[96] Furthermore, the Roadmap attempts to reflect the institutional ideology of Pan-Africanism, improve self-reliance and strengthen ownership through consensus and synergy between the AU and the REC/RMs.[97] Once again, ownership and agency appear to be a driving force behind the initiatives and frameworks adopted.

The Roadmap identifies various security issues contributing to instability, including the notion of neighbourhood effects and the negative impact on state fragility.[98] Hence, part of APSA's strategic priorities is to engage with conflict prevention through 'addressing the root, proximate and structural causes of conflict'.[99] Regional concerns affecting stability include narcotics, piracy, human trafficking and small arms proliferation. One preventive method by which to address these is through legal enforcement mechanisms and strengthening national, regional and continental legislation. Due to the reliance on cooperation between states to effectively combat these issues it makes sense for regional and continental legislation to be adopted. The benefit of this is a lack of dependence on bilateral agreements, while simultaneously imposing a continental minimum standard of cooperation. From the above, the need for the ICLS to expand its jurisdiction beyond the core international crimes is evident to address the reality of conflict and instability issues. This is an example of how the ICLS can be utilised to assist the APSA objectives.

95 AU 'Agenda 2063' at 2.

96 Roadmap (n 94) 39.

97 Roadmap (n 94) 10.

98 Roadmap (n 94) 19.

99 Roadmap (n 94) 23.

5 The International Criminal Law Section of the African Court and the African Peace and Security Architecture

The emphasis placed on peace and security within the AU system is rooted in the institutional ideology and developments within the continent which have shaped the understanding of and preferred approach to justice. The sections below focus on how and why the ICLS should be situated within APSA and the Court's contribution to regional peace, security, justice and ICL.

5.1 The role of the PSC under the Malabo Protocol

Under the Malabo Protocol the PSC is able to refer situations to the Court's Prosecutor.[100] The mandate and role of the PSC makes this referral ability important to peace, justice and reconciliation as under the AU's Constitutive Act states can request intervention to 'restore peace and security',[101] or the AU can exercise its right to intervene in situations of grave concerns.[102] With the addition of a PSC referral, the chance of a situation coming before the court may increase. A state request is generally uncontroversial and as the PSC has APSA mechanisms at its disposal, the ICLS could gain relevance as a possible judicial mechanism. Furthermore, other APSA bodies can make recommendations to the AU Assembly and PSC on how to address conflict situations. For example, the Mbeki Report called for the establishment of a hybrid court in Sudan,[103] whereas in future the ICLS could fulfil such a role.

An article 4(h) intervention is controversial and is considered to be military in nature as reflecting the understanding of the drafters and State concerns at the time of adoption.[104] Yet, recently the Assembly has shown willingness to expand this understanding of intervention to encompass prosecutions. For example, the Assembly's decisions related to the prosecution of Hissène Habré make reference to article 4(h) as reflecting

100 Article 46F of the Malabo Protocol.

101 Article 4(j) of the AU's Constitutive Act.

102 Article 4(h) of the AU's Constitutive Act.

103 Mbeki Report (n 40) 25.

104 See D Kuwali 'The rationale for Article 4(h)' in Kuwali & Viljoen (n 22); D Kuwali 'The meaning of "intervention" under article 4(h)' in Kuwali & Viljoen (n 22). B Kioko, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 852 *International Review of the Red Cross* 807.

its competence to deal with the matter,[105] and of its commitment to fight impunity.[106] What's more, the Report of the Committee of Eminent African Jurists on the Case of Hissène Habré concludes the Assembly has the power to establish an ad hoc tribunal on the basis of articles 3(h), 4(h) and (o), 9(1)(d) and 5(1)(d) of the AU's Constitutive Act.[107] Unfortunately, no further explanation is provided. When discussing the AU's position on Universal Jurisdiction, reference is made to article 4(h) as reflecting the organisation's commitment to fight impunity.[108] Similarly, in relation to the Assembly's decisions on the ICC, the fight against impunity is reaffirmed via article 4(h).[109] Thus, taken together with the development of the APSA, the expanded notion of justice and the emergence of the ICC and the ICLS, there may be a case for interpreting this intervention to include judicial and other transitional justice initiatives. This is especially true if the AU links peace and security to justice and reconciliation. Military intervention would still be an option, particularly since the AU has expressed concern over the practicalities of investigations and prosecutions during ongoing conflicts,[110] something the International Criminal Tribunal for the Former Yugoslavia had to overcome. A sequencing approach may be appropriate here whereby military action to halt a conflict or escalation of the situation is followed by criminal prosecutions based on a transitional justice assessment. Arguably, the relevance of the intervention is reduced given the PSC's ability to refer situations to the ICLS which could be used instead of military intervention as a means to address the situation and contribute to deterrence. However, ICL, as implemented by international courts and tribunals, suffers from a lack of enforcement and reliance on state cooperation, negatively impacting on any deterrence argument put forward.

As part of the APSA the PSC is empowered to undertake 'any other function as may be decided by the Assembly', including peace building activities during and after conflicts.[111] Therefore, the PSC can impose

105 AU Assembly, Decision on the Hissène Habré Case and the African Union, Doc Assembly/AU/3 (VII), AU Doc Assembly/AU/Dec.127 (VII) para 3.

106 Assembly/AU/Dec.272(XIV) para 2; Assembly/AU/Dec.297(XV) para 2; Assembly/AU/ Dec.340(XVI) para 4; Assembly/AU/Dec.371(XVII) para 2; Assembly/AU/Dec.401(XVIII) para 3; and Assembly/AU/Dec.546(XXIV) para 2.

107 Para 23.

108 For example, AU Assembly, Decision on the Abuse of the Principle of Universal Jurisdiction Doc EX.CL/640(XVIII), AU Doc Assembly/AU/Dec.335(XVI) para 2.

109 For example, AU Assembly, Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII), AU Doc Assembly/AU/Dec.334(XVI) para 2.

110 Impunity Report (n 43) 11.

111 Article 14 PSC Protocol (n 66).

obligations on African states related to justice, peace and reconciliation, increasing the likely prevalence of transitional justice and the ability to address a variety of objectives including criminal prosecutions before the ICLS.

Through placing the ICLS within the APSA it creates possibilities for the supporting bodies to complement and support its work. A radical proposal for increasing the Court's deterrence and increasing its ability to fight impunity would be to utilise the ASF to assist in enforcing arrest warrants. This would create an enforcement mechanism never before seen by an international court as the ASF is not a peacekeeping force but a peace support force,[112] such forces have played a role in peace-making/peace-enforcement (see work of AMISOM). The concerns over using UN peacekeepers in support of the ICC's work are not automatically relevant, especially with regard to the independence of the international court argument. However, the proposal does raise numerous legal questions: whether PSC authorisation is required every time the ASF is used; and who has ultimate responsibility for the troops conduct? These issues deserve further research and mechanisms to prevent political abuse of the system. It will also require robust accountability mechanism over the ASF to ensure that they do not commit crimes themselves.[113] While states may be wary to let the ASF be used in such a capacity given the potential for political manipulation, it does bear further research to assess its viability as ICL lacks enforcement.

112 Article 13(3) of the PSC Protocol (n 66).

113 As seen with peacekeepers, who have been accused of committing a host of crimes in the situations deployed. D Smith & P Lewis 'UN peacekeepers accused of killing and rape in Central African Republic' *The Guardian* 11 August 2015 https://www.theguardian.com/world/2015/aug/11/un-peacekeepers-accused-killing-rape-central-african-republic (accessed 28 June 2017); SM Patrick 'The dark side of UN peacekeepers' *Newsweek* 8 August 2015 http://www.newsweek.com/why-are-un-peacekeepers-still-sexually-abusing-children-361065 (accessed 28 June 2017); UN 'UN peacekeepers exempted from war crimes prosecution for another year' *UN News Centre* 12 June 2013 http://www.un.org/apps/news/story.asp?NewsID=7402#.WVdveRPyveQ (accessed 28 June 2017). For how the AU approaches the issue, see African Union 'African Union Policy on Prevention and Response to Sexual Exploitation and Abuse for Peace Support Operations' (last updated 3 December 2018) http://www.peaceau.org/en/article/african-union-policy-on-prevention-and-response-to-sexual-exploitation-and-abuse-for-peace-support-operations (accessed 30 May 2022).

5.2 Complementary purposes

5.2.1 Prevention, resolution and stability to address development

The APSA's long term goal is to promote stability that may enable socio-economic development and thus prevent conflict emergence and relapse. The jurisdictional scope of ICLS adds a complementary feature by addressing a broader range of crimes, including those the PSC identified as contributing to fragility and hence some underlying causes of conflict. This simultaneously fulfils the court's aim to promote justice and human and peoples' rights, and address the root causes contributing to instability and conflicts. The impact that transnational and treaty-based crimes have on overall peace and security and conflict is often under-acknowledged but even the ICC Office of the Prosecutor has recognised this.[114] Furthermore, national systems may not be equipped to deal with these types of prosecutions due to the cross-border elements requiring cooperation and the potential for corrupt officials creating hurdles. As the ICC is not able to address these crimes the AU has had to seek an alternative solution.

Adopting the approach of Agenda 2063 and its African centralism in outlook and aim, the objective is to address continental concerns through unified and harmonised approaches helping eradicate conflict and crimes at the domestic and regional level. While undoubtedly lofty ambitions, they have been an important influence over the AU's approach as seen with the inclusion of transnational crimes under the Malabo Protocol. The definitional basis of these crimes stem from existing regional and international instruments. The adoption of a regional criminal court applying consistent definitions will further the aim of the AU in unifying and harmonising its approach and laws. While the Malabo Protocol has expanded on some of the definitional elements, this has been done in a manner which further reflects the needs and context of African states and situations. A brief overview of the crimes helps demonstrate this point.

The crime of unconstitutional change of government is a product of the ACDEG as a response to African leaders amending constitutions to extend their rule, disregarding term limits, and overthrowing democratically elected governments.[115] Piracy caught the attention of the media in 2005 due to activity off the coast of Somalia,[116] while Nigeria and

114 OTP Strategic Plan 2016-2018 (July 2016) 30.

115 For example, Coté d'Ivoire in 2010, Central African Republic in 2003 and 2013, Gambia in late 2016, Guinea Bissau in 2009 and 2012, Madagascar in 2009, Mali in 2012, and Mauritania in 2005 and 2008.

116 'Piracy "on the rise" off Somalia' *BBC News* 8 November 2005 http://news.bbc.

the Delta region have long experienced piracy problems.[117] The definition of terrorism has a historical context in the approach adopted and is based on the OAU Convention on Prevention and Combating Terrorism, with the exclusion of self-determination acts and those permitted under International Humanitarian Law (IHL). This goes back to the political context at the time of the OAU Convention's adoption as decolonisation struggles were still being waged and it was not the desire of the OAU to criminalise or condemn self-determination groups.

Another destabilising presence has been the use of mercenaries across Africa.[118] The Malabo Protocol has opened the possibility to hold not just individual mercenaries liable but also those involved in their training and corporations.[119] Corruption is not unique to Africa yet it is having a huge impact on stability and peace. Numerous corruption scandals have been exposed and opportunities for corruption are greatly increased during conflicts.[120] However, the political concession of including the immunity provision limits the scope of this crime where corruption involved at least one state official.[121] Senior state officials and heads of state and government have now been protected from prosecution leading to the possibility of one-sided prosecutions of citizens or lower-level officials and corporations. Furthermore, it appears to be inconsistent with the original intentions behind the Convention on Preventing and Combating Corruption who sought to remove immunity before domestic courts, as under article 7(5): '[S]ubject to the provisions of domestic legislation, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials'. While immunity before a domestic court is distinct from that before international courts, the removal of immunity related to corruption would be desirable before the continental court to prevent the negative impacts of corruption which the Convention seeks to end.

While money laundering can be linked to corruption, there are also various trafficking offences occurring across the region and member

co.uk/1/hi/world/africa/4415196.stm (accessed 03 January 2017).

117 'Piracy report says Nigerian waters the most deadly' *IRIN News* 27 July 2004 http://www.irinnews.org/report/50843/nigeria-piracy-report-says-nigerian-waters-most-deadly (accessed 3 January 2017).

118 Angola, Central African Republic, Democratic Republic of Congo and Equatorial Guinea.

119 Article 46C of the Malabo Protocol.

120 Kolawole Olaniyan identifies Equatoguinean, Nigerian and Angolan family members involved and benefiting from corruption in K Olaniyan *Corruption and Human Rights Law in Africa* (2014) Chap 3.

121 Article 46A bis of the Malabo Protocol.

states.[122] Finally, the illicit exploitation of natural resources has devastating consequences on wildlife, livelihoods, fuelling corruption, helping sustain conflicts and destabilising states.[123] Overall, the Malabo Protocol crimes have all been a priority or area of legislative attempts by the AU, helping place the ICLS in the context of furthering the objectives of the AU and not merely being anti-ICC.

A further aspect contributing to prevention and resolution is reflected in the inclusion of corporate criminal liability for the crimes. Many African conflicts are alleged to be fuelled or sustained by corporate entities and individual interests. There is no possibility for such liability ever coming before the ICC without a treaty amendment. Likewise, in most African states, especially those following a Civil Law tradition, such liability is not provided for or generally accepted. Through inclusion of such a criminal modality greater chances of addressing the facilitating environment are achieved while reflecting a truer representation of the crimes and situation. More importantly, the ability to consider the facilitating environment for international crimes, and the actors outside the immediate perpetrators, increase the likelihood of the AU's understanding of justice being met.

As one of the key objectives of the AU is to promote peace and security within the continent,[124] the Court is expected to contribute and promote peace and security through prevention. The ICLS's preventive mandate is through complementarity with the national, regional and continental institutions. Despite the questioning of courts as a preventive mechanism,[125] if there were serious consequences for violations of the crimes under the court's jurisdiction and supporting enforcement mechanisms in place, such as the ASF, this aim would have a greater

122 Trafficking in Drugs is of particular concern for West African states, specifically Guinea-Bissau. Trafficking in persons is of concern in East Africa.

123 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) http://postconflict.unep.ch/publications/UNEP_DRCongo_MONUSCO_OSESG_final_report.pdf (accessed 3 January 2017).

124 Art 3(f) of the AU's Constitutive Act.

125 J Klabbers 'Just revenge? The deterrence argument in International Criminal Law' (2001) 12 *Finnish Yearbook of International Law* 249; R Henham 'The philosophical foundations of international sentencing' (2003) *Journal of International Criminal Justice* 64; MC Bassiouni 'Perspectives on International Criminal Justice' (2010) 50 *Virginia Journal of International Law* 269; CW Mullins & DL Rothe 'The ability of the International Criminal Court to deter violations of International Criminal Law: A theoretical assessment' (2010) 10 *International Criminal Law Review* 771; G Fletcher 'The theory of criminal liability and International Criminal Law' (2012) 10 *Journal of International Criminal Justice* 1029.

chance of success. This is only made possible through inclusion in the APSA and the utilisation of all the available pillars.

5.2.2 Accountability and reconciliation

It cannot be ignored that the ICLS is only capable of dispensing criminal justice. For the Court's impact to be felt in terms of peace and security, states need to cooperate and help ensure the full range of crimes under its jurisdiction are utilised.

In terms of addressing accountability, the Court will never ensure full accountability. Limitations in capacity aside, like the international court the ICLS can contribute to overall accountability goals by working together with the national, regional and international levels. However, the ability to consider the facilitating environment-linked crimes, international crimes, and the actors outside the immediate perpetrators, may increase the likelihood of the AU understanding of justice being met. This would positively contribute to accountability and reconciliation as a more accurate representation of criminal liability and the situation may be achieved. The ICLS is the only permanent regional or international judicial mechanism at present that could address the expanded list of crimes. This is until the RECs/RMs grant such jurisdiction to their judicial bodies as envisioned in the Malabo Protocol.[126] This is the area in which the court has the greatest potential of contributing. Yet, the issues surrounding immunity needs to be addressed as many of the crimes include some form of state or state official complicity. If this is not addressed the ICLS will be constrained in its ability to contribute to accountability and justice, hindering the AU and APSA from discharging their respective duties and responsibilities.

For those crimes with a transnational component, the ICLS provides the possibility for prosecutions when there is a lack of suitable national forum or no bilateral extradition agreement exists. Together with the additional venue for trying international crimes outside of national courts, the court will greatly increase the chance of accountability within Africa if properly utilised.

The ICLS is able to contribute to reconciliation, as understood by the AU and APSA, through its adoption into the transitional justice sequencing approach. It provides the forum in which a broad range of crimes can be addressed while being able to strengthen the commitment to peace and security through its vision of criminal justice, when African states ratify the Malabo Protocol and domesticate the crimes. Its symbolic

126 Article 46H of the Malabo Protocol.

and real value is also in reducing the dependencies on the international court and system for addressing continental challenges. Yet, this is highly dependent on states living up to their legal, political and moral obligations and implementing AU decisions and instruments. It is not enough to take a passive role while maintaining that the AU is the institution which should be overseeing transitional justice efforts if one aspect of it, the court, is relegated to the side lines due to lack of member participation or utilisation.

5.2.3 Enhance capacity, ownership and Pan-Africanism

The wide scope of crimes, not addressed by the ICC or other international courts, when taken together with Agenda 2063 and the desire to limit international assistance, increases agency and ownership. Given this gap the ICLS becomes a tool through which the AU can achieve its objectives while promoting greater stability, peace and security throughout the continent.

As the AU's judicial mechanism African notions of justice in conformity with international law are advanced, helping states and the AU gain much needed agency and ownership over the process. This is done by incorporating the broader concept of justice and the inclusion of non-judicial mechanism to which the ICLS or REC/RMs Court can complement when the national system is unable to carry out the prosecutions.[127] Consequently, the ICLS is not the final stage in the pursuit for accountability and ending impunity, rather it should be seen as one of many elements which are to be utilised, as appropriate, post conflict.

There is also the possibility for weak or compromised judicial systems to be bypassed to fulfil prosecutorial obligations, while simultaneously enabling capacity development through African and regional expertise, without compromising on ending impunity. This capacity development is something currently missing in the international system. An AU court would be staffed by African nationals and invariably build capacity and expertise if staff are trained and supported properly, something sorely needed within the continent to truly achieve the Pan-African goals of the AU and the APSA. When the ICLS plays a central judicial role in the APSA, Africa will inevitably gain a greater stake in the initiatives, but this needs real commitment from the AU and its member states.

127 This was one of the impetus for the Habré trial and the recommendations included there.

6 Conclusion

The ICLS is in a unique position given it is a political organisation's judicial organ. The linking of peace, justice and reconciliation within the AU and the APSA creates a conducive environment for the ICLS to contribute to the continental system's development of regional international criminal mechanisms and institutional aims, as is expected of it. At the continental level, the Court provides an opportunity for the reinforcement of Pan-Africanism while offering an individual responsibility component to the continental judicial system which has been lacking. By perceiving the ICLS as one of many tools through which transitional justice can be implemented and justice achieved, the expectations of the court change. It is not expected to be the mechanism through which all gaps left by the national and international system are addressed. Instead, the Court is a permanent institution through which the sequencing approach proposed by the Transitional Justice Policy and other supporting documents can be fulfilled in terms of criminal justice. This can be done through its facilitation of quick access to a judicial mechanism when and if required, reducing reliance on international assistance, and the overarching goal of promoting peace and security.

Regarding the concept of justice, given the Court's aim of promoting justice it is vital that the AU and the ICLS are working on an agreed understanding. If not, there is potential for expectations to not be meet and disillusionment with both institutions. This will lead to a weakening in credibility of both the AU and the Court, negatively impacting ownership and reducing potential partnerships at the international level.

The ICLS is not an anti-ICC court in the sense of rejecting international criminal justice. The Court seeks ways to address the limitations placed on ICL's development and regional peace and security by not adopting an ICC-only approach. International law is not apolitical. The political landscape and context of individual states affects the extent to which treaty-based developments are undertaken as well as the direction of the law, provided it is permitted under international law. What we are seeing with the proposed African Court is the workings of a regional organisation which has been dissatisfied with certain aspects of the international system and its inability to address African-specific situations and is seeking to strengthen its own capacity and agency of itself and its members. It should moreover not be forgotten that despite the ICC being an independent judicial organ, supposedly free from political interference, in reality this has not been the case. The ICLS will be part of the judicial organ of the AU, and like the ICC, some aspects of political interference will creep in.

The job of the judges, and the true test of the AU's and African states' commitment to criminal justice and the ICLS will be in ensuring they do not exert undue influence over its workings.

It is hard to see how the politics of the day within the AU cannot but influence the legal approach and speed at which initiatives are undertaken. Yet, this does not automatically discredit and delegitimise the initiatives. If African states want their concerns over the international framework to be taken seriously and result in actual change, they need to demonstrate real commitment to their own regional initiatives, helping reduce dependencies, and addressing the criticisms and reasons for dismissing African initiatives. There cannot be superficial attempts to address accountability.

The Court's ability to assist in addressing the underlying root causes of conflict, beyond the core international crimes, may contribute to prevention and reconciliation. It also falls in line with a restorative rather than retributive conception of justice, which is more appropriate for the security and conflict related African cases. Thus, reducing the amount of new conflicts emerging and mass violations of human rights and ICL. If one accepts that there is validity in regional human rights systems and what they have to offer to the development of human rights law, it may be time to start looking to regional criminal courts in the same way. Provided the basic standard applied is that of ICL, there is potential for regional systems to develop jurisprudence and relevance beyond that of the ICC and advance the field. For now, the immunity provision of the ICLS should not act as a barrier and prevent a broader discussion.

7 The positive implications of the Malabo Protocol and the African Court: The exercise of 'judicial' self-determination by African states and the possibility of the new complementary system with the ICC

*Mitsue Inazumi**

Abstract

If the Malabo Protocol comes into force, the African Court of Justice and Human and Peoples' Rights will be able to exercise international criminal jurisdiction to prosecute and punish individuals responsible for certain international and transnational crimes. The purpose of this contribution is to highlight its positive implications and significance. The Malabo Protocol and the idea of the African Court have historical significance and rationale for Africa and they manifest the regionalisation of international criminal law. Wider jurisdiction than the ICC by covering 14 international and transnational crimes and also by holding corporate entities responsible is the result of the experiences of African states victimised by such crimes and having a history of coping with such crimes. The African Court is a manifestation of the 'Africanisation' (reflection of the experiences and value and *opinio juris* of African states) and the exercise of 'judicial' self-determination (prosecution and punishment of crimes in accordance with international law that African states elaborated on, through the international judicial organ that African states created themselves). The African Court could be a model for other regional organisations in creating a regional criminal court. It implies a new mechanism under the Principle of Complementarity composed of national, regional, and international levels, and we should explore the possibility of constructing a new comprehensive system in which the African Court and the ICC work together to end impunity in future.

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1 Introduction

On 27 June 2014, the African Union (AU) adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).[1] The Malabo Protocol is intended to reform the judicial organ of the AU by adding a new section to the African Court of Justice and Human and Peoples' Rights (ACJHPR, hereafter the African Court) which shall be the main judicial organ of the AU after merging the two preceding courts of the AU.[2] In accordance with the statute which is amended by the annex of the Malabo Protocol (hereafter the African Court Statute), the new court will have an International Criminal Law Section[3] exercising international criminal jurisdiction. If the Malabo Protocol comes into force, it will establish an African Court that can prosecute and punish individuals responsible for certain international and transnational crimes, thus tantamount to creating an international adjudicating body similar to the International Criminal Court (ICC).[4]

Although the establishment of a court with international criminal jurisdiction may contribute to ending impunity and promotes justice, the most common initial responses from scholars and commentators were negative and full of concerns. For example, many criticise the hidden political motivation to protect senior African officials by creating a regionally oriented criminal system as a way to avoid the ICC.[5] Others point out deficiencies such as the lack of effective mechanisms and of

1 AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 2014) (Malabo Protocol). See AU, Decision on the Draft Legal Instruments – Doc Assembly/AU/8(XXIII), AU Doc Assembly/AU/Dec.529(XXIII). For the text of the Malabo Protocol, see the AU's homepage https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (accessed 31 March 2021).

2 It will merge the African Court on Human and Peoples' Rights (AfCHPR) and the African Court of Justice of the AU, the former is presently a working court while the latter is established but not yet operational. See the figure 1 in Section 3.5.

3 See art 16 of the African Court Statute. The text of the statute is annexed in the Malabo Protocol (n 1).

4 The ICC is a permanent criminal court established by international convention that was adopted in 1998 and came into force in 2002. It is operating in The Hague, the Netherlands.

5 K Rau 'Jurisprudential innovation or accountability avoidance? The International Criminal Court and proposed expansion of the African Court of Justice and Human Rights' (2012) 97 *Minnesota Law Review* 346. See also M du Plessis 'Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders' Institute for Security Studies Paper 278 (2014) https://www.files.ethz.ch/isn/185934/Paper278.pdf (accessed 31 March 2021).

sufficient human and monetary resources.[6] It is observed that many scholars and commentators share the negative perception concerning the Malabo Protocol and the concept of the criminal judicial system enshrined in it.[7] However, the real significance of the Malabo Protocol should not be undermined and underestimated. The Malabo Protocol has some very innovative parts, and has the potential to greatly impact on international criminal law (regardless of whether the impact produces a positive/negative result or legal/political controversies).

In this submission, the author views the Malabo Protocol and the future African Court as the manifestation of the 'Africanisation' of international criminal law and a potential model for other regional organisations. The intention of this paper is to call upon others to take cognisance of the importance and significance of the fact that the Malabo Protocol exists as an international instrument expressing the view of a regional organisation, and rather than nullifying its idea altogether, to search for ways to improve the Protocol for a more effective and efficient court to be established in future. While in the following sections, the author aims to present the significance of the African Court in the scope of regionalisation, it is not the intention of the author to deny the criticisms expressed by others, but rather to present a different approach hoping that it will promote a more comprehensive and effective international criminal justice system in future.

Section 2 will list the unique features of the African Court that can be characterised as the 'Africanisation' of international criminal law, all of

6 M du Plessis 'Implications of the AU decision to give the African Court jurisdiction over international crimes' Institute for Security Studies Paper 235 (2012) 6-7, 9-10 https://issafrica.org/research/papers/implications-of-the-au-decision-to-give-the-african-court-jurisdiction-over-international-crimes (accessed 31 March 2021). See also MVS Sirleaf 'The African Justice Cascade and the Malabo Protocol' (2017) 11 *International Journal of Transitional Justice* 71; andAmnesty International 'Malabo Protocol: Legal and institutional implications of the merged and expanded African Court' (2016) 24-26 & 35 https://www.amnesty.org/en/documents/afr01/3063/2016/en/ (accessed 31 March 2021). See also G Abraham 'Africa's evolving continental court structures: At the crossroads?' South African Institute of International Affairs Occasional Paper 209 (2015) 11.

7 See for example, International Justice Resource Centre 'African Union approves immunity for government officials in amendment to African Court of Justice and Human Rights' Statute' (2 July 2014) https://ijrcenter.org/2014/07/02/(accessed 31 March 2021). The opposing opinions were expressed by many NGOs at the drafting stage of the Malabo Protocol. For example, Human Rights Watch 'Joint Civil Society Letter on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights' (12 May 2014) https//www.hrw.org/news/2014/05/12joint-civil-society-letter-draft-protocol-amendments-protocol-statute-afriacan-court- (accessed 31 March 2021).

which have historical significance and rationale in Africa, and Section 3 will enumerate the significance of the African Court as a potential model for other regional organisations for future discussions. Finally, Section four elaborates on the relationship with the ICC and the implication for a new complementarity mechanism. The author will consequently highlight that the African Court will neither be a way to avoid the ICC nor hide African high officials from prosecution by the ICC. Before starting examination two things should be kept in mind: First, the evaluation of the new African Court in this paper will be based solely on the matters related to the work of the International Criminal Law Section and its Chambers, and the matters concerning the other sections of this Court will be dealt with only in relevance to the former. Second, it should be kept in mind that the Malabo Protocol is not in effect yet, hence the African Court with international criminal jurisdiction remains for now an idea and a plan for the future. According to article 11 of the Malabo Protocol, the Protocol will come into effect 30 days after the 15th ratification by states. The likelihood of the fulfilment of this condition is slim, since the number of signature states is 15 but as yet no state has ratified it.[8] In other words, we might have a lengthy time to contemplate the idea of the African Court to make some improvements before its actual establishment.

2 The 'Africanisation' of international criminal law

In comparison with the pre-existing international tribunals and courts, the African Court has some unique features deriving from the African experiences and reflecting the interpretation of international criminal law upheld by African states. These features signify the 'Africanisation' of international criminal law, and can be construed as the fruits of the exercise of 'judicial' self-determination by African states. In this contribution, the 'Africanisation' means reflecting the experiences and value and *opinio juris* of African states to international criminal law, and also African states taking control of the legislation and application and enforcement of international criminal law. The author will briefly review the following unique features and their African backgrounds: (1) the permanence of the institution; (2) the principle of complementarity; (3) wider jurisdiction than the ICC by covering 14 international and transnational crimes; (4) possibility of prosecuting and punishing corporations; (5) conferment of the absolute immunity to African head of state and other senior officials. Leaving the deep analysis of the legal problems surrounding the characteristics of the African Court to other writings in this volume, this

8 The figure is as of 20 May 2019 as reported by the AU at the AU homepage (n 1) (accessed 31 March 2021).

paper concentrates on illustrating that the regionalisation of international criminal law has historical significance and rationale for Africa, before examining the significance of the African Court as a model for other regional organisations.

2.1 Permanence of the African Court

The African Court is not an ad hoc tribunal, instead it is a permanent judicial body that will continue to operate without any time limit set forth.[9] All the criminal tribunals created so far with a region-specific jurisdiction were ad hoc in character, designed from the outset to terminate their operations after a certain period of time or upon the accomplishment of their tasks, for example, the Nuremburg Military Tribunal and the Tokyo Tribunal,[10] the International Criminal Tribunal for the Former Yugoslavia (ICTY),[11] for Rwanda (ICTR),[12] the Special Tribunal for Sierra Leone (SCSL),[13] the

9 The African Court shall be the main judicial organ of the AU (art 2 of the African Court Statute), and it will keep functioning for future, unlike the ad hoc tribunals established especially for the specific situations.

10 The Nuremburg Military Tribunal and the Tokyo Tribunal were established by the Allied states to prosecute major war criminals of the World War II. The former was established for the just and prompt trial and punishment of the major war criminals of the European Axis, as prescribed in art 1 of the United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), 8 August 1945 (known as the Nuremberg Charter or the London Charter), and the latter was established for major criminals in the Far East, as prescribed in art 1 of the United Nations, Charter of the International Military Tribunal for the Far East (1946) (known as the Tokyo Charter). Both tribunals ceased to exist after the completion of their operations.

11 The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the UN Security Council to prosecute crimes that took place during the conflicts in the Balkans in the 1990s. The mandate of the ICTY lasted from 1993 to 2017. See UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993.

12 UN Security Council established 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 Rwanda Citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994. As prescribed in art 1 of the ICTR Statute, the ICTR had several limitations on its jurisdiction (for example, only targeting crimes committed on 1994).

13 The Special Court for Sierra Leone (SCSL) was established in 2002 as a result of the request from Sierra Leone to the UN, in order to 'prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of an implementation of the peace process in Sierra Leone', as prescribed in art 1 of the SCSL Statute. After the closure of the SCSL in 2013, the

Extraordinary Chambers in the Courts of Cambodia (ECCC),[14] and the Special Tribunal for Lebanon (STL).[15] One might say that considering that the African Court shall sit in ordinary or extra-ordinary sessions and judges (with the exception of the President and Vice President)[16] will perform their functions on a part-time basis,[17] the permanence of the African Court is mitigated. However, compared to the ad hoc tribunals mentioned above, once established the African Court has the potential to keep functioning within the AU in the future. As a permanent judicial organ, the African Court shares the same objective and goal with the ICC, and together they can work side-by-side, operating to end impunity with no time limit.[18]

Africa has the experience of having ad hoc tribunals such as the ICTR and SCSL created by the efforts of the United Nations after the commission of serious international crimes. Also, with the motivation of accomplishing an 'African solution for African problems',[19] Africa created its own ad hoc hybrid tribunal specifically for trying Hissène Habré: the Extra Ordinary Chamber (*Chambre Africaine Extraordinaire*) in Senegal.[20]

Residual Special Court for Sierra Leone was established.

14 The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established to prosecute 'senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979' as provided in art 1 of the ECCC Statute.

15 The Special Tribunal for Lebanon (STL) has 'jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafik Hariri and in the death or injury of other persons' as provided in art 1 of the STL Statute.

16 Article 22(5) of the African Court Statute.

17 Article 5(4) of the African Court Statute.

18 Both the African Court and the ICC are intended to work to prevent crimes and to end impunity. See the Preamble of the Malabo Protocol and the Preamble of the ICC Statute. Condemnation and rejection of impunity is one of the founding principles of the AU. See also art 4(o) of the Constitutive Act of the AU (adopted on 11 July 2000, entered into force on 26 May 2001).

19 See S Williams 'The Extraordinary African Chambers in the Senegalese Courts: An African solution to an African problem?' (2013) 11 *Journal of International Criminal Justice* 1139.

20 The Extraordinary Chamber found Hissène Habré guilty for crimes against humanity, war crimes, and torture. See, Chambre Africaine Extraordinaire D'Assises, *Ministère Public contre Hissein Habré*, Jugement (30 mai 2016), and *Situation en République du Tchad Le Procureur Général contre Hissein Habré*, Arrêt (27 avril 2017). Some legal questions related to the handling of Hissène Habré case in Senegal were also discussed in a regional court of ECOWAS. See, La Cour de Justice de la Communaute Economique des Etats de L'Afrique de L'Ouest (CEDEAO), *Affaire Hissein Habré cl Republic of Senegal* (18 November 2010), arrêt No. ECW/CCJ/JUD/06/10. See also, La Cour de Justice de la Communaute Economique des Etats de L'Afrique de L'Ouest

Additionally, Africa has experienced creating within a domestic legal system a court that operates alongside the ICC: the Special Criminal Court (SCC) in the Central African Republic.[21] Taking into consideration that the idea of creating a criminal court dates back in history in Africa,[22] the progress towards it has a special historical significance in Africa. Furthermore, the presence of the African Court can avoid the additional creation of ad hoc tribunals with the external interference and furthermore prevent the crimes in future with deterrent effect.

2.2 The Principle of complementarity

Article 46H(1) of the African Court Statute provides that the jurisdiction of the African 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'. This is the adoption of the Principle of Complementarity. The Principle of Complementarity means that the exercise of national jurisdiction is encouraged as the first resort with the African Court being the second.[23] Therefore, states especially

(CEDEAO), *Affaire Hissein Habré cl Republic of Senegal* (5 November 2013) arrêt No. ECW/CCJ/JUD/03/13. For the entire process of the Hissène Habré case, see KD Magliveras 'Fighting impunity unsuccessfully in Africa: A critique of the African Union's handling of the Hissène Habré affair' (2014) 22 *African Journal of International and Comparative Law* 420.

21 The Special Criminal Court (SCC) is created by the domestic law of Central African Republic to prosecute serious crimes committed on the territory of the Central African Republic since 1 January 2003. The SCC is composed of national and international staff. See Amnesty International 'Central African Republic: Five years later, more efforts to be done to get special criminal court fully operational' (3 June 2020) https://www.amnesty.org/en/latest/news/2020/06/central-african-republic-five-years-later-more-effort-to-be-done-scc/ (accessed 31 March 2021). See also PI Labuda 'The Special Criminal Court in the Central African Republic: Failure or vindication of complementarity?' (2017) 15 *Journal of International Criminal Justice* 175.

22 The Organisation of African Unity (OAU) which existed before the AU discussed a proposal for the international criminal jurisdiction in the 1970s, and the interest towards punishing the crime of apartheid in South Africa was behind the scene. See A Abass 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 933 at 936-937. See also SDD Bachmann & NA Sowatey-Adjei 'The African Union-ICC Controversy before the ICJ: A way forward to strengthen international criminal justice?' (2020) 29 *Washington International Law Journal* 247 at 272-273. Also in 1980, there was a discussion on the establishment of a court to try violations of human rights and other international crimes in the drafting of the African Charter on Human and Peoples' Rights but this proposal was rejected.

23 Article 46H of the African Court Statute prescribes that the jurisdiction of the African Court is to be complementary to the jurisdiction of the national courts, and a case will be inadmissible if it is being investigated or prosecuted by a state unless that state is unwilling or unable to do so.

African states are expected to investigate and prosecute crimes as the holder of the primary responsibility.

The Principle of Complementarity does not have a long history since its first appearance in a convention was the ICC Statute,[24] making it hard to say definitively that it has achieved customary international law status. The ICC holds the Principle of Complementarity as a basic rule, and in accordance with this principle, states have the first opportunity to investigate and prosecute, and the ICC will exercise its jurisdiction if a state with jurisdiction is genuinely unwilling or unable to investigate or to prosecute.[25] Although many people perceive the African Court as motivated by an anti-ICC sentiment, the Malabo Protocol adopted the Principle of Complementarity, following the ICC precedent. The fact the African Court adopted a similar principle[26] shows that this principle is generally accepted by African states too.

Article 46H(2)(a) of the African Court Statute provides that the African Court will decide a case is inadmissible if 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. It is noted that Article 46H plainly refers to 'a State' with jurisdiction instead of 'a member State', thus the criminal jurisdiction of any state, irrespective of whether the state in question is an AU member or not, can prevent the African Court from prosecuting a case as long as the state concerned is not unwilling or genuinely unable to investigate or prosecute. Therefore, the adoption of the Principle of Complementarity is odd since the African Court has no choice but to hold a case inadmissible if a state exercises its universal jurisdiction over the same case.[27] It was the so called 'abuse' of universal jurisdiction exercised by European states targeting some African senior state officials that was criticised by many African states and triggered the African states to crave their own international criminal

24 See the Preamble and arts 1 and 17 of the ICC Statute. For the history and legal background of the Principle of Complementarity, see NN Jurdi *The International Criminal Court and national courts: A contentious relationship* (2011) 9-31.

25 Article 17 of the ICC Statute.

26 It is a similar, but not identical principle because compared to art 17 of the ICC Rome Statute which prescribes that it will hold a case inadmissible 'unless the State is unwilling or unable genuinely' to investigate or prosecute, art 46H of the African Court Statute is taken word by word from the ICC's provision, except it deleted the word 'genuinely'.

27 MJ Ventura & AJ 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 EA Ankumah (ed) *The International Criminal Court and Africa: One decade on* (2016) 447.

judicial organ.[28] But ironically the same situation cannot be avoided even under this provision of the African Court Statute.

It is especially noted that the African Court promotes a new form of the Principle of Complementarity. This is owing to the fact that the African Court is not only complementary to states' jurisdictions but also to the courts of the Regional Economic Communities (RECs).[29] In Africa, there are many RECs which are regional organisations established through respective treaties concluded by the African states in the specific regions, and the RECs such as the East African Community (EAC),[30] the Economic Community of West African States (ECOWAS),[31] the Common Market for Eastern and Southern Africa (COMESA),[32] and the Southern African Development Community (SADC)[33] have courts.

28 CB Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067 at 1068-1072.

29 Article 46H of the African Court Statute provides that 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'.

30 The East African Community (EAC) is a regional intergovernmental organisation with its headquarters in Arusha, Tanzania. There are six member states: Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. The EAC has the East African Court of Justice as its principal judicial organ which is established under art 9 of the Treaty for the Establishment of the EAC. See A Heinrich 'Sub-regional courts as transitional justice mechanism: The case of the East African Court of Justice in Burundi' in JT Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal, and social change* (2020) 88-105.

31 The Economic Community of West African States (ECOWAS) was established in 1975. There are 15 member states: Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo. The ECOWAS has the Community Court of Justice which was created pursuant to arts 6 and 15 of the Revised Treaty of the ECOWAS. See OC Okafor & OJ Effoduh 'The ECOWAS Court as a (promising) resource for pro-poor activist forces: Sovereign hurdles, brainy relays, and "flipped strategic social constructivism"' in Gathii (n 30) 107-148. See also OD Akinkugbe 'Towards an analyses of the mega-political jurisprudence of the ECOWAS Community Court of Justice' in Gathii (n 30) 149-177.

32 The Common Market for Eastern and Southern Africa (COMESA) was established in 1994 to replace the Preferential Trade Area (PTA), and the 21 member states are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, and Zimbabwe. The COMESA Court of Justice was established in 1994 under art 7 of The Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty). See JT Gathii & HO Mbori 'Reference guide to Africa's international courts' in Gathii (n 30) 324-326.

33 Southern African Development Community (SADC), established in 1992 to replace the Southern African Development Coordinating Conference (SADCC) which was established in 1980, has 15 member states: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesothos, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia and

Because none of the RECs have a court with jurisdiction to prosecute international crimes to date, the complementarity system between the African Court and the courts of the RECs in criminal cases remains hypothetical. However, there is a precedent of the ECOWAS Court of Justice handling a case related to the prosecution of Hissène Habré (as mentioned), this situation is not unrelated to the cases concerning international crimes. Furthermore, it is noted that the EAC is interested in conferring international criminal jurisdiction to the East African Court of Justice.[34] Therefore it is estimated that an 'international criminal law mandate may eventually be shared with the Courts of the RECs as well, if some of the current discussions on the continent come to fruition'.[35] It signifies that the Principle of Complementarity can be maintained among courts of regional organisations. As will be illustrated in Section 4.2 of this paper, it illustrates the potential for a new complementarity system.

2.3 Fourteen international and transnational crimes of particular importance to Africa

The African Court has material jurisdiction over 14 categories of crimes, far more than the ICC's four categories.[36] In addition to the four core crimes of the ICC (genocide,[37] crimes against humanity,[38] war crimes,[39] and

Zimbabwe. The SADC Tribunal was established by the Protocol on the Tribunal, which was signed in Windhoek, Nambia in 2000, and was officially established on August 2005 in Gaborone, Botswana. There is a controversy over the Tribunal, and the Tribunal was de facto suspended at the 2010 SADC Summit, and aftermath, the SADC Summit resolved that a new Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between member states. See the SADC homepage https://sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 31 March 2021). See Gathii & Mbori (n 30) 317-321.

34 Kweka explains that the EAC demonstrates such intention since 2004. GJ Kweka 'African regional and sub-regional instruments on ending impunity for international crimes: Hit or miss?' in Hl van der Merwe & G Kemp (eds) *International criminal justice in Africa 2017* (2018) 49, available at the homepage of Konrad Adenauer Stiftung https://www.kas.de/en/web/rspssa/single-title/-/content/bericht-ueber-internationales-strafrecht-in-afrika-20171 (accessed 31 March 2021).

35 D Deya 'Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes' *Openspace on International Criminal Justice* (2012) 25.

36 Article 5 of the ICC Statute provides that the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and crime of aggression.

37 Genocide is prescribed in art 6 of the ICC Statute, and art 28B of the African Court Statute. As explained in this section, the definition adopted by the African Court is different from that of the ICC.

38 Crimes against humanity is prescribed in art 7 of the ICC Statute, and art 28C of the African Court Statute.

39 War crimes are prescribed in art 8 of the ICC Statute, and art 28D of the African Court Statute.

the crime of aggression),[40] the African Court shall have the power to try persons for the following ten crimes: the crime of unconstitutional change of government,[41] piracy,[42] terrorism,[43] mercenarism,[44] corruption,[45] money laundering,[46] trafficking in persons,[47] trafficking in drugs,[48] trafficking in hazardous wastes,[49] and illicit exploitation of natural resources,[50] each defined under the statute.[51] Furthermore, the categories of crime can be increased in future by the Assembly, with state parties consensus, extending the jurisdiction of the African Court to add crimes to reflect developments in international law.[52]

There is debate over the inclusion of non-core crimes, and whether these international or transnational crimes are appropriately addressed by an international criminal court.[53] It is generally understood that international criminal jurisdiction exists for those crimes with sufficient gravity and seriousness to make them a matter of international concern.[54] The inclusion of these additional crimes may influence their criminalisation under general international law and such discussion may open the door for the progressive development of the law on international criminal law.

The new crimes listed reflect the experiences of African states victimised by such crimes and having a history of coping with such

40 The crime of aggression is prescribed on art 8 bis of the ICC Statute, and artt 28M of the African Court Statute.

41 Article 28E of the African Court Statute.

42 Article 28F of the African Court Statute.

43 Article 28G of the African Court Statute.

44 Article 28H of the African Court Statute.

45 Article 28I of the African Court Statute.

46 Article 28I bis of the African Court Statute.

47 Article 28J of the African Court Statute.

48 Article 28K of the African Court Statute.

49 Article 28L of the African Court Statute.

50 Article 28A(1) of the African Court Statue.

51 See art 28B-28M of the African Court Statute.

52 Article 28A(2) of the African Court Statute.

53 Du Plessis (n 6) 7-8.

54 Both the ICC and the African Court handle a case with sufficient gravity. As prescribed in the ICC Statute, the ICC has 'the power to exercise its jurisdiction over persons for the most serious crimes of international concern' (art 1) and ICC's jurisdiction is 'limited to the most serious crimes of concern to the international community as a whole' (art 5), therefore a case without 'sufficient gravity to justify the further action by the ICC will be found inadmissible (art 17(1)(d)). Also, art 46H(2)(d) prescribes that the African Court will determine if a case is inadmissible if the case is 'not of sufficient gravity to justify further action by the Court.'

crimes.[55] For example, many African states share the bitter experience of being victims of the illicit exploitation of natural resources by the colonial powers in history and later by multi-national corporations from the developed states[56] and also by some armed rebels and terrorist groups. The problem of the trafficking of hazardous wastes from developed states to Africa was so notorious that it even motivated the international community to conclude an international treaty to prevent such trafficking: The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.[57] The acts of piracy in Somalia caused the United Nations' Security Council to adopt the measures under Chapter 7 of its Charter, recognising it as the threat to the international peace and security.[58] The inclusion of the crime of unconstitutional change of government symbolises the bitter experiences among African states of maintaining peace and security under unstable governmental power. There are authors evaluating positively, from the historical perspective in which for years African states have engaged in efforts to consolidate democracy and respect for the rule of law through the elimination of unconstitutional changes of government,[59] but there is an opposing view that it may bring

55 See for example, the following sec 2.5 on the corporate responsibilities. The non-core crimes included in the jurisdiction of the African Court are crimes each prescribed in relevant international and regional treaties, therefore they are not entirely new to African states. Rather, these crimes are a common concern of African states. Some argue that national courts are found to be unreliable because 'sadly these crimes are committed by people who hold political power, and efficient prosecution of such crimes has always presented a difficulty in Africa where political manipulation of the judiciary is rife'. See Bachmann & Sowatey-Adjei (n 22) 274.

56 Such experience influenced the Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), and the Charter prescribes that all peoples have rights to freely dispose of their wealth and natural resources, and state parties to this Charter shall undertake to eliminate all forms of foreign economic exploitation in order to enable their peoples to fully benefit from the advantages derived from their national resources (art 21).

57 The Basel Convention was adopted on 22 March 1989 by the Conference of Plenipotentiaries in Basel, Switzerland, in response to a public outcry following the discovery, in the 1980s, in Africa and other parts of the developing world of deposits of toxic waste imported from abroad.

58 See JA Roach 'Countering piracy off Somalia: International Law and international institutions' (2010) 104 *American Journal of International Law* 397.

59 See CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: Development and challenges* (2019) 39-42 https://www.cambridge.org/core (accessed 31 March 2021). See also Abass (n 22) 939-941; Bachmann & Sowatey-Adjei (n 22) 275-277; HVD Wilt 'Unconstitutional change of government: A new crime within the jurisdiction of the African Criminal Court' (2017) 30 *Leiden Journal of International Law* 967; G Kemp & S Kinyunyu 'The crime of unconstitutional change of government (Article 28E)' in G Werle & M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 57-70.

potentially dangerous consequences of state repression of popular protest and serving the interests of authoritarian states.[60] The evaluation may vary but undeniably the non-core crimes included are the crimes of particular importance to Africa.

Even the definition of core crimes is adjusted by African experiences.[61] In many parts, the Malabo Protocol adopts the same provisions and rules of the preceding international criminal tribunals and courts by borrowing word for word from the provisions of the ICC Statute, but in some parts it adopts different wording.[62] For example the definition of genocide adopted for the African Court is slightly different from its definition in the ICC Statute, by including the rape and other sexual violence as constituting the crime.[63] This new definition reflects the expanded notion of the crime of genocide developed through the judgments of the ICTR.[64] Therefore it can

60 A Branch 'The African Criminal Court: Towards an emancipatory politics' in Jalloh, Clarke &Nmehielle (n 59) 212-213.

61 The core crimes are genocide (art 28B of the African Court Statute), crimes against humanity (art 28C), war crimes (art 28D), and the crime of aggression (art 28M).

62 Apart from the addition to the definition of genocide described in this section of the contribution, the African Court Statute made some changes such as: crimes against humanity to be committed as part of a wide-spread or systematic attack 'or enterprise' directed against any civilian population, with knowledge of the attack 'or enterprise' (art 28C of the African Court Statute); and use of children under 18 years of age in armed conflict as a war crime (art 28D(b)(xxvii) of the African Court Statute), while the ICC Statute provides that it is a war crime to conscript or otherwise use children under 15 years of age (art 8(b)(xxvi) of the ICC Statute); the African Court Statute prescribes slavery and deportation to slave labour as a war crime (art 28D(b)(xxxi)), while the ICC Statute treats enslavement as a crime against humanity. For a comparison of the respective statutes and additions made by the African Court Statute, see EY Omorogbe 'The crisis of international criminal law in Africa: A regional regime in response?' (2019) 66 *Netherlands International Law Review* 287 at 302-309.

63 Article 28B of the African Court Statute defines the crime of genocide as follows, and especially subsection (f) which is not found in the ICC Rome Statute: 'For the purposes of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group; f) Acts of rape or any other form of sexual violence.'

64 This expansion of the notion of genocide was first upheld in the ICTR *Akayesu Case* and later supported by the ICTY *Karadžić Case*. See, *Prosecutor v Jean-Paul Akayesu*, Judgment, ICTR-96-4-A (2 September 1998) and *Prosecutor v Radovan Karadžić*, redacted Judgment, IT-95-5/18-T (24 March 2016).

be said that the African Court Statute is more up-to-date, progressive and consistent with the jurisprudence in Africa.

2.5 Corporate responsibility

It is innovative that the African Court has jurisdiction over corporations[65] and will be able to prosecute and punish legal entities. African states have been tackling the problem of regulating corporate activities involved in various criminal acts such as environmental destruction and illegal trafficking and mercenaries. For example, the OAU Convention for the Elimination of Mercenarism in Africa of 1977 and the Protocol against Illegal Exploitation of Natural Resources of 2006, which was an initiative taken by the International Conference on the Great Lakes Region (ICGLR)[66] show that the concerns of African states over regulating corporate activities were discussed both in sub-regional and continental level. Therefore, the idea of holding corporations accountable for their economic activities is not new to African states. The African experiences illustrated that not only individuals, but also corporations have to be held accountable for the crimes in order to effectively prevent and punish crimes and also to provide appropriate reparations and compensation for the victims.[67]

In general, the notion of the legal personality of corporations under international law is not fully recognised yet as the rights of corporations are only partially recognised.[68] For example, the right to bring suit before international institutions like the International Centre for Settlement of Investment Disputes (ICSID), but as to the duties of corporations and their

65 Article 46C of the African Court Statute provides that 'the Court shall have jurisdiction over legal persons, with the exception of States' and 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'.

66 ICGLR is an inter-governmental organisation of the countries in the African Great Lakes Region.

67 For example, see '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' UN Doc S/2002/1146 (2002).

68 See 'Developments in the Law: Corporate Liability for Violations of International Human Rights Law' (2001) 114 Harvard Law Review 2030-31. The international community recognised the need to regulate corporations, and created guidelines. For example, the responsibility of corporations to respect human rights was discussed under the UN Human Rights Council, and the Guiding Principles submitted by the Special Rapporteur suggested that business enterprises should respect human rights. See the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, in 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' UN Doc A/HRC/17/31 (2011) 13.

responsibility in international plane, there is not enough evidence showing its recognition in international law.[69] A case in the Special Tribunal for Lebanon held a corporate entity responsible for the crime against the court proceedings,[70] but there are not enough precedents to conclude that the notion of corporate responsibility acquired general acceptance in the international community. Currently, the international community is striving to develop international law to regulate corporations, moving away from relying solely on the non-binding soft law such as the United Nations Guiding Principles on Business and Human Rights.[71] In order to create more concrete international law to regulate corporate activities, an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, namely the Intergovernmental Working Group (IGWG) was established in accordance with the United Nations Human Rights Council resolution which was drafted by Ecuador and South Africa.[72] The IGWG is currently working on an international convention and protocol towards that end.[73] However, the draft convention to regulate transnational

69 In the *Kiobel Case* the Supreme Court of the United States denied the notion of corporate responsibility under international customary law. *Kiobel v Royal Dutch Petroleum* (2d Cir. 2010) 621 F 3d 111.

70 *Akhbar Beirut S.A.L. & Mr Al Amin Case*, STL, Case STL-14-06 (31 January 2014). The STL charged Akhbar Beirut with the contempt and obstruction of justice pursuant to Rule 60 bis of the Tribunal's Rules of Procedure and Evidence, for publishing articles on its Arabic and English websites and in its newspaper which contained information about confidential witnesses in the *Ayyash et al* case. The Defence challenged the STL's jurisdiction, and on 6 November 2014, the Contempt Judge found the Tribunal lacked jurisdiction over legal persons, but an Appeals Panel overturned this decision on 23 January 2015, finding that the case could proceed against Akhbar Beirut, who the Contempt Judge found guilty on 15 July 2016, he was sentenced to a 6 000 euro fine in August 2016. See also, *Al Jadeed S.A.L. & Al Khayat Case*, STL, Case No. STL-14-05/1/CJ/ (31 January 2014). In this decision in 2014, the STL charged Al Jadeed SAL with contempt for allegedly knowingly and willfully interfering in the administration of justice by approaching the confidential witnesses in the A*yyash et al* Case for the broadcast. However, later on 18 September 2015, the Contempt Judge reversed the judgment and found him not guilty of contempt, and on 8 March 2016 the Appeals Panel confirmed the acquittal of Al Jadeed. See N Bernaz 'Corporate criminal liability under international law: The New TVS.A.L. and Akhbar Beiruit S.A.L. case at the Special Tribunal for Lebanon' (2015) 13 *Journal of International Criminal Justice* 313.

71 As above.

72 See HRC, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 25 June 2014, UN Doc A/HRC/26/L.22/Rev.1 (25 June 2014).

73 The IGWG submitted the second draft of the 'Legally binding instrument to regulate, international human rights law, the activities of transnational corporations and other business enterprises' in 2020. For the latest information, see Business & Human Rights Resource Centre 'Binding Treaty' https://www.business-humanrights.org/en/big-issues/binding-treaty/ (accessed 31 March 2021).

corporations depends on national courts for handling the cases.[74] The fact that the African Court is entitled to pursue corporate liability implies that the legal personality of corporations is recognised on the regional international plane. Under the Malabo Protocol, corporations are obliged to observe international law and not to commit any of the international crimes listed in the Malabo Protocol, and upon their breach, the corporate entity responsible will be forced to take responsibility and be prosecuted accordingly.[75] The very idea of prosecuting a corporation for international crimes at the international level influences the development of general international law as well as international criminal law and international law on responsibility. The Malabo Protocol has the effect of enhancing the active discussions and expectations on corporate criminal liability under international law.[76] Once the African Court is established, it may encounter many legal and practical difficulties in prosecuting a corporate entity. However, with multinational or transnational companies, or foreign state-owned companies or economic entities, the African Court may face jurisdictional conflicts with the foreign states.

2.6 Absolute immunity

Without a doubt that the most controversial provision in the African Court Statute is article 46A bis, as:

> 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.

With this provision, the African Court confers absolute immunity to the heads of state and governments and other senior officials of the AU

74 The art 9(1) of the second draft prescribes that: 'Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omission that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vested in the courts of the State where: a) the human rights abuse occurred; b) an act or omission contributing to the human rights abuse occurred; or c) the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled.' See the OEIGWG Chairmanship Second Revised Draft (6 August 2020) , https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (accessed 31 March 2021).

75 See art 40C of the African Court Statute.

76 See GJ Kweka 'Regulating the exploitation of natural resources through the doctrine of corporate criminal liability in Contemporary Africa' (2019) 33 *Speculum Juris*.

member states. It is conceived that inclusion of such a provision is a response to, from the view of the African states protesting the ICC, the ICC's 'ignorance' of the immunity of the African heads of states.[77]

Leaving the in-depth analysis of this provision to other writings,[78] this contribution will focus on its illustration of the 'Africanisation' of international criminal law. In the ICC,

> 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.

This is provided for in article 27 of the ICC Rome Statute.[79] Kenya once submitted a proposal to amend this article by inserting as paragraph 3 similar words to that of article 46A bis of the African Court Statute giving immunity to incumbent heads of state, but this amendment proposal was unsuccessful.[80]

There is vehement criticism that the African Court is promising a safe haven for African politicians.[81] It is noticeable that the African Court

77 M Falkowska & A Verdebout 'L'opposition de l'Union africaine aux poursuites contre Omar Al Bashir: Analyse des arguments juridiques avancés pour entraver le travail de la Cour pénale international et leur expression sur le terrain de la coopération' (2012) 45 *Belgian Review of International Law* 201. See also Bachmann & Sowatey-Adjei (n 22).

78 See for example, D Tladi 'The Immunity Provision in the AU Amendment Protocol: Separating the (doctrinal) wheat from the (normative) chaff' (2015) 13 *Journal of International Criminal Justice* 3.

79 The Article 27 of the ICC Rome Statute which is titled 'Irrelevance of official capacity' prescribes as follows: '1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 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.'

80 Kenya proposed to insert the following words to art 27 of the ICC Rome Statute: 'Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions'. See, 'Submission by the Republic of Kenya on Amendments to Rome Statute of the International Criminal Court for Consideration by the Working Group on Amendments' (22 November 2013), UN Depositary Notification C.N.1026.2013, TREATIES-XVIII.10 https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf (accessed 31 March 2021).

81 See Abraham (n 6) 13-14. See also Omorogbe (n 62) 293, explaining that the provision conferring immunity to AU head of states 'is intended to protect Kenyatta and Ruto'.

Statute gives absolute immunities only to persons of AU member states and not to the Head of State or Head of Government representing non-AU member states.[82] Therefore the rule of article 46A bis is far from presenting a general international rule.

Also, article 46A bis is not clear on the actual holders of the immunity since 'anybody acting or entitled to act in such capacity' and 'other senior state officials based on their functions' are so vague in notion that some commentators conclude that the article gives immunity to just about every senior government official.[83] There is academic dispute whether the provision prescribes immunity *ratione personae* or immunity *ratione materiae* or a mixture of two,[84] but in any interpretation it is hard to find consistency with the general understanding on the scope of immunity.[85]

There is no doubt that the provision conferring absolute immunity for certain high-level officials is problematic, and it will produce a lacuna of prosecution depending on the political status of the criminals. It is the view of the author that article 46A bis may allow for impunity and should

82 Article 46A bis confers immunity specifically to 'AU' heads of state or government or other senior state officials and others.

83 See ZB Abebe 'The African Court with a Criminal Jurisdiction and the ICC: A Case for Overlapping Jurisdiction?' (2017), 25(3) *African Journal of International and Comparative Law* 425.

84 D Tladi 'Article 46A bis: Beyond the rhetoric' in Jalloh, Clarke &Nmehielle (n 59) 854-856.

85 For example, according to the UN International Law Commission and the Sixth Committee of the General Assembly, whom are working on the codification of the law on immunity, immunity ratione personae is enjoyed by the Troika, that is, the persons in three positions – Heads of State, Heads of Government, and Ministers of Foreign Affairs. The draft article 3 on the Immunity of State officials from foreign criminal jurisdiction which is elaborated by the International Law Commission prescribes as follows: 'Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction.' See, UNGA, Immunity of State officials from foreign criminal jurisdiction: Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission, 4 June 2013, UN Doc A/CN.4/L.814 (2013). Although the above codification deals with the immunities from foreign criminal jurisdiction and not with the international criminal jurisdiction, it shows that it is considered generally that other high-level officials not in the above three positions may be eligible for immunity ratione materiae, but not to immunity ratione personae. Therefore, they are not entitled to claim absolute immunity from foreign jurisdiction.

be amended. But as I explain in Section 4, the new complementary system can fill the lacuna of prosecution.

2.7 Sectional conclusion

Section 2 offered some features that can be characterised as the 'Africanisation' of international criminal law. The permanence of the institution is the result of African states seeking an African judicial organ to handle African cases without the external interference in the future, after the experiences of having ad hoc tribunals such as the ICTR and SCSL, and the hybrid tribunal the Extra Ordinary Chamber. The adoption of the Principle of Complementarity by the African Court suggests that the principle is not a rule relevant only to the ICC but may be a general rule that should be adopted by any permanent international criminal judicial organ. Moreover, the African Court presents a new model of the Principle of Complementarity in which the African Court is complementary to regional courts in addition to national courts. Wider jurisdiction than the ICC by covering 14 international and transnational crimes reflects the experiences of African states victimised by such crimes and having a history of coping with such crimes. Thus the new crimes listed are the crimes of African concerns. The possibility of prosecuting and punishing corporations is innovative in international criminal law, but the idea is not new to African states which have been tackling the problem of regulating corporate activities involved in criminal acts such as exploitation of natural resources, illegal trafficking and mercenaries. The conferment of the absolute immunity to African head of state and other senior officials is without a doubt the most controversial feature of the African Court. Article 46A bis of the African Court Statute should be amended, otherwise the new system of complementarity should be adopted (as outlined in Section 4) in order to make the African Court play a distinctive role in the future comprehensive international criminal justice system. There are many negative evaluations and criticisms over some features introduced above. However, considering that the features introduced in this section have unique historical backgrounds and significance for African states, it is noted that the evaluation of the 'Africanisation' of international criminal law is beyond simple 'good or bad'. They all have historical significance and rationale within Africa.

Furthermore there is an argument that regionalism leads to the fragmentation of international law and produces complexity in international criminal law.[86] It is argued that regionalism is undesirable for

86 M Sirleaf 'Regionalism, regime complexes and the crisis in international criminal justice' (2016) 54 *Columbia Journal of Transnational Law* 727 at 743-747.

the development of the unified universal international criminal law.[87] This argument is not limited to the field of international criminal law but also observed in the long debate in other fields such as that of international human rights law.[88] There is a common criticism on regionalisation of international law: Possibility of producing inconsistent and incoherent legal findings among courts with different legal bases and interpretations. However, Jalloh indicates that the African Court is taking the ICC Statute as a starting point and he argues that it implies 'a desire to ensure that the obligations assumed by African States are at least compliant with the ICC regime', and it might help to 'maintain greater coherence and perhaps even help to avoid fragmentation of region and international criminal law'.[89] And one of the advocates of the regionalisation of international criminal law insists that beside domestic courts, 'power to prosecute and try international crimes should be distributed between regions and universal mechanisms of criminal accountability',[90] and proposes 'the principle of regional territoriality' which implies that 'international crimes should be prosecuted or tried in each region where they have been committed to the exclusion of external judicial interventions of foreign states and the international community'.[91] A comprehensive international criminal justice system entailing cooperation at national, regional and international level for future may be desirable for achieving the goal of ending the culture of impunity. In the opinion of the author, regionalism and 'Africanisation' of international criminal law may be considered as a step forward in achieving the universal goal.

87 For the discussion on the regionalism in the field of international criminal justice, see MVS Sirleaf 'Regionalism, regime complexes & international criminal justice' (2015) 109 *Proceedings of the Annual Meeting (American Society of International Law), Adapting to a Rapidly Changing World* at 161-166.

88 G Werle & M VormBaum 'The Search for alternatives: The "African Criminal Court"' ISPI Commentary (28 March 2017)http://www.ispionline.it/sites/default/files/pubblicazioni/commentary_werle_wormbaum_28_03.2017.pdf (accessed 31 March 2021).

89 CC Jalloh 'The Place of the African Court of Justice and Human and Peoples' Rights in the prosecution of serious crimes in Africa' in CC Jalloh, Clarke & Nmehielle (n 59) 105.

90 B Kahombo 'Towards coordination of the global system of international criminal justice with the criminal court of the African Union' in Van der Merwe & Kemp (n 34) 17.

91 Kahombo (n 90) 27.

3 The significance and implication of the creation of the African Court as a model for other international regional organisations

The preceding section specified the 'Africanisation' of international law expressed in the unique features of the African Court and their historical backgrounds and rationale. Before elaborating on the future relationship between the African Court and the ICC and the potential role of the African Court in the comprehensive system of international criminal justice with the idea of new Principle of Complementarity in the next section, this section illustrates the significance of Malabo Protocol and the African Court as a model for the other regional organisations. Regionalisation of the international criminal justice system may contribute to the fight against impunity. Considering the current stage of the development of the international criminal justice system, having more institutions willing to conduct trials is generally welcomed. Currently, the highest concerns over the criminal prosecutions of the serious crimes against international law is how to end the culture of impunity and the lack of prosecution and punishment, rather than the positive conflicts of jurisdictions in which multiple entities willing to try the criminals are competing and fighting over the initiative.[92] Therefore filling the gap of a jurisdictional lacuna and having multiple choices for trial contribute to the globalisation of the web of criminal jurisdiction, serving the quest for ending the culture of impunity.

It should be noted that the Malabo Protocol contributes to the development of international criminal law, and may be construed as the expression of *opinio juris* of the African states and could be a model for other regional organisations in considering developing such a criminal judicial organ.[93] Furthermore, the African Court has historical and sociological

92 In the situation of a positive conflict of jurisdiction, there is more than one state willing to prosecute the crime, so it is likely that the crime will be prosecuted somewhere, on the other hand, in the situation of a negative conflict of jurisdiction, there is no state willing to prosecute and it might cause impunity of the crime.

93 The United Nations pointed out the increasing importance of regional organisations to criminal justice and crime prevention on a number of occasions. For example, the United Nations held a high-level debate on the role of regional organisations in strengthening and implementing crime prevention initiatives and criminal justice responses in accordance with the UN General Assembly, Resolution 73/186: Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity, 29 January 2019, UN Doc A/RES/73/186 (2019). See 'High-level Thematic Debate of the General Assembly on "The Role of Regional Organizations in Strengthening and Implementing Crime Prevention Initiatives and Criminal Justice Responses"' 6 June 2019, Trusteeship Council Chamber https://

and institutional significance as: the first criminal judicial organ established by a regional organisation intended specifically to exercise international criminal jurisdiction;[94] a symbol for promoting justice and rule of law; the exercise of 'judicial self-determination' by Africa; the proposal for the comprehensive judicial mechanism with unique institutional structure; and a basis for the further reform for Africa and other regions.

3.1 The creation of a criminal judicial organ within a regional organisation to exercise international criminal jurisdiction

The African Court will be the first permanent criminal court vested manifestly with international criminal jurisdiction established by a regional organisation. Even the European Union (EU), which is well known for its extensive power and complex and intimate organisational framework, has no such criminal court. As a precedent of a regional court to enjoy explicit criminal jurisdiction, there is the Caribbean Court of Justice (CCJ)[95] established by the Caribbean Community (CARICOM), but unlike the African Court, it is not created especially for the endowment and exercise of international criminal jurisdiction. The CCJ is entitled to handle both civil and criminal matters appealed from the courts of the member states, and it has a potential to handle cases over international crimes as a consequence, and it is noted that the Treaty establishing the CCJ does not emphasise the prosecution and punishment of serious international

www.un.org/pga/73/event/the-role-of-regional-organizations-in-strengthening-and-implementing-crime-prevention-initiatives-and-criminal-justice-responses/ (accessed 31 March 2021). There are some proposals for other regional international criminal court from scholars and commentators. For example, for a comment proposing an Asian international criminal court, see L Hunt 'Time for an ASEAN Criminal Court? A look at a proposal for the regional grouping' *The Diplomat* 16 December 2016 https://thediploat.com/2016/12/time-for-an-asean-criminal-court/ (accessed 31 March 2021). See also for the proposal for the establishment of the European Environmental Criminal Court, see http://court4planet.eu/wp-content/uploads/2019/10/Speech_by_Abrami_EN.pdf (accessed on 18 June 2022), see also http://www.iaes.info/en/file/documento/219/3001122295BrochureIAES.2012.pdf (accessed on 18 June 2022)..

94 As mentioned in Section 3.1, there is the precedent of Caribbean Court of Justice as the first regional court to enjoy criminal jurisdiction, but the Treaty establishing the court neither prescribes international criminal jurisdiction in explicit words, nor holds prosecution and punishment of serious international crimes as the main objectives of the court.

95 Agreement Establishing the Caribbean Court of Justice (14 February 2001). For the details of the CCJ, see AN Maharajh 'The Caribbean Court of Justice: A horizontally and vertically comparative study of the Caribbean's first independent and interdependent court' (2014) 47 *Cornell International Law Journal* Article 8. See also J Kocken & G van Roozendaal 'Constructing the Caribbean Court of Justice: How ideas inform institutional choices' (2012) 93 *European Review of Latin American and Caribbean Studies* 95.

crimes as the Malabo Protocol does.[96] If we turn to Asia, we cannot find a commitment to establishing a regional international organisation with such a judicial organ. The Association of Southeast Asian Nations (ASEAN) is in the process of forming a human rights mechanism,[97] but it does not cover the entire region of Asia.

Comparatively, the AU is a bigger regional organisation with 55 member states and its leading action may become a model for other regions. The Malabo Protocol signifies that Africa is eager to develop a highly organised judicial mechanism within the AU. Even though there is no ratification of the Malabo Protocol so far, from the perspective of international organisational law and of international regional law, there is no doubt that the mere adoption of the Malabo Protocol has historical significance. If the African Court is established, it will be the first permanent regional international criminal court to exercise international criminal jurisdiction. The African Court can be perceived as the fruit of the systematisation, signifying the high level of maturity of the AU as a regional organisation uniting states in the African Continent.

3.2 Promoting justice and rule of law: A model for the regions recovering from heinous crimes and atrocities

The African Court is created to end impunity, and given how the African Continent has suffered and continues to suffer from grave and heinous crimes, its establishment will be historical.[98] The overall goal and objective of the court itself serve a good purpose, as the African Court is expected to perform its task of criminalising and punishing heinous crimes.[99] The positive values underlying the Protocol and the court include: respecting human rights and protecting the right to life;[100] condemning violent acts

96 Art 25(5) of the Agreement Establishing the Caribbean Court of Justice provides that appeal shall lie to the Caribbean Court with the special leave of the Court from any decision of the Court of Appeal of a contracting party in any civil or criminal matter. Taking note of art 25(6) which prescribes that the Caribbean Court shall 'in relation to any appeal to it in any case, have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal of the Contracting Party from which the appeal was brought', it can be argued that the Caribbean Court is exercising the jurisdiction conferred by the national court instead of international criminal jurisdiction. Compared to that, art 3 of the Malabo Protocol clearly specify that the African Court 'is vested with an original and appellate jurisdiction including international criminal jurisdiction'.

97 M Inazumi 'Towards the establishment of a Regional Human Rights Mechanism in Asia' in I Lintel & A Buyse *Defending human rights: Tools for social justice* (2012) 71-83.

98 Deya (n 35).

99 See the Preamble paras 9, 11, 12 of the Malabo Protocol.

100 See for example, the Preamble, paras 5, 10, and 11 of the Malabo Protocol, paras 9, 10,

denying the right to life and other basic rights inalienable for the peaceful life of people;[101] and respecting the rule of law and due process.[102] Expressing strong condemnation of international and transnational crimes by creating an institution to prosecute and punish those responsible will have a deterrent effect and will contribute to achieving the goal of obtaining a society without the fear of such crimes.[103]

The adoption of the idea of the African Court with criminal jurisdiction has influence on an international, regional and domestic level. For instance, the presence of the African Court will likely to promote higher interests in the criminal justice among AU member states. Seeing and hearing annual reports and having discussions on the activities of the African Court in future, AU member states will likely be more conscious of international criminal justice. The Principle of Complementarity may also encourage states to exercises jurisdiction domestically, and consequently that may contribute to raising the quality of justice in national judicial system as well. Also, the African Court may promote the abolishment of death penalty in the African continent.[104]

Such commitments for the promotion of justice and rule of law are requested by the international community also to the other regions of the world, and regional organisations may consider building a regional criminal court. For instance, if we turn to Asia, among the ten member states of the ASEAN, Cambodia receiving international assistance through the United Nations prosecuted the crimes committed under the Khmer Rouge regime (1975-1979) at the Extraordinary Chambers in the Courts of Cambodia (ECCC).[105] The international community is hoping Myanmar will respect the human rights of the Muslim minority group Rohingya and solve the problems of Rohingya refugees who fled to neighbouring states, and Pre-Trial Chamber III of the ICC authorised, on November 2019, the Prosecutor to proceed with an investigation for the alleged crimes of deportation, persecution and other crimes in the context

11, 12, and 16. See Amnesty International (n 6) 5.

101 See for example, the Preamble, paras 5, 9, 11, 12, 17. See Amnesty International (n 6).

102 See for example, the Preamble, paras 6, 7, 10, 13. See Amnesty International (n 6).

103 See the Preamble, para 17 of the Malabo Protocol.

104 Article 43A(1) explicitly excludes the death penalty as it provides that the African Court shall pronounce judgment and impose sentences and/or penalties 'other than the death penalty'. Considering that not all states – in Africa have abolished the death penalty, the fact their regional international court denies the application of the death penalty, even for the most serious international crimes, may influence states to reconsider their – national position on the death penalty and move towards its abolishment.

105 See supra note (15).

of the escalation of violence which occurred in Myanmar in 2017.[106] The enforcement measures against drug crimes taken under the rule of President Duterte of the Philippines are criticised as serious violations of human rights, and the ICC announced in February 2018 that it intended to open a preliminary examination of the situation in the Philippines and analyse crimes allegedly committed in the context of the 'war on drugs' campaign.[107]

3.3 Consolidating *opinio juris* of the African states and regional international law: A model for the regions with distinct legal minds

The presence of the Malabo Protocol and the idea of the African Court indicate a new development in the field of international criminal law. While the African Court has some similarities to the earlier international courts, such as the ICC, it also has some unique features not seen in any other existing international judicial organ. Therefore, it can be said that the African Court is conservative in some parts but at the same time is very innovative in others. Either way, the fact that the Malabo Protocol was adopted by the AU implies that the African Court can be construed as the expression of the *opinio juris* of the African states, their understanding on the notion and status of specific rules under customary international law. Therefore, the part following the precedents may be regarded as evidence of a customary law, while the innovative part is evidence of, or a stimulation for, the progressive development of international criminal law. It is easier for states to exhibit their *opinion juris* and state practice (*usus*) concerning the rules and principles of international criminal law that are applicable to national courts, but it is more difficult for states to express and to make the international courts and tribunals to reflect their *opinion juris* through their state practice (*usus*) concerning the rules and principles applicable to international courts and tribunals. The Malabo Protocol is utilised as a direct expression and evidence of *opinion juris* and *usus* of the African states concerning rules governing international criminal courts and tribunals.

Also, as illustrated in Section 2, other regions can join in the regionalisation of international criminal law. As the African Court shows the 'Africanisation' through the inclusion of crimes other than the core

106 See ICC Pre-Trial Chamber III *Decision pursuant to Article 15 of the Rome Statute on the authorisation of an investigation into the situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar* ICC-01/19-27 (14 November 2019).

107 See, ICC Office of the Prosecutor 'Report on preliminary examination activities (2018)' (5 December 2018) 15-18.

crimes that are of special relevance in the African context, other regional organisations can choose to prescribe the regionalisation of international criminal law that is particularly suitable for a specific region.

3.4 Exercise of 'judicial' self-determination: A model for decolonised states

By the author adopting a different perspective, it is argued that the Malabo Protocol and the idea of the African Court with international criminal jurisdiction are the expression of the will of Africa to actively participate in the formulation and implementation of international criminal law. Many African states participated and contributed to the elaboration of the ICC Statute, but the support for the ICC decreased when concerns arose about the ICC targeting the presidents and high-level officials of some African states. There are voices from African states that accuse the ICC as the tool of the Western states and being 'neo-colonial' and 'imperialistic'.[108] Setting aside the anti-ICC sentiment, the African Court symbolises that Africa will no longer be the object waiting diligently to have international law, created by other states, applied to it through the hand of non-African judicial organs. This may be the beginning of the exercise of 'judicial' self-determination by African states.[109] In the history of modern international law developing states exercised their political self-determination to free themselves from colonisation and win the status of an independent state, while securing economic self-determination to gain control of their natural resources and to participate in the decision making of the world economy.[110] Now with the Malabo Protocol and the establishment of the African Court, African states are exercising 'judicial' self-determination, prosecuting and punishing crimes in accordance with

108 See M Pheko 'The ICC now an instrument of imperialism' *The Herald* 1 July 2015 https://www.herald.co.zw/the-icc-now-an-instrument-of-imperialism/ (accessed 31 march 2021). See also F Cowell 'Inherent imperialism: Understanding the legal roots of anti-imperialist criticism of the International Criminal Court' (2017) 15 *Journal of International Criminal Justice* 667. See also, PI Labuda 'The International Criminal Court and perceptions of sovereignty, colonialism and Pan-African solidarity' (2013-2014) 20 *African Yearbook of International Law* 289 at 305-314. See also, R Schuerch *The International Criminal Court at the mercy of powerful states: An assessment of the neo-colonialism claim made by African stakeholders* (2017).

109 The word 'judicial' self-determination is not used commonly, but I use this word to express the determination to exercise judicial jurisdiction by the states notwithstanding the intervention or pressure or from the Western states. See M Inazumi 'The regional differences on human rights and criminal justice: Judicial self-determination lost through the suppression from Western states? Universal jurisdiction and prohibition of the death penalty' (2013) 1 *Korean Journal of International and Comparative Law* 188.

110 The common art 1 of the International Covenants for Economic, Social and Cultural Rights (IESCR) and the International Covenant for civil and Political Rights (ICCPR) prescribes the rights of political self-determination and of economic self-determination.

international law (Malabo Protocol and the African Court Statute) that they elaborated, through the international judicial organ (the African Court) that they created themselves.

Having African states and the AU actively participating in formulising rules in the field of international criminal law and in exercising jurisdiction to end impunity and maintain order, international criminal law may no longer be criticised as a law made only by the Western states, a law made by the powerful states to punish losing or under-developed states, or a law of imperialism. The African Court has competence to punish corporate entities for crimes, therefore crimes such as money laundering, trafficking in hazardous waste, and illicit exploitation of natural resources which may be the result of the misconduct of foreign or multi-national corporations can be punished by the hand of the African Court.

3.5 Comprehensive judicial mechanism and unique institutional structure: A model for building a new court system

The organisational structure of the African Court is unique, encompassing three sections and corresponding chambers to maintain its broad jurisdiction, wider than that of the ICC or the International Court of Justice (ICJ), as the Court can rule on state responsibility as well as individual responsibility.[111] As illustrated in Figure 1 below, the judicial system of the AU is to be transformed into the African Court which is composed of multiple sections each vested with different tasks. The three sections individually handle different types of cases: the General Affairs Section, the Human and Peoples' Rights Section, and the International Criminal Law Section.[112] The former two involve state responsibility while the last one pursues individual and corporate criminal responsibility.[113] Encompassing such a variety of jurisdictions, the African Court is to be an

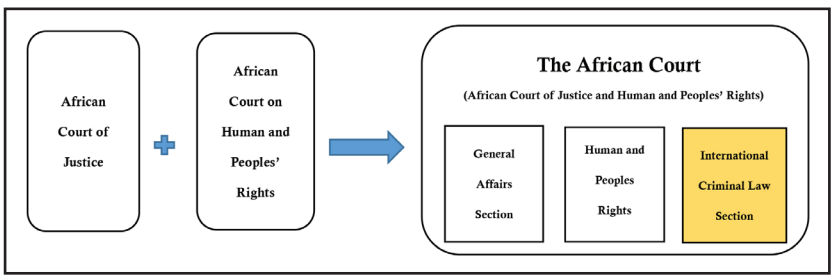
111 The African Court can rule on state responsibility within the General Affairs Section and Human and Peoples' Rights Section, and on individual responsibility within International Criminal Law Section. See art 17 of the African Court Statute. Note also that concerning the criminal proceedings, art 46C (1) of the African Court Statute prescribes that the African Court has jurisdiction 'over legal persons with the exception of States', thus the African Court can prosecute individuals (art 46B, except persons under the age of 18, art 46D) and corporations (art 46C) but cannot prosecute a state for crimes.

112 Article 16 of the African Court Statute.

113 Article 17 of the African Court Statute.

innovative court with extensive and comprehensive authority never seen in any other international judicial body.

Figure 1: The AU's Judicial Reform to Establish the African Court (African Court of Justice and Human and Peoples' Rights)



It is very interesting that the section handling the prosecution of criminals belongs to the same judicial institution that determines state responsibility. It remains uncertain how this structural neighbourhood will affect the work of each section since such an institutional framework is the first in history, but it is natural to expect that it might have a positive influence. It is expected that each section should reinforce the values and ideals pursued by the other sections. The staff of the International Criminal Law Section and the members of the respective Chambers may become more conscious of respecting human rights of suspects and victims in performing their task, paying due respect to the task and mandate of the co-workers in the other sections and other Chambers. Also, because many core crimes under international law are committed by or with the acquiescence of a government or high officials, state responsibility may be highly relevant. Because most courts in general respect their own precedent,[114] and especially since judgments given by any Chamber shall be considered as rendered by the African Court,[115] each Chamber may be conscious of constituting the jurisprudence of the African Court as a whole.

It is noted that within the institutional framework of the African Court, the International Criminal Law Section works alongside the section handling human rights.[116] There are also other regional human rights

114 The decisions of international courts and tribunals generally have no legal binding force except for the parties and in respect of that particular case, but courts and tribunals have a tendency to respect their own precedents in general.

115 Article 19 of the African Court Statute.

116 The Human and Peoples' Rights Section shall be competent to hear all cases relating to

courts currently at work, the Americas and Europe.[117] Asia and Middle East are without any human rights courts but Jalloh points out that these regions 'could in the future be inspired by the other regions', and 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', thus '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'.[118]

Moreover, the composition of the African Court might imply a new solution to the problems faced by modern international law: the fragmentation among different fields of international law and the contradiction and inconsistency in the decisions and reasoning rendered by different international judicial organs. It might ease the fragmentation between different fields of international law, such as that between international human rights law and international criminal law, and law of state responsibility. Being part of a court with a wide range of jurisdictions might cause the Chambers of the International Criminal Law Section to be aware of its task to win not only justice but also a society prevailing peace and respecting human rights.

3.6 Sectional conclusion

Section 3 illustrated some features of the African Court that can be considered as a model for the other regional organisations when considering the development of similar criminal judicial organs. The African Court signifies that Africa is eager to develop a highly organised judicial mechanism within the AU, and the high level of maturity of the AU as a regional organisation uniting states in the African Continent. Once the African Court starts functioning it will promote higher interests in international criminal justice among AU member states through its

human and peoples' rights, while the International Criminal Law Section shall hear all cases relating to the crimes specified in the Statute. Article 17(2) and (3) of the African Court Statute.

117 There are three regional human rights tribunals, each established by the regional international organisations in Africa, America, and Europe. The Inter-American Court of Human Rights is a regional human rights tribunals within the human rights protection system of the Organisation of American States (OAS). In Europe there is the European Court of Human Rights (known as the Strasbourg Court) that rules on individual or state applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. And the African Court on Human and Peoples' Rights is currently in place as the organ of the AU, which will be taken over by the Human and Peoples Rights Section of the African Court if the Malabo Protocol enters into force.

118 Jalloh, Clarke & VO Nmehielle (n 59) 61.

actions and also by the exercises of national jurisdictions encouraged under the Principle of Complementarity. Therefore, for the regions recovering from heinous crimes and atrocities, a regional criminal court may be a way to promote justice and the rule of law in the regions and to express the firm commitment to end impunity and to prevent such crimes in future. Also, for the regions with distinct legal systems, the African Court may be considered as a model for consolidating *opinio juris* of the states in the region, enabling the development of the regionalisation of international criminal law that is particularly suitable for the specific region. Also, other decolonised states may be interested in the exercise of 'judicial' self-determination expressed by African states, prosecuting and punishing crimes in accordance with international law that they elaborated, through the international judicial organ that they created.

From the perspective of the history of international institutional law, the African Court is remarkable, but from a practical point of view, it is feared that such wide jurisdiction vested in the hands of 16 judges may be too big a burden and detrimental by overloading the African Court.[119] However, the burden will be shared with national courts and the courts of the RECs under the new model of the Principle of Complementarity presented by the African Court. Therefore, if the comprehensive international criminal justice system works properly as illustrated in the next section, then the African Court may not be overloaded. Believing that the establishment of a court contributes to ending impunity and has a deterrent effect on preventing crimes in future, we expect the African Court to conquer the numerous difficulties it faces. It might take decades or a century, or the African states, encouraged by the courts potential, may bring it to realisation sooner than we think. Regardless, having something to start with will make it easier to begin discussions on the measures for its realisation and for improvements. The Malabo Protocol can be the basis of the discussion for the establishment of a truly effective and efficient criminal tribunal for Africa, as well as for the other regional organisations.

119 Amnesty International (n 6) 24-26 & 35. The AU judicial organ does not have enough manpower or budget support needed to perform such additional tasks. The new International Criminal Law Section 'shall be competent to hear all cases relating to the crimes specified in this statute', but the task is too wide considering the ability and available resources of the present institution. For reference, the ICC, which has jurisdiction over fewer crimes, took almost decade to tackle its first case (Lubanga Case). Further, its operation must be supported by the annual budget from contributions from ICC member states, it is difficult to see how African states will maintain a court with international criminal jurisdiction. International criminal trials are expensive, time-consuming and require tremendous effort both in monetary and human resources terms.

4 The relationship with the ICC: The new system of complementarity

4.1 No provision on the relation with the ICC

The Malabo Protocol and the African Court Statute have no explicit reference to the ICC. Considering how it replicates some provisions of the ICC Rome Statute, it can be inferred that the drafters intentionally avoided recognising the presence of the ICC. Many scholars criticise this point.[120] It is hard to deny the contentions, remembering the atmosphere of the relation between the ICC and the African states at the time of the adoption of the Malabo Protocol, which evidence the confrontation among the members of the AU towards the ICC. It is true that the anti-ICC sentiment influenced the adoption of the Malabo Protocol, but it is not the entire motive. The idea for an African judicial organ with criminal jurisdiction existed long before the confrontation of the AU and the ICC emerged as explained in Section 2.1. There are many incidents that pushed the African states to realise the need to establish a criminal court within African Continent, for example, the Hissène Habré case,[121] and the reluctance of African states to admit exercise of national jurisdiction by non-African states and accusations of abuse of the exercise of universal jurisdiction especially by European states.[122]

The relationship between the two courts can be elaborated on in any future agreement between them, and such an agreement can be concluded under article 46L(3) of the African Court Statute which provides that the African Court can seek the co-operation or assistance of 'international courts' and may conclude agreements for that purpose. Luckily, the confrontation with the ICC is not expressively engraved in the wording of the African Court Statute, therefore leaving the possibility to build a positive relationship with the ICC. The Malabo Protocol does not prohibit the African Court to work with the ICC in collaboration. Is it too much to expect both courts to respect each other, and work together under

120 See Abraham (n 6) 12-13.

121 Magliveras (n 20).

122 The Preamble of the Malabo Protocol recalls the Assembly decision adopted in relation to the question of the abuses of the principle of universal jurisdiction.

the Principle of Complementarity? The next section elaborates on the possibility.

4.2 New complementary system

The Principle of Complementarity held by the ICC is based on collaboration only with national jurisdiction and the ICC Statute does not address the jurisdiction of other international courts.[123] However, with the birth of the idea of the African Court, we should seek a modified complementarity system by adding regional jurisdiction as one of the components. In order to create a more efficient system to end impunity worldwide, the prosecution and punishment of all criminals – irrespective of whether they are the most responsible or the small fish – should be accomplished and sought at all levels from national to international, as well as the regional level. Given that it is practically impossible for the ICC to prosecute all the crimes committed in the world, the additional judicial organ should be welcomed. Jalloh analyses that regional organisations 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.[124] Murungu proposes that

> a progressive interpretation of positive complementarity might, for the purposes of closing all impunity gaps, infer that even regional criminal courts could have jurisdiction over international crimes within the ICC jurisdiction.[125]

Nimigan argues that the ICC 'is not intended to be, nor capable of being, a standalone response to atrocity', and the inclusion of all forms of jurisdiction recognised by international law including regional mechanisms such as the African Court 'should be built-in to establish a positive interpretation of complementarity'.[126] Judge Chile Eboe-Osuji (Nigeria) of the ICC comments that the ICC should keep an open mind towards working not just with states but also regional organisations, as it develops proactive or positive complementarity, and he says that from

123 Note that the Preamble and art 1of the ICC Statute specifies that the ICC shall be complementary to 'national' criminal jurisdictions, and art 17 allows the ICC to determine that a case is inadmissible when the case is being investigated or prosecuted by 'a State'. In prescribing the Principle of Complementarity, the concurrency with the jurisdiction of states is clearly considered but the possibility of concurring with the jurisdiction of other international or regional judicial organs is not addressed.

124 Jalloh, Clarke & Nmehielle (n 59) 57-61.

125 Murungu (n 28) 1081.

126 S Nimigan 'The Malabo Protocol, the ICC, and the idea of "regional complementarity"' (2019) 17 *Journal of International Criminal Justice* 1005 at 1008.

the particular perspective of Africa the world 'is improved immensely by conferring criminal jurisdiction upon the African Court'.[127]

It is interesting that there was an effort from Africa to amend the Principle of Complementarity of the ICC although the relevant ICC Rome Statute was not amended. Kenya proposed, in accordance with AU resolution, to amend the Preamble of the ICC Rome Statute to allow recognition of regional judicial mechanisms as follows: 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.'[128]

In the opinion of the author, it is possible to interpret the Principle of Complementarity to allow a new mechanism to ensure prosecution at any level: the national level in which states exercise jurisdiction; at the regional level by a regional international organisation such as the African Court; and finally, the international level in which the ICC exercises jurisdiction. It can be concluded that outside of the immunity issue, the drafters of the Malabo Protocol intended the relationship between the African Court and the ICC as a complementary one, which seeks to incorporate an intermediary regional focus into the existing international criminal justice framework. The Principle of Complementarity is not necessarily limited to regulating the vertical relationships between courts.[129] The international and regional level might not be in the form of a subordinate relationship, instead, it may be a horizontal relationship since there is no hierarchy among international organisations in general. Therefore, since there is no provision commanding or prohibiting a specific relationship to be built with the ICC, the African Court may choose to function in several ways: to compete with the ICC; to collaborate with the ICC; or support the ICC as a subordinate body.

There is speculation that the relationship between the African Court and the ICC will be that of rivals rather than being cooperative,[130] thus many people may expect the African Court to act in place of the ICC.[131]

127 C Eboe-Osuji 'Administering international criminal justice through the African Court: Opportunities and challenges in international law' in Jalloh, Clarke & VO Nmehielle (n 59) 841.

128 'Submission by the Republic of Kenya on Amendments to Rome Statute of the International Criminal Court for Consideration by the Working Group on Amendments' (n 80).

129 Nimigan (n 126) 1014.

130 RJV Cole 'Africa's relationship with the International Criminal Court: More political than legal' (2013) 14 *Melbourne Journal of International Law* 670 at 695-696.

131 See Bachmann & Sowatey-Adjei (n 22) 277, commenting on 'the need to establish an African regional criminal court which would enable Africa to better handle its affairs

On the other hand, there are voices from scholars that cooperation between the African Court and the ICC would benefit both institutions greatly, by allowing the caseload to be shared.[132] It is proposed to divide the burden between the ICC and the African Court based on the gravity of crimes, or on the nature of crimes.[133] There is a suggestion proposing that 'with the ICC focusing on the highest-level perpetrators of core international crimes', the African Court is to be 'concentrated on perpetrators of crimes not under the jurisdiction of the ICC, or mid-level perpetrators of the core crimes'.[134] Reflecting interviews conducted by the Office of the Prosecutor in the ICC, Nimigan proposes that regional jurisdictions may serve as an effective middle-ground between national and international jurisdiction, and 'national jurisdictions would investigate and prosecute foot soldiers, regional jurisdictions would pursue rebel leaders, military commanders or intermediaries, and the ICC would deal with heads of state and senior governmental officials' as 'an ideal distribution of investigatory and prosecutorial roles'.[135]

There is an opinion suggesting that the ICC treat the African Court in the same manner as the national courts under the ICC's Principle of Complementarity.[136] The supporters of this opinion suggest that a judgment by the African Court

> might be superseded by one of the ICC if the former's judgment be found not to measure up to the standards of the ICC Statute and therefore to exemplify the inability (or unwillingness) of the African Court to exercise jurisdiction in a particular case.[137]

They view the African Court as subordinate to the ICC in hierarchy and insist that the ICC 'would remain at the apex of international criminal

without facing further "prejudice" as is currently alleged to be happening at the ICC'.

132 See Nimigan (n 126) 1015-1018, 1022-1023.

133 See Kahombo (n 90) 10-11.

134 Kenyans for Peace with Truth & Justice 'Seeking justice or shielding suspects? An analysis of the Malabo Protocol on the African Court' *KPTJ (Kenyans for Peace with Truth & Justice)* 23 November 2016 at 20-21 http://kptj.africog.org/seeking-justice-or-shielding-suspects-an-analysis-of-the-malabo-protocol-on-the-african-court/ (accessed 31 August 2019).

135 Nimigan (n 126) 1013 and 1022.

136 For example, Jackson contends that prosecutions by a regional criminal court should be seen as prosecution by a state. See M Jackson 'Regional complementarity: The Rome Statute and Public International Law' (2016) 14 *Journal of International Criminal Justice* 1061 at 1062.

137 H Van der Wilt 'Complementarity jurisdiction (Article 46 H)' in Werle & Vormbaum (n 59) 191.

law enforcement'.[138] They propose transforming the regional courts into jurisdictions of first instance and the ICC to a court of appeal within the system of international criminal justice.[139]

4.3 Wide jurisdiction with less limitations

Compared to the ICC, the African Court has different aspects which enable it to play a distinctive role in the future comprehensive international criminal justice system. For example, considering that the African Court is the first international criminal court to explicitly have jurisdiction over corporations,[140] the provision of the African Court Statute is innovative, and will likely be the milestone for the rules and principles concerning corporate legal responsibilities under international law. The rules for acknowledging the intention or knowledge of a corporation prescribed in it might become the first, and basic rule, on the procedure for corporate liability.

In addition, the African Court's jurisdiction has no regional limitation, and is wider than the ICC in two aspects: Easier fulfilment of the pre-condition for the exercise of jurisdiction and a larger number of crimes. The latter aspect is already discussed in Section 2.3, so let me explain the former aspect. Firstly, although some people may be inclined to misunderstand, the African Court has no regional limit to its jurisdiction. Based on the fact that the AU is a regional organisation, one may assert that the jurisdiction of the AU's court is limited to crimes occurring in Africa since the African Court will be a part of the APSA, and the Common African Defence and Security Policy limits the competence of the APSA to threats to peace and security occurring in Africa. But on a careful reading of the statute's wording the African Court is not prohibited from exercising its jurisdiction beyond the African Continent. Article 28A's listing of crimes under its jurisdiction is not limited to crimes occurring in Africa, and also all the provisions on the subjects under its jurisdiction – article 46B that prescribes individual criminal responsibility; article 46C that provides corporate criminal liability and article 46D which eliminate persons under age of 18 from its jurisdiction – no mention is made of limitation based on region or nationality. The only provision that may limit its jurisdiction may be article 29(2) which provides that it 'shall not be open to States, which are not members of the Union', and that the African Court 'shall also have no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol', but the scope

138 As above.

139 See Kahombo (n 90)22-27.

140 Art 46C of the African Court Statute. See sect 2.5 of this contribution.

of the states involved in a criminal case is uncertain from this provision. Therefore, the African Court will be able to exercise its jurisdiction over multi-lateral corporations of non-African developed states.

Secondly, the pre-conditions for the African Court exercising its jurisdiction are easier to fulfil than the ICC. Both the African Court and the ICC have the pre-condition of obtaining the agreement from the states related to the individual case before exercising their jurisdiction which can be fulfilled by the ratification of its statute by these states.[141] While the ICC can exercises jurisdiction over crimes committed on the territory of a state party, or when the person accused is a state party's national,[142] the African Court can exercise jurisdiction when the victim is a national of the state party, or where the state's vital interest is threatened, in addition to the two situations listed by the ICC above.[143] Because a consent from one state is enough to fulfil the precondition, it is easier for the African states to attain consent than the ICC since there is more choice of states.

4.4 Sectional conclusion

The African Court presents a new model of the Principle of Complementarity in which international criminal jurisdiction is exercised complementary to national courts and regional courts of the RECs. Moreover it may be a step forward in accomplishing a comprehensive international criminal justice system in which judicial organs at all levels (including national, regional, and international) work together for the same goal of ending impunity. As explained in Section 2, the African Court is prohibited from prosecuting incumbent heads of state and governments and other senior officials by article 46A bis of the African Court Statute. The Malabo Protocol explicitly confers absolute immunity to them, unlike the ICC. This provision caused much criticism on the idea of the African Court asserting that its objective was to 'roll back the fight against the most serious crimes under international law', and it symbolises 'a rejection of the fight against impunity'.[144] However, it should be emphasised that article 46A bis of the African Court Statute *does not* and *cannot* prohibit the ICC from exercising its jurisdiction over African head of state or any other person that is given the absolute immunity by the Malabo Protocol provision. The ICC is not bound by the African Court Statute or by any

141 Article 12 of the ICC Rome Statute, and Art 46E bis of the African Court Statute.

142 Article 12(2) of the ICC Rome Statute.

143 See art 46E bis.

144 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* (2015) 3-12.

decision of the African Court to not proceed with prosecution of certain individuals. If any national jurisdiction is exercised, the ICC refrains from exercising its jurisdiction under the Principle of Complementarity or rule of *ne bis in idem*,[145] but the fact that the African Court applied absolute immunity and conducted no trial does not hinder the ICC's prosecution. Hence, if the motive of the article 46A bis of the African Court Statute is to harbour the African politicians from the ICC proceedings, as some commentators say, it cannot be accomplished.

If article 46A bis of the African Court Statute is to be maintained, then a more constructive approach giving it some positive meaning would be to interpret that the African Court refrained from prosecuting African senior state officials, and instead of trying them itself in Africa, it is relying on the ICC to do so. By entrusting the prosecution of African heads of state and government and senior officials to a court outside the African Continent, the African Court can eliminate any possibility of political influence over it from local powerful rulers. Under this interpretation, the provision of the African Court Statute conferring absolute immunity may be appraised as a way to ensure impartiality of a trial by from the outset abandoning its power to adjudicate on those individuals with strong political power within Africa. Therefore, giving a clear way for the ICC to prosecute them without the concern of being inconsistent with the Principle of Complementarity or the rule of *ne bis in idem*.

5 Conclusion

If the Malabo Protocol comes into force, the African Court may play a similar role to that of the ICC. It is true that there are many legal and practical complexities that seem to bar the establishment of the African Court with international criminal jurisdiction. However, even if the Malabo Protocol is not an effective instrument and lacks the necessary ratifications, the mere fact that such an instrument is elaborated on and adopted has historical significance. It can be considered as the manifestation of the 'Africanisation' of international criminal law and the exercise of 'judicial' self-determination by African states to participate in international criminal justice system. The African Court offers a model for the other regional organisations in creating a regional criminal court. This is illustrated through 'Africanisation', that is the reflection of the experiences and value and *opinio juris* of African states to international criminal law, and 'judicial' self-determination, namely prosecuting and punishing crimes in accordance with international law that African states elaborated on through the international judicial organ that African states

145 Article 20 of the ICC Rome Statute.

created. Even if the hostilities between the African states and the ICC dissolve or the situation is improved in future, the historical and legal significances of Malabo Protocol do not disappear. The African Court will be the first international criminal court to be established by a regional international organisation with comprehensive and extensive international criminal jurisdiction never seen in existing international judicial organs. It will also be the first international court to have explicit authority to pursue criminal responsibility of corporations at the international level. Together with the many unique features of the African Court presented in this paper, there are grounds for a new complementary mechanism on international, regional and domestic levels which has the potential to advance international criminal law.

This potential will disappear if the concept of the African Court is completely denied or politically manipulated and abused to protect certain individuals from justice. Rather than nullifying all the efforts put into the completion of the Malabo Protocol, it is better to use this opportunity to give support and guidance towards improving the instrument and the mechanisms created by this Treaty. The speculation about the realisation and coming into force of the Malabo Protocol may be low at this moment in current antagonistic environment, but the possibility of the Court coming into existence is not unrealistic, as there is the potential for the African Court to be a model for other regional organisations. It is always the cooperation and collaboration that enables the creation of a new international system for ending impunity.

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