

Chapter 2

Historical and Political Background to the Malabo Protocol

Ademola Abass

Abstract In June 2014 the Assembly of the African Union adopted the Malabo Protocol which in its Annex includes amendments to the Statute of the African Court of Justice and Human and Peoples' Rights empowering the Court with international criminal jurisdiction. This chapter gives an overview of the historical and political background to the Malabo Protocol and discusses the rationales behind conferring on an African regional court international criminal jurisdiction. It also addresses certain constraints that, from the point of view of the author, will prevent the Court from effectively prosecuting international crimes in Africa, even if the protocol ever enters into force.

Keywords Africa • African Union • International Criminal Court • African Court of Justice and Human and Peoples' Rights • Unconstitutional change of government

Contents

2.1 Introduction.....	12
2.2 The Grounds for Establishing International Criminal Prosecution in Africa.....	15
2.2.1 Historical Necessity for Prosecuting International Crimes in Africa.....	15
2.2.2 The Establishment of International Criminal Prosecution in Africa as a Legal Obligation	16
2.2.3 The Obligation to Prosecute Crimes Peculiar to African States	18
2.3 The Legality of African International Criminal Prosecution <i>Vis-à-Vis</i> the Rome Statute	20
2.4 Some Challenges to the Court's Effectiveness.....	23
2.4.1 The Problem of Combined Civil and Criminal Jurisdiction	23

This chapter is an updated version of an article that first appeared as Abass (2013) *European Journal of International Law* 24:933–946.

All internet sources in this chapter were last visited on 30 June 2016.

A. Abass (✉)

Office of Overseas Affairs and Investment, Lagos State, Nigeria

e-mail: Ade111@hotmail.com

2.4.2 The Complementarity Principle of the African Court of Justice and Human and Peoples' Rights	24
2.5 Conclusions.....	26
References.....	27

2.1 Introduction

At its 18th ordinary session in January 2012, the Assembly of Heads of State and Government of the African Union (hereafter the AU Assembly), requested the African Union Commission “to place the Progress Report of the Commission on the implementation of Assembly Decision on the ICC on the agenda of the forthcoming Meeting of Ministers of Justice and Attorneys General for additional input”.¹ In a 2009 text referred to herein as the “Assembly Decision”, the AU Assembly requested that the African Union, “in consultation with the African Commission on Human and Peoples’ Rights, and the African Court on Human and Peoples’ Rights [...] examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010”.²

The resultant draft protocol, which amended the Protocol on the Statute of the Court by extending its jurisdiction to cover international crimes,³ was endorsed by the African Ministers of Justice and Attorneys General on Legal Matters in May 2012.⁴ However, contrary to common expectations, the July 2012 AU Assembly did not adopt the new Protocol. Instead, it requested the Commission in collaboration with the African Court of Human and Peoples’ Rights, to “prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the African Court” and urged the Union to adopt a definition of the crime of unconstitutional change of government. The Commission was to submit its report for consideration by the policy organs at the January 2013 Summit.⁵

An experts’ meeting, which was convened by the African Union Commission on 19 and 20 December 2012 in Arusha, Tanzania, to consider the Assembly’s requests, decided that there was no need to amend sub articles 1 and 2 of Article 28E of the Draft Protocol,⁶ which embodies the crime of unconstitutional change of government. Regarding the financial and structural implications, the group

¹ Assembly/AU/Dec. 397 (XVIII) (2012).

² Assembly/AU/Dec. 213 (XII) (2012).

³ EX.CL/731 (XXI)a; (2013).

⁴ Min/Legal/ACJHR-PAP/3(II) Rev. 1.5.

⁵ Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court on Human and Peoples’ Rights, Assembly of the African Union, 19th Ordinary Session, Assembly/AU/Dec. 427 (XIX) (2012).

⁶ AfCHPR/LEGAL/Doc. 3, at 4.

adopted an arguably simplistic and over-optimistic approach, concluding that “the only additional expenses envisaged will be in the expanded structure and operation of the African Court on Human and Peoples’ Rights”.⁷

The January 2013 AU Assembly would seem to have accepted the experts’ meeting’s verdict on the crime of unconstitutional change of government, that is if one were to take its non-revisiting the issue as indicative of its position, although it clearly did not share the group’s finding on the financial and structural implications of the expansion. Consequently, the Assembly requested the African Union Commission to prepare a report on that subject. Interestingly, the Assembly also requested the Commission, acting in conjunction with the AU Peace and Security Council, to “conduct a more thorough reflection [...] on the issue of popular uprising in all its dimensions, and on the appropriate mechanism capable of deciding the legitimacy of such an uprising.”⁸ The Commission was required to submit its report on these requests to the May 2013 Assembly. Contrary to the expectation of many, in its twenty-fifth ordinary session, the AU’s Assembly of Heads of State and Government adopted the Protocol in Malabo, Equatorial Guinea on 27 June 2014.

It is uncertain whether the Protocol will get the fifteen ratifications of AU Members States that it needs to enter into force,⁹ but the prospect of the African regional court adjudicating on international crimes portends some troubling times for the International Criminal Court, but more so for international criminal justice in Africa. On the one hand, the International Criminal Court will suffer a major dent to its vital referral mechanism—self-referral by African ICC States Parties, aside from losing “ad hoc referral” by African non-States Parties to the Rome Statute. The impact of this double loss is significant if one recalls that of all the situations currently pending before the International Criminal Court, three were self-referred (Uganda, Democratic Republic of Congo, and the Central African Republic) and one involved the voluntary (ad hoc) acceptance of ICC jurisdiction (Côte d’Ivoire).¹⁰ On the other hand, an operational but ineffective international criminal jurisdiction—a highly likely scenario in light of the discussion below—raises myriad questions about what to do with African *genocidaires* and culpable heads of state and other governmental officials.

⁷ Ibid., at 5.

⁸ EX.CL/Dec. 766 (XXII), at 1 Doc. PRC/Rpt (XXV). Although this remit did not form part of the issues the 2012 Summit referred to the Commission, it would appear that the January 2013 Assembly took this issue on board given the extensive attention the Dec. 2012 AU Experts’ Meeting in Arusha gave the issue.

⁹ Thus far eight countries have signed the Protocol, namely: Benin, Congo, Kenya, Ghana, Guinea-Bissau, Mauritania, Sierra Leon, Sao Tome and Principe, AU, http://au.int/en/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_19.pdf. See also Amnesty International, Malabo Protocol, Legal and Institutional Implications of the Merged and Expanded African Court, 2016.

¹⁰ The Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11; see also Bamba 2003.

In addition to a number of practical challenges confronting the ratification of the Annex to the Malabo Protocol, which will not be discussed here, the instrument itself contains several flawed provisions that the AU experts' meeting in Arusha did not deal with, that will severely curtail the ability of the African Court of Justice and Human and Peoples' Rights to prosecute international crimes, should the Court's criminal jurisdiction become operative. First, the combination of civil and criminal jurisdictions through the General Affairs Section, the Human and Peoples' Rights Section, and the International Criminal Section, in a single court is not only almost unprecedented in international judicial practice, but is also fraught with myriad substantive and procedural problems that the Court, under the current proposal, will be unable to handle.¹¹ Furthermore, the provision of the new protocol on the complementarity principle¹² raises many perplexing questions.

The second section of this chapter discusses the grounds for proposing international criminal jurisdiction for an African regional court. The pervasive, but arguably erroneous assumption is that Africa began prospecting for international criminal jurisdiction *after* and as a *consequence* of the fall-out over the Al Bashir arrest warrant. As I will show in this section, this is inaccurate. This section also argues that creating an African Court with international criminal jurisdiction is, in fact, an obligation that the African Union must fulfil partly because its legal regimes require it and partly because not doing so will result in an absurd situation whereby its treaties codify or create crimes none of which its court can prosecute. The third section of this chapter responds to the argument that the prosecution of international crimes by an African regional court is incompatible with the Rome Statute. The fourth section discusses some of the most fundamental legal constraints on the projected effectiveness of the African Court of Justice and Human and Peoples' Rights.

The chapter concludes that whereas there is a clear and compelling case to be made for the conferment of international criminal jurisdiction on the African regional court, the added value of that court is extremely doubtful. This doubt does not arise from any *ipso facto* undesirability of such a court, but from the low probability that African leaders will ever allow the court to discharge the *ultima ratio* of international criminal justice—ending impunity for heinous international crimes—and not turn the Court into a torment chamber for opposition parties and dissident activists.

¹¹ The only known instance of combined jurisdiction by an international tribunal, though in particular circumstances, is the Caribbean Court of Justice. Article 4 of the Agreement establishing the Court provides that “subject to para 2, an appeal shall lie to the 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”: available at: www.caribbeancourtjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf. But see Viljoen 2012, arguing that the African Union's proposition in this regard is unprecedented.

¹² Article 46 of the Malabo Protocol (Annex). See on this provision the chapter by van der Wilt in this book.

2.2 The Grounds for Establishing International Criminal Prosecution in Africa

There are at least three fundamental bases to support the prosecution of international crimes by an African regional court. These are: (1) a historical necessity for such a court to prosecute crimes which are committed in Africa but which are of no prosecutorial interest to the rest of the world; (2) a treaty obligation to prosecute international crimes in Africa; and (3) the existence of crimes peculiar to Africa but over which global international criminal tribunals, such as the International Criminal Court, have no jurisdiction.

2.2.1 *Historical Necessity for Prosecuting International Crimes in Africa*

For most commentators, Africa's quest for its regional court to prosecute international crimes was politically motivated and began as a consequence of the fallout between the African Union and the International Criminal Court over Al Bashir's arrest warrant.¹³ While there is no denying that the Al Bashir affair exacerbated Africa's desire to prosecute international crimes, it is misleading to conclude that this episode lies at the foundation of Africa's quest for international criminal jurisdiction.

Africa first expressed a desire to prosecute international crimes in the 1970s during the discussion on the African Charter on Human and Peoples' Rights.¹⁴ Although the Committee of Experts responsible for drafting the Charter rejected the proposal to include a court with international criminal jurisdiction in its provisions, recalling the reasons for the proposal and its rejection will allow for a better understanding of the historical pedigree.

In the introduction to the first draft document in the *travaux préparatoires* to the African Charter on Human and Peoples' Rights, the Charter author, M'Baye, argued the prematurity of establishing an African judicial institution with criminal jurisdiction as part of the Human Rights Charter system, especially,¹⁵ since the

¹³ See, for instance, Murungu 2011, p. 1073. According to Murungu, "the origin of an African idea or priority to prosecute international crimes in Africa had begun in 2006". As for Deya 2012, p. 24 "[t]he first body to suggest that due consideration should be given to an additional international criminal jurisdiction for the African Court was the group of (African) Experts, who were commissioned by the African Union (AU) in 2007–2008 to advise it on the 'merger' of the African Court of Human and Peoples' Rights with the African Court of Justice". While Murungu clearly erred in thinking that 2006 was the first attempt ever for Africans to contemplate the idea of international prosecution, Deya limited his dateline to only when the idea was first suggested in the context of the proposed African Court.

¹⁴ See M'Baye 2002, p. 65.

¹⁵ Ibid.; see also Viljoen 2004, pp. 4–5.

International Convention on the Suppression and Punishment of the crime of apartheid¹⁶ already provided for “an international *penal* court” and the United Nations was then considering establishing “an international court to repress crime against mankind”.¹⁷

Thus the proposal to prosecute international crimes in 1970s Africa was primarily motivated by the crime of apartheid in South Africa, which the UN General Assembly had in 1966 labelled a crime against humanity,¹⁸ a determination affirmed by the Security Council in 1984.¹⁹ From 1948 until 1990 apartheid existed as an international crime, but there was no international criminal court that could prosecute it. The international penal court that African states had hoped would be established to prosecute the crime—on the basis of which they forewent providing for such a court in the African Charter of Human Rights—did not materialize.²⁰ Nor did the special penal court contemplated by the United Nations in the 1980s to try apartheid offences ever materialize. Instead, “it was left to States to enact legislation to enable them to prosecute apartheid criminals on the basis of a form of universal jurisdiction.”²¹ The impact this “dupe”, so to speak, had on Africans was significant, but it underscored the fact that not every crime committed in Africa would be of prosecutorial interest to the rest of humanity.

2.2.2 The Establishment of International Criminal Prosecution in Africa as a Legal Obligation

A distinct legal basis for prosecuting international crimes in Africa derives from the obligation incurred by the African Union under its Constitutive Act (AU Act) and other treaties to prosecute crimes prescribed in those treaties.

Article 4(h) of the AU Act provides for “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a *serious threat to legitimate order to restore peace and stability to the Member State* of the Union upon the recommendation of the Peace and Security Council.” These crimes are, with the exception of “threat to legitimate order” (which is a

¹⁶ 28 UN GAOR Supp. (No. 30), at 75, UN Doc. A/9030 (1974), 1015 UNTS 243, entered into force 18 July 1976.

¹⁷ “Rapporteur’s Report of the Ministerial Meeting in Banjul, The Gambia, Organization of African Unity”, at para 13, OUA Doc. CAB/LEG/67/Draft. Rapt. Rpt (II) Rev. 4, reprinted in Heyns (ed.) 2002, p. 95 (emphasis added).

¹⁸ UN GA Res 2202 A (XXI), 16 Dec. 1966.

¹⁹ UN Doc. S/RES/556 (1984) adopted 23 Oct. 1984.

²⁰ Article V of the Apartheid Convention.

²¹ See Dugard 2008. See also Article V of the Apartheid Convention.

new crime added to the provision by virtue of an amendment in 2003), the same crimes over which the International Criminal Court has jurisdiction.

The proscription of the foregoing international crimes by the AU Act necessarily implies the obligation to take measures to redress violations. It cannot be the case that with its Constitutive Act the African Union legislates on crimes it does not intend its own court to prosecute. The question to ask is, in the absence of the International Criminal Court or any other comparable judicial institution, what would happen in the event of crimes itemized in Article 4(h) of the AU Act? Should we hope that the national courts of concerned African states would prosecute such crimes even when committed by senior officials of their own governments, or should we expect courts of other African states to prosecute such high-profile culprits from fellow African nations on the basis of the much-maligned universal jurisdiction principle?

An instructive case on this point is the trial of Hissène Habré, the former president of Chad.²² Belgium issued an arrest warrant against Habré, who was at that time in asylum in Senegal.²³ Senegal refused to extradite the culprit to Belgium,²⁴ and with the blessing of the African Union chose to prosecute Habré instead before the Extraordinary African Chambers.²⁵ The Chambers convicted Habré for crimes against humanity, torture and war crimes, and sentenced him to life imprisonment in May 2016.²⁶ Although Senegal and Chad were found to possess jurisdiction to try Habré,²⁷ Senegal refused to yield Habré to Chad based on the claim that, as a former Head of State, Habré enjoyed absolute immunity for crimes he committed while he was in office, a position most African countries indeed subscribe to.²⁸

While I am not questioning the African Union's resolve to prosecute Habré in Africa, the fact is that with Senegal not prosecuting him and not giving him up to Chad either, the only remaining option was for the organization to turn to its own courts. The Committee of Eminent African Jurists²⁹ set up by the African Union specifically to advise on all ramifications of the Habré case reported³⁰ that neither

²² See AU Committee of Eminent African Jurists 2006.

²³ See Human Rights Watch 2005.

²⁴ Ibid.

²⁵ See Assembly/AU/Dec. 127 (VII) (Doc. Assembly/AU/3/VII).

²⁶ See Amnesty International 2016.

²⁷ See AU Committee of Eminent African Jurists 2006, para 22 et seq.

²⁸ But see Decisions of the Committee Against Torture Under Article 22 of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment, Committee Against Torture, 36th Session, Communication No. 181/2001 (2001), where the Committee condemned Senegal for refusing to extradite *Habré* to Belgium and held that the country had violated Articles 5(2) and 7 of the Torture Convention to which Senegal is a party.

²⁹ Decision on the Hissène Habré Case and the African Union, Assembly of the African Union, 6th Ordinary Session, Assembly/AU/Dec. 103 (VI) (2006).

³⁰ See AU Committee of Eminent African Jurists 2006.

of the AU's two courts could prosecute the fugitive. The Committee made other specific recommendations pertaining to the Habré issue,³¹ but, with an eye on similar cases that might arise in the future, it also suggested:

the possibility of *conferring criminal jurisdiction on the African Court of Justice* [to confer criminal competence that can be adopted by states within a reasonable time-frame] to make the respect for human rights at national, regional and continental levels a fundamental tenet of African governance.³²

What this case shows is that neither national courts of putative African criminals, especially government officials, nor the courts of other African states can be trusted to dispense justice under those circumstances.

2.2.3 The Obligation to Prosecute Crimes Peculiar to African States

Aside from the general obligation to prosecute all crimes proscribed by its treaties, the African Union incurs a distinct obligation to prosecute crimes which are *peculiar* to Africa but over which the International Criminal Court has no jurisdiction. The non-inclusion of such crimes in the jurisdiction of the Court could be attributable either to a perception among a great majority of ICC States Parties that such acts do not constitute international crimes *at all*, or to a perception that these international crimes are not “serious” enough for the purposes of the International Criminal Court.

There are a number of crimes peculiar to Africa, but one is particularly worth mentioning due to its importance. Unconstitutional changes of government are undoubtedly one of the most common sources of conflict in Africa, howsoever they are brought about.³³ The examples of Zimbabwe's Mugabe, Kenya's Kibaki and Ivory Coast's Gbagbo readily come to mind. The rampant menace of the unconstitutional takeover of government and its direct impact on the peace and stability of African countries drove the African Union to adopt the African Charter on Democracy, Election, and Governance in 2007.³⁴ The treaty entered into force in February 2012. Through Article 23 of the Charter the African Union lists and criminalizes the various acts constituting the crime of unconstitutional change of government,³⁵ in the hope of promoting a greater respect for the rule of law and inducing a concomitant reduction in the prevalence of armed conflicts.³⁶

³¹ Ibid., para 31.

³² Ibid., para 34.

³³ On this crime see the chapter by Kemp and Kinyunyu in this book.

³⁴ Assembly/AU/Dec. 147 (VIII) (2007).

³⁵ See also Article 28(E)(1)(D) of the Malabo Protocol (Annex).

³⁶ See preamble to the Charter on Democracy, Election, and Governance.

The Rome Statute is limited to the most serious international crimes, which, although common to the whole of humanity, are often committed in the aftermath of the breakdown of law and order. Hence, one could say that while the International Criminal Court prosecutes crimes mostly committed *after* violence or disorder has already ensued in a state, by criminalizing unconstitutional changes of government the African Union aims to prevent the occurrence of such crimes *ab initio* through the proscription of acts that may precipitate violence and disorder in a state.

In order for the African regional court to prosecute the crime of unconstitutional change of government, it is not enough that the crime be legislated upon by the African Union treaty, but it is also important that the crime be regarded as a “serious” international crime. That is not to say that whenever a regional treaty proscribes a crime other than the classical ones there must always be a determination that the crime is an international crime before a regional court can adjudicate on it. There are several international crimes *par excellence*, such as piracy, over which an international criminal tribunal may not have jurisdiction. But when a regional treaty proscribes a crime—such as unconstitutional change of government—that is not universally recognized as an international crime, it is crucial first to consider the status of that crime under international law.

The trajectory of unconstitutional change of government from a crime previously dealt with within the confines of national law at the individual country level in Africa to an international crime that an African regional court can now prosecute involves a formidable pedigree and confirms the influence of state practice in the crystallization of customary norms into treaty obligations. The treatment of unconstitutional change of government is one of the few norms in Africa that gradually evolved through custom, culminating in its codification by the African Charter on Democracy, Election, and Governance.

The rejection of unconstitutional changes of government in Africa dates back to the time of the Organization of African Unity, which, after several pronouncements and a major decision in 1999 against the practice,³⁷ adopted the Lomé Declaration in 2000,³⁸ shortly followed by the 2001 New Partnership for Africa Development.³⁹ Within the New Partnership, African leaders adopted the Declaration on Democracy, Political, Economic and Corporate Governance, and affirmed democratic governance.⁴⁰ In 2002, the AU Assembly adopted the Declaration on the Principle Governing Democratic Elections in Africa.⁴¹ In despair over the pervasiveness of the crime of unconstitutional change of government in Africa and in recognition of the ineffectiveness of responses by the

³⁷ OAU Doc. AHG/Dec. 141 (XXXV) (1999); OAU Doc. AHG/Dec. 142 (XXXV). Both decisions condemned unconstitutional changes of government in Africa.

³⁸ OAU Doc. AHG/Dec. 5 (XXXVI) (2000).

³⁹ OAU Doc. AHG/Dec. 1 (XXXVII) (2001).

⁴⁰ AU Doc. AHG/Dec. 235 (XXXVIII), Annex 1 (2002).

⁴¹ OAU Doc. AHG/Dec. 1 (XXXVIII) (2002).

Organization of African Unity and the African Union, the AU Assembly adopted the African Charter on Democracy, Election, and Governance on 30 January 2007. The status of unconstitutional change of government as an international crime was further confirmed by the entry into force of the treaty in February 2012.

Without conferring on its court jurisdiction to prosecute international crimes, the African Union will permanently face a rather absurd situation in which its Member States recognize the existence of a crime in their region—a crime that they regard as very serious, as their practice dating back at least two decades shows—but one that the Union’s court cannot prosecute. Several AU Member States that are to date still afflicted by unconstitutional changes of government are States Parties to the Rome Statute that established the International Criminal Court, which has no jurisdiction over unconstitutional change of government. It is plausible to argue, therefore, that even if the African Union were to concede the prosecution of classical international crimes codified by Article 4(h) of the AU Act exclusively to the International Criminal Court, the likelihood that the Union will continue to seek jurisdictional competence for its Court over *other* serious crimes, like unconstitutional change of government, remains very high. Short of amending the Rome Statute to incorporate this crime, which affects many of its African States Parties but over which the International Criminal Court currently has no jurisdiction, it will be hard to argue against the need for the African Union to create a court that can prosecute such Africa-specific crimes.

The foregoing analysis does not presuppose that the African Court of Justice and Human and Peoples’ Rights would, as a matter of fact, be able to adjudicate on unconstitutional change of government cases when, and if, the time comes. Although the AU Assembly’s sensitivity to the unconstitutional change of government issue at its July 2012 summit was absent from its January 2013 summit, its charge that the Commission should look more deeply into the meaning of “popular uprisings” and who may determine the legitimacy of such is disconcerting. Should the Assembly possess the power to determine the legitimacy of popular uprisings, just as the AU Peace and Security Council has been proposed to exercise a similar authority in respect of unconstitutional change of government, then a government which violates the African Charter on Democracy, Election, and Governance, say, by not relinquishing power after losing an election may find itself maintained in office by the Assembly’s determination that an uprising against it is illegitimate.

2.3 The Legality of African International Criminal Prosecution *Vis-à-Vis* the Rome Statute

The view has lately gained currency that there is no basis in the Rome Statute for allowing regional prosecution of international crimes, and that such jurisdiction as has been proposed for the African Court of Justice and Human and Peoples’

Rights is incompatible with the ICC Statute.⁴² To those advocating this view, one may address three preliminary questions. First, why should a court created by a multilateral treaty require the approval of another multilateral treaty creating a similar court to justify its own existence? Secondly, under what rules of international law, based on treaty or general principles, do states ratify a treaty to the exclusion of all other treaties, even those governing the same subject as the pre-existing one? Thirdly, why should the African Union, being a non-signatory to the Rome Statute, seek the legality of its own court under that Statute?

Those who impugn the legality of the proposed international criminal jurisdiction for the African Court on the basis of “incompatibility with the Rome Statute” draw support partly from the opinion of the Committee of African Eminent Jurists on the Hissène Habré case, and partly from the complementarity principle of the Rome Statute.⁴³ After proposing the establishment of the African Court of Justice, the Committee said:

this new body be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of Convention Against Torture [...] [and] that *there is room in the Rome Statute* for such a development and that it would not be a duplication of the work of the International Criminal Court.⁴⁴

The need to justify the existence of the African international criminal jurisdiction with reference to the provisions of the Rome Statute has also been linked to the “principle of complementarity” in the Rome Statute. As argued, “the Rome Statute only envisaged national criminal jurisdiction and not regional or sub-regional criminal jurisdictions in so far as the question of complementarity is concerned”.⁴⁵ Thus, “the Rome Statute does not expressly *allow or even imply that regional courts* such as the proposed Criminal Chambers be conferred with jurisdiction to try international crimes that are under the jurisdiction of the ICC.”⁴⁶ In the light of this view, the commentator then asks, “Does the proposed Criminal Chamber have a legal basis under the ICC Statute?”⁴⁷

For several reasons, an inquiry into the legality of the proposed international criminal jurisdiction in Africa *with reference* to the Rome Statute is fallacious, fundamentally mistaken and unscrupulous. No provision of the Statute forbids its States Parties from concluding other treaties, even if those were to establish courts of a similar nature to the International Criminal Court. The Rome Statute is not a *primus inter pares* among treaties and cannot fetter the competence of its States Parties to deploy their consent in international law. It is but a manifestation

⁴² See, for instance, Murungu 2011, p. 1081.

⁴³ Ibid.

⁴⁴ Abraham 2015, p. 8.

⁴⁵ Murungu 2011, p. 1075.

⁴⁶ Emphasis added.

⁴⁷ Murungu 2011, p. 1081.

of uncritical appraisal now to regard the Rome Statute as the *fons et origo* of all international crimes and their international prosecution.

By way of comparison, despite the fact that Article 92 of the UN Charter designates the International Court of Justice, as the “principal judicial organ” of the organization, several regional dispute settlement mechanisms exercise jurisdiction similar to the one of the International Court of Justice. And before the creation of the International Criminal Court, the International Criminal Tribunals for the Former Yugoslavia and Rwanda prosecuted the same crimes that the International Criminal Court now does, even if those two had a more limited mandate. No one has argued that the creation of those two tribunals extinguished the right of other international tribunals to prosecute the same crimes, lest the International Criminal Court would be the poorer for it.

There are two well-known situations in international law in which the validity/legality of a subsequent treaty may be determined by reference to a pre-existing treaty. First, where the States Parties to a treaty decide to conclude another treaty which establishes obligations similar to those in the previous treaty, the only legal requirement they must satisfy is that their obligations under the later treaty do not *conflict* with obligations assumed under the previous treaty, especially if there is a specific provision in the pre-existing treaty to that effect. Hence, Article 103 of the UN Charter states:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

There is no provision of the Rome Statute comparable to this Article.

Secondly, if a pre-existing treaty embodies a *jus cogens* obligation, then States Parties to that treaty are forbidden to conclude another treaty containing a provision that violates a peremptory norm. Thus, if Treaty A to which states X, Y, and Z are parties forbids the use of force (now widely regarded as a *jus cogens*), then whereas those states are not precluded from adopting another treaty that may govern the use of force, they may not adopt Treaty B *if one of its provisions violates the peremptory obligation* in Treaty A.

Article 53 of the Vienna Convention on the Law of Treaties provides that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”. It is noteworthy that this provision forbids only the creation of treaties that may breach a peremptory norm of international law already assumed under another treaty, but not the creation of a new treaty *per se*. In any case, there are no peremptory norms in the Rome Statute, and if one accepts some of the crimes under the Statute (e.g. genocide) as being subject to *jus cogens* rules, the creation of an African court to *prosecute* such crimes is confirmatory of, not conflictual with, such a peremptory norm in the Rome Statute.

Some argue that the complementarity principle of the Rome Statute “does not allow” regional courts and binds the International Criminal Court and its States Parties in an exclusive relationship.⁴⁸ The complementarity principle is the mecha-

⁴⁸ Ibid.

nism by which the Rome Statute orders a jurisdictional relationship between the Court and its States Parties so that the latter will always have the first go at a case unless where, according to Article 17 and preambular para 10 of the Statute, they are “unwilling” or “genuinely unable” to investigate or prosecute a case. This principle exists for the benefit of the International Criminal Court and its States Parties so that any obligation imposed or envisaged by that principle can exist only with respect to those states.

The African Union is an international organization with legal personality separate from those of its Member States.⁴⁹ The obligations assumed by any AU Member State under the ICC Statute, specifically with respect to the complementarity rule or other rules or principles, cannot apply to the Union under international law. Article 34 of the Vienna Convention on the Law of Treaties states that “[a] treaty does not create either obligations or rights for a third State without its consent”. Thus, if there is an obligation imposed by the complementarity principle against the creation of an alternative international criminal jurisdiction—and there is no convincing reason to believe that such an obligation exists—a common sense application of the rules of international law dictates that the obligation can *only* apply to States Parties to that Statute.

The right of the African Union to establish whatever courts it deems fit, regardless of what other court may have jurisdiction over the same crimes, is unassailable in international law. International law is created by the consent of states, and it is almost unthinkable, except in the context of peremptory norms, that there would be firewalls against the reach of state consent. Consequently, one does not need to construct “a progressive interpretation of positive complementarity”⁵⁰ of the Rome Statute or any other fanciful jargon, for that matter, in order to argue for the right of the African Union to establish a court. One has to emphasize again that the African Union Member States have a different legal personality from the African Union, and that the two cannot be confused.

2.4 Some Challenges to the Court’s Effectiveness

2.4.1 *The Problem of Combined Civil and Criminal Jurisdiction*

According to Article 16 of the Malabo Protocol (Annex) the African Court of Justice and Human and Peoples’ Rights shall have a General Affairs Section, a Human and Peoples’ Right Section, and an International Criminal Law Section.

⁴⁹ See App. No. 001/2011, *Femi Falana v. African Union*, Judgment of 26 June 2012.

⁵⁰ See Murungu 2011, p. 1081.

The first two sections embody the civil jurisdiction of the Court while the third embodies its criminal jurisdiction. Thus, the African Court of Justice and Human and Peoples' Rights combines civil and criminal jurisdictions. A full discussion of the huge practical and procedural complications attendant on combined jurisdiction is beyond the scope of this endeavour, but it is worthwhile to remark briefly on some matters arising.

Article 18(4) of the Malabo Protocol (Annex) provides that "[t]he Appellate Chamber may affirm, reverse the decision appealed against. The decision of the Appellate Chamber shall be final". It is unclear whether this provision refers to appeals arising from criminal matters only or appeals from other sections of the Court. This ambiguity is not helped by the fact that the only "Appellate Chamber" mentioned in the protocol is in relation to the International Criminal Law Section.⁵¹ The implication is that a criminal Appellate Chamber will sit on appeals arising from civil cases. This arrangement clearly leaves much to be desired.

The Court will also have to grapple with the resource implications of its combined jurisdiction. The cost of prosecuting one international crime could well out-strip the annual budget of the African Court of Justice and Human and Peoples' Rights as a whole. The cost of prosecuting Liberian Charles Taylor stands at a whopping USD 50 million, while the annual budget of the Sierra Leonean justice sector is about USD 13 million.⁵² The high cost of international criminal prosecutions derives mainly from the excruciating evidentiary processes associated with criminal prosecutions. Proving a case beyond reasonable doubt—the evidentiary standard of criminal prosecution—involves an investment of huge financial and time resources, comprehensive and expensive investigations, exhaustive examination of extensive materials, and, above all, the servicing of different levels of chambers within the Court itself. The International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights, for instance, consists of the Office of the Prosecutor, a Pre-Trial and Trial Chambers, and an Appellate Chamber, all of these with their distinct staff.⁵³

2.4.2 The Complementarity Principle of the African Court of Justice and Human and Peoples' Rights

Article 46 of the Malabo Protocol (Annex) provides for the complementarity principle.⁵⁴ This Article states 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". Impliedly the

⁵¹ See Article 16 of the Malabo Protocol (Annex).

⁵² Hirsch 2012.

⁵³ Article 19*bis* of the Malabo Protocol (Annex).

⁵⁴ See on this issue the chapter by van der Wilt in this book.

African Court of Justice and Human and Peoples' Rights can accept a case, not only after the national court of an indicted person has proved "unwilling" or "unable" to prosecute, but also after a court of a Regional Economic Community has failed to prosecute that person. Thus, instead of the scheme of complementarity under the Rome Statute, which makes a case admissible once a national court has failed the twin criteria, admissibility of cases to the African Court of Justice and Human and Peoples' Rights requires the "double failure" of national courts and Regional Economic Communities' courts under the same twin standard.

For many reasons this provision is not only problematic but also ill-advised. First, most states in Africa belong to more than one Regional Economic Community. For instance, the majority of ECOWAS⁵⁵ Member States are also members of CENSAD,⁵⁶ and there is a great overlap between the membership of COMESA⁵⁷ and that of SADC.⁵⁸ Therefore, the question is which of the Regional Economic Communities' courts should be considered for the purposes of the complementarity principle where the national state of an accused person holds multiple memberships. Furthermore, whereas national courts are accessible to individuals some regional courts are not automatically accessible to individuals. For instance, the African Court of Human and Peoples' Rights can only admit a case directly from an individual if the respondent state has deposited to the Court's jurisdiction under Article 34(6) of the Protocol establishing the Court. It was principally on this basis that the Court declined jurisdiction in *Michelot Yogogombaye v. The Republic of Senegal*.⁵⁹ Also, community courts, by their very nature, do not deal with the criminal responsibility of individuals. The contentious jurisdiction of the ECOWAS Court of Justice, for instance, concerns only violations of human rights of ECOWAS citizens. How then can a court not accessible to individuals, or which cannot determine the criminal responsibility of individuals, be asked to make an initial determination of such a nature before their Member State's national court has recourse to the African Court of Justice and Human and Peoples' Rights?

A close reading of Article 46 of the Malabo Protocol (Annex) on complementarity also discloses another serious loophole relating to the requirement of "inability to prosecute". The formula adopted in the Rome Statute is that there must be

⁵⁵ The Economic Community of West African States was founded on 28 May 1975, with the signing of the Treaty of Lagos.

⁵⁶ The Community of Sahel-Saharan States, established on 4 February 1998 with its seat in Libya. See <http://www.au.int/en/recs/censad>.

⁵⁷ The Common Market for Eastern and Southern Africa was established in December 1994, with its head-quarters in Lusaka, Zambia. See <http://www.comesa.int/overview-of-comesa/>.

⁵⁸ The Southern African Development Community was established on 1 April 1980, and has its seat in Gaborone, Botswana. See www.sadc.int/.

⁵⁹ Judgment, Communication No. 001/2008 (African Court on Justice and Human Rights, 30 July 2010).

“genuine” inability to prosecute. The word “genuine” serves to prevent a trivialization of that criterion by states. However, the formula adopted by the draft protocol dispenses with “genuineness”. The non-qualification of “inability to prosecute” dangerously lowers the evidentiary standard of “inability” and may seriously undermine that criterion. It implies that African states will easily avoid prosecuting their nationals and offload such cases on to the African Court of Justice and Human and Peoples’ Rights, thereby unduly burdening the Court and making it a Court of first rather than last resort.

2.5 Conclusions

The decision of the African Union to confer on its Court international criminal jurisdiction is an unassailable exercise in sovereignty. However, it is uncertain whether the Protocol will ever get the necessary ratifications by the AU Member States. If it eventually does the challenge will be for the Court to be able to investigate and prosecute crimes relating to anyone regardless of their status. Whether the Court can perform this duty in respect of African heads of state and senior government officials, who cannot be expected to be brought before their national courts, either because of immunity or because they are shielded by the deployment of raw political force, remains to be seen.⁶⁰ It would have been unrealistic to expect Al Bashir or Gaddafi to have been prosecuted by their national courts. And if there is any serious lesson to be learned from the cat-and-mouse game of the Ugandan regime and the “Lord’s Resistance Army” before the referral of the case to the International Criminal Court, it is precisely that domestic justice may not be suitable where potential culprits have as much or even more fire power than the state, or where the government is itself morally compromised.

The tension between the International Criminal Court and Africa⁶¹ is regrettable but, to put it in context, it was a disaster waiting to happen. Had the International Criminal Court and the Africa Union not fallen out over the Al Bashir affair, they would probably still have done so over a different issue, if maybe with less acrimony. The International Criminal Court is a court designed to prosecute crimes that more frequently arise *after* a complete breakdown of law and order in a country. Genocide, crimes against humanity and war crimes are all crimes mostly committed *during* an ugly interface in human society—at the outbreak of violence. They are crimes rarely committed when the rule of law reigns. What the African Union urgently requires today is a court that can prosecute crimes the *occurrence* of which *may lead* to the breakdown of law and order if not prevented. One such crime is unconstitutional change of government.

⁶⁰ On this issue see the chapter by Tladi in this book.

⁶¹ On this issue see Werle et al. (eds.) 2014.

In not countenancing such crimes as unconstitutional change of government, the international community ignores the pedigree of *particular* international law. Although the popularity of “regional custom” has waned considerably in modern times, its attraction has not diminished. It allows a few states existing in a given region, bound together perhaps by the same culture or other common attributes, to recognize certain practices amongst themselves as constituting international law. The International Court of Justice recognized this practice in the *Asylum case* between Peru and Colombia.⁶² Although it rejected the Peruvian claim on evidential grounds, the Court never doubted that such a principle in fact existed—it only stressed that its existence must be rigorously proved by the state alleging it as manifesting the necessary *opinio juris*.⁶³

Regardless of the fate of the protocol, the future of international criminal justice in Africa lies not in the duplicity of international judicial institutions but in the prosecutors of the International Criminal Court discharging their duties and responsibilities with candour and impartiality. The ICC Prosecutor cannot afford to deal with the ICC States Parties as though she is a headmaster prevailing over a pack of unruly pupils.

References

- Abraham G (2015) Africa’s Evolving Continental Court Structures: At the Crossroads? SAIIA Occasional Paper 209. <http://www.saiia.org.za/occasional-papers/669-africa-s-evolving-continental-court-structures-at-the-crossroads/file>
- African Union Committee of Eminent African Jurists (2006) Report of the Committee of Eminent African Jurists on the Case of Hissene Habré. https://www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pdf
- Amnesty International (2016) Hissene Habre verdict: Landmark decision brings justice for tens of thousands of victims. <https://www.amnesty.org/en/latest/news/2016/05/hissene-habre-verdict-landmark-decision-brings-justice-for-tens-of-thousands-of-victims>
- Bamba M (2003) Déclaration de Reconnaissance de la Compétence de la Cour Pénale Internationale. <https://www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf>
- Deya D (2012) Worth the wait: pushing for the African Court to exercise jurisdiction for international crimes. *OpenSpace Int. Crim. Justice* 2:22–26
- Dugard J (2008) International Convention on the Suppression and Punishment of the Crime of Apartheid. In: Audiovisual library of international law. http://legal.un.org/avl/pdf/ha/cspca/cspca_e.pdf
- Heyns C (ed) (2002) Human rights law in Africa. Kluwer, The Hague/London/New York
- Hirsch A (2012) Charles Taylor is guilty—but what’s the verdict on international justice? *The Guardian*. www.guardian.co.uk/commentisfree/libertycentral/2012/apr/26/charles-taylor-guilty-abetting-war-crimes
- Human Rights Watch (2005) Ex-Chad dictator indicted in Belgium. www.hrw.org/news/2005/09/29/ex-chad-dictator-indicted-belgium-0

⁶² *Asylum (Colombia v. Peru)* [1950] ICJ Rep 266.

⁶³ *Ibid.*, at 277.

- M'Baye K (2002) Introduction to the Draft African Charter on Human and Peoples' Rights, OAU Doc. CAB/ LEG/67/1, reprinted in Heyns C (ed) Human rights law in Africa
- Murungu CB (2011) Towards a criminal chamber in the African Court of Justice and Human Rights. *J. Int. Crim. Justice* 9:1067–1088
- Viljoen F (2004) A human rights court for Africa, and Africans. *Brooklyn J. Int. Law* 30:1–66
- Viljoen F (2012) AU assembly should consider human rights implications before adopting the amending merged African Court Protocol, *AfricLaw*, 23 May 2012. <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol>
- Werle G, Fernandez L, Vormbaum M (eds) (2014) *Africa and the International Criminal Court*. T.M.C. Asser Press, The Hague

The African Criminal Court
A Commentary on the Malabo Protocol
Werle, G.; Vormbaum, M. (Eds.)
2017, XII, 347 p., Hardcover
ISBN: 978-94-6265-149-4
A product of T.M.C. Asser Press