6 Understanding African justice mechanisms as part of the African peace and security architecture: Moving beyond an anti-ICC understanding

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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.