7 The positive implications of the Malabo Protocol and the African Court: The exercise of 'judicial' self-determination by African states and the possibility of the new complementary system with the ICC

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Abstract

If the Malabo Protocol comes into force, the African Court of Justice and Human and Peoples' Rights will be able to exercise international criminal jurisdiction to prosecute and punish individuals responsible for certain international and transnational crimes. The purpose of this contribution is to highlight its positive implications and significance. The Malabo Protocol and the idea of the African Court have historical significance and rationale for Africa and they manifest the regionalisation of international criminal law. Wider jurisdiction than the ICC by covering 14 international and transnational crimes and also by holding corporate entities responsible is the result of the experiences of African states victimised by such crimes and having a history of coping with such crimes. The African Court is a manifestation of the 'Africanisation' (reflection of the experiences and value and *opinio juris* of African states) and the exercise of 'judicial' self-determination (prosecution and punishment of crimes in accordance with international law that African states elaborated on, through the international judicial organ that African states created themselves). The African Court could be a model for other regional organisations in creating a regional criminal court. It implies a new mechanism under the Principle of Complementarity composed of national, regional, and international levels, and we should explore the possibility of constructing a new comprehensive system in which the African Court and the ICC work together to end impunity in future.

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1 Introduction

On 27 June 2014, the African Union (AU) adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).[1] The Malabo Protocol is intended to reform the judicial organ of the AU by adding a new section to the African Court of Justice and Human and Peoples' Rights (ACJHPR, hereafter the African Court) which shall be the main judicial organ of the AU after merging the two preceding courts of the AU.[2] In accordance with the statute which is amended by the annex of the Malabo Protocol (hereafter the African Court Statute), the new court will have an International Criminal Law Section[3] exercising international criminal jurisdiction. If the Malabo Protocol comes into force, it will establish an African Court that can prosecute and punish individuals responsible for certain international and transnational crimes, thus tantamount to creating an international adjudicating body similar to the International Criminal Court (ICC).[4]

Although the establishment of a court with international criminal jurisdiction may contribute to ending impunity and promotes justice, the most common initial responses from scholars and commentators were negative and full of concerns. For example, many criticise the hidden political motivation to protect senior African officials by creating a regionally oriented criminal system as a way to avoid the ICC.[5] Others point out deficiencies such as the lack of effective mechanisms and of

1 AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 2014) (Malabo Protocol). See AU, Decision on the Draft Legal Instruments – Doc Assembly/AU/8(XXIII), AU Doc Assembly/AU/Dec.529(XXIII). For the text of the Malabo Protocol, see the AU's homepage https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (accessed 31 March 2021).

2 It will merge the African Court on Human and Peoples' Rights (AfCHPR) and the African Court of Justice of the AU, the former is presently a working court while the latter is established but not yet operational. See the figure 1 in Section 3.5.

3 See art 16 of the African Court Statute. The text of the statute is annexed in the Malabo Protocol (n 1).

4 The ICC is a permanent criminal court established by international convention that was adopted in 1998 and came into force in 2002. It is operating in The Hague, the Netherlands.

5 K Rau 'Jurisprudential innovation or accountability avoidance? The International Criminal Court and proposed expansion of the African Court of Justice and Human Rights' (2012) 97 *Minnesota Law Review* 346. See also M du Plessis 'Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders' Institute for Security Studies Paper 278 (2014) https://www.files.ethz.ch/isn/185934/Paper278.pdf (accessed 31 March 2021).

sufficient human and monetary resources.[6] It is observed that many scholars and commentators share the negative perception concerning the Malabo Protocol and the concept of the criminal judicial system enshrined in it.[7] However, the real significance of the Malabo Protocol should not be undermined and underestimated. The Malabo Protocol has some very innovative parts, and has the potential to greatly impact on international criminal law (regardless of whether the impact produces a positive/negative result or legal/political controversies).

In this submission, the author views the Malabo Protocol and the future African Court as the manifestation of the 'Africanisation' of international criminal law and a potential model for other regional organisations. The intention of this paper is to call upon others to take cognisance of the importance and significance of the fact that the Malabo Protocol exists as an international instrument expressing the view of a regional organisation, and rather than nullifying its idea altogether, to search for ways to improve the Protocol for a more effective and efficient court to be established in future. While in the following sections, the author aims to present the significance of the African Court in the scope of regionalisation, it is not the intention of the author to deny the criticisms expressed by others, but rather to present a different approach hoping that it will promote a more comprehensive and effective international criminal justice system in future.

Section 2 will list the unique features of the African Court that can be characterised as the 'Africanisation' of international criminal law, all of

6 M du Plessis 'Implications of the AU decision to give the African Court jurisdiction over international crimes' Institute for Security Studies Paper 235 (2012) 6-7, 9-10 https://issafrica.org/research/papers/implications-of-the-au-decision-to-give-the-african-court-jurisdiction-over-international-crimes (accessed 31 March 2021). See also MVS Sirleaf 'The African Justice Cascade and the Malabo Protocol' (2017) 11 *International Journal of Transitional Justice* 71; andAmnesty International 'Malabo Protocol: Legal and institutional implications of the merged and expanded African Court' (2016) 24-26 & 35 https://www.amnesty.org/en/documents/afr01/3063/2016/en/ (accessed 31 March 2021). See also G Abraham 'Africa's evolving continental court structures: At the crossroads?' South African Institute of International Affairs Occasional Paper 209 (2015) 11.

7 See for example, International Justice Resource Centre 'African Union approves immunity for government officials in amendment to African Court of Justice and Human Rights' Statute' (2 July 2014) https://ijrcenter.org/2014/07/02/(accessed 31 March 2021). The opposing opinions were expressed by many NGOs at the drafting stage of the Malabo Protocol. For example, Human Rights Watch 'Joint Civil Society Letter on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights' (12 May 2014) https//www.hrw.org/news/2014/05/12joint-civil-society-letter-draft-protocol-amendments-protocol-statute-afriacan-court- (accessed 31 March 2021).

which have historical significance and rationale in Africa, and Section 3 will enumerate the significance of the African Court as a potential model for other regional organisations for future discussions. Finally, Section four elaborates on the relationship with the ICC and the implication for a new complementarity mechanism. The author will consequently highlight that the African Court will neither be a way to avoid the ICC nor hide African high officials from prosecution by the ICC. Before starting examination two things should be kept in mind: First, the evaluation of the new African Court in this paper will be based solely on the matters related to the work of the International Criminal Law Section and its Chambers, and the matters concerning the other sections of this Court will be dealt with only in relevance to the former. Second, it should be kept in mind that the Malabo Protocol is not in effect yet, hence the African Court with international criminal jurisdiction remains for now an idea and a plan for the future. According to article 11 of the Malabo Protocol, the Protocol will come into effect 30 days after the 15th ratification by states. The likelihood of the fulfilment of this condition is slim, since the number of signature states is 15 but as yet no state has ratified it.[8] In other words, we might have a lengthy time to contemplate the idea of the African Court to make some improvements before its actual establishment.

2 The 'Africanisation' of international criminal law

In comparison with the pre-existing international tribunals and courts, the African Court has some unique features deriving from the African experiences and reflecting the interpretation of international criminal law upheld by African states. These features signify the 'Africanisation' of international criminal law, and can be construed as the fruits of the exercise of 'judicial' self-determination by African states. In this contribution, the 'Africanisation' means reflecting the experiences and value and *opinio juris* of African states to international criminal law, and also African states taking control of the legislation and application and enforcement of international criminal law. The author will briefly review the following unique features and their African backgrounds: (1) the permanence of the institution; (2) the principle of complementarity; (3) wider jurisdiction than the ICC by covering 14 international and transnational crimes; (4) possibility of prosecuting and punishing corporations; (5) conferment of the absolute immunity to African head of state and other senior officials. Leaving the deep analysis of the legal problems surrounding the characteristics of the African Court to other writings in this volume, this

8 The figure is as of 20 May 2019 as reported by the AU at the AU homepage (n 1) (accessed 31 March 2021).

paper concentrates on illustrating that the regionalisation of international criminal law has historical significance and rationale for Africa, before examining the significance of the African Court as a model for other regional organisations.

2.1 Permanence of the African Court

The African Court is not an ad hoc tribunal, instead it is a permanent judicial body that will continue to operate without any time limit set forth.[9] All the criminal tribunals created so far with a region-specific jurisdiction were ad hoc in character, designed from the outset to terminate their operations after a certain period of time or upon the accomplishment of their tasks, for example, the Nuremburg Military Tribunal and the Tokyo Tribunal,[10] the International Criminal Tribunal for the Former Yugoslavia (ICTY),[11] for Rwanda (ICTR),[12] the Special Tribunal for Sierra Leone (SCSL),[13] the

9 The African Court shall be the main judicial organ of the AU (art 2 of the African Court Statute), and it will keep functioning for future, unlike the ad hoc tribunals established especially for the specific situations.

10 The Nuremburg Military Tribunal and the Tokyo Tribunal were established by the Allied states to prosecute major war criminals of the World War II. The former was established for the just and prompt trial and punishment of the major war criminals of the European Axis, as prescribed in art 1 of the United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), 8 August 1945 (known as the Nuremberg Charter or the London Charter), and the latter was established for major criminals in the Far East, as prescribed in art 1 of the United Nations, Charter of the International Military Tribunal for the Far East (1946) (known as the Tokyo Charter). Both tribunals ceased to exist after the completion of their operations.

11 The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the UN Security Council to prosecute crimes that took place during the conflicts in the Balkans in the 1990s. The mandate of the ICTY lasted from 1993 to 2017. See UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993.

12 UN Security Council established the International Criminal Tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the Territory of Rwanda and Rwanda Citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994. As prescribed in art 1 of the ICTR Statute, the ICTR had several limitations on its jurisdiction (for example, only targeting crimes committed on 1994).

13 The Special Court for Sierra Leone (SCSL) was established in 2002 as a result of the request from Sierra Leone to the UN, in order to 'prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of an implementation of the peace process in Sierra Leone', as prescribed in art 1 of the SCSL Statute. After the closure of the SCSL in 2013, the

Extraordinary Chambers in the Courts of Cambodia (ECCC),[14] and the Special Tribunal for Lebanon (STL).[15] One might say that considering that the African Court shall sit in ordinary or extra-ordinary sessions and judges (with the exception of the President and Vice President)[16] will perform their functions on a part-time basis,[17] the permanence of the African Court is mitigated. However, compared to the ad hoc tribunals mentioned above, once established the African Court has the potential to keep functioning within the AU in the future. As a permanent judicial organ, the African Court shares the same objective and goal with the ICC, and together they can work side-by-side, operating to end impunity with no time limit.[18]

Africa has the experience of having ad hoc tribunals such as the ICTR and SCSL created by the efforts of the United Nations after the commission of serious international crimes. Also, with the motivation of accomplishing an 'African solution for African problems',[19] Africa created its own ad hoc hybrid tribunal specifically for trying Hissène Habré: the Extra Ordinary Chamber (*Chambre Africaine Extraordinaire*) in Senegal.[20]

Residual Special Court for Sierra Leone was established.

14 The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established to prosecute 'senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979' as provided in art 1 of the ECCC Statute.

15 The Special Tribunal for Lebanon (STL) has 'jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafik Hariri and in the death or injury of other persons' as provided in art 1 of the STL Statute.

16 Article 22(5) of the African Court Statute.

17 Article 5(4) of the African Court Statute.

18 Both the African Court and the ICC are intended to work to prevent crimes and to end impunity. See the Preamble of the Malabo Protocol and the Preamble of the ICC Statute. Condemnation and rejection of impunity is one of the founding principles of the AU. See also art 4(o) of the Constitutive Act of the AU (adopted on 11 July 2000, entered into force on 26 May 2001).

19 See S Williams 'The Extraordinary African Chambers in the Senegalese Courts: An African solution to an African problem?' (2013) 11 *Journal of International Criminal Justice* 1139.

20 The Extraordinary Chamber found Hissène Habré guilty for crimes against humanity, war crimes, and torture. See, Chambre Africaine Extraordinaire D'Assises, *Ministère Public contre Hissein Habré*, Jugement (30 mai 2016), and *Situation en République du Tchad Le Procureur Général contre Hissein Habré*, Arrêt (27 avril 2017). Some legal questions related to the handling of Hissène Habré case in Senegal were also discussed in a regional court of ECOWAS. See, La Cour de Justice de la Communaute Economique des Etats de L'Afrique de L'Ouest (CEDEAO), *Affaire Hissein Habré cl Republic of Senegal* (18 November 2010), arrêt No. ECW/CCJ/JUD/06/10. See also, La Cour de Justice de la Communaute Economique des Etats de L'Afrique de L'Ouest

Additionally, Africa has experienced creating within a domestic legal system a court that operates alongside the ICC: the Special Criminal Court (SCC) in the Central African Republic.[21] Taking into consideration that the idea of creating a criminal court dates back in history in Africa,[22] the progress towards it has a special historical significance in Africa. Furthermore, the presence of the African Court can avoid the additional creation of ad hoc tribunals with the external interference and furthermore prevent the crimes in future with deterrent effect.

2.2 The Principle of complementarity

Article 46H(1) of the African Court Statute provides that the jurisdiction of the African Court 'shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities'. This is the adoption of the Principle of Complementarity. The Principle of Complementarity means that the exercise of national jurisdiction is encouraged as the first resort with the African Court being the second.[23] Therefore, states especially

(CEDEAO), *Affaire Hissein Habré cl Republic of Senegal* (5 November 2013) arrêt No. ECW/CCJ/JUD/03/13. For the entire process of the Hissène Habré case, see KD Magliveras 'Fighting impunity unsuccessfully in Africa: A critique of the African Union's handling of the Hissène Habré affair' (2014) 22 *African Journal of International and Comparative Law* 420.

21 The Special Criminal Court (SCC) is created by the domestic law of Central African Republic to prosecute serious crimes committed on the territory of the Central African Republic since 1 January 2003. The SCC is composed of national and international staff. See Amnesty International 'Central African Republic: Five years later, more efforts to be done to get special criminal court fully operational' (3 June 2020) https://www.amnesty.org/en/latest/news/2020/06/central-african-republic-five-years-later-more-effort-to-be-done-scc/ (accessed 31 March 2021). See also PI Labuda 'The Special Criminal Court in the Central African Republic: Failure or vindication of complementarity?' (2017) 15 *Journal of International Criminal Justice* 175.

22 The Organisation of African Unity (OAU) which existed before the AU discussed a proposal for the international criminal jurisdiction in the 1970s, and the interest towards punishing the crime of apartheid in South Africa was behind the scene. See A Abass 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 933 at 936-937. See also SDD Bachmann & NA Sowatey-Adjei 'The African Union-ICC Controversy before the ICJ: A way forward to strengthen international criminal justice?' (2020) 29 *Washington International Law Journal* 247 at 272-273. Also in 1980, there was a discussion on the establishment of a court to try violations of human rights and other international crimes in the drafting of the African Charter on Human and Peoples' Rights but this proposal was rejected.

23 Article 46H of the African Court Statute prescribes that the jurisdiction of the African Court is to be complementary to the jurisdiction of the national courts, and a case will be inadmissible if it is being investigated or prosecuted by a state unless that state is unwilling or unable to do so.

African states are expected to investigate and prosecute crimes as the holder of the primary responsibility.

The Principle of Complementarity does not have a long history since its first appearance in a convention was the ICC Statute,[24] making it hard to say definitively that it has achieved customary international law status. The ICC holds the Principle of Complementarity as a basic rule, and in accordance with this principle, states have the first opportunity to investigate and prosecute, and the ICC will exercise its jurisdiction if a state with jurisdiction is genuinely unwilling or unable to investigate or to prosecute.[25] Although many people perceive the African Court as motivated by an anti-ICC sentiment, the Malabo Protocol adopted the Principle of Complementarity, following the ICC precedent. The fact the African Court adopted a similar principle[26] shows that this principle is generally accepted by African states too.

Article 46H(2)(a) of the African Court Statute provides that the African Court will decide a case is inadmissible if the case is being investigated or prosecuted by 'a State which has jurisdiction over it, unless the State is unwilling or unable' to carry out the investigation or prosecution. It is noted that Article 46H plainly refers to 'a State' with jurisdiction instead of 'a member State', thus the criminal jurisdiction of any state, irrespective of whether the state in question is an AU member or not, can prevent the African Court from prosecuting a case as long as the state concerned is not unwilling or genuinely unable to investigate or prosecute. Therefore, the adoption of the Principle of Complementarity is odd since the African Court has no choice but to hold a case inadmissible if a state exercises its universal jurisdiction over the same case.[27] It was the so called 'abuse' of universal jurisdiction exercised by European states targeting some African senior state officials that was criticised by many African states and triggered the African states to crave their own international criminal

24 See the Preamble and arts 1 and 17 of the ICC Statute. For the history and legal background of the Principle of Complementarity, see NN Jurdi *The International Criminal Court and national courts: A contentious relationship* (2011) 9-31.

25 Article 17 of the ICC Statute.

26 It is a similar, but not identical principle because compared to art 17 of the ICC Rome Statute which prescribes that it will hold a case inadmissible 'unless the State is unwilling or unable genuinely' to investigate or prosecute, art 46H of the African Court Statute is taken word by word from the ICC's provision, except it deleted the word 'genuinely'.

27 MJ Ventura & AJ Bleeker 'Universal jurisdiction, African perceptions of the International Criminal Court and the new AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' in EA Ankumah (ed) *The International Criminal Court and Africa: One decade on* (2016) 447.

judicial organ.[28] But ironically the same situation cannot be avoided even under this provision of the African Court Statute.

It is especially noted that the African Court promotes a new form of the Principle of Complementarity. This is owing to the fact that the African Court is not only complementary to states' jurisdictions but also to the courts of the Regional Economic Communities (RECs).[29] In Africa, there are many RECs which are regional organisations established through respective treaties concluded by the African states in the specific regions, and the RECs such as the East African Community (EAC),[30] the Economic Community of West African States (ECOWAS),[31] the Common Market for Eastern and Southern Africa (COMESA),[32] and the Southern African Development Community (SADC)[33] have courts.

28 CB Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067 at 1068-1072.

29 Article 46H of the African Court Statute provides that the 'jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities'.

30 The East African Community (EAC) is a regional intergovernmental organisation with its headquarters in Arusha, Tanzania. There are six member states: Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. The EAC has the East African Court of Justice as its principal judicial organ which is established under art 9 of the Treaty for the Establishment of the EAC. See A Heinrich 'Sub-regional courts as transitional justice mechanism: The case of the East African Court of Justice in Burundi' in JT Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal, and social change* (2020) 88-105.

31 The Economic Community of West African States (ECOWAS) was established in 1975. There are 15 member states: Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo. The ECOWAS has the Community Court of Justice which was created pursuant to arts 6 and 15 of the Revised Treaty of the ECOWAS. See OC Okafor & OJ Effoduh 'The ECOWAS Court as a (promising) resource for pro-poor activist forces: Sovereign hurdles, brainy relays, and "flipped strategic social constructivism"' in Gathii (n 30) 107-148. See also OD Akinkugbe 'Towards an analyses of the mega-political jurisprudence of the ECOWAS Community Court of Justice' in Gathii (n 30) 149-177.

32 The Common Market for Eastern and Southern Africa (COMESA) was established in 1994 to replace the Preferential Trade Area (PTA), and the 21 member states are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, and Zimbabwe. The COMESA Court of Justice was established in 1994 under art 7 of The Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty). See JT Gathii & HO Mbori 'Reference guide to Africa's international courts' in Gathii (n 30) 324-326.

33 Southern African Development Community (SADC), established in 1992 to replace the Southern African Development Coordinating Conference (SADCC) which was established in 1980, has 15 member states: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesothos, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia and

Because none of the RECs have a court with jurisdiction to prosecute international crimes to date, the complementarity system between the African Court and the courts of the RECs in criminal cases remains hypothetical. However, there is a precedent of the ECOWAS Court of Justice handling a case related to the prosecution of Hissène Habré (as mentioned), this situation is not unrelated to the cases concerning international crimes. Furthermore, it is noted that the EAC is interested in conferring international criminal jurisdiction to the East African Court of Justice.[34] Therefore it is estimated that an 'international criminal law mandate may eventually be shared with the Courts of the RECs as well, if some of the current discussions on the continent come to fruition'.[35] It signifies that the Principle of Complementarity can be maintained among courts of regional organisations. As will be illustrated in Section 4.2 of this paper, it illustrates the potential for a new complementarity system.

2.3 Fourteen international and transnational crimes of particular importance to Africa

The African Court has material jurisdiction over 14 categories of crimes, far more than the ICC's four categories.[36] In addition to the four core crimes of the ICC (genocide,[37] crimes against humanity,[38] war crimes,[39] and

Zimbabwe. The SADC Tribunal was established by the Protocol on the Tribunal, which was signed in Windhoek, Nambia in 2000, and was officially established on August 2005 in Gaborone, Botswana. There is a controversy over the Tribunal, and the Tribunal was de facto suspended at the 2010 SADC Summit, and aftermath, the SADC Summit resolved that a new Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between member states. See the SADC homepage https://sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 31 March 2021). See Gathii & Mbori (n 30) 317-321.

34 Kweka explains that the EAC demonstrates such intention since 2004. GJ Kweka 'African regional and sub-regional instruments on ending impunity for international crimes: Hit or miss?' in Hl van der Merwe & G Kemp (eds) *International criminal justice in Africa 2017* (2018) 49, available at the homepage of Konrad Adenauer Stiftung https://www.kas.de/en/web/rspssa/single-title/-/content/bericht-ueber-internationales-strafrecht-in-afrika-20171 (accessed 31 March 2021).

35 D Deya 'Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes' *Openspace on International Criminal Justice* (2012) 25.

36 Article 5 of the ICC Statute provides that the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and crime of aggression.

37 Genocide is prescribed in art 6 of the ICC Statute, and art 28B of the African Court Statute. As explained in this section, the definition adopted by the African Court is different from that of the ICC.

38 Crimes against humanity is prescribed in art 7 of the ICC Statute, and art 28C of the African Court Statute.

39 War crimes are prescribed in art 8 of the ICC Statute, and art 28D of the African Court Statute.

the crime of aggression),[40] the African Court shall have the power to try persons for the following ten crimes: the crime of unconstitutional change of government,[41] piracy,[42] terrorism,[43] mercenarism,[44] corruption,[45] money laundering,[46] trafficking in persons,[47] trafficking in drugs,[48] trafficking in hazardous wastes,[49] and illicit exploitation of natural resources,[50] each defined under the statute.[51] Furthermore, the categories of crime can be increased in future by the Assembly, with state parties consensus, extending the jurisdiction of the African Court to add crimes to reflect developments in international law.[52]

There is debate over the inclusion of non-core crimes, and whether these international or transnational crimes are appropriately addressed by an international criminal court.[53] It is generally understood that international criminal jurisdiction exists for those crimes with sufficient gravity and seriousness to make them a matter of international concern.[54] The inclusion of these additional crimes may influence their criminalisation under general international law and such discussion may open the door for the progressive development of the law on international criminal law.

The new crimes listed reflect the experiences of African states victimised by such crimes and having a history of coping with such

40 The crime of aggression is prescribed on art 8 bis of the ICC Statute, and artt 28M of the African Court Statute.

41 Article 28E of the African Court Statute.

42 Article 28F of the African Court Statute.

43 Article 28G of the African Court Statute.

44 Article 28H of the African Court Statute.

45 Article 28I of the African Court Statute.

46 Article 28I bis of the African Court Statute.

47 Article 28J of the African Court Statute.

48 Article 28K of the African Court Statute.

49 Article 28L of the African Court Statute.

50 Article 28A(1) of the African Court Statue.

51 See art 28B-28M of the African Court Statute.

52 Article 28A(2) of the African Court Statute.

53 Du Plessis (n 6) 7-8.

54 Both the ICC and the African Court handle a case with sufficient gravity. As prescribed in the ICC Statute, the ICC has 'the power to exercise its jurisdiction over persons for the most serious crimes of international concern' (art 1) and ICC's jurisdiction is 'limited to the most serious crimes of concern to the international community as a whole' (art 5), therefore a case without 'sufficient gravity to justify the further action by the ICC will be found inadmissible (art 17(1)(d)). Also, art 46H(2)(d) prescribes that the African Court will determine if a case is inadmissible if the case is 'not of sufficient gravity to justify further action by the Court.'

crimes.[55] For example, many African states share the bitter experience of being victims of the illicit exploitation of natural resources by the colonial powers in history and later by multi-national corporations from the developed states[56] and also by some armed rebels and terrorist groups. The problem of the trafficking of hazardous wastes from developed states to Africa was so notorious that it even motivated the international community to conclude an international treaty to prevent such trafficking: The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.[57] The acts of piracy in Somalia caused the United Nations' Security Council to adopt the measures under Chapter 7 of its Charter, recognising it as the threat to the international peace and security.[58] The inclusion of the crime of unconstitutional change of government symbolises the bitter experiences among African states of maintaining peace and security under unstable governmental power. There are authors evaluating positively, from the historical perspective in which for years African states have engaged in efforts to consolidate democracy and respect for the rule of law through the elimination of unconstitutional changes of government,[59] but there is an opposing view that it may bring

55 See for example, the following sec 2.5 on the corporate responsibilities. The non-core crimes included in the jurisdiction of the African Court are crimes each prescribed in relevant international and regional treaties, therefore they are not entirely new to African states. Rather, these crimes are a common concern of African states. Some argue that national courts are found to be unreliable because 'sadly these crimes are committed by people who hold political power, and efficient prosecution of such crimes has always presented a difficulty in Africa where political manipulation of the judiciary is rife'. See Bachmann & Sowatey-Adjei (n 22) 274.

56 Such experience influenced the Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), and the Charter prescribes that all peoples have rights to freely dispose of their wealth and natural resources, and state parties to this Charter shall undertake to eliminate all forms of foreign economic exploitation in order to enable their peoples to fully benefit from the advantages derived from their national resources (art 21).

57 The Basel Convention was adopted on 22 March 1989 by the Conference of Plenipotentiaries in Basel, Switzerland, in response to a public outcry following the discovery, in the 1980s, in Africa and other parts of the developing world of deposits of toxic waste imported from abroad.

58 See JA Roach 'Countering piracy off Somalia: International Law and international institutions' (2010) 104 *American Journal of International Law* 397.

59 See CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: Development and challenges* (2019) 39-42 https://www.cambridge.org/core (accessed 31 March 2021). See also Abass (n 22) 939-941; Bachmann & Sowatey-Adjei (n 22) 275-277; HVD Wilt 'Unconstitutional change of government: A new crime within the jurisdiction of the African Criminal Court' (2017) 30 *Leiden Journal of International Law* 967; G Kemp & S Kinyunyu 'The crime of unconstitutional change of government (Article 28E)' in G Werle & M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 57-70.

potentially dangerous consequences of state repression of popular protest and serving the interests of authoritarian states.[60] The evaluation may vary but undeniably the non-core crimes included are the crimes of particular importance to Africa.

Even the definition of core crimes is adjusted by African experiences.[61] In many parts, the Malabo Protocol adopts the same provisions and rules of the preceding international criminal tribunals and courts by borrowing word for word from the provisions of the ICC Statute, but in some parts it adopts different wording.[62] For example the definition of genocide adopted for the African Court is slightly different from its definition in the ICC Statute, by including the rape and other sexual violence as constituting the crime.[63] This new definition reflects the expanded notion of the crime of genocide developed through the judgments of the ICTR.[64] Therefore it can

60 A Branch 'The African Criminal Court: Towards an emancipatory politics' in Jalloh, Clarke &Nmehielle (n 59) 212-213.

61 The core crimes are genocide (art 28B of the African Court Statute), crimes against humanity (art 28C), war crimes (art 28D), and the crime of aggression (art 28M).

62 Apart from the addition to the definition of genocide described in this section of the contribution, the African Court Statute made some changes such as: crimes against humanity to be committed as part of a wide-spread or systematic attack 'or enterprise' directed against any civilian population, with knowledge of the attack 'or enterprise' (art 28C of the African Court Statute); and use of children under 18 years of age in armed conflict as a war crime (art 28D(b)(xxvii) of the African Court Statute), while the ICC Statute provides that it is a war crime to conscript or otherwise use children under 15 years of age (art 8(b)(xxvi) of the ICC Statute); the African Court Statute prescribes slavery and deportation to slave labour as a war crime (art 28D(b)(xxxi)), while the ICC Statute treats enslavement as a crime against humanity. For a comparison of the respective statutes and additions made by the African Court Statute, see EY Omorogbe 'The crisis of international criminal law in Africa: A regional regime in response?' (2019) 66 *Netherlands International Law Review* 287 at 302-309.

63 Article 28B of the African Court Statute defines the crime of genocide as follows, and especially subsection (f) which is not found in the ICC Rome Statute: 'For the purposes of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group; f) Acts of rape or any other form of sexual violence.'

64 This expansion of the notion of genocide was first upheld in the ICTR *Akayesu Case* and later supported by the ICTY *Karadžić Case*. See, *Prosecutor v Jean-Paul Akayesu*, Judgment, ICTR-96-4-A (2 September 1998) and *Prosecutor v Radovan Karadžić*, redacted Judgment, IT-95-5/18-T (24 March 2016).

be said that the African Court Statute is more up-to-date, progressive and consistent with the jurisprudence in Africa.

2.5 Corporate responsibility

It is innovative that the African Court has jurisdiction over corporations[65] and will be able to prosecute and punish legal entities. African states have been tackling the problem of regulating corporate activities involved in various criminal acts such as environmental destruction and illegal trafficking and mercenaries. For example, the OAU Convention for the Elimination of Mercenarism in Africa of 1977 and the Protocol against Illegal Exploitation of Natural Resources of 2006, which was an initiative taken by the International Conference on the Great Lakes Region (ICGLR)[66] show that the concerns of African states over regulating corporate activities were discussed both in sub-regional and continental level. Therefore, the idea of holding corporations accountable for their economic activities is not new to African states. The African experiences illustrated that not only individuals, but also corporations have to be held accountable for the crimes in order to effectively prevent and punish crimes and also to provide appropriate reparations and compensation for the victims.[67]

In general, the notion of the legal personality of corporations under international law is not fully recognised yet as the rights of corporations are only partially recognised.[68] For example, the right to bring suit before international institutions like the International Centre for Settlement of Investment Disputes (ICSID), but as to the duties of corporations and their

65 Article 46C of the African Court Statute provides that 'the Court shall have jurisdiction over legal persons, with the exception of States' and that the 'criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes'.

66 ICGLR is an inter-governmental organisation of the countries in the African Great Lakes Region.

67 For example, see 'Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo' UN Doc S/2002/1146 (2002).

68 See 'Developments in the Law: Corporate Liability for Violations of International Human Rights Law' (2001) 114 Harvard Law Review 2030-31. The international community recognised the need to regulate corporations, and created guidelines. For example, the responsibility of corporations to respect human rights was discussed under the UN Human Rights Council, and the Guiding Principles submitted by the Special Rapporteur suggested that business enterprises should respect human rights. See the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, in 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' UN Doc A/HRC/17/31 (2011) 13.

responsibility in international plane, there is not enough evidence showing its recognition in international law.[69] A case in the Special Tribunal for Lebanon held a corporate entity responsible for the crime against the court proceedings,[70] but there are not enough precedents to conclude that the notion of corporate responsibility acquired general acceptance in the international community. Currently, the international community is striving to develop international law to regulate corporations, moving away from relying solely on the non-binding soft law such as the United Nations Guiding Principles on Business and Human Rights.[71] In order to create more concrete international law to regulate corporate activities, an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, namely the Intergovernmental Working Group (IGWG) was established in accordance with the United Nations Human Rights Council resolution which was drafted by Ecuador and South Africa.[72] The IGWG is currently working on an international convention and protocol towards that end.[73] However, the draft convention to regulate transnational

69 In the *Kiobel Case* the Supreme Court of the United States denied the notion of corporate responsibility under international customary law. *Kiobel v Royal Dutch Petroleum* (2d Cir. 2010) 621 F 3d 111.

70 *Akhbar Beirut S.A.L. & Mr Al Amin Case*, STL, Case STL-14-06 (31 January 2014). The STL charged Akhbar Beirut with the contempt and obstruction of justice pursuant to Rule 60 bis of the Tribunal's Rules of Procedure and Evidence, for publishing articles on its Arabic and English websites and in its newspaper which contained information about confidential witnesses in the *Ayyash et al* case. The Defence challenged the STL's jurisdiction, and on 6 November 2014, the Contempt Judge found the Tribunal lacked jurisdiction over legal persons, but an Appeals Panel overturned this decision on 23 January 2015, finding that the case could proceed against Akhbar Beirut, who the Contempt Judge found guilty on 15 July 2016, he was sentenced to a 6 000 euro fine in August 2016. See also, *Al Jadeed S.A.L. & Al Khayat Case*, STL, Case No. STL-14-05/1/CJ/ (31 January 2014). In this decision in 2014, the STL charged Al Jadeed SAL with contempt for allegedly knowingly and willfully interfering in the administration of justice by approaching the confidential witnesses in the A*yyash et al* Case for the broadcast. However, later on 18 September 2015, the Contempt Judge reversed the judgment and found him not guilty of contempt, and on 8 March 2016 the Appeals Panel confirmed the acquittal of Al Jadeed. See N Bernaz 'Corporate criminal liability under international law: The New TVS.A.L. and Akhbar Beiruit S.A.L. case at the Special Tribunal for Lebanon' (2015) 13 *Journal of International Criminal Justice* 313.

71 As above.

72 See HRC, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 25 June 2014, UN Doc A/HRC/26/L.22/Rev.1 (25 June 2014).

73 The IGWG submitted the second draft of the 'Legally binding instrument to regulate, international human rights law, the activities of transnational corporations and other business enterprises' in 2020. For the latest information, see Business & Human Rights Resource Centre 'Binding Treaty' https://www.business-humanrights.org/en/big-issues/binding-treaty/ (accessed 31 March 2021).

corporations depends on national courts for handling the cases.[74] The fact that the African Court is entitled to pursue corporate liability implies that the legal personality of corporations is recognised on the regional international plane. Under the Malabo Protocol, corporations are obliged to observe international law and not to commit any of the international crimes listed in the Malabo Protocol, and upon their breach, the corporate entity responsible will be forced to take responsibility and be prosecuted accordingly.[75] The very idea of prosecuting a corporation for international crimes at the international level influences the development of general international law as well as international criminal law and international law on responsibility. The Malabo Protocol has the effect of enhancing the active discussions and expectations on corporate criminal liability under international law.[76] Once the African Court is established, it may encounter many legal and practical difficulties in prosecuting a corporate entity. However, with multinational or transnational companies, or foreign state-owned companies or economic entities, the African Court may face jurisdictional conflicts with the foreign states.

2.6 Absolute immunity

Without a doubt that the most controversial provision in the African Court Statute is article 46A bis, as:

> No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

With this provision, the African Court confers absolute immunity to the heads of state and governments and other senior officials of the AU

74 The art 9(1) of the second draft prescribes that: 'Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omission that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vested in the courts of the State where: a) the human rights abuse occurred; b) an act or omission contributing to the human rights abuse occurred; or c) the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled.' See the OEIGWG Chairmanship Second Revised Draft (6 August 2020) , https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (accessed 31 March 2021).

75 See art 40C of the African Court Statute.

76 See GJ Kweka 'Regulating the exploitation of natural resources through the doctrine of corporate criminal liability in Contemporary Africa' (2019) 33 *Speculum Juris*.

member states. It is conceived that inclusion of such a provision is a response to, from the view of the African states protesting the ICC, the ICC's 'ignorance' of the immunity of the African heads of states.[77]

Leaving the in-depth analysis of this provision to other writings,[78] this contribution will focus on its illustration of the 'Africanisation' of international criminal law. In the ICC,

> official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility.

This is provided for in article 27 of the ICC Rome Statute.[79] Kenya once submitted a proposal to amend this article by inserting as paragraph 3 similar words to that of article 46A bis of the African Court Statute giving immunity to incumbent heads of state, but this amendment proposal was unsuccessful.[80]

There is vehement criticism that the African Court is promising a safe haven for African politicians.[81] It is noticeable that the African Court

77 M Falkowska & A Verdebout 'L'opposition de l'Union africaine aux poursuites contre Omar Al Bashir: Analyse des arguments juridiques avancés pour entraver le travail de la Cour pénale international et leur expression sur le terrain de la coopération' (2012) 45 *Belgian Review of International Law* 201. See also Bachmann & Sowatey-Adjei (n 22).

78 See for example, D Tladi 'The Immunity Provision in the AU Amendment Protocol: Separating the (doctrinal) wheat from the (normative) chaff' (2015) 13 *Journal of International Criminal Justice* 3.

79 The Article 27 of the ICC Rome Statute which is titled 'Irrelevance of official capacity' prescribes as follows: '1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

80 Kenya proposed to insert the following words to art 27 of the ICC Rome Statute: 'Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions'. See, 'Submission by the Republic of Kenya on Amendments to Rome Statute of the International Criminal Court for Consideration by the Working Group on Amendments' (22 November 2013), UN Depositary Notification C.N.1026.2013, TREATIES-XVIII.10 https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf (accessed 31 March 2021).

81 See Abraham (n 6) 13-14. See also Omorogbe (n 62) 293, explaining that the provision conferring immunity to AU head of states 'is intended to protect Kenyatta and Ruto'.

Statute gives absolute immunities only to persons of AU member states and not to the Head of State or Head of Government representing non-AU member states.[82] Therefore the rule of article 46A bis is far from presenting a general international rule.

Also, article 46A bis is not clear on the actual holders of the immunity since 'anybody acting or entitled to act in such capacity' and 'other senior state officials based on their functions' are so vague in notion that some commentators conclude that the article gives immunity to just about every senior government official.[83] There is academic dispute whether the provision prescribes immunity *ratione personae* or immunity *ratione materiae* or a mixture of two,[84] but in any interpretation it is hard to find consistency with the general understanding on the scope of immunity.[85]

There is no doubt that the provision conferring absolute immunity for certain high-level officials is problematic, and it will produce a lacuna of prosecution depending on the political status of the criminals. It is the view of the author that article 46A bis may allow for impunity and should

82 Article 46A bis confers immunity specifically to 'AU' heads of state or government or other senior state officials and others.

83 See ZB Abebe 'The African Court with a Criminal Jurisdiction and the ICC: A Case for Overlapping Jurisdiction?' (2017), 25(3) *African Journal of International and Comparative Law* 425.

84 D Tladi 'Article 46A bis: Beyond the rhetoric' in Jalloh, Clarke &Nmehielle (n 59) 854-856.

85 For example, according to the UN International Law Commission and the Sixth Committee of the General Assembly, whom are working on the codification of the law on immunity, immunity ratione personae is enjoyed by the Troika, that is, the persons in three positions – Heads of State, Heads of Government, and Ministers of Foreign Affairs. The draft article 3 on the Immunity of State officials from foreign criminal jurisdiction which is elaborated by the International Law Commission prescribes as follows: 'Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction.' See, UNGA, Immunity of State officials from foreign criminal jurisdiction: Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission, 4 June 2013, UN Doc A/CN.4/L.814 (2013). Although the above codification deals with the immunities from foreign criminal jurisdiction and not with the international criminal jurisdiction, it shows that it is considered generally that other high-level officials not in the above three positions may be eligible for immunity ratione materiae, but not to immunity ratione personae. Therefore, they are not entitled to claim absolute immunity from foreign jurisdiction.

be amended. But as I explain in Section 4, the new complementary system can fill the lacuna of prosecution.

2.7 Sectional conclusion

Section 2 offered some features that can be characterised as the 'Africanisation' of international criminal law. The permanence of the institution is the result of African states seeking an African judicial organ to handle African cases without the external interference in the future, after the experiences of having ad hoc tribunals such as the ICTR and SCSL, and the hybrid tribunal the Extra Ordinary Chamber. The adoption of the Principle of Complementarity by the African Court suggests that the principle is not a rule relevant only to the ICC but may be a general rule that should be adopted by any permanent international criminal judicial organ. Moreover, the African Court presents a new model of the Principle of Complementarity in which the African Court is complementary to regional courts in addition to national courts. Wider jurisdiction than the ICC by covering 14 international and transnational crimes reflects the experiences of African states victimised by such crimes and having a history of coping with such crimes. Thus the new crimes listed are the crimes of African concerns. The possibility of prosecuting and punishing corporations is innovative in international criminal law, but the idea is not new to African states which have been tackling the problem of regulating corporate activities involved in criminal acts such as exploitation of natural resources, illegal trafficking and mercenaries. The conferment of the absolute immunity to African head of state and other senior officials is without a doubt the most controversial feature of the African Court. Article 46A bis of the African Court Statute should be amended, otherwise the new system of complementarity should be adopted (as outlined in Section 4) in order to make the African Court play a distinctive role in the future comprehensive international criminal justice system. There are many negative evaluations and criticisms over some features introduced above. However, considering that the features introduced in this section have unique historical backgrounds and significance for African states, it is noted that the evaluation of the 'Africanisation' of international criminal law is beyond simple 'good or bad'. They all have historical significance and rationale within Africa.

Furthermore there is an argument that regionalism leads to the fragmentation of international law and produces complexity in international criminal law.[86] It is argued that regionalism is undesirable for

86 M Sirleaf 'Regionalism, regime complexes and the crisis in international criminal justice' (2016) 54 *Columbia Journal of Transnational Law* 727 at 743-747.

the development of the unified universal international criminal law.[87] This argument is not limited to the field of international criminal law but also observed in the long debate in other fields such as that of international human rights law.[88] There is a common criticism on regionalisation of international law: Possibility of producing inconsistent and incoherent legal findings among courts with different legal bases and interpretations. However, Jalloh indicates that the African Court is taking the ICC Statute as a starting point and he argues that it implies 'a desire to ensure that the obligations assumed by African States are at least compliant with the ICC regime', and it might help to 'maintain greater coherence and perhaps even help to avoid fragmentation of region and international criminal law'.[89] And one of the advocates of the regionalisation of international criminal law insists that beside domestic courts, 'power to prosecute and try international crimes should be distributed between regions and universal mechanisms of criminal accountability',[90] and proposes 'the principle of regional territoriality' which implies that 'international crimes should be prosecuted or tried in each region where they have been committed to the exclusion of external judicial interventions of foreign states and the international community'.[91] A comprehensive international criminal justice system entailing cooperation at national, regional and international level for future may be desirable for achieving the goal of ending the culture of impunity. In the opinion of the author, regionalism and 'Africanisation' of international criminal law may be considered as a step forward in achieving the universal goal.

87 For the discussion on the regionalism in the field of international criminal justice, see MVS Sirleaf 'Regionalism, regime complexes & international criminal justice' (2015) 109 *Proceedings of the Annual Meeting (American Society of International Law), Adapting to a Rapidly Changing World* at 161-166.

88 G Werle & M VormBaum 'The Search for alternatives: The "African Criminal Court"' ISPI Commentary (28 March 2017)http://www.ispionline.it/sites/default/files/pubblicazioni/commentary_werle_wormbaum_28_03.2017.pdf (accessed 31 March 2021).

89 CC Jalloh 'The Place of the African Court of Justice and Human and Peoples' Rights in the prosecution of serious crimes in Africa' in CC Jalloh, Clarke & Nmehielle (n 59) 105.

90 B Kahombo 'Towards coordination of the global system of international criminal justice with the criminal court of the African Union' in Van der Merwe & Kemp (n 34) 17.

91 Kahombo (n 90) 27.

3 The significance and implication of the creation of the African Court as a model for other international regional organisations

The preceding section specified the 'Africanisation' of international law expressed in the unique features of the African Court and their historical backgrounds and rationale. Before elaborating on the future relationship between the African Court and the ICC and the potential role of the African Court in the comprehensive system of international criminal justice with the idea of new Principle of Complementarity in the next section, this section illustrates the significance of Malabo Protocol and the African Court as a model for the other regional organisations. Regionalisation of the international criminal justice system may contribute to the fight against impunity. Considering the current stage of the development of the international criminal justice system, having more institutions willing to conduct trials is generally welcomed. Currently, the highest concerns over the criminal prosecutions of the serious crimes against international law is how to end the culture of impunity and the lack of prosecution and punishment, rather than the positive conflicts of jurisdictions in which multiple entities willing to try the criminals are competing and fighting over the initiative.[92] Therefore filling the gap of a jurisdictional lacuna and having multiple choices for trial contribute to the globalisation of the web of criminal jurisdiction, serving the quest for ending the culture of impunity.

It should be noted that the Malabo Protocol contributes to the development of international criminal law, and may be construed as the expression of *opinio juris* of the African states and could be a model for other regional organisations in considering developing such a criminal judicial organ.[93] Furthermore, the African Court has historical and sociological

92 In the situation of a positive conflict of jurisdiction, there is more than one state willing to prosecute the crime, so it is likely that the crime will be prosecuted somewhere, on the other hand, in the situation of a negative conflict of jurisdiction, there is no state willing to prosecute and it might cause impunity of the crime.

93 The United Nations pointed out the increasing importance of regional organisations to criminal justice and crime prevention on a number of occasions. For example, the United Nations held a high-level debate on the role of regional organisations in strengthening and implementing crime prevention initiatives and criminal justice responses in accordance with the UN General Assembly, Resolution 73/186: Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity, 29 January 2019, UN Doc A/RES/73/186 (2019). See 'High-level Thematic Debate of the General Assembly on "The Role of Regional Organizations in Strengthening and Implementing Crime Prevention Initiatives and Criminal Justice Responses"' 6 June 2019, Trusteeship Council Chamber https://

and institutional significance as: the first criminal judicial organ established by a regional organisation intended specifically to exercise international criminal jurisdiction;[94] a symbol for promoting justice and rule of law; the exercise of 'judicial self-determination' by Africa; the proposal for the comprehensive judicial mechanism with unique institutional structure; and a basis for the further reform for Africa and other regions.

3.1 The creation of a criminal judicial organ within a regional organisation to exercise international criminal jurisdiction

The African Court will be the first permanent criminal court vested manifestly with international criminal jurisdiction established by a regional organisation. Even the European Union (EU), which is well known for its extensive power and complex and intimate organisational framework, has no such criminal court. As a precedent of a regional court to enjoy explicit criminal jurisdiction, there is the Caribbean Court of Justice (CCJ)[95] established by the Caribbean Community (CARICOM), but unlike the African Court, it is not created especially for the endowment and exercise of international criminal jurisdiction. The CCJ is entitled to handle both civil and criminal matters appealed from the courts of the member states, and it has a potential to handle cases over international crimes as a consequence, and it is noted that the Treaty establishing the CCJ does not emphasise the prosecution and punishment of serious international

www.un.org/pga/73/event/the-role-of-regional-organizations-in-strengthening-and-implementing-crime-prevention-initiatives-and-criminal-justice-responses/ (accessed 31 March 2021). There are some proposals for other regional international criminal court from scholars and commentators. For example, for a comment proposing an Asian international criminal court, see L Hunt 'Time for an ASEAN Criminal Court? A look at a proposal for the regional grouping' *The Diplomat* 16 December 2016 https://thediploat.com/2016/12/time-for-an-asean-criminal-court/ (accessed 31 March 2021). See also for the proposal for the establishment of the European Environmental Criminal Court, see http://court4planet.eu/wp-content/uploads/2019/10/Speech_by_Abrami_EN.pdf (accessed on 18 June 2022), see also http://www.iaes.info/en/file/documento/219/3001122295BrochureIAES.2012.pdf (accessed on 18 June 2022)..

94 As mentioned in Section 3.1, there is the precedent of Caribbean Court of Justice as the first regional court to enjoy criminal jurisdiction, but the Treaty establishing the court neither prescribes international criminal jurisdiction in explicit words, nor holds prosecution and punishment of serious international crimes as the main objectives of the court.

95 Agreement Establishing the Caribbean Court of Justice (14 February 2001). For the details of the CCJ, see AN Maharajh 'The Caribbean Court of Justice: A horizontally and vertically comparative study of the Caribbean's first independent and interdependent court' (2014) 47 *Cornell International Law Journal* Article 8. See also J Kocken & G van Roozendaal 'Constructing the Caribbean Court of Justice: How ideas inform institutional choices' (2012) 93 *European Review of Latin American and Caribbean Studies* 95.

crimes as the Malabo Protocol does.[96] If we turn to Asia, we cannot find a commitment to establishing a regional international organisation with such a judicial organ. The Association of Southeast Asian Nations (ASEAN) is in the process of forming a human rights mechanism,[97] but it does not cover the entire region of Asia.

Comparatively, the AU is a bigger regional organisation with 55 member states and its leading action may become a model for other regions. The Malabo Protocol signifies that Africa is eager to develop a highly organised judicial mechanism within the AU. Even though there is no ratification of the Malabo Protocol so far, from the perspective of international organisational law and of international regional law, there is no doubt that the mere adoption of the Malabo Protocol has historical significance. If the African Court is established, it will be the first permanent regional international criminal court to exercise international criminal jurisdiction. The African Court can be perceived as the fruit of the systematisation, signifying the high level of maturity of the AU as a regional organisation uniting states in the African Continent.

3.2 Promoting justice and rule of law: A model for the regions recovering from heinous crimes and atrocities

The African Court is created to end impunity, and given how the African Continent has suffered and continues to suffer from grave and heinous crimes, its establishment will be historical.[98] The overall goal and objective of the court itself serve a good purpose, as the African Court is expected to perform its task of criminalising and punishing heinous crimes.[99] The positive values underlying the Protocol and the court include: respecting human rights and protecting the right to life;[100] condemning violent acts

96 Art 25(5) of the Agreement Establishing the Caribbean Court of Justice provides that appeal shall lie to the Caribbean Court with the special leave of the Court from any decision of the Court of Appeal of a contracting party in any civil or criminal matter. Taking note of art 25(6) which prescribes that the Caribbean Court shall 'in relation to any appeal to it in any case, have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal of the Contracting Party from which the appeal was brought', it can be argued that the Caribbean Court is exercising the jurisdiction conferred by the national court instead of international criminal jurisdiction. Compared to that, art 3 of the Malabo Protocol clearly specify that the African Court 'is vested with an original and appellate jurisdiction including international criminal jurisdiction'.

97 M Inazumi 'Towards the establishment of a Regional Human Rights Mechanism in Asia' in I Lintel & A Buyse *Defending human rights: Tools for social justice* (2012) 71-83.

98 Deya (n 35).

99 See the Preamble paras 9, 11, 12 of the Malabo Protocol.

100 See for example, the Preamble, paras 5, 10, and 11 of the Malabo Protocol, paras 9, 10,

denying the right to life and other basic rights inalienable for the peaceful life of people;[101] and respecting the rule of law and due process.[102] Expressing strong condemnation of international and transnational crimes by creating an institution to prosecute and punish those responsible will have a deterrent effect and will contribute to achieving the goal of obtaining a society without the fear of such crimes.[103]

The adoption of the idea of the African Court with criminal jurisdiction has influence on an international, regional and domestic level. For instance, the presence of the African Court will likely to promote higher interests in the criminal justice among AU member states. Seeing and hearing annual reports and having discussions on the activities of the African Court in future, AU member states will likely be more conscious of international criminal justice. The Principle of Complementarity may also encourage states to exercises jurisdiction domestically, and consequently that may contribute to raising the quality of justice in national judicial system as well. Also, the African Court may promote the abolishment of death penalty in the African continent.[104]

Such commitments for the promotion of justice and rule of law are requested by the international community also to the other regions of the world, and regional organisations may consider building a regional criminal court. For instance, if we turn to Asia, among the ten member states of the ASEAN, Cambodia receiving international assistance through the United Nations prosecuted the crimes committed under the Khmer Rouge regime (1975-1979) at the Extraordinary Chambers in the Courts of Cambodia (ECCC).[105] The international community is hoping Myanmar will respect the human rights of the Muslim minority group Rohingya and solve the problems of Rohingya refugees who fled to neighbouring states, and Pre-Trial Chamber III of the ICC authorised, on November 2019, the Prosecutor to proceed with an investigation for the alleged crimes of deportation, persecution and other crimes in the context

11, 12, and 16. See Amnesty International (n 6) 5.

101 See for example, the Preamble, paras 5, 9, 11, 12, 17. See Amnesty International (n 6).

102 See for example, the Preamble, paras 6, 7, 10, 13. See Amnesty International (n 6).

103 See the Preamble, para 17 of the Malabo Protocol.

104 Article 43A(1) explicitly excludes the death penalty as it provides that the African Court shall pronounce judgment and impose sentences and/or penalties 'other than the death penalty'. Considering that not all states – in Africa have abolished the death penalty, the fact their regional international court denies the application of the death penalty, even for the most serious international crimes, may influence states to reconsider their – national position on the death penalty and move towards its abolishment.

105 See supra note (15).

of the escalation of violence which occurred in Myanmar in 2017.[106] The enforcement measures against drug crimes taken under the rule of President Duterte of the Philippines are criticised as serious violations of human rights, and the ICC announced in February 2018 that it intended to open a preliminary examination of the situation in the Philippines and analyse crimes allegedly committed in the context of the 'war on drugs' campaign.[107]

3.3 Consolidating *opinio juris* of the African states and regional international law: A model for the regions with distinct legal minds

The presence of the Malabo Protocol and the idea of the African Court indicate a new development in the field of international criminal law. While the African Court has some similarities to the earlier international courts, such as the ICC, it also has some unique features not seen in any other existing international judicial organ. Therefore, it can be said that the African Court is conservative in some parts but at the same time is very innovative in others. Either way, the fact that the Malabo Protocol was adopted by the AU implies that the African Court can be construed as the expression of the *opinio juris* of the African states, their understanding on the notion and status of specific rules under customary international law. Therefore, the part following the precedents may be regarded as evidence of a customary law, while the innovative part is evidence of, or a stimulation for, the progressive development of international criminal law. It is easier for states to exhibit their *opinion juris* and state practice (*usus*) concerning the rules and principles of international criminal law that are applicable to national courts, but it is more difficult for states to express and to make the international courts and tribunals to reflect their *opinion juris* through their state practice (*usus*) concerning the rules and principles applicable to international courts and tribunals. The Malabo Protocol is utilised as a direct expression and evidence of *opinion juris* and *usus* of the African states concerning rules governing international criminal courts and tribunals.

Also, as illustrated in Section 2, other regions can join in the regionalisation of international criminal law. As the African Court shows the 'Africanisation' through the inclusion of crimes other than the core

106 See ICC Pre-Trial Chamber III *Decision pursuant to Article 15 of the Rome Statute on the authorisation of an investigation into the situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar* ICC-01/19-27 (14 November 2019).

107 See, ICC Office of the Prosecutor 'Report on preliminary examination activities (2018)' (5 December 2018) 15-18.

crimes that are of special relevance in the African context, other regional organisations can choose to prescribe the regionalisation of international criminal law that is particularly suitable for a specific region.

3.4 Exercise of 'judicial' self-determination: A model for decolonised states

By the author adopting a different perspective, it is argued that the Malabo Protocol and the idea of the African Court with international criminal jurisdiction are the expression of the will of Africa to actively participate in the formulation and implementation of international criminal law. Many African states participated and contributed to the elaboration of the ICC Statute, but the support for the ICC decreased when concerns arose about the ICC targeting the presidents and high-level officials of some African states. There are voices from African states that accuse the ICC as the tool of the Western states and being 'neo-colonial' and 'imperialistic'.[108] Setting aside the anti-ICC sentiment, the African Court symbolises that Africa will no longer be the object waiting diligently to have international law, created by other states, applied to it through the hand of non-African judicial organs. This may be the beginning of the exercise of 'judicial' self-determination by African states.[109] In the history of modern international law developing states exercised their political self-determination to free themselves from colonisation and win the status of an independent state, while securing economic self-determination to gain control of their natural resources and to participate in the decision making of the world economy.[110] Now with the Malabo Protocol and the establishment of the African Court, African states are exercising 'judicial' self-determination, prosecuting and punishing crimes in accordance with

108 See M Pheko 'The ICC now an instrument of imperialism' *The Herald* 1 July 2015 https://www.herald.co.zw/the-icc-now-an-instrument-of-imperialism/ (accessed 31 march 2021). See also F Cowell 'Inherent imperialism: Understanding the legal roots of anti-imperialist criticism of the International Criminal Court' (2017) 15 *Journal of International Criminal Justice* 667. See also, PI Labuda 'The International Criminal Court and perceptions of sovereignty, colonialism and Pan-African solidarity' (2013-2014) 20 *African Yearbook of International Law* 289 at 305-314. See also, R Schuerch *The International Criminal Court at the mercy of powerful states: An assessment of the neo-colonialism claim made by African stakeholders* (2017).

109 The word 'judicial' self-determination is not used commonly, but I use this word to express the determination to exercise judicial jurisdiction by the states notwithstanding the intervention or pressure or from the Western states. See M Inazumi 'The regional differences on human rights and criminal justice: Judicial self-determination lost through the suppression from Western states? Universal jurisdiction and prohibition of the death penalty' (2013) 1 *Korean Journal of International and Comparative Law* 188.

110 The common art 1 of the International Covenants for Economic, Social and Cultural Rights (IESCR) and the International Covenant for civil and Political Rights (ICCPR) prescribes the rights of political self-determination and of economic self-determination.

international law (Malabo Protocol and the African Court Statute) that they elaborated, through the international judicial organ (the African Court) that they created themselves.

Having African states and the AU actively participating in formulising rules in the field of international criminal law and in exercising jurisdiction to end impunity and maintain order, international criminal law may no longer be criticised as a law made only by the Western states, a law made by the powerful states to punish losing or under-developed states, or a law of imperialism. The African Court has competence to punish corporate entities for crimes, therefore crimes such as money laundering, trafficking in hazardous waste, and illicit exploitation of natural resources which may be the result of the misconduct of foreign or multi-national corporations can be punished by the hand of the African Court.

3.5 Comprehensive judicial mechanism and unique institutional structure: A model for building a new court system

The organisational structure of the African Court is unique, encompassing three sections and corresponding chambers to maintain its broad jurisdiction, wider than that of the ICC or the International Court of Justice (ICJ), as the Court can rule on state responsibility as well as individual responsibility.[111] As illustrated in Figure 1 below, the judicial system of the AU is to be transformed into the African Court which is composed of multiple sections each vested with different tasks. The three sections individually handle different types of cases: the General Affairs Section, the Human and Peoples' Rights Section, and the International Criminal Law Section.[112] The former two involve state responsibility while the last one pursues individual and corporate criminal responsibility.[113] Encompassing such a variety of jurisdictions, the African Court is to be an

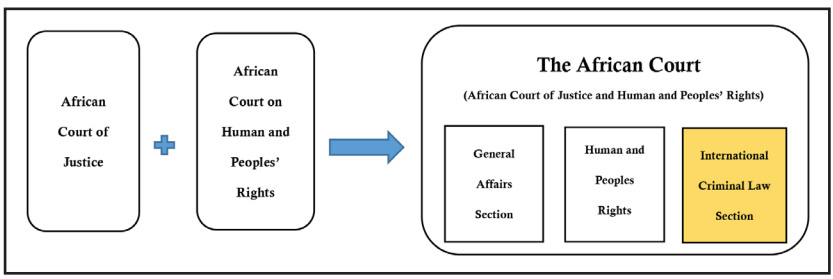
111 The African Court can rule on state responsibility within the General Affairs Section and Human and Peoples' Rights Section, and on individual responsibility within International Criminal Law Section. See art 17 of the African Court Statute. Note also that concerning the criminal proceedings, art 46C (1) of the African Court Statute prescribes that the African Court has jurisdiction 'over legal persons with the exception of States', thus the African Court can prosecute individuals (art 46B, except persons under the age of 18, art 46D) and corporations (art 46C) but cannot prosecute a state for crimes.

112 Article 16 of the African Court Statute.

113 Article 17 of the African Court Statute.

innovative court with extensive and comprehensive authority never seen in any other international judicial body.

Figure 1: The AU's Judicial Reform to Establish the African Court (African Court of Justice and Human and Peoples' Rights)



It is very interesting that the section handling the prosecution of criminals belongs to the same judicial institution that determines state responsibility. It remains uncertain how this structural neighbourhood will affect the work of each section since such an institutional framework is the first in history, but it is natural to expect that it might have a positive influence. It is expected that each section should reinforce the values and ideals pursued by the other sections. The staff of the International Criminal Law Section and the members of the respective Chambers may become more conscious of respecting human rights of suspects and victims in performing their task, paying due respect to the task and mandate of the co-workers in the other sections and other Chambers. Also, because many core crimes under international law are committed by or with the acquiescence of a government or high officials, state responsibility may be highly relevant. Because most courts in general respect their own precedent,[114] and especially since judgments given by any Chamber shall be considered as rendered by the African Court,[115] each Chamber may be conscious of constituting the jurisprudence of the African Court as a whole.

It is noted that within the institutional framework of the African Court, the International Criminal Law Section works alongside the section handling human rights.[116] There are also other regional human rights

114 The decisions of international courts and tribunals generally have no legal binding force except for the parties and in respect of that particular case, but courts and tribunals have a tendency to respect their own precedents in general.

115 Article 19 of the African Court Statute.

116 The Human and Peoples' Rights Section shall be competent to hear all cases relating to

courts currently at work, the Americas and Europe.[117] Asia and Middle East are without any human rights courts but Jalloh points out that these regions 'could in the future be inspired by the other regions', and when they do so, that could make 'global enforcement of international criminal law through regional courts a potential reality for all regions of the world', thus 'a system of regional criminal law enforcement has the prospect of a universal reach, depending on the progress made toward universalization of regional human rights courts'.[118]

Moreover, the composition of the African Court might imply a new solution to the problems faced by modern international law: the fragmentation among different fields of international law and the contradiction and inconsistency in the decisions and reasoning rendered by different international judicial organs. It might ease the fragmentation between different fields of international law, such as that between international human rights law and international criminal law, and law of state responsibility. Being part of a court with a wide range of jurisdictions might cause the Chambers of the International Criminal Law Section to be aware of its task to win not only justice but also a society prevailing peace and respecting human rights.

3.6 Sectional conclusion

Section 3 illustrated some features of the African Court that can be considered as a model for the other regional organisations when considering the development of similar criminal judicial organs. The African Court signifies that Africa is eager to develop a highly organised judicial mechanism within the AU, and the high level of maturity of the AU as a regional organisation uniting states in the African Continent. Once the African Court starts functioning it will promote higher interests in international criminal justice among AU member states through its

human and peoples' rights, while the International Criminal Law Section shall hear all cases relating to the crimes specified in the Statute. Article 17(2) and (3) of the African Court Statute.

117 There are three regional human rights tribunals, each established by the regional international organisations in Africa, America, and Europe. The Inter-American Court of Human Rights is a regional human rights tribunals within the human rights protection system of the Organisation of American States (OAS). In Europe there is the European Court of Human Rights (known as the Strasbourg Court) that rules on individual or state applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. And the African Court on Human and Peoples' Rights is currently in place as the organ of the AU, which will be taken over by the Human and Peoples Rights Section of the African Court if the Malabo Protocol enters into force.

118 Jalloh, Clarke & VO Nmehielle (n 59) 61.

actions and also by the exercises of national jurisdictions encouraged under the Principle of Complementarity. Therefore, for the regions recovering from heinous crimes and atrocities, a regional criminal court may be a way to promote justice and the rule of law in the regions and to express the firm commitment to end impunity and to prevent such crimes in future. Also, for the regions with distinct legal systems, the African Court may be considered as a model for consolidating *opinio juris* of the states in the region, enabling the development of the regionalisation of international criminal law that is particularly suitable for the specific region. Also, other decolonised states may be interested in the exercise of 'judicial' self-determination expressed by African states, prosecuting and punishing crimes in accordance with international law that they elaborated, through the international judicial organ that they created.

From the perspective of the history of international institutional law, the African Court is remarkable, but from a practical point of view, it is feared that such wide jurisdiction vested in the hands of 16 judges may be too big a burden and detrimental by overloading the African Court.[119] However, the burden will be shared with national courts and the courts of the RECs under the new model of the Principle of Complementarity presented by the African Court. Therefore, if the comprehensive international criminal justice system works properly as illustrated in the next section, then the African Court may not be overloaded. Believing that the establishment of a court contributes to ending impunity and has a deterrent effect on preventing crimes in future, we expect the African Court to conquer the numerous difficulties it faces. It might take decades or a century, or the African states, encouraged by the courts potential, may bring it to realisation sooner than we think. Regardless, having something to start with will make it easier to begin discussions on the measures for its realisation and for improvements. The Malabo Protocol can be the basis of the discussion for the establishment of a truly effective and efficient criminal tribunal for Africa, as well as for the other regional organisations.

119 Amnesty International (n 6) 24-26 & 35. The AU judicial organ does not have enough manpower or budget support needed to perform such additional tasks. The new International Criminal Law Section 'shall be competent to hear all cases relating to the crimes specified in this statute', but the task is too wide considering the ability and available resources of the present institution. For reference, the ICC, which has jurisdiction over fewer crimes, took almost decade to tackle its first case (Lubanga Case). Further, its operation must be supported by the annual budget from contributions from ICC member states, it is difficult to see how African states will maintain a court with international criminal jurisdiction. International criminal trials are expensive, time-consuming and require tremendous effort both in monetary and human resources terms.

4 The relationship with the ICC: The new system of complementarity

4.1 No provision on the relation with the ICC

The Malabo Protocol and the African Court Statute have no explicit reference to the ICC. Considering how it replicates some provisions of the ICC Rome Statute, it can be inferred that the drafters intentionally avoided recognising the presence of the ICC. Many scholars criticise this point.[120] It is hard to deny the contentions, remembering the atmosphere of the relation between the ICC and the African states at the time of the adoption of the Malabo Protocol, which evidence the confrontation among the members of the AU towards the ICC. It is true that the anti-ICC sentiment influenced the adoption of the Malabo Protocol, but it is not the entire motive. The idea for an African judicial organ with criminal jurisdiction existed long before the confrontation of the AU and the ICC emerged as explained in Section 2.1. There are many incidents that pushed the African states to realise the need to establish a criminal court within African Continent, for example, the Hissène Habré case,[121] and the reluctance of African states to admit exercise of national jurisdiction by non-African states and accusations of abuse of the exercise of universal jurisdiction especially by European states.[122]

The relationship between the two courts can be elaborated on in any future agreement between them, and such an agreement can be concluded under article 46L(3) of the African Court Statute which provides that the African Court can seek the co-operation or assistance of 'international courts' and may conclude agreements for that purpose. Luckily, the confrontation with the ICC is not expressively engraved in the wording of the African Court Statute, therefore leaving the possibility to build a positive relationship with the ICC. The Malabo Protocol does not prohibit the African Court to work with the ICC in collaboration. Is it too much to expect both courts to respect each other, and work together under

120 See Abraham (n 6) 12-13.

121 Magliveras (n 20).

122 The Preamble of the Malabo Protocol recalls the Assembly decision adopted in relation to the question of the abuses of the principle of universal jurisdiction.

the Principle of Complementarity? The next section elaborates on the possibility.

4.2 New complementary system

The Principle of Complementarity held by the ICC is based on collaboration only with national jurisdiction and the ICC Statute does not address the jurisdiction of other international courts.[123] However, with the birth of the idea of the African Court, we should seek a modified complementarity system by adding regional jurisdiction as one of the components. In order to create a more efficient system to end impunity worldwide, the prosecution and punishment of all criminals – irrespective of whether they are the most responsible or the small fish – should be accomplished and sought at all levels from national to international, as well as the regional level. Given that it is practically impossible for the ICC to prosecute all the crimes committed in the world, the additional judicial organ should be welcomed. Jalloh analyses that regional organisations and their courts may well offer some of the key advantages associated with national courts and mitigate some of the key disadvantages of international tribunals.[124] Murungu proposes that

> a progressive interpretation of positive complementarity might, for the purposes of closing all impunity gaps, infer that even regional criminal courts could have jurisdiction over international crimes within the ICC jurisdiction.[125]

Nimigan argues that the ICC 'is not intended to be, nor capable of being, a standalone response to atrocity', and the inclusion of all forms of jurisdiction recognised by international law including regional mechanisms such as the African Court 'should be built-in to establish a positive interpretation of complementarity'.[126] Judge Chile Eboe-Osuji (Nigeria) of the ICC comments that the ICC should keep an open mind towards working not just with states but also regional organisations, as it develops proactive or positive complementarity, and he says that from

123 Note that the Preamble and art 1of the ICC Statute specifies that the ICC shall be complementary to 'national' criminal jurisdictions, and art 17 allows the ICC to determine that a case is inadmissible when the case is being investigated or prosecuted by 'a State'. In prescribing the Principle of Complementarity, the concurrency with the jurisdiction of states is clearly considered but the possibility of concurring with the jurisdiction of other international or regional judicial organs is not addressed.

124 Jalloh, Clarke & Nmehielle (n 59) 57-61.

125 Murungu (n 28) 1081.

126 S Nimigan 'The Malabo Protocol, the ICC, and the idea of "regional complementarity"' (2019) 17 *Journal of International Criminal Justice* 1005 at 1008.

the particular perspective of Africa the world 'is improved immensely by conferring criminal jurisdiction upon the African Court'.[127]

It is interesting that there was an effort from Africa to amend the Principle of Complementarity of the ICC although the relevant ICC Rome Statute was not amended. Kenya proposed, in accordance with AU resolution, to amend the Preamble of the ICC Rome Statute to allow recognition of regional judicial mechanisms as follows: 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.'[128]

In the opinion of the author, it is possible to interpret the Principle of Complementarity to allow a new mechanism to ensure prosecution at any level: the national level in which states exercise jurisdiction; at the regional level by a regional international organisation such as the African Court; and finally, the international level in which the ICC exercises jurisdiction. It can be concluded that outside of the immunity issue, the drafters of the Malabo Protocol intended the relationship between the African Court and the ICC as a complementary one, which seeks to incorporate an intermediary regional focus into the existing international criminal justice framework. The Principle of Complementarity is not necessarily limited to regulating the vertical relationships between courts.[129] The international and regional level might not be in the form of a subordinate relationship, instead, it may be a horizontal relationship since there is no hierarchy among international organisations in general. Therefore, since there is no provision commanding or prohibiting a specific relationship to be built with the ICC, the African Court may choose to function in several ways: to compete with the ICC; to collaborate with the ICC; or support the ICC as a subordinate body.

There is speculation that the relationship between the African Court and the ICC will be that of rivals rather than being cooperative,[130] thus many people may expect the African Court to act in place of the ICC.[131]

127 C Eboe-Osuji 'Administering international criminal justice through the African Court: Opportunities and challenges in international law' in Jalloh, Clarke & VO Nmehielle (n 59) 841.

128 'Submission by the Republic of Kenya on Amendments to Rome Statute of the International Criminal Court for Consideration by the Working Group on Amendments' (n 80).

129 Nimigan (n 126) 1014.

130 RJV Cole 'Africa's relationship with the International Criminal Court: More political than legal' (2013) 14 *Melbourne Journal of International Law* 670 at 695-696.

131 See Bachmann & Sowatey-Adjei (n 22) 277, commenting on 'the need to establish an African regional criminal court which would enable Africa to better handle its affairs

On the other hand, there are voices from scholars that cooperation between the African Court and the ICC would benefit both institutions greatly, by allowing the caseload to be shared.[132] It is proposed to divide the burden between the ICC and the African Court based on the gravity of crimes, or on the nature of crimes.[133] There is a suggestion proposing that 'with the ICC focusing on the highest-level perpetrators of core international crimes', the African Court is to be 'concentrated on perpetrators of crimes not under the jurisdiction of the ICC, or mid-level perpetrators of the core crimes'.[134] Reflecting interviews conducted by the Office of the Prosecutor in the ICC, Nimigan proposes that regional jurisdictions may serve as an effective middle-ground between national and international jurisdiction, and 'national jurisdictions would investigate and prosecute foot soldiers, regional jurisdictions would pursue rebel leaders, military commanders or intermediaries, and the ICC would deal with heads of state and senior governmental officials' as 'an ideal distribution of investigatory and prosecutorial roles'.[135]

There is an opinion suggesting that the ICC treat the African Court in the same manner as the national courts under the ICC's Principle of Complementarity.[136] The supporters of this opinion suggest that a judgment by the African Court

> might be superseded by one of the ICC if the former's judgment be found not to measure up to the standards of the ICC Statute and therefore to exemplify the inability (or unwillingness) of the African Court to exercise jurisdiction in a particular case.[137]

They view the African Court as subordinate to the ICC in hierarchy and insist that the ICC 'would remain at the apex of international criminal

without facing further "prejudice" as is currently alleged to be happening at the ICC'.

132 See Nimigan (n 126) 1015-1018, 1022-1023.

133 See Kahombo (n 90) 10-11.

134 Kenyans for Peace with Truth & Justice 'Seeking justice or shielding suspects? An analysis of the Malabo Protocol on the African Court' *KPTJ (Kenyans for Peace with Truth & Justice)* 23 November 2016 at 20-21 http://kptj.africog.org/seeking-justice-or-shielding-suspects-an-analysis-of-the-malabo-protocol-on-the-african-court/ (accessed 31 August 2019).

135 Nimigan (n 126) 1013 and 1022.

136 For example, Jackson contends that prosecutions by a regional criminal court should be seen as prosecution by a state. See M Jackson 'Regional complementarity: The Rome Statute and Public International Law' (2016) 14 *Journal of International Criminal Justice* 1061 at 1062.

137 H Van der Wilt 'Complementarity jurisdiction (Article 46 H)' in Werle & Vormbaum (n 59) 191.

law enforcement'.[138] They propose transforming the regional courts into jurisdictions of first instance and the ICC to a court of appeal within the system of international criminal justice.[139]

4.3 Wide jurisdiction with less limitations

Compared to the ICC, the African Court has different aspects which enable it to play a distinctive role in the future comprehensive international criminal justice system. For example, considering that the African Court is the first international criminal court to explicitly have jurisdiction over corporations,[140] the provision of the African Court Statute is innovative, and will likely be the milestone for the rules and principles concerning corporate legal responsibilities under international law. The rules for acknowledging the intention or knowledge of a corporation prescribed in it might become the first, and basic rule, on the procedure for corporate liability.

In addition, the African Court's jurisdiction has no regional limitation, and is wider than the ICC in two aspects: Easier fulfilment of the pre-condition for the exercise of jurisdiction and a larger number of crimes. The latter aspect is already discussed in Section 2.3, so let me explain the former aspect. Firstly, although some people may be inclined to misunderstand, the African Court has no regional limit to its jurisdiction. Based on the fact that the AU is a regional organisation, one may assert that the jurisdiction of the AU's court is limited to crimes occurring in Africa since the African Court will be a part of the APSA, and the Common African Defence and Security Policy limits the competence of the APSA to threats to peace and security occurring in Africa. But on a careful reading of the statute's wording the African Court is not prohibited from exercising its jurisdiction beyond the African Continent. Article 28A's listing of crimes under its jurisdiction is not limited to crimes occurring in Africa, and also all the provisions on the subjects under its jurisdiction – article 46B that prescribes individual criminal responsibility; article 46C that provides corporate criminal liability and article 46D which eliminate persons under age of 18 from its jurisdiction – no mention is made of limitation based on region or nationality. The only provision that may limit its jurisdiction may be article 29(2) which provides that it 'shall not be open to States, which are not members of the Union', and that the African Court 'shall also have no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol', but the scope

138 As above.

139 See Kahombo (n 90)22-27.

140 Art 46C of the African Court Statute. See sect 2.5 of this contribution.

of the states involved in a criminal case is uncertain from this provision. Therefore, the African Court will be able to exercise its jurisdiction over multi-lateral corporations of non-African developed states.

Secondly, the pre-conditions for the African Court exercising its jurisdiction are easier to fulfil than the ICC. Both the African Court and the ICC have the pre-condition of obtaining the agreement from the states related to the individual case before exercising their jurisdiction which can be fulfilled by the ratification of its statute by these states.[141] While the ICC can exercises jurisdiction over crimes committed on the territory of a state party, or when the person accused is a state party's national,[142] the African Court can exercise jurisdiction when the victim is a national of the state party, or where the state's vital interest is threatened, in addition to the two situations listed by the ICC above.[143] Because a consent from one state is enough to fulfil the precondition, it is easier for the African states to attain consent than the ICC since there is more choice of states.

4.4 Sectional conclusion

The African Court presents a new model of the Principle of Complementarity in which international criminal jurisdiction is exercised complementary to national courts and regional courts of the RECs. Moreover it may be a step forward in accomplishing a comprehensive international criminal justice system in which judicial organs at all levels (including national, regional, and international) work together for the same goal of ending impunity. As explained in Section 2, the African Court is prohibited from prosecuting incumbent heads of state and governments and other senior officials by article 46A bis of the African Court Statute. The Malabo Protocol explicitly confers absolute immunity to them, unlike the ICC. This provision caused much criticism on the idea of the African Court asserting that its objective was to 'roll back the fight against the most serious crimes under international law', and it symbolises 'a rejection of the fight against impunity'.[144] However, it should be emphasised that article 46A bis of the African Court Statute *does not* and *cannot* prohibit the ICC from exercising its jurisdiction over African head of state or any other person that is given the absolute immunity by the Malabo Protocol provision. The ICC is not bound by the African Court Statute or by any

141 Article 12 of the ICC Rome Statute, and Art 46E bis of the African Court Statute.

142 Article 12(2) of the ICC Rome Statute.

143 See art 46E bis.

144 R Dicker 'The International Criminal Court (ICC) and double standards of international justice' in C Stahn (ed) *The law and practice of the International Criminal Court* (2015) 3-12.

decision of the African Court to not proceed with prosecution of certain individuals. If any national jurisdiction is exercised, the ICC refrains from exercising its jurisdiction under the Principle of Complementarity or rule of *ne bis in idem*,[145] but the fact that the African Court applied absolute immunity and conducted no trial does not hinder the ICC's prosecution. Hence, if the motive of the article 46A bis of the African Court Statute is to harbour the African politicians from the ICC proceedings, as some commentators say, it cannot be accomplished.

If article 46A bis of the African Court Statute is to be maintained, then a more constructive approach giving it some positive meaning would be to interpret that the African Court refrained from prosecuting African senior state officials, and instead of trying them itself in Africa, it is relying on the ICC to do so. By entrusting the prosecution of African heads of state and government and senior officials to a court outside the African Continent, the African Court can eliminate any possibility of political influence over it from local powerful rulers. Under this interpretation, the provision of the African Court Statute conferring absolute immunity may be appraised as a way to ensure impartiality of a trial by from the outset abandoning its power to adjudicate on those individuals with strong political power within Africa. Therefore, giving a clear way for the ICC to prosecute them without the concern of being inconsistent with the Principle of Complementarity or the rule of *ne bis in idem*.

5 Conclusion

If the Malabo Protocol comes into force, the African Court may play a similar role to that of the ICC. It is true that there are many legal and practical complexities that seem to bar the establishment of the African Court with international criminal jurisdiction. However, even if the Malabo Protocol is not an effective instrument and lacks the necessary ratifications, the mere fact that such an instrument is elaborated on and adopted has historical significance. It can be considered as the manifestation of the 'Africanisation' of international criminal law and the exercise of 'judicial' self-determination by African states to participate in international criminal justice system. The African Court offers a model for the other regional organisations in creating a regional criminal court. This is illustrated through 'Africanisation', that is the reflection of the experiences and value and *opinio juris* of African states to international criminal law, and 'judicial' self-determination, namely prosecuting and punishing crimes in accordance with international law that African states elaborated on through the international judicial organ that African states

145 Article 20 of the ICC Rome Statute.

created. Even if the hostilities between the African states and the ICC dissolve or the situation is improved in future, the historical and legal significances of Malabo Protocol do not disappear. The African Court will be the first international criminal court to be established by a regional international organisation with comprehensive and extensive international criminal jurisdiction never seen in existing international judicial organs. It will also be the first international court to have explicit authority to pursue criminal responsibility of corporations at the international level. Together with the many unique features of the African Court presented in this paper, there are grounds for a new complementary mechanism on international, regional and domestic levels which has the potential to advance international criminal law.

This potential will disappear if the concept of the African Court is completely denied or politically manipulated and abused to protect certain individuals from justice. Rather than nullifying all the efforts put into the completion of the Malabo Protocol, it is better to use this opportunity to give support and guidance towards improving the instrument and the mechanisms created by this Treaty. The speculation about the realisation and coming into force of the Malabo Protocol may be low at this moment in current antagonistic environment, but the possibility of the Court coming into existence is not unrealistic, as there is the potential for the African Court to be a model for other regional organisations. It is always the cooperation and collaboration that enables the creation of a new international system for ending impunity.

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