4 The African contribution to the development of international criminal law

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1 Introduction

Fighting impunity is one of the principles of the African Union (AU)[1] and a major impetus for the African contribution to the development of international criminal law. This contribution normally has two different dimensions. The first is universalism or globalism that dictates the life of global or universal international criminal law. The latter contains rules and institutions that govern the fight against impunity from international crimes worldwide. The second dimension pertains to regionalism and African regional international criminal law that specifically governs the struggle against impunity from international and regional crimes on the African continent. African international criminal law has to be considered as a branch of African international law. It comprises universal rules incorporated into African legal instruments that apply to or within African states and other rules and institutions designed to enforce them.

The African contribution to the development of global international criminal law is not examined in this chapter since its content is more or less well known. The existing literature has identified three types of contribution. Foremost, there is a negative contribution whereby Africa has been a consumer of institutions of international criminal law, thereby supporting the utility and the functioning of the global system of international criminal justice.[2] This has been the case with the deployment of the United Nations (UN) courts and tribunals in Africa, such as the International Criminal Tribunal for Rwanda (ICTR). Another type of contribution relates to African inputs during the negotiation processes of major global penal treaties, notably the Rome Statute of the International Criminal Court (ICC).[3] African states and the AU have also contributed to enriching alternative narratives on the fate of international criminal law. There have been heated debates on the interaction between protected

1 African Union Constitutive Act 11 July 2000, art 4(o).

2 P Manirakiza 'L'Afrique et le système de justice pénale internationale' (2009) 3 *African Journal of Legal Studies* 27.

3 Manirakiza (n 2) 28.

values, such as peace and reconciliation in the course of a process of justice based on a prosecution-sentencing approach of offenders, immunities before international criminal jurisdictions, the scope and application of the principle of universal jurisdiction, judicial neocolonialism and the need to reform the ICC justice system.[4]

However, the contribution of Africa to the development of international criminal law through the lenses of African international criminal law is often overlooked. This chapter endeavours to identify this contribution in the form of progressive development and/or codification of international law. Efforts made by Africa with a view to regionalising international criminal law must be saluted and result in a third layer of international criminal justice, beside the universal and domestic ones, in a manner that can improve the world struggle against impunity. Regionalisation here refers to the process by which African states, acting particularly within the AU, transform rules and principles of international criminal law into a sort of law made in Africa; develop its substantive rules and/or procedural as well as enforcement mechanisms; and also regulate, within the regional framework, those penal problems of specific concern to the continent. It therefore is a process of 'Africanisation of international criminal law'[5] based on regionalism which represents, for the International Law Commission (ILC), another privileged forum for international law making 'because of the relative homogeneity of the interests and actors concerned'.[6] Regionalisation likely is the most important contribution of African states and the AU to the development of international criminal law. It is expected that regional rules developed on this basis will influence, even in the long term, the development of this body of law at the global level. As the ILC has underscored, 'much of international law has developed in this way, as the gradual extension of originally regional rules to areas outside the region'.[7]

This chapter focuses only on some substantive and jurisdictional developments that the author subjectively considers to be of major

4 See B Kahombo 'Africa within the justice system of the International Criminal Court: The need for a reform' (2016) 2 KFG Working Paper Series Berlin Potsdam Research Group 'The international law: Rise or decline?'; R Schuerch *The International Criminal Court at the mercy of powerful states: An assessment of the neo-colonialism claim made by African stakeholders* (2017).

5 A Soma 'L'africanisation du droit international pénal' in Société africaine pour le Droit international *L'Afrique et le droit international pénal* (2015) 7-36.

6 International Law Commission (ILC) 'Report of the International Law Commission on the Work of its 57th Session' 2 May-3 June and 11 July-5 August 2005 UN Doc A/60/10 207 209.

7 As above.

importance for the development of international criminal law. It is an analytical, constructivist and critical study based on various African legal instruments and judicial practices. In this regard, the substantive contribution refers to the codification of crimes against peace and security in Africa whilst the jurisdictional aspects concern the promotion of the system of African regional criminal justice.

2 The codification of crimes against peace and security in Africa

This is an innovative concept in African international law. The specificity of the notion must be highlighted (2.1) before analysing, notably, the extent to which by regionalising ICC crimes, the concept contributes to the development of international criminal law (2.2).

2.1 The specificities of the notion

The concept of crimes against peace and security in Africa has two major points of specifity. These relate to the list of codified crimes and its rationale as well as their legal nature.

2.1.1 The list of codified crimes and its rationale

There are at least 14 categories of crimes against peace and security in Africa: four ICC crimes (aggression, genocide, crimes against humanity and war crimes); two crimes against the security of states (mercenarism and unconstitutional change of government); and eight more crimes against human security (piracy, terrorism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources). This classification may be challenged but it enables to shed light on the justification for the list and its bases in African international criminal law. Some crimes are based on the regionalisation of the rules contained in universal legal instruments, others on treaties that are very specific to Africa, adopted within the AU, others still on treaties concluded within the regional economic communities (RECs). In the first case, let us mention the ICC Statute; in the second case, the African Charter on Democracy, Elections and Governance (2007) and the AU Convention on the Prevention and Fight against Corruption (2003); and in the third, the Multilateral Agreement on Regional Cooperation to Combat Trafficking in Persons, in particular Women and Children in West and Central Africa (2006). The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) establishing an International Criminal Law Section (AU Criminal Court) within the African Court of Justice and Human and

Peoples' Rights (AfCJHPR) defines each of these 14 crimes and lays down the foundations for their repression. In this respect, it appears as a unifying instrument of Africa.

The question, however, arises as to the rationale of the codification of these crimes on the continent. The first reason derives from their collective classification: crimes against peace and security in Africa. This concept is enshrined as such in the Organisation of African Unity (OAU) Convention of 1977 for the Elimination of Mercenarism, which provides that 'any person, natural or juridical who commits the crime of mercenarism as defined in paragraph 1 of this Article commits *an offence considered as a crime against peace and security in Africa* and shall be punished as such'. [8] It is reminiscent of the ILC's list of 'crimes against the peace and the security of mankind'[9] at the universal level, which can also be found in some domestic legislation.[10] However, the two concepts are not identical. Crimes against the peace and security of humanity, namely, aggression, genocide, crimes against humanity, war crimes and crimes against UN personnel and associated personnel, are less numerous than crimes against the peace and security of Africa. The ICC Statute also refers to 'the most serious crimes of concern to the international community as a whole'[11] and that 'threaten the peace, security and well-being of the world'.[12] Another important distinction is the definitions contained in the Malabo Protocol (annex), which are sometimes extended and adapted to the African context, even if their territorial scope remains confined to the continent.

Second, it can be assumed, and rightly so, that no African state alone has the capacity or ambition to end these crimes. The latter should be seen as behaviours that undermine African regional public order, so the cooperation of the entire African community of states and peoples appears to be a necessity to eradicate them. The two primary interests affected

8 OAU Convention for the Elimination of Mercenarism in Africa 3 July 1977 art 1(3) (my emphasis).

9 ILC Draft Code of Offences Against the Peace and Security of the Mankind (1954); ILC Draft Code of Crimes Against the Peace and Security of Mankind (1996).

10 See DRC's Acts implementing the Rome Statute: Law 15/022 of 31 December 2015 modifying and complementing the Decree of 30 January 1940 relating to the Penal Code; Law 15/023 of 31 December 2015 modifying Law 024-2002 of 18 November 2002 laying down the Military Penal Code; Law 15/024 of 31 December 2015 modifying and complementing the Decree of 6 August 1959 laying down the Code of Criminal Procedure.

11 Rome Statute of the International Criminal Court (ICC Statute) (17 July 1998) Preamble, para 4.

12 ICC Statute, Preamble, para 3.

by this criminality, that is to say, peace and security, are common to this community and not specific to a single country. It is not just about peace and national security, which is state-centred, or regional security based on peaceful coexistence between African states. It also and above all concerns human security which revolves around the satisfaction of the socio-economic needs of peoples and individuals. All this implies a strategic change in the conception of Africa's pacification policy. Hence, the use of armed force and political-economic sanctions or the establishment of a common development strategy is particularly limited in order to put an end to the aforementioned criminality, without a real criminal deterrence policy.

This is all the more true since crimes against peace and security in Africa are emerging today from the ordinary, if not daily, problems of the continent.[13] This is largely attested by the number and frequency of armed conflicts and the commission of worse international crimes (war crimes, crimes against humanity and genocide) in African states.[14] In this regard, the Kenyan non-governmental organisation (NGO), Kenyans for Peace with Truth and Justice, has posited in respect of crimes other than ICC crimes or core international crimes as follows:[15]

> An important rationale for placing these crimes on the same level as the so-called 'core' international crimes is that many of them are capable of destabilising a state, which in turn leads to the proliferation of core international crimes. For example, several of the civil wars in Africa were preceded by an unconstitutional change of government that threw the state into chaos in which core crimes were committed. Thus, it is arguably more sensible and forward-looking to address the crimes that may *lead* to serious conflict or civil war, rather than waiting for violence to happen. In addition, there is often a mutually causative and reinforcing relationship between these crimes and core international crimes.

Third, criminal judicial cooperation is self-evident because such instability makes national borders porous, resulting in the mobility of criminals across several countries and the development of cross-border crimes. This risk would be compounded by the opening of state borders in favour of the

13 M Sirleaf 'The African justice cascade and the Malabo Protocol' (2017) *International Journal of Transitional Justice* 5-6.

14 See J Cilliers 'Future (im)perfect? Mapping conflict, violence and extremism in Africa' (2015) 287 Institute of Security Studies Paper.

15 Kenyans for Peace with Truth and Justice 'Seeking justice or shielding suspects? An analysis of the Malabo Protocol on the African Court' November 2016 13, http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf (accessed 18 March 2018).

free movement of persons, in line with the continent's integration process. In this context, it is easy to understand why the Niamey Convention seeks to engage state parties to promote cross-border cooperation in the field of 'security, especially combating cross-border crime, terrorism, piracy and other forms of crime'.[16] Justice will intervene to help curb these phenomena as 'an aspect of efforts to promote the objectives of the political and socio-economic integration and development of the continent with a view to realising the ultimate objective of a United States of Africa'.[17]

Finally, the concept intends to fill the gap of the global system of international criminal justice which focuses on core crimes only. It must be reminded that it was because of this gap that the UN Secretary-General in 2012 proposed to the Security Council the establishment of specialised mixed courts in Somalia in order to prosecute acts of piracy committed in the Horn of Africa.[18] In taking into account socio-economic crimes, such as illicit exploitation of natural resources, corruption and money laundering, the concept provides a positive evolution in international criminal law that has the potential to strengthen the fight against impunity of businessmen and enterprises, including transnational corporations, of which the criminal activities impair development in Africa.

2.1.2 The legal nature of codified crimes

Crimes against peace and security in Africa are both of international and transnational character, but the difference between transnational and international crimes is not a truism. It is the subject of a long debate.[19] Authors do not perceive the notion of international crimes in the same way. The distinction is important due to its legal implications. In principle, international crimes are not subject to statutes of limitation, blanket amnesty or pardon. They may attract states to exercise universal jurisdiction, justify the launch of prosecutions before an international court or the rejection of state officials' immunities.

In the ILC's Draft Articles on State Responsibility of 1996 the notion of international crimes was linked to that of the crimes of

16 African Union Convention on Cross-Border Cooperation (Niamey Convention) 27 June 2014 art 3(4).

17 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (ACtJHR Amendments Protocol) 27 June 2014 (Annex) art 46H(1).

18 UN Security Council 'Report of the Secretary-General on specialised anti-piracy courts in Somalia and other States in the region' 20 January 2012 S/2012/50 para 126.

19 CC Jalloh 'The nature of the crimes in the African Criminal Court' (2017) 15 *Journal of International Criminal Justice* 799-826.

states.[20] The commission of such crimes in principle is a manifestation of political violence to maintain power and may entail individual criminal responsibility of officials who act on behalf of the state under international law.[21] Even individuals who may have acted outside the state umbrella can also be held criminally responsible. This is the case of members of armed groups. In this regard, some commentators define the notion of international crimes as 'those offences over which international courts and tribunals have been given jurisdiction under *general international law*'.[22] However, this definition seems to conceive the notion of international crimes only in relation to global international criminal law. This was also the position of the American Tribunal at Nuremberg in 1948 which held that an international crime was 'such act *universally* recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances'.[23] This universal recognition to qualify a behaviour as an international crime seems to be justified by the fact that such a crime amounts to a gross or serious violation of universal values protected by international law. This is the case of the prohibition to use armed force between states, the violation of which can constitute an act of aggression. Accordingly, international crimes have been identified in respect of gross violations of (universal) international law which entail international criminal responsibility[24] and constitute a matter of concern to the entire world community.[25] It arguably is this universal concern that justifies the intervention of international courts, expressing the will of the whole international community.[26]

However, the above definitions do not provide any indication as to why jurisdiction may not be conferred over international crimes on regional criminal courts. Likewise, these definitions do not tell anything about the possible existence of regional crimes, that is to say international crimes under regional international criminal law. Furthermore, it is known that even mixed criminal courts and tribunals, that is, those jurisdictions combining both domestic and international characters, have been given

20 ILC Draft Articles on State Responsibility (1996) arts 19(2) & (3). See also A Cassese 'Remarks on the present legal regulation of crimes of states' in P Gaeta & S Zappala (eds) *The Human Dimension of International Law: Selected Papers* (2008) 403-404.

21 A Smeulers & F Grünfeld *International crimes and other gross human rights violations: A multi- and interdisciplinary textbook* (2011) 20-21.

22 R Cryer et al *An introduction to international criminal law* (2007) 2.

23 K Kittichaisaree *International criminal law* (2001) 3.

24 A Cassese *International criminal law* (2003) 23.

25 A Cassese 'Rationale for international criminal justice' in A Cassese (ed) *The Oxford companion to international criminal justice* (2009) 127.

26 Cassese (n 25) 127 130.

jurisdiction not only over international crimes but also over ordinary offences, without the latter being transformed into international crimes. Additionally, the ICC Statute implies a gradation between international crimes. It applies to the most serious crimes of concern to the international community as a whole. This may suggest that there are other crimes that do not constitute the most serious international crimes and a matter of concern to the international community as a whole. Therefore, outside ICC crimes, other crimes against peace and security in Africa may be considered international crimes constituting a matter of concern to the entire community of African states and peoples.

This suggestion is without prejudice to the notion of transnational crimes. The AU Non-Aggression and Common Defence Pact refers to transnational crimes in the definition of 'trans-national organised criminal group' in the following terms:[27]

> Trans-national organised criminal group means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more *serious crimes* which are transnational in scope, or offences established in accordance with international law, including the United Nations Convention Against Transnational Organised Crime and its Protocols thereto, the purpose being which to obtain, directly or indirectly financial and other material benefits.

Beside the UN Convention against Transnational Organised Crime (Palermo Convention) of 15 November 2000, two other treaties may be referred to, namely, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (November 2000); and the Protocol against the Smuggling of Migrants by Land, Sea and Air (November 2000). The Palermo Convention clearly defines the notion of transnational organised crimes.[28]

First of all, there must be a group of three or more persons who act in concert with the aim of committing a crime.[29] This group shall be structured, meaning that 'it is not randomly formed for the immediate commission of an offence',[30] regardless of whether there are 'formally defined roles for its members, continuity of its membership or a developed

27 AU Non-Aggression and Common Defence Pact art 1(x) (my emphasis).

28 See also N Boister *An introduction to transnational criminal law* (2012) 3-4.

29 United Nations Convention against Transnational Organised Crime 15 November 2000 art 2(a).

30 UN Convention (n 29) art 2(c).

structure'.[31] Second, the Palermo Convention requires an international dimension to qualify a crime as transnational by nature in four different situations, namely, if (a) it is committed in more than one state; (b) it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; (c) it is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state; or (d) it is committed in one state but has substantial effects in another state.[32] Third, a transnational organised crime must fulfil the condition of gravity and be among those offences that are referred to by the Palermo Convention or its additional protocols. A serious crime means 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'.[33] This is the case of participation in an organised criminal group;[34] corruption;[35] trafficking in persons, especially women and children;[36] the laundering of proceeds of crime,[37] including money laundering;[38] and related obstructions to justice.[39]

Unlike international crimes, transnational crimes are not in principle state crimes in the sense of political violence to maintain power or mass atrocities. Rather, they are mostly criminal conducts of individuals (private or official) and constitute offences against a certain decency or morality that should reign within a community.[40] Some of these offences are on the list of crimes against peace and security in Africa, such as corruption, money laundering and trafficking in persons. These must be distinguished from 'trans-border crimes' of which they may form a category. The definition of trans-border crimes can be borrowed from the Economic Community of West African States (ECOWAS) Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security:[41]

31 As above.

32 UN Convention (n 29) art 3(2).

33 UN Convention (n 29) art 2(b).

34 UN Convention (n 29) art 5.

35 UN Convention (n 29) art 8.

36 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime 15 November 2000) arts 3 & 5.

37 UN Convention (n 29) art 6.

38 UN Convention (n 29) art 7.

39 UN Convention (b 29) art 23.

40 S Szurek 'La formation du droit international pénal' in H Ascensio et al (eds) *Droit international pénal* (2000) 19.

41 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, 'Definitions'.

> 'Trans-border crime' refers to all crimes organised or perpetrated by individuals, organisations or networks of local and/or foreign criminals operating beyond the national boundaries of a member state, or acting in complicity with associates based on one or several states adjoining the country where the crimes are actually committed or having any connection with any member state.

These crimes in principle are subject to prosecutions in domestic legal orders. However, if some crimes against peace and security in Africa are transnational by nature, it is submitted that they have been *conventionally* raised by the Malabo Protocol to an independent status of regional crimes, entailing individual and corporate criminal responsibility. Their commission, therefore, does not necessarily any longer require the 'structured group' element or the condition of perpetration in more than one state as provided for by the UN Convention against Transnational Organised Crime. To establish these regional crimes, it would be sufficient to prove the only constituent elements that are contained in their independent definitions enshrined in the Malabo Protocol (Annex) instituting the AU Criminal Court. This obviously is the case of corruption committed within one state by public agents. This change of nature from transnational to regional international crimes reflects the necessity for solidarity with which the impunity from these crimes, which are particularly dangerous for the states or the entire African community, should be combated. The need for solidarity in the prosecution of these crimes justifies the whole process of their regional codification.

2.2 The regionalisation of ICC crimes

The regionalisation of ICC crimes means their incorporation into African regional legal instruments. This can happen in two ways. First, it can simply be referred to the crimes in question in terms of prohibition, obligation for states to prevent or to punish their perpetrators, or in relation to the expression of a need for a regional action to protect human and peoples' rights. The second way relates to the definition of these crimes in the context of the region. While a mere reference to these crimes does not raise any particular problem as far as regional codification is concerned, their different definitions in an African regional instrument may have a drawback and an advantage. As drawback, regionalisation may lead to contradictions with universal legal standards or bring ambiguities in law. As advantage, it can result in the expansion of the scope of the definitions of ICC crimes in Africa, thereby contributing to the development of international criminal law. If some states not parties to universal treaties ratify the regional instrument, the range of addressees of the definitions in question would be widened. Two cases can illustrate this state of affairs

on the basis of the Malabo Protocol (Annex): the expansion of the scope of the definition of war crimes and the case of aggression.

2.2.1 The case of war crimes

War crimes are defined by the Malabo Protocol (Annex) in article 28D. It is the most expansive article among all the definitions of ICC crimes incorporated into the Malabo Protocol (Annex). It restates article 11 of the AU model national law on universal jurisdiction over international crimes. This article largely differs from the provision of the International Conference on Great lakes Region (CGLR) Protocol on the prevention and suppression of sexual violence against women and children, which wrongly restricts the definition of war crimes to graves breaches of the Geneva Conventions of 1949.[42] Compared to the ICC Statute, the Malabo Protocol (Annex) is a progressive development of international law even though it is not perfect due to many other omissions of universal standards.

The starting point is the improvement of the age of children victims of conscription or enlistment into armed forces or groups or their use to participate actively in hostilities. The ICC Statute, which relies on both Additional Protocols of 1977 to the Geneva Conventions (1949),[43] takes into account the yardstick of 15 years old.[44] Instead, the Malabo Protocol (Annex) incriminates such acts for children under the age of 18 years.[45] This age limit emanates from the African Charter on the Rights and Welfare of the Child (African Children's Charter), which defines such person as 'every human being below the age of 18 years'.[46] The Children's Charter does not permit any derogation from this definition.[47] All children

42 Protocol on the Prevention and Suppression of Sexual Violence against Women and Children art 1(7).

43 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (with annexes, Final Act of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts dated 10 June 1977 and resolutions adopted at the fourth session) adopted at Geneva on 8 June 1977(GP I) art 77(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (with Final Act of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts dated 10 June 1977 and resolutions adopted at the fourth session adopted at Geneva on 8 June 1977 (GPII) art 4(3)(c).

44 ICC Statute arts 8(2)(b)(xxvi) and (e)(vii).

45 ACtJHR Amendments Protocol (Annex) arts 28D(b)(xxvii) and (e)(vii).

46 African Charter on the Rights and Welfare of the Child 1 July 1990 art 2.

47 See *Institute for Human Rights and Development in Africa v The Government of Malawi* ACERWC Comm 004/Com/001/2014, Report on consideration of an amicable

within this age limit and not only a category of them must be protected. The ICC Statute contradicts itself on this issue. It does not prohibit the practice of child soldiers over the age of 15 years, while excluding them from the Court's jurisdiction if they commit crimes when they are younger than 18 years old.[48]

The Malabo Protocol (Annex) also incorporates a total number of 15 new crimes, such as the criminalisation of the use of nuclear weapons or other weapons of mass destruction. Yet, in its Advisory Opinion of 8 July 1996, the ICJ stated that it could not 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake'.[49] International efforts rather focused on nuclear weapons disarmament. For example, the UN General Assembly has considered Africa as a denuclearised zone since 1961.[50] This policy was endorsed by the OAU Assembly in July 1964.[51] It resulted in the adoption of the African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty) in 1996. State parties are forbidden to possess, to develop, to manufacture, to test, to allow transit or stationing of any nuclear weapons or explosive devises within this zone. Only peaceful nuclear activities for non-military purposes are permitted.

However, the Pelindaba Treaty does not as such prohibit the use of nuclear weapons in African conflicts. It is the Malabo Protocol (Annex) that takes a step in this direction,[52] regardless of the type of armed conflict. The African continent is taking the lead on a controversial issue on which states have not yet found a compromise at the global level. The

settlement under the auspices of the Committee 27 October 2016 paras 6-7. In this case, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) decided to adopt the Amicable Settlement on Communication 004/Com/001/2014 opposing the Institute for Human Rights and Development in Africa (IHRDA) to the Republic of Malawi, in which the latter state committed itself to conform its Constitution (as amended in 2010) art 23(5) which defines children as persons under the age of 16 years, to the African Charter on the Rights and Welfare of the Child by December 2018.

48 Art 26 of the ICC Statute provides: 'The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.'

49 *Legality of the threat or use of nuclear weapons,* Advisory Opinion of 8 July 1996, ICJ Reports 1996 para 105.

50 UNGA Res.1652 (XVI) 24 November 1961 para 6.

51 AHG/Res.11(I), Denuclearisation of Africa, 1st ordinary session of the Assembly of Heads of State and Government of the Organisation of African Unity, Cairo, Egypt 17-21 July 1964 paras 1-4.

52 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex) art 28D(g).

use of nuclear weapons is not criminalised under the ICC Statute despite the will of several states from the Global South, including India.[53] In this regard, a proposal to amend the ICC Statute was introduced by Mexico,[54] even though it seems to have little chance of being accepted by military nuclear powers. The fact that these powers rejected the UN Treaty on the prohibition of nuclear weapons, adopted on 7 July 2017, is a clear indication that they will not *a fortiori* adhere to the criminalisation of their use in the context of armed conflict.

Other innovations relate to seven new war crimes in the context of international armed conflicts as stipulated in articles 28D(b)(v), (xxviii), (xxix), (xxx), (xxxi), (xxxii) and (xxxiii) of the Malabo Protocol (Annex): intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects that will be excessive in relation to the concrete and direct overall military advantage anticipated; unjustifiably delaying the repatriation of prisoners of war or civilians; wilfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; making non-defended localities and demilitarised zones the object of attack; slavery and deportation to slave labour; collective punishments; and despoliation of the wounded, sick, shipwrecked or dead. Article 28D of the Malabo Protocol (Annex) incorporates other seven war crimes in the context of armed conflicts of non-international character under paragraphs (e)(xvi), (xvii), (xviii), (xix), (xx), (xxi) and (xxii): intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies; utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage; making non-defended localities and demilitarised zones the object of attack; slavery; collective punishments; and despoliation of the wounded, sick, shipwrecked or dead. All these new crimes find their original source in international humanitarian law in terms of prohibitions.[55]

53 G Tiwari 'Why India continues to stay out of ICC?' (2013) *A Contrario International Criminal Law*, http://acontrarioicl.com/2013/04/27/why-india-continues-to-stay-out-of-icc/ (accessed 18 March 2021).

54 Secretariat of the Assembly of the States Parties 'Informal Compilation of Proposals to Amend the Rome Statute' 23 January 2015 4, http://www.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf (accessed 19 March 2021).

55 K Ambos 'Genocide (article 28B), crimes against humanity (article 28C), war crimes

These innovations have faced several criticisms. The main criticism suggests that the passage from prohibition to criminalisation is not automatic.[56] It must be based on a special justification, that is, the wrongfulness and the gravity of the prohibition.[57] However, it is curious to observe that this argument does not specify to which extent the aforementioned war crimes do not fulfil this requirement. In any case, there is no legal obstacle to a group of states expanding the protection of humanitarian standards through international criminal law. States are sovereign and free to adopt the laws that fit better with the preservation of their collective interests or those of their peoples. The only difference is that the new war crimes will not be universal because of their treaty-based character between state parties to the Malabo Protocol. A similar expansion can even be made by one state within its domestic legal order as in the case of extensive definitions of genocide.[58] However, the principle of legality would be breached in respect of the exercise of adjudicative powers if the war crime to be prosecuted against aliens (in case of universal jurisdiction, passive personality and protective principle) were not committed on the territory of a state party to the Malabo Protocol or another state which has adopted the same definition under its domestic legislation. The Malabo Protocol (Annex) should be applied in light of the same requirement.

2.2.2 The case of the crime of aggression

The crime of aggression is defined by the Malabo Protocol (Annex) in article 28M. Previously, various initiatives were undertaken to codify rules on aggression in Africa. The most important treaties were concluded in Western and Central Africa.[59] The reason why aggression captured the attention of African states so early, contrary to the other ICC crimes, apparently is the discourse on decolonisation and the consolidation of state sovereignty after accessing independence, notably against former

(article 28D) and the crime of aggression (article 28M)' in G Werle & M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 43 46-47.

56 Ambos (n 55) 43 47.

57 Ambos (n 55) 48.

58 J Quigley *The Genocide Convention: An international law analysis* (2006) 16-17.

59 Agreement on Non-Aggression and Defence Assistance (ANAD) between Member States of the Western African Economic Community (CEAO) and Togo (9 June 1977); Amended Protocol on Non-Aggression between Member States of the Economic Community of West African States (22 April 1978); Non-Aggression Pact between Member States of the United Nations Standing Advisory Committee on Security Questions in Central Africa (8 July 1996); Mutual Assistance Pact between Member States of the Economic Community of Central African States (2000). See M Mubiala *Coopérer pour la paix en Afrique centrale* (2003) 35-37 65-69.

colonial powers. Human rights protection was not yet a priority. The AU adopted its own Non-Aggression and Common Defence Pact in 2005 and inspired other initiatives at the sub-regional level, such as the *International Conference on the Great Lakes Region* (ICGLR) in 2006.[60] The AU Non-Aggression and Common Defence Pact also inspired the Malabo Protocol (Annex) regarding at least the list of constitutive acts of aggression. The UN General Assembly resolution 3314 of 14 December 1974 on aggression, which has influenced the definition of this crime under the ICC Statute, was not referred to. This is because the said resolution limits the crime of aggression to state acts, while the AU Non-Aggression and Common Defence Pact extends its definition to acts of 'a state, a group of states, an organisation of states or non-state actor(s) or … any foreign or external entity'.[61] This is a substantial departure from global international law which may have implications with respect to the exercise of the right of a state to self-defence (against non-state actors). As a consequence, the definition of aggression in the Malabo Protocol (Annex) differs from the one that is provided for in the ICC Statute, with the exception of the nature of acts of individuals who may be held criminally responsible. Both treaties criminalise 'the planning, preparation, initiation or execution' of acts of aggression. What has to be noted is the criminalisation of preparatory acts that should in principle fall outside the ambit of criminal law. Such criminalisation of preparatory acts seems to be the acknowledgment of the gravity of aggression as the 'supreme international crime'[62] from which other crimes can be committed.

Furthermore, the Malabo Protocol (Annex) criminalises acts of aggression that constitute violations of the UN Charter or the AU Constitutive Act 'and with regard to the territorial integrity and human security of the population of a state party'.[63] The phrase 'with regard to the territorial integrity and human security of the population of a state party' at first sight appears ambiguous. The *travaux préparatoires* of the Malabo Protocol (Annex) provide no indication in order to clarify its meaning. However, given that the UN Charter prohibits the use of armed force between states, one may suggest that the phrase is connected to acts of aggression by non-state actors, the prosecution of which might be relevant if only they have infringed the territorial integrity of the state party or

60 Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region 30 November 2006 arts 1(2) & (3). It copies the definition of aggression provided for by the African Union Non-Aggression and Common Defence Pact under arts 1(c)(i) to (xi).

61 AU Non-Aggression and Common Defence Pact art 1(c).

62 C Kress 'The crime of aggression before the first review of the ICC Statute' (2007) 20 *Leiden Journal of International Law* 852.

63 ACtJHR Amendments Protocol (Annex) art 28M(A).

human security of its population. As a consequence, simple threats of aggressive acts against a state would not be sufficient for the commission of this crime. Likewise, fears of a state to be a victim of such acts could not justify the use of armed force against a non-state actor on the territory of another state without the latter's consent. Such use of armed force without the consent of the territorial state would be constitutive of the crime of aggression.

However, the deficiency of the Malabo Protocol (Annex) is the inclusion of the general definition of aggression under article 28M(B)(a), that is, 'the use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations', in the list of constitutive acts of this crime. It is a non-sense insofar as every act of aggression proceeds from the use of armed force, meaning that such use cannot *per se* constitute a crime. The general definition also extends to violations of the AU Constitutive Act *and* the UN Charter, whereas article 28M(A) already defines redundantly aggression with respect to 'a manifest violation of the Charter of the United Nations *or* the Constitutive Act of the African Union'.

Finally, the nature of some perpetrators of aggression can be misunderstood. For the state or non-state actors, everything is clear. It does not seem to be the case for 'an organisation of states or any foreign entity'. Maybe, such an organisation of states could include not only interstate organisations having legal personality and *de facto* military alliances. However, the hypothesis may turn out to be an aggression by a state because such organisations are constituted by individual countries. Concerning 'any foreign entity', the AU Non-Aggression and Common Defence Pact refers to 'any external entity'. The adjective 'external' apparently alludes to 'out of the African continent', but the term 'entity' remains very ambiguous. Even the *travaux préparatoires* are silent on the issue. Arguably, 'given the criminal responsibility of corporations, the phrase may refer to legal entities in the sense of legal persons, but such "entities" would certainly need military assistance to perform acts of aggression'.[64] It will belong to the AU Criminal Court to clarify the text in its case law.

64 Ambos (n 55) 50.

3 The promotion of the system of African regional criminal justice

The system of African regional criminal justice comprises African criminal courts and tribunals, as well as alternative mechanisms to justice, designed to fight against impunity or to address the adverse effects of crimes on peace and reconciliation within states at the regional level. It complements the two traditional levels of international criminal justice, that is, universal and municipal administration of justice. It implies the existence of regional legal power to prescribe penal rules, to investigate, to prosecute and eventually to try crimes against peace and security in Africa.[65] Ensuring international criminal justice, therefore, is part of what Adjovi calls 'African international criminal policy',[66] the objective of which is to place Africa in the centre of the fight against impunity. In this system, the AU plays a central role, solely and/or in cooperation with RECs or its member states. Various questions arise regarding the legal bases for the emerging system of regional criminal justice and the judicial options that are available as may be attested by African justice practices.

3.1 The legal bases

There are two main bases for the promotion of the system of African regional criminal justice, namely, the Common African Defence and Security Policy and the AU's right to intervene in a member state.

3.1.1 The Common African Defence and Security Policy

The Common African Defence and Security Policy (CADSP) is the main AU instrument that describes threats to regional peace and security and collective institutions that are competent to take action in defence of the interests of the African community of states and peoples. The AU Constitutive Act provides that the Union shall establish 'a common defence policy for the African continent'.[67] This policy has been adopted by the AU Assembly which is the competent organ to 'determine the common policies of the Union'.[68] The expression 'Common African Defence and Security Policy' was explicitly used in other important decisions of the

65 M Mubiala 'Chronique de droit pénal de l'Union africaine: vers une justice pénale régionale en Afrique' (2012) 83 *Revue internationale de droit pénal* 548.

66 R Adjovi 'Introduction: l'Afrique dans le développement de la justice pénale internationale' (2006) 14 *African Yearbook of International Law* 28.

67 AU Constitutive Act art 4(d).

68 AU Constitutive Act art 9(a).

AU Assembly in 2002 and 2003. The Durban Decision was a call on the AU Chairperson and South African President, Thabo Mbeki, to establish a group of experts to examine all aspects related to the establishment of such policy and to submit recommendations to the AU Assembly.[69] The Maputo Decision commended the efforts of the AU Chairperson for the implementation of his mission after presenting the Draft Framework for a Common African Defence and Security Policy.[70] This document constitutes the basis on which the Solemn Declaration on a Common African Defence and Security Policy was adopted in February 2004.

The CADSP pursues three objectives, which are interconnected and mutually dependent. First, the CADSP aims to preserve national security, that is, the security of the state. Second, it aims to protect human security, which turns around the individual. According the AU Non-Aggression and Common Defence Pact, human security must be understood in terms of satisfaction of the basic needs of the individual.[71] However, human security also includes 'the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development'.[72] As far as African regional criminal law is concerned, this is an important distinctive feature from the global system of international criminal justice that pays little attention to economic crimes as threats to human security. Third, the CADSP aims to establish peace and security on the African continent. In this regard, the AU Constitutive Act provides that the scourge of conflicts in Africa constitutes 'a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of [the] development and integration agenda'.[73] Likewise, the AU Non-Aggression and Common Defence Pact aims 'to deal with threats to peace, security and stability in the continent and to ensure the well-being of the African peoples'.[74] This third goal is transversal as it can be attained only if human security and state security

69 ASS/AU/Dec. 8 (I), Decision on a Common African Defence and Security, 1st ordinary session of the Assembly of the African Union, Durban, South Africa 9-10 July 2002 para 2.

70 Assembly/AU/Dec.13 (II), Decision on the African Defence and Security Policy (Doc. Assembly/AU/6 (II)), 2nd ordinary session of the Assembly of the African Union, Maputo, Mozambique 10-12 July 2003 paras 1 & 4.

71 AU Non-Aggression and Common Defence Pact art 1(k).

72 AU Non-Aggression and Common Defence Pact art 1(k).

73 AU Constitutive Act, Preamble para 9.

74 AU Non-Aggression and Common Defence Pact, Preamble para 9.

are guaranteed. Put differently, there will not be peace, security and stability in Africa if individuals, peoples and states are not secured or protected.

Against this backdrop the CADSP covers any threat to peace and security occurring in Africa: aggression; genocide; war crimes; crimes against humanity; subversion; political assassinations; unconstitutional changes of government; corruption; trafficking in human beings; and so forth. Situations or cases of crimes that occur outside the continent are not within its ambit.

This limitation applies to all collective institutions that are competent to deal with these threats: first, the AU Peace and Security Council (PSC), which is competent to 'develop a common defence policy for the Union, in accordance with article 4(d) of the Constitutive Act'[75] on behalf of the AU Assembly, and to 'implement the common defence policy of the Union'.[76] According to the AU Non-Aggression and Common Defence Pact, the PSC shall be assisted in the implementation of its mandate by 'any organ of the Union, pending the setting up of mechanisms and institutions for *common defence and security*'.[77] These institutions constitute an integral part of the African Peace and Security Architecture (APSA). Their list extends to criminal courts and tribunals established at the regional level. In other words, the system of African regional criminal justice is one of the available means of the APSA to react against crimes committed in Africa. It can be superseded by the action of other institutions of common defence and security, such as the PSC or other alternative mechanisms to justice, depending on each specific circumstance, when prosecutions and fighting impunity are not the primary goal to be first achieved.

3.1.2 The right of the African Union to intervene in a member state

The will to curb the OAU inertia when faced with crises and criminality within its member states is the reason for the broad ambitions of the AU. However, the modification of the law is not of itself sufficient for the effective realisation of these ambitions if no action is undertaken on the ground to ensure order, peace and security;[78] hence, the AU's right to intervene in a member state pursuant to a decision of the AU Assembly.[79]

75 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (AUPSC Protocol) 9 July 2002 art 3(e).

76 AUPSC Protocol (n 75) art 7(h).

77 AU Non-Aggression and Common Defence Pact art 9 (my emphasis).

78 NJ Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review* 1256-1257.

79 AU Constitutive Act art 4(h).

The mechanism contains two different coexisting conceptions in the AU Constitutive Act. The first is an intervention 'in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'.[80] This is the first time that such a right is provided for in a treaty in favour of an intergovernmental organisation in international law. The UN Charter prohibits interferences with the domestic affairs of member states, except for measures adopted under Chapter VII in order to maintain international peace and security.[81] Instead, the right to intervene in a member state is one of the principles governing AU functioning. The mechanism aims to protect human security. It is also provided for in other AU legal instruments, such as the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).[82]

The second conception is brought in by the Protocol on Amendments on the AU Constitutive Act of 2003. This Protocol adds to the list of grave circumstances a new situation as follows: 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity *as well as a serious threat to legitimate order to restore peace and stability to the member state of the Union upon the recommendation of the Peace and Security Council*'.[83] If the amendment comes into force, it will put on a balance the protection of human security with the right to intervene for the protection of the legitimate order established and contested in a member state.[84] The AU's choice might be difficult between these two conflicting conceptions: protecting human and peoples' rights or saving a bloody or a dictatorial government. The ambiguity is such that there is not even a definition of what could be 'a serious threat to legitimate order', contrary to serious crimes that have established definitions under international law. The risk of misusing one conception against another cannot be excluded.

In addition, there is no definition of the forms in which the AU could exercise its right to intervene in a member state. In practice, the AU may decide a military intervention to stop gross violations of human

80 As above.

81 UN Charter art 2(7).

82 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 22 October 2009 art 8(1).

83 Protocol on Amendments on the AU Constitutive Act 11 July 2003 art 4(d) (my emphasis).

84 E Baimu & K Sturman 'Amendments to the African Union's right to intervene: A shift from human security to regime security' (2003) 12 *African Security Review* 37-45.

rights or humanitarian international law. The possibility was invoked as such by the PSC as a measure of last resort in Burundi, following the constitutional crisis due to a contested third presidential term for Pierre Nkurunziza in 2015, should this country not accept the deployment of a peace support operation, called the African Prevention and Protection Mission in Burundi (MAPROBU).[85] The AU's right to intervene also implies a criminal dimension. On this basis, the AU took the decision to try the former Chadian President,[86] Hissène Habré, for acts of torture, war crimes and crimes against humanity. This practice illustrates that the AU can establish even a special regional criminal tribunal with the mandate to prosecute crimes that would normally fall within the primary jurisdiction of one or more member state(s).

The AU's right to intervene in a member state must be distinguished from 'the right of member states to request intervention from the Union in order to restore peace and security',[87] for example, in the event of aggression or non-international armed conflict. This request would imply that the intervention is accepted by the territorial state. However, it is not clear whether any other country may demand the AU's intervention in the territory of a non-requesting state. There is not yet a sufficient practice to support a trend in this direction.

On the other hand, the AU has just a right to be exercised. This does imply that there is a political will to intervene, if the necessary resources (financial, military or others) are made available to carry out an intervention.[88] Nothing indicates that the AU has a duty to intervene. However, the Kampala Convention seems to give rise to a duty insofar as it reaffirms the Union's right to intervene in a member state as part of its obligations to protect and assist internally-displaced persons (IDPs). Given the fact that the AU cannot access this treaty, the enforcement of its obligation becomes problematic. In the *Femi Falana* case the African Court on Human and Peoples' Rights (African Court) declined its jurisdiction to examine a judicial claim against the AU concerning violations of a treaty to which it was not a party.[89]

85 PSC/PR/COMM (DLXV) 17 December 2015 para 13(c)(iv).

86 Assembly/AU/Dec.127 (VII), Decision on the Hissène Habré case and the African Union (Doc.Assembly/AU/3 (VII)), 7th ordinary session of the Assembly of the African Union, Banjul, The Gambia 1-2 July 2006 para 3.

87 AU Constitutive Act art 4(j).

88 N Dyani-Mhango 'Reflections on the African Union's right to intervene' (2012) 38 *Brooklyn Journal of International Law* 13.

89 *Femi Falana v The African Union* Judgment of 26 June 2012, African Court, Application 001/2011 paras 71-72. See A Kilangi 'Legal personality, responsibility and immunity of the African Union: Reflections on the decision of the African Court on Human and

Another problem with the AU's right to intervene in a member state is the lack of an anticipatory or preventive authority.[90] The intervention can be decided on only if one of the grave circumstances has occurred or is ongoing. The mechanism is also very difficult to activate. As a matter of procedure, the AU Constitutive Act is 'incomplete on how to decide when to intervene'.[91] In fact, 'it is unclear whether the AU Assembly may first conduct an investigation before determining if an intervention is necessary, or whether it needs to first decide to intervene before finding out if indeed international crimes were committed in a member state'.[92] However, looking at the MAPROBU case, it is clear that the PSC invoked the AU's right to intervene after taking note of the preliminary findings of the fact-finding mission dispatched in Burundi by the African Commission on Human and Peoples' Rights (African Commission) pursuant to the Communiqué of 13 November 2015.[93]

Finally, the decision to intervene in a member state is a regional enforcement action in the meaning of Chapter VIII of the UN Charter on regional arrangements of collective security. The authorisation of the Security Council therefore is necessary pursuant to article 53(1) of the UN Charter.[94] However, the AU Constitutive Act makes no express reference to this procedure. In practice, the Security Council's authorisation can be given *a priori* or after adopting the decision to intervene, or even after its implementation, in terms of an approval resolution. This is a requirement for practical flexibility because of the urgent character of the right to intervene. It must be kept in mind that the authorisation or approval in question guarantees that the AU's right to intervene is not

Peoples' Rights in the *Femi Falana* case' (2013) 1 *AUCIL Journal of International Law* 95-139.

90 S Dujardin 'L'Union africaine: objectifs et moyens de gestion des crises politiques et des conflits armés' in D Bangoura & EFA Bidias (eds) *L'Union africaine et les acteurs sociaux dans la gestion des crises et des conflits armés* (2006) 61.

91 D Kuwali 'The conundrum of conditions for intervention under article 4(h) of the African Union Act' (2008) 17 *African Security Review* 93.

92 Dyani-Mhango (n 88)4-15.

93 PSC/PR/COMM.(DLVII) 13 November 2015 paras 9(iii) and 10; PSC/PR/COMM (DLXV) para 5.

94 Art 53(1) of the UN Charter provides: 'The Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.'

perceived, contrary to what some commentators have argued,[95] as a challenge to the authority of the UN Security Council. Rather, the AU's right to intervene is a prerogative aiming to ensure that Africa takes its political responsibility in dealing with African situations and problems, even when there is not any timely action decided at the global level. This understanding is consistent with the view of the AU itself, as expressed in the Common African Position on the Proposed Reform of the United Nations, famously known as 'The Ezulwini Consensus'. This Position was adopted by the AU Executive Council in March 2005 in reaction to the report of the UN Secretary-General's High-Level Panel on Threats, Challenges and Change, issued in the context of the emerging doctrine of the responsibility to protect in 2004.[96] The Ezulwini Consensus indicates:[97]

> Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organisations, in areas of proximity to conflicts, are empowered to take actions in this regard. The African Union agrees with the Panel that the intervention of Regional Organisations should be with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in circumstances requiring urgent action.

On this basis it is now important to look at African judicial practices and see the kind of jurisdictions have been created or deployed to tackle impunity at the regional level.

3.2 The African regional judicial practices

Like the UN, the AU is not an institution of criminal nature. However, it has three judicial options at its disposal. In practice, the AU has preferred to resort to the technique of delegating jurisdiction to a member state or attempting to ensure justice through hybrid criminal tribunals. These two approaches to the exercise of regional criminal jurisdiction have

95 YG Muhire 'The African Union's right of intervention and the UN system of collective security' PhD thesis, Utrecht University, 2013 231-236 (on file with the author); A Abass & MA Baderin 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union' (2002) 49 *Netherlands International Law Review* 23.

96 United Nations 'A more secure world: Our shared responsibility – Report of the Secretary General's High-Level Panel on threats, challenges and changes' (2004) paras 185 & 203, <http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf> (accessed 19 March 2021).

97 Ext/EX.CL/2 (VII) The common African position on the proposed reform of the United Nations: 'The Ezulwini Consensus' 7th extraordinary session of the Executive Council of the African Union, Addis Ababa, Ethiopia, 7-8 March 2005 6.

contributed to the process towards the establishment of the AU Criminal Court.

3.2.1 The delegation of jurisdiction to a member state

A delegation of jurisdiction is a conferral of judicial power by a competent entity on another entity that becomes entitled to exercise the delegated power in the interests of both parties. In international law, such a delegation of jurisdiction is possible between states or in their relationship with intergovernmental organisations.[98] The delegation of jurisdiction is a legal operation that is realised through the conclusion of an international treaty or in application of it. The operation aims to vest the delegated entity with the power of the delegating authority without which it would have been incompetent to act or to proceed. Practices of delegation of jurisdiction are particularly widespread in international law as far as powers conferred on international tribunals are concerned.[99] The striking example is the ICC jurisdiction over nationals of a state that is not a party to the Rome Statute.[100] This power derives from the jurisdiction that could be exercised over such nationals by a state party in the territory of which the crime has been committed. In other words, the ICC will be just doing the job in the place of the state concerned. Despite criticisms,[101] consent of the state not party is not required.[102]

The AU has delegated jurisdiction to one of its member states (Senegal) in order to try the former Chadian head of state, Hissène Habré. It is a distinct practice from the conferral of jurisdiction on a court by treaty as in the case of the ICC or the creation of an *ad hoc* international criminal tribunal by the UN Security Council. The delegation of jurisdiction was decided upon the referral of the matter to the AU by Senegal. Support was given to the collective commitment to fight impunity 'in line with the

98 D Sarooshi 'Some preliminary remarks on the conferral by states of powers on international organisations' (2003) 4 Jean Monnet Working Paper 2.

99 See K J Alter 'Delegating to international courts: Self-binding vs other-binding delegation' (2007) 7 Working Paper Buffett Center for International and Comparative Studies, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1452&context=lcp1(accessed 8 March 2021).

100 D Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties: Legal basis and limits' (2003) 1 *Journal of International Criminal Justice* 634-636.

101 See M Morris 'High crimes and misconceptions: The ICC and non-party states' (2001) 64 *Law and Contemporary Problems* 15 21; R Wedgwood 'The irresolution of Rome' (2001) 64 *Law and Contemporary Problems* 199.

102 F Mégret 'Epilogue to an endless debate: The International Criminal Court's third party jurisdiction and the looming revolution of international law' (2001) 12 *European Journal of International Law* 251-254.

relevant provisions of the Constitutive Act'.[103] After deliberations, the AU Assembly decided to establish a Committee of Eminent African Jurists with the following mandate:[104]

> to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial, taking into account the following benchmarks: (a) adherence to the principles of total rejection of impunity; (b) adherence to international fair trial standards including the independence of the judiciary and impartiality of proceedings; (c) jurisdiction over the alleged crimes for which Mr Habré should be tried; (d) efficiency in terms of cost and time of trial; (e) accessibility to the trial by alleged victims as well as witnesses; (f) priority for an African mechanism.

In its reports of July 2006, the Committee recommended three options for the trial of Hissène Habré.[105] The first option was national jurisdiction in Senegal or Chad. Senegal was chosen as the country of residence of the suspect, while Chad was the state where the alleged crimes were committed against Chadian victims. The Committee argued that Senegal was the country best suited to conduct the trial as it was bound by international law to perform its obligations under the UN Convention against Torture.[106]

The second option was the creation of an *ad hoc* regional criminal tribunal, composed of five judges.[107] In the Committee's view, 'the power of the Assembly to set up such an *ad hoc* regional criminal tribunal is based upon article 3(h), 4(h) and (o), 9(1)(d) and article 5(2) of the Constitutive Act of the African Union'.[108] While these articles do not explicitly give the

103 Assembly/AU/Dec.103 (VI) Decision on the Hissène Habré Case and the African Union (Doc.Assembly/AU/8 (VI)) Add.9, 6th ordinary session of the Assembly of the African Union, Khartoum, Sudan, 23-24 January 2006 para 1.

104 Decision (n 103) para 3.

105 African Union 'Report of the Committee of Eminent African Jurists on the Case of Hissène Habré' (2006) paras 27-33, http://www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pdf (accessed 18 March 2021).

106 African Union (n 105) paras 17 & 29.

107 African Union (n 105) paras 24 & 31.

108 African Union (n 105) para 23. Art 3(h) provides that the AU aims to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments. Art 4(h) confers on the AU the right to intervene in a member state in the event of genocide, war crimes and crimes against humanity. Art 4(o) provides for the principle of respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities. Art 5(2) states that the AU shall have organs that the Assembly may decide to establish in addition to those which are expressly determined by the Constitutive Act. Art 9(1)(d) reiterates such power of the AU Assembly to establish any other organ of the Union.

power to the AU Assembly to create an *ad hoc* regional criminal tribunal, one may agree that objectives to protect human rights and principles to fight impunity which they provide for play a functional role, from which complementary rules can be adopted or implied.[109] In this regard, creating an *ad hoc* regional criminal tribunal as a subsidiary organ of the AU Assembly was not problematic. However, the Committee warned that 'an ad hoc tribunal, in whatever form, would cost a lot of money and create further delay in the trial of Habré',[110] even though 'where there is a will, there is a way and the process could be expedited'.[111]

The third option took into account the possibility for any African state to prosecute and exercise jurisdiction.[112] The criterion of availability of any African state to do so was simply the ratification by it of the UN Convention against Torture. However, this option was more problematic than the previous ones for two main reasons. First, there was no evidence as to the existence of domestic legislation implementing the UN Convention against Torture in any other African state. Second, the preparedness of the judiciary of any African third state to begin with the trial could be undertaken by zero, including the transfer of the existing judicial file from Senegal and the study of its various documents.

Consequently, the AU Assembly rightly decided to confer jurisdiction on Senegal.[113] The motivation of this decision contains three considerations. First of all, the AU Assembly observed that 'according to the terms of articles 3(h), 4(h) and 4(o) of the Constitutive Act of the African Union, the crimes of which Hissène Habré is accused fall within the competence of the African Union'.[114] Second, the AU Assembly acknowledged that 'in its present state, the African Union has no legal organ competent to try Hissène Habré'.[115] Third, given that the *Hissène Habré* case was within the competence of the Union, the AU Assembly decided to mandate Senegal to prosecute and ensure that the suspect was tried, 'on behalf of Africa, by a competent Senegalese court with guarantees for fair trial'.[116] All AU

109 JF Wandji 'L'Afrique dans la lutte contre l'impunité des crimes internationaux' (2013) 11 *Cahiers de la recherche sur les droits fondamentaux* 97.

110 African Union (n 105) para 25.

111 As above.

112 African Union (n 105) paras 21 & 33.

113 Assembly/AU/ Dec.127 (VII), Decision on the Hissène Habré Case and the African Union (DOC. ASSEMBLY/AU/3 (VII)), 7th ordinary session of the Assembly of the African Union, Banjul, The Gambia, 1-2 July 2006.

114 Assembly/AU/ Dec.127 (VII) (n 113) para 3.

115 Assembly/AU/ Dec.127 (VII) (n 113) para 4.

116 Assembly/AU/ Dec.127 (VII) (n 113) para 5(ii).

member states were requested to cooperate with Senegal on this matter,[117] while the Chairperson of the Union, in consultation with the Chairperson of the AU Commission, was mandated 'to provide Senegal with the necessary assistance for the effective conduct of the trial'.[118]

The benefits of this model of jurisdiction are not negligible. It appears that it fits better for trying a small number of specific individuals, such as high-ranking state officials, in a particular situation and outside the territory of the state of commission of the crime or the state of nationality. The collective delegation of jurisdiction increases the legitimacy of proceedings on the part of the designated/delegated third state. The latter acts as a true agent of the international community, exercising its power. This is a significant departure from the exercise of universal jurisdiction by a state. Compared with prosecutions before *ad hoc* international criminal tribunals, state procedures are likely to take not too much time. These procedures may also cost less money due to a reduced internationalisation as regards staff composition and institutional building. However, there are also drawbacks. One of these could be the perception of an imperial jurisdiction when the state of nationality of the presumed offenders has not consented to such a delegation of power or when jurisdiction is not conferred on the country of its wish. Difficulties in the process of implementation can also arise if the content of the legal mandate is not clearly specified for the delegated state in advance. Interpretations on how this mandate has to be executed can create a number of complex legal problems to solve, thereby undermining the start of the trial in a reasonable time or even thwarting the effectiveness of prosecutions. An alternative could be to create a mixed or hybrid court.

3.2.2 The creation of mixed or hybrid courts

A mixed, hybrid or internationalised criminal tribunal is a jurisdiction that combines national and international staff, and often involves both domestic and internationally-recognised criminal justice rules and procedures.[119] There are, however, different variants: either a national jurisdiction that is internationalised or an international court that is nationalised.[120] Such a criminal tribunal may take the form of a mixed

117 Assembly/AU/ Dec.127 (VII) (n 113) para 5(iv).

118 Assembly/AU/ Dec.127 (VII) (n 113) para 5(iii).

119 T Mbeki et al 'Darfur: The quest for peace and reconciliation. Report of the African Union High-Level Panel on Darfur (AUPD)' October 2009 PSC/AHG/2(CCVII) Peace and Security Council, Abuja, Nigeria 29 October 2009 para 247.

120 P Pazartzis 'Tribunaux pénaux internationaux internationalisés: une nouvelle approche de la justice pénale internationale ?' (2003) XLIX *Annuaire français de droit international* 644 646.

court that is autonomous from the domestic legal system or of special mixed chambers that are integrated into the judicial system of the state concerned. A hybrid tribunal is designed to deliver justice in a particular context or special circumstances. Its jurisdiction, therefore, is limited in time, whereas its exercise is often expected to contribute to the promotion of stability or reconciliation in a post-conflict state.

In practice, the AU in cooperation with Senegal resorted to a hybrid jurisdiction with the creation of the Extraordinary African Chambers (EACs) in the Senegalese Courts in 2012. Other relevant experiences must be noted with recommendations made to create hybrid courts in relation to Sudan in 2009 and South Sudan in 2014.[121]

If we focus only on the example of the EACs, one has to observe that the Chambers were created after the failure to implement the delegation of criminal jurisdiction to Senegal for the purpose of the trial of Hissène Habré. Contestations of this delegated jurisdiction were brought before several African courts,[122] including the ECOWAS Court of Justice. In its judgment of 18 November 2010 the ECOWAS Court of Justice concluded that by amending its domestic legislation for the purpose of trying Hissène Habré, Senegal violated the principle non-retroactivity of penal laws.[123] Furthermore, the Court held that the AU's delegation of jurisdiction conferred on Senegal the mandate to conceive and to suggest specific modalities for trying the accused person in the framework of an *ad hoc* special procedure of an international character as is practised in international law by all civilised nations.[124] For the Court, this was the only procedure that would not breach the principle of non-retroactivity of criminal laws as it was consistent with article 15(2) of the International Covenant on Civil and Political Rights (ICCPR),[125] which permits 'the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general

121 Mbeki et al (n 119) para 246; African Union 'Final Report of the African Union Commission of Inquiry on South Soudan' 15 October 2014 paras 1125-1129 & 1133, http://www.peaceau.org/uploads/auciss.final.report.pdf (accessed 19 March 2021).

122 *Michelot Yogogombaye v Republic of Senegal*, Judgment of 15 December 2009 African Commission, Application 001/2008 paras 20-21. Art 7(2) of the African Charter provides: 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

123 *Hissène Habré v Republic of Senegal* Judgment ECW/CCJ/JUD/06/10 of 18 November 2010, ECOWAS Court of Justice paras 54 & 61.

124 *Hissène Habré v Republic of Senegal* (n 123) paras 58 & 61.

125 *Hissène Habré v Republic of Senegal* (n 123) para 58.

principles of law recognised by the community of nations'. The Court decided that Senegal should respect decisions delivered by its own courts declining their jurisdiction over this case.[126]

This judgment may raise much criticism. However, the AU Assembly took note of it in spite of various legal flaws. In January 2011 it requested the AU Commission 'to undertake consultations with the government of Senegal in order to finalise the modalities for the expeditious trial of Hissene Habre through a special tribunal with an international character consistent with the Economic Community of West African States (ECOWAS) Court of Justice Decision'.[127] With the advent of the new Senegalese government of President Macky Sall in April 2012, negotiations with the AU were resumed. These resulted in the conclusion of the Agreement on the Establishment of the Extraordinary African Chambers on 22 August 2012. This Agreement was ratified by Senegal after parliamentary authorisation by virtue of the Law 2012/25 of 28 December 2012.

The EACs qualified as a mixed or hybrid tribunal,[128] as they fulfilled the six criteria of this type of jurisdiction.[129] First, the EACs performed criminal functions. Second, concerning the duration of their existence, they were temporary institutions. Third, there was a minimum international participation in the functioning of the Chambers: The president of the Trial Chamber and the president of the Appeals Chamber were non-Senegalese judges, selected from another AU member state. Nevertheless, all other Senegalese judges were nominated by the Senegalese Minister of Justice but appointed by the Chairperson of the AU. Fourth, international assistance in the financing of the EACs was provided. Fifth, the applicable law combined both international law and Senegalese domestic legislation. Sixth, a party other than Chad was involved in the EACs, that is, the AU. According to Williams, the EACs constituted a new type of mixed tribunal

126 *Souleymane Guengueng & Others v Hissène Habré* Judgment 14 of 20 March 2001, Court of Cassation (Première chambre statuant en matière pénale) http://www.asser.nl/upload/documents/20121105T123352-Habre,%20Cassation%20Court,%20Senegal,%2020%20March%202001.pdf (accessed 18 March 2021); *Public Prosecutor's Office and Francois Diouf v Hissène Habré* Judgment 135 of 4 July 2000, Dakar Court of Appeal (Chambre d'accusation) https://www.hrw.org/legacy/french/themes/habre-decision.html (accessed 18 March 2021).

127 Assembly/AU/ Dec.340(XVI), Decision on the Hissene Habre Case (Doc Assembly/AU/9(XVI)), 16th ordinary session of the Assembly of the African Union, Addis Ababa, Ethiopia, 30-31 January 2011 para 9.

128 S Williams 'The extraordinary African chambers in the Senegalese courts: An African solution to an African problem?' (2013) 11 *Journal of International Criminal Justice* 1140, 1147 & 159.

129 Williams (n 128) 1145-1146.

as it was the first jurisdiction of the kind to apply universal jurisdiction (with the consent of Chad), so operating outside the state of commission and having a minimalist approach to judicial internationalisation, in order to address a particular situation of impunity in Africa.[130]

Thus, the involvement of the international community in the functioning of a hybrid tribunal may not come only from the UN.[131] It could also come from a regional organisation or even other states.[132] The restriction of such an involvement to the UN had no justification. In fact, international law not only exists but may also be enforced at the regional level.

3.2.3 The establishment of the Criminal Court of the African Union

The project for the creation of an African criminal court dates back to the time of the OAU.[133] It was materialised with the AU following criticisms against the global system of international criminal justice, notably those related to the abusive application of the principle of universal jurisdiction by some European states and the ICC's intervention in Africa perceived as being neocolonial and applying double standards.[134] The AU Criminal Court contains some good innovations, such as the inclusion of corporate criminal responsibility and a Defence Office, led by the Principal Defender, who is vested with equal status to that of the Prosecutor.[135] It is a permanent jurisdiction. This raises two important issues concerning the Court's legal status that must be carefully considered. First, what informed the decision to establish a permanent rather than a non-permanent jurisdiction? Second, did the AU follow a maximalist approach in establishing a single court or a minimalist approach, implying that this jurisdiction would coexist with several other courts or tribunals established by the RECs? These two questions were not scrutinised during the drafting process of the Malabo Protocol. The creation of the International Criminal Law Section within the AfCJHPR has given birth to a giant and complex court's system because of the failure to opt for a single court for the African continent, and to establish a non-permanent criminal jurisdiction.

130 Williams (n 128) 1160.

131 Williams (n 128) 1145.

132 As above.

133 M du Plessis et al 'Africa and the International Criminal Court' (2013) 1 International Law Programme Paper 'Africa programme, Africa and the changing balance of international power' 9.

134 Kahombo (n 4) 20-25.

135 ACtJHR Amendments Protocol (Annex) arts 22C & 46C.

A single regional criminal jurisdiction for Africa

The starting point of the debate is the AU decision of July 2009 which indicated that the proposed AU Criminal Court 'would be complementary to national jurisdiction and processes for fighting impunity'.[136] No reference was made to tribunals other than domestic courts. Surprisingly, the Malabo Protocol (Annex) provides: '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'.[137] The reasons why the drafters have departed from the original will of the AU Assembly to include jurisdictions of RECs in the system of the AU Criminal Court are not specified in the *travaux préparatoires*. However, one may suppose that the Malabo Protocol (Annex) espouses the minimalist approach to pan-Africanism and African regionalism.

The meaning of the minimalist approach is closely related to controversies over the way in which African unity and, thus, pan-Africanism should be achieved. The Conference of African Independent States, held in Accra, Ghana, on 15 April 1958 had particularly insisted on uniting all African states in one continental organisation. In this organisation, African unity could have been based on three objectives according to President Kwame N'krumah: economic integration; common foreign policy; common defence and a united government of Africa.[138] This maximalist approach to pan-Africanism suggested that multiplication of regional groupings was a factor of division of African states depending on geography, colonial history and so linguistic and economic ties. Instead, the Conference of African peoples, which took place in Accra from 5 to 13 December 1959, was reluctant to a policy of continentalisation. While agreeing with the necessity for African unity, the Conference concluded that states should first and foremost create specific groupings on the bases of their location, economic, linguistic and cultural connections as initial steps towards the realisation of continental unity, the ultimate objective.[139] In other words, and for the first time, it was agreed that continentalisation should be progressively realised, step by step, through the division of

136 Assembly/AU/Dec.245 (XIII) Rev.1, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) (Doc. Assembly/AU/13(XIII)), 13th ordinary session of the Assembly of the African Union, Sirte, Libya, 1-3 July 2009 para 5.

137 ACtJHR Amendments Protocol (Annex) art 46H.

138 R Ndeshyo et al *L'antidérive de l'Afrique en désarroi: le Plan d'action de Lagos* (1985) 148.

139 Ndeshyo et al (n 138) 149.

Africa into different regions and state groupings.[140] These two visions were confronted during the Conference of Addis Ababa for the creation of the OAU in 1963. The proponents of immediate continentalisation constituted the so-called progressist group, led by Presidents Kwame N'krumah (Ghana) and Sekou Touré (Guinea/Conakry). The other group consisted of the so-called realist states, led by Presidents Félix Houphouët Boigny and Léopold Sédar Senghor (Senegal). At the end of negotiations, a compromise was found. The OAU Charter provided for a minimum cooperation between states at the continental level. States would have to consolidate their independence before embarking progressively on the path of Africa's integration. They were also free to create their specific regional groupings in conformity with relevant criteria defined by the OAU Council of Ministers in August 1963.[141] This minimalist approach, therefore, leaves minor powers to the continental level but tends to include regions as primary spaces from which African unity has to be built and realised. The coexistence between continental and regional institutions is its main characteristic. This logic persists with the advent of the AU. President Kwame N'krumah's maximalist approach was revived by Muhammar Kadhafi, who was defending the establishment of the United States of Africa.[142] However, views from the majority of states such as Nigeria and South Africa were in favour of the minimalist position.[143] In any case, if the continental level is vested with more power in the framework of the AU than it was under the OAU, it is still a fact that RECs remain the pillars of Africa's integration.

The drafters of the Malabo Protocol seem to have followed the minimalist approach: The AU Criminal Court should coexist with courts of justice of RECs, the latter having even jurisdictional primacy over it. This position can be politically justified. However, the implication of such courts in criminal matters is likely to render justice difficult to administrate. First of all, the financial burden to operationalise the AU Criminal Court become aggravated owing to the costs that states must pay to make other potential eight criminal jurisdictions attached to those recognised RECs effective. Second, states normally belong to more than a REC. For example, the Democratic Republic of the Congo (DRC) is a member of four RECs: SADC, COMESA, EAC and ECCAS. It is not

140 Organisation Internationale de la Francophonie (OIF) *Le mouvement panafricain au vingtième siècle: recueil des textes* (2004) 283-284.

141 CM/Res. 5 (I), Regional Groupings, 1st ordinary session of the Council of Ministers of the Organisation of the African Unity, Dakar, Senegal, 2-11 August 1963 para 2.

142 GN Tshibambe 'Etats-Unis d'Afrique: analyse généalogique d'une vision' (June-July-August 2008) 426 *Congo-Afrique* 510-516.

143 As above.

excluded that it consents to their respective criminal jurisdictions. In such a situation, the multiple membership to RECs reduces the state capacity to contribute substantially to the funding of common and duplicated criminal institutions. Third, and more important, there are technical drawbacks. On the one hand, the AU Criminal Court may prove to in fact be useless due to the lack of cases to handle. This is because of the double complementarity principle established by the Malabo Protocol (Annex), requiring that the Court intervenes only when states fail to carry out investigations and prosecutions against the alleged perpetrators, and when the case is not or has not been prosecuted or tried before a regional court of justice. On the other hand, the Malabo Protocol (Annex) creates unnecessary competing criminal jurisdictions. In this regard, 'the question is which of the RECs' courts should be considered for the purposes of the complementarity principle where the national state of an accused person holds multiple memberships'.[144] The Malabo Protocol (Annex) is dramatically silent on the coordination of these courts. There is only one reference to agreements which the AU Criminal Court may conclude with any other jurisdictions.

There are two additional reasons why the Malabo Protocol (Annex) should have opted for the maximalist approach. First, the proper dynamic of African regionalism towards continental unification shows that RECs themselves are in a process of rationalisation. They were grouped into two main regional blocs of integration in order to avoid duplication of objectives, programmes and institutions in view of reaching in time 'the final stage of the political and economic integration of the continent'.[145] One of these blocs is constituted by SADC-COMESA-EAC-IGAD and the other by ECOWAS-ECCAS-AMU-CEN-SADC.[146] Therefore, whereas there is a will to speed up the process of integration towards continental unification, the trend that consists of creating and increasing the number of regional institutions runs against this backdrop. Second, in 2012 it was envisaged to create an arbitral section within the African Court of Justice

144 A Abass 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 945.

145 AU Non-Aggression and Common Defence Pact art 4(d).

146 Assembly/AU/Dec.392(XVIII), Decision on African Integration (Doc: EX.CL/693(XX)), 18th ordinary session of the Assembly of the African Union, Malabo, Equatorial Guinea, 29-30 January 2012 para 7; Assembly/AU/Dec.394(XVIII), Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area (Doc. EX.CL/700(XX)), 18th ordinary session of the Assembly of the African Union, Malabo, Equatorial Guinea, 29-30 January 2012 paras 4(i) & (ii); Assembly/AU/Decl.1(XVIII), Declaration on Boosting Intra-African Trade and the Establishment of a Continental Free Trade Area (CFTA), 18th ordinary session of the Assembly of the African Union, Malabo, Equatorial Guinea, 29-30 January 2012 para 6.

and Human Rights (AfCJHR) as part of the institutional mechanism of the proposed African Continental Free Trade Area.[147] For the first time, one jurisdiction was foreseen to be relevant for the settlement of disputes on the continent without any role being left to courts of justice of RECs.[148] Due to all the drawbacks mentioned above, the Malabo Protocol (Annex) could have followed the same dynamic of unification. The AU had the power to make such an institutional rationalisation and harmonisation pursuant to article 4(l) of the Constitutive Act.

A permanent or non-permanent court

As a reminder, the AU Assembly chose to confer criminal jurisdiction on the AfCJHPR rather than creating a separate criminal tribunal comparable to an ICC made in Africa. This choice was quite logical because it was already decided in 2004 to merge the AU's existing courts as a matter of institutional rationalisation and for reducing financial costs.[149] Creating a separate criminal jurisdiction could have been in contradiction with this policy.[150] Nevertheless, the form of the criminal jurisdiction to create was not thoroughly considered during the drafting process of the Malabo Protocol.

Like the Court itself, its International Criminal Law Section shall be permanent. This means that the criminal jurisdiction will be also exercised permanently. In other words, the Court is not designed to deal with particular situations with a limited mandate in time. However, its permanence to some extent is mitigated by the fact that the Court shall sit in ordinary or extraordinary sessions,[151] and so judges will perform their functions on a part-time basis.[152] Only 'the President and Vice President reside at the seat of the Court'.[153] However, for a permanent criminal

147 B Kahombo 'L'intensification du commerce intra-africain et l'accélération de la création de la Zone continentale de libre-échange: aperçu global sur le nouveau Plan d'action de l'Union africaine' in O Ndeshyo (ed) *Le nouvel élan du panafricanisme, l'émergence de l'Afrique et la nécessité de l'intégration continentale –Les actes des journées scientifiques consacrées à la commémoration de la journée de l'Afrique: 2011-2012-2013-2014* (2015) 142.

148 As above.

149 K Kindiki 'The proposed integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal difficulties and merits' (2007) 15 *African Journal of International and Comparative Law* 138.

150 Manirakiza (n 2) 49.

151 Protocol to the Statute of the African Court of Justice and Human Rights (ACtJHR Statute) (Annex) art 20.

152 ACtJHR Amendments Protocol (Annex) art 5(4).

153 ACtJHR Amendments Protocol (Annex) art 22(5).

jurisdiction, it is difficult to imagine that sessions would permit criminal judges to be out of the seat of the Court during a large period of the year as in the case of their counterparts sitting in the General Affairs and Human Rights Sections. The reason is that criminal justice is a matter of daily administration, particularly if the accused persons are in detention. The procedure is characterised by a high degree of oral submission and publicity before the Court. Hence, procedural motions to be dealt with and the length of hearings must make these judges almost permanent at the seat of the Court like the president and vice-president. The Office of the Prosecutor (OTP), which shall not only support the accusation before the Court but also monitor situations occurring on the continent, will also necessarily be permanent. The same observation applies to the Registry which shall be responsible for the administration of the Court,[154] in addition to its traditional judicial mission to record the Court's hearings. This permanent character of the Court will imply enormous financial costs for African states. Yet, the AU has wished to avoid these costs through the rationalisation of its institutions.

Another judicial option was possible: the creation of a non-permanent criminal jurisdiction. The Malabo Protocol (Annex) could have included article 19(2) of the Protocol of the Court of Justice of the AU of July 2003, which was deleted without justification in the Protocol on the Statute of the AfCJHR of July 2008. This article provided that the AU Assembly could confer on the Court jurisdiction over *any dispute* other than those referred to in its first paragraph.[155] The term 'any dispute' could be given a broad meaning in order to cover criminal matters. For example, such conferral of jurisdiction could be decided on matters in which competent states remain inactive or that engender an international dispute as it has been observed in the *Hissène Habré* case. In this scenario, the AU Criminal Court could have received the function analogues to that of an *ad hoc* international criminal tribunal, intervening only in exceptional circumstances when a particular situation was referred to it. In this context, it was not necessary to institutionalise a permanent

154 ACtJHR Amendments Protocol (Annex) art 22B(5).

155 Art 19(2) of this Protocol reads as follows: '1. The Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act and this Protocol which relate to: (a) the interpretation and application of the Act; (b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union; (c) any question of international law; (d) all acts, decisions, regulations and directives of the organs of the Union; (e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court; (f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; (g) the nature or extent of the reparation to be made for the breach of an obligation.'

criminal jurisdiction; rather, the AU needed to appoint a special prosecutor attached to the Court, vested with the mandate to monitor and investigate permanently situations all over Africa. It could have been up to this special prosecutor to identify situations or cases which could deserve regional judicial action and to recommend to the AU Assembly or the PSC either to refer the matter to the Court or to choose any other option of regional criminal justice mentioned above, that is, to delegate jurisdiction to a third member state or to create a hybrid criminal tribunal. The involvement of the AU Assembly or the PSC as political bodies in this system of justice could not have hampered the course of justice. First, their involvement could be a test of good faith on the part of the AU to fight impunity. Second, at least for crimes falling under its competence, the ICC's eyes would be permanent in a manner that when a situation or a case is not dealt with by the competent state or the AU, there would be no reason to complain about its intervention to deliver justice. In this regard, the AU special prosecutor could work hand-in-hand with the ICC Prosecutor and exchange judicial information, documents and evidence. Likewise, if the AU decided to resort to any of the three models of regional criminal jurisdiction, the ICC could support the proceedings in the same manner or even more and up to providing financial assistance.

This kind of non-permanent criminal jurisdiction had several advantages as a matter of judicial policy. First, it gives a margin of appreciation to the AU Assembly to decide, on a case-by-case basis, whether or not to trigger the regional criminal jurisdiction. In this process of decision making, various factors could be put into consideration, including the political sensibility of a situation or a case to be taken out of Africa and the availability of financial means. Second, it would avoid unnecessary conflicts with the ICC. This is important because there has been a perception that calls for the establishment of the AU Criminal Court 'are manifestly meant to detract from the progressive development of international criminal justice'.[156] Third, the exercise of regional criminal jurisdiction would remain very exceptional. Positive cooperation would be strengthened between the ICC and the AU through its special prosecutor. The operations of this kind of regional criminal jurisdiction would be less heavy to sustain than the institution established by the Malabo Protocol which poses questions about its viability.

156 CB Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1086.

4 Conclusion

Africa not only is a consumer but also an enforcer of international criminal justice. In addition, African states, acting mainly through the AU, have adopted several treaties, decisions and declarations on international criminal law in order to improve the fight against impunity from crimes of collective concern to the continent. It is a process of regionalisation of international criminal law that entails substantive, procedural and institutional African contributions to the development of international criminal law.

This chapter has focused on two important contributions: first, the codification of crimes against peace and security in Africa. These crimes constitute serious violations of rules of fundamental importance for the protection of peace, stability and human rights in Africa or any other essential interests of the African community of states and peoples as a whole, and imply criminal responsibility. They represent a tangible threat to the African regional public order. Three main categories have been identified, namely, crimes against human security; crimes against the states and Africa; and ICC crimes incorporated into African legal instruments with a relative expansion of their definitions. In this regard, suffice it to recall some innovations in respect of ICC crimes under the Malabo Protocol (Annex). For example, the crime of aggression can be committed on behalf of a state or a non-state actor. War crimes include 15 new offences as compared to the definition provided for by the ICC Statute. This notably is the case of the criminalisation of the use of nuclear weapons or other weapons of mass destruction in the context of any armed conflict. The other crimes of specific concern to Africa over which the ICC does not have jurisdiction are unconstitutional changes of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and illicit exploitation of natural resources.

Second, the fight against impunity from all these crimes by Africa itself is the *raison d'être* of the promotion of the system of African regional criminal justice. The chapter has demonstrated that this system is based on three optional models of justice, namely, the delegation of jurisdiction to a member state; the creation of hybrid courts with the participation of regional judges; and the establishment of a regional criminal court. Together with crimes against peace and security in Africa, these models of justice form the core of the content of African international criminal law. Delegation of jurisdiction to a member state was experienced in the case of the trial of the former Chadian President, Hissène Habré, in

Senegal. Hybrid courts were suggested in Senegal, Darfur (Sudan) and South Sudan. The first experience succeeded with the establishment of the EACs, the second failed due to insufficient international support and the lack of political will on the part of Sudan, while the third is still in its prime infancy of conception. The regional criminal court was created by the Malabo Protocol in June 2014, which has not yet entered into force. In fact, the Malabo Protocol rather creates an International Criminal Law Section within the AfCJHPR which this chapter has referred to as the AU Criminal Court. For any initiation of regional prosecutions or trials of crimes committed in Africa, the AU may attempt to rely on any of these three models of justice, depending on the specificity of every situation or case and of course the availability of financial resources. The AU Criminal Court is the main judicial institution in the emerging system of African regional criminal justice, although its intervention will remain exceptional because prosecutions and trials could be conducted by states themselves, in collaboration with the AU, or by courts of justice of RECs.

Overall, regional criminal justice is an additional level to the fight against impunity at the universal and national levels. Jurisdictional conflicts of course are possible. Thus, the efficiency of the fight against impunity will depend on the better coordination of regional judicial institutions with global mechanisms of international criminal justice, notably the ICC and the principle of universal jurisdiction.