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The African Criminal Court

A Commentary on the Malabo Protocol

Gerhard Werle
Moritz Vormbaum *Editors*

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While editing this book, South Africa and Burundi notified the Secretary General of the United Nations of their intention to withdraw from the Statute of the International Criminal Court. Other African states have expressed an intention to do similarly. It remains to be seen which impact this will have on the work of the International Criminal Court in Africa. It is clear, however, that alternative approaches to prosecute crimes under international law in Africa, including the creation of an "African Criminal Court", will become increasingly important.

Berlin, November 2016

Gerhard Werle
Moritz Vormbaum

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Abbreviations

AC	Appeals Chamber
AU	African Union
AUCPCC	African Union Convention on Preventing and Combating Corruption
DRC	Democratic Republic of Congo
EAC	East African Community
EC	European Commission
ECOWAS	Economic Community of West African States
ed(s)	editor(s)
edn	edition
e.g.	for example (*exempli gratia*)
EJIL	European Journal of International Law
et al.	and others (*et alii*)
et seq.	and the following (*et sequens; et sequentes*)
EU	European Union
FATF	Financial Action Task Force
GA	General Assembly
i.e.	that is (*id est*)
ibid.	in the same place (*ibidem*)
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JICJ	Journal of International Criminal Justice
marg. number(s)	marginal number(s)
n., nn.	footnote(s) (*nota*, *notae*)
NGO	Non-Governmental Organization
no(s).	number(s)
OAU	Organization of African Unity
OTP	Office of the Prosecutor (at the International Criminal Court)

p, pp	page(s)
para(s)	paragraph(s)
PTC	Pre-Trial Chamber
Res.	Resolution
SADC	Southern African Development Community
SCSL	Special Court for Sierra Leone
SERAP	Socio-Economic Rights and Accountability Project
TC	Trial Chamber
UN	United Nations
UNCAC	United Nations Convention against Corruption
UN Doc.	Documents of the United Nations
UNTOC	United Nations Convention against Transnational Organized Crime
UNTS	United Nations Treaty Series
USAID	United States Agency for International Development
USD	United States Dollars
v	against (*versus*)
VCLT	Vienna Convention on the Law of Treaties of 1969

Part I
Introduction

Chapter 1
Creating an African Criminal Court

Gerhard Werle and Moritz Vormbaum

At its Twelfth Ordinary Session in February 2009 in Addis Ababa, Ethiopia, the Assembly of the African Union requested the Commission of the African Union

> in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes.

Since then, the African Union has repeatedly adopted resolutions to establish an international, or more precisely, an inter-African criminal jurisdiction. Finally, in June 2014, the African Union, at its Summit meeting in Malabo, Equatorial Guinea, adopted a protocol (the "Malabo Protocol") which included in its Annex an amendment to the Statute of the African Court of Justice and Human and Peoples' Rights. The Court is a merger of the African Court of Justice and the African Court on Human and Peoples' Rights. Its merger protocol currently awaits ratification. According to the Statute, as amended by the Annex to the Malabo Protocol, the Court will have three Sections, namely, "a General Affairs Section, a Human and Peoples' Rights Section and an International Criminal Law Section" (see Article 16 of the Annex to the Malabo Protocol). Even though the ratification of the Malabo Protocol and its Annex may be a protracted process with some important questions still to be resolved, the establishment of, simply speaking, an "African Criminal Court" is becoming an increasingly concrete possibility, particularly because South Africa and Burundi have given notice of their withdrawal from the International Criminal Court and other states might follow suit.

Whereas the resolutions of the African Union to empower the African Court of Justice and Human and Peoples' Rights with criminal jurisdiction initially

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attracted scant public attention, the situation has now changed. It seems, however, that the current debate—as Dire Tladi notes in his chapter in this book—is less about a thorough legal analysis and more about either broadly supporting or opposing the efforts to create an "African Criminal Court". To its supporters, the envisaged Court has the potential of contributing to the development of international criminal law and could, eventually, become even a useful complement to the International Criminal Court. To critics, it is no more than a political ploy by the African Union to weaken the International Criminal Court, which, for the last couple of years, has been the target of its pointed attacks.

This book focuses on the legal analysis of the Malabo Protocol and its Annex. The starting point of this analysis is that a regional court with jurisdiction over international crimes would be a novel phenomenon in the landscape of international courts and tribunals. Until now, so-called hybrid courts for special situations have been established in different countries. Noteworthy, given the subject of this book, are the Extraordinary African Chambers in the Courts of Senegal that convicted Hissène Habré in 2016 for systematic crimes committed in Chad. The UN-ad hoc Tribunals have also exercised jurisdiction in specific regions, in particular, the Yugoslavian Tribunal for the Balkan region. What has not taken place is the regionalization of international criminal law in the sense of developing a body of international criminal law that is particularly suitable for a specific region. Such regionalization of international criminal law could consist in extending the catalogue of crimes over which a regional court could have jurisdiction, while retaining the four core crimes under international law. And this is exactly what is provided for in the Annex to the Malabo Protocol.

We do not consider such regionalization a retrogressive step. In the field of human rights law, regionalization has taken place through the adoption of human rights treaties in Europe, America and Africa. This has not watered down the core content of universally accepted human rights; on the contrary, human rights have been undoubtedly strengthened through the work of regional human rights courts. A similar development is conceivable in the field of international criminal law. The Annex to the Malabo Protocol does not in any way question the validity of the international core crimes. What the protocol does do, however, is to add crimes of specific relevance in the African context. Here, the best example is the crime of unconstitutional change of government. Outside of Africa, unconstitutional changes of governments have become a rare phenomenon, even in regions such as South America where such changes occurred commonly only a few decades ago. In Africa, by contrast, violent coups, or leaders who remain in office unconstitutionally are a common phenomenon, with countries like Burkina Faso and Burundi being the most recent cases in point. Such unconstitutional coups threaten, in the worst case, to destabilize whole states and even regions without the possibility of the culprits being prosecuted before national courts. It, therefore, made sense that already in 2007 the African Charter on Democracy, Election and Governance declared such conduct to be an international crime, punishable by a court of the African Union. The Annex to the Malabo Protocol follows up on this attempt.

If then, the creation of an African Criminal Court is not to be rejected from the outset, and indeed could enrich the international criminal justice landscape, a closer analysis of the protocol's contents does nevertheless raise concerns. As the contributors to this book show, some provisions clearly need improvement. The protocol fails, for example, to regulate its relationship with the International Criminal Court. Moreover, the immunity for heads of state and heads of government, as well as for high-ranking officials, is a feature which could constitute the Achilles heel of the future Court.

However, whatever its present flaws, the Statute of the African Court of Justice and Human and Peoples' Rights, as amended by the Annex to the Malabo Protocol, will not be changed or amended. This means that the Malabo Protocol, should it, together with its Annex, receive the necessary number of ratifications, will become operational as it stands now. It is, therefore, crucial to clarify the contents of the future Statute of the African Court of Justice and Human and Peoples' Rights as far as the provisions on international criminal law are concerned. For this purpose, this book includes contributions by international experts in the field of international criminal law who comprehensively analyze the central provisions of the Annex to the Malabo Protocol.

The book begins with a chapter by Ademola Abass that gives an overview on the historical and political background of the establishment of a regional criminal court for Africa. Abass stresses that the idea of creating such a court did not originate, as one may think, with the deterioration of the relations between the African Union and the International Criminal Court over the Al Bashir-case. Instead, he refers to examples such as the proposed court to deal with the crime of apartheid in the 1970s, and he also points to the obligation of the African Union to create a competent court to prosecute the crime of unconstitutional change of government, as reflected in the African Charter on Democracy, Election and Governance of 2007. Abass rejects the argument that empowering the African Court of Justice and Human and Peoples' Rights with criminal jurisdiction is incompatible with the Rome Statute. In his view "an inquiry into the legality of the proposed international criminal jurisdiction in Africa with reference to the Rome Statute is fallacious, fundamentally mistaken and unscrupulous". The Rome Statute, he argues, is no *primus inter pares* and therefore cannot possibly forbid its Member States from creating another criminal court at the regional level. Yet, the author sees a number of serious challenges which the Court would face in practice. Besides some procedural issues which, according to Abass, result from the combination of civil and criminal jurisdiction, he stresses that it is unclear how the Court could be financed. The author points to the fact that the cost of a single trial for crimes under international law—the Charles Taylor trial, for example, cost more than USD 50 million—could easily outstrip the entire annual budget of the African Court of Justice and Human and Peoples' Rights.

Kai Ambos analyzes the definitions of the core crimes under international law in the Annex to the Malabo Protocol by comparing them with those in the ICC Statute. His analysis shows that the crimes in both legal instruments overlap considerably. Yet, Ambos also identifies some striking differences. As regards

genocide, for example, the drafters added "acts of rape or any other form of sexual violence" as a genocidal act. In the provision of crimes against humanity, further criminal acts were added, too. In addition, according to the Annex to the Malabo Protocol, not only an "attack" but also an "enterprise" (which is not defined in the Annex to the Malabo Protocol) against a civilian population satisfies the chapeau-requirements. The provision on war crimes is likewise, according to the author, considerably wider than that in the ICC Statute, as it criminalizes, among other things, the use of nuclear weapons and "conscripting or enlisting children under the age of eighteen years" (instead of fifteen years as in the ICC Statute). As regards the crime of aggression, the Annex to the Malabo Protocol, according to Ambos, is more comprehensive in different ways, for example, explicitly covering acts of "non-State actors" and "any foreign entity". Ambos regards these changes, for the most part, as problematic. At the same time he regrets that the drafters of the Malabo Protocol took over provisions of the ICC Statute which have been criticized for good reasons. For example, the "civilian population" element is, in his words, an "infamous transplant from international humanitarian law". In this regard, Ambos sees a missed opportunity for Africa to come up with a better statute than the ICC's.

A crime which has attracted considerable attention, especially since it has until now been unknown in the sphere of international criminal law, is the crime of unconstitutional change of government. In their chapter, Gerhard Kemp and Selemani Kinyunyu shed light on the drafting process of this crime. According to the authors, the origins of the crime go back to the late 1990s, when a political solution was sought to tackle the problem of the numerous coup d'états and attempted coups d'états in Africa at the Pan-African level. In 2007, a provision on unconstitutional change of government appeared in Article 23 of the African Charter on Democracy, Elections and Governance, which also included sanctions against perpetrators to be tried "before a competent court of the African Union". This provision also represents the core of Article 28E(1) of the Malabo Protocol (Annex). After evaluating the elements of the crime thoroughly, the authors conclude that the provision could have been drafted better, yet insist that the creation of such a provision is a step in the right direction for tackling an urgent problem in Africa.

Apart from the core crimes under international law and the crime of unconstitutional change of government, the Annex to the Malabo Protocol includes a number of other crimes. Florian Jeßberger rightly stresses that these transnational crimes must be distinguished clearly from the crimes under international law within the jurisdiction of the Court, such as genocide or war crimes. In his chapter he deals with piracy, mercenarism and terrorism, crimes of specific relevance to Africa. He explores the origins of these crimes in international treaties and analyzes the elements of each crime. Jeßberger's analysis shows that the Court will be the first international tribunal ever provided with jurisdiction over these and other transnational crimes. He concludes his chapter with the recommendation not to repudiate rashly the ambitious project of regionalizing the enforcement of international and transnational criminal law.

The stability of states or of unions of states can be affected not only by armed conflict and human rights atrocities. It is also weakened by large-scale economic crimes that have the potential of undermining the financial system of such states. It is, therefore, of great interest that the Annex to the Malabo Protocol includes the crimes of corruption and money laundering. In his chapter, Lovell Fernandez examines the feasibility of including these crimes within the jurisdiction of the African Court of Justice and Human and Peoples' Rights. He focuses on specific aspects of the two crimes, particularly their relationship to other economic crimes. In Fernandez's view, the immunity granted to heads of state or government raises questions about the legitimacy of the African Court of Justice and Human and Peoples' Rights, particularly in regard to crimes such as corruption and money laundering. He argues that definitional and jurisdictional issues will pose major challenges to successful prosecution as will the fact that practical issues, related to the ability of Member States to co-operate in criminal investigations, appear to have been overlooked in adding these two crimes to the catalogue of international crimes.

Fatuma Mninde-Silungwe deals with two other transnational crimes which the African Court of Justice and Human and Peoples' Rights will be competent to deal with, namely trafficking in drugs and trafficking in persons. The author discusses the history of these two crimes which can be traced back, partly, to the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and to the Palermo Convention. In both these international instruments, the acts in question were not explicitly criminalized. The author regards this as a critical shortcoming, insisting that the "approach […] should not be to simply copy the definition under a convention, but to reformulate it and give it the constitutive elements of a crime". Mninde-Silungwe analyzes the wording of the provisions in the Annex to the Malabo Protocol and considers its significance for the administration of international criminal justice in Africa. In her conclusion, Mninde-Silungwe points out that the criminalization at the regional level is not an end in itself, given that recent research has shown that trafficking in persons takes place more *within* states than across state borders. Mninde-Silungwe, therefore, argues that the strengthening of domestic laws in African states should become a priority.

While the States Parties to the ICC Statute could not agree on extending the crimes contained in the ICC Statute to include crimes against the natural environment, the Annex to the Malabo protocol does so by incorporating the crimes of trafficking in hazardous wastes and illicit exploitation of natural resources. In his chapter, Martin Heger points to the fact that pollution committed on a vast scale has long been a problem for Africa as European states have often used Africa as their "trash bin". Heger gives an overview of the international instruments that regulate the trafficking in hazardous wastes and the illicit exploitation of natural resources. He shows that, so far, the task of *criminalizing* serious acts of pollution has been left to the domestic legislator. In contrast, the Annex to the Malabo Protocol directly criminalizes trafficking in hazardous wastes and the illicit exploitation of natural resources, a contribution to the development of international law that Heger welcomes in principle. However, the crimes in the Annex to the Malabo

Protocol have some problematic features, insofar as they constitute, in Heger's view, a too far-reaching criminalization.

The Annex to the Malabo Protocol contains several comprehensive provisions on modes of responsibility. Article 28N, for example, covers the following modes: "inciting", "instigating", "organizing", "directing", "facilitating", "financing", "counseling", "participating as principle, co-principle, agent or accomplice", "aiding and abetting", "acting as an accessory before or after the act", "participating in a collaboration or conspiracy" and "attempting to commit a crime". In addition, the Protocol includes corporate criminal liability. In her chapter, Chantal Meloni offers an in-depth analysis of these provisions. Although Meloni is critical of the fact that, among other things, some of the provisions are not couched in sufficiently clear language and are overly broad in scope, she also mentions some positive features. Her view is that the criminal responsibility of corporations, in particular, represents "a progressive and positive development for international criminal law and could perhaps serve as an inspiration for future amendments of the ICC Statute". It will be the duty of the judges of the African Court of Justice and Human and Peoples' Rights to interpret the complex and not always coherent provisions of the Malabo Protocol's Annex in the future.

In his comprehensive chapter Volker Nerlich defines the parameters of the criminal jurisdiction of the African Court of Justice and Human and Peoples' Rights. According to his evaluation, while the provisions on jurisdiction have been largely modelled along the ICC Statute, they are considerably broader. In contrast to the International Criminal Court, the African Court of Justice and Human and Peoples' Rights will be vested also with the authority to exercise jurisdiction on the basis of the passive personality principle and the protective principle. While, according to Nerlich, this is an acceptable decision, he identifies a number of loopholes. Most notably he points to Article 46E*bis*(3) of the Malabo Protocol (Annex) which contains a provision that is "curiously incomplete" as it provides as follows: "If the acceptance of a State which is not a Party to this Statute is required under para 2, that State may, by declaration lodged with the Registrar, accept the exercise … [sic!—end of sentence]". According to Nerlich, the provision has no meaningful content in its current form and he makes reference to Article 12 of the ICC Statute in order to identify what was intended by the drafters. Nerlich concludes that the provisions on jurisdiction do "provide for a workable regime regarding the scope of and exercise of jurisdiction". However, he argues that additional procedural rules are likely to be needed to make the African Court of Justice and Human and Peoples' Rights' jurisdictional regime in criminal matters fully functional in practice.

A crucial practical question in connection with the future criminal jurisdiction of the African Court of Justice and Human and Peoples' Rights is its relationship with the International Criminal Court. Harmen van der Wilt analyzes this issue in his chapter by scrutinizing the provision on complementarity in the Annex to the Malabo Protocol. He sees certain dangers, namely, that African states may "outsource" the prosecution of crimes committed on their territory, perpetuating the strained relationship between the African Union and the International Criminal

Court. However, he also identifies possibilities on how the courts could work together effectively by sharing their work and by assisting each other: The competence of the African Court of Justice and Human and Peoples' Rights to prosecute transnational crimes creates the possibility for the Court to focus on these crimes, while the International Criminal Court could act as the main international court to prosecute the core crimes under international law.

In the concluding chapter Dire Tladi deals with probably the most contentious provision of the Annex to the Malabo Protocol—the exclusion of immunities for sitting heads of state and other government officials, as provided for in Article 46A*bis*. In the author's view, the debate about this provision combines political and legal arguments, which has caused confusion and has led to a "hero-villain" perception, with the International Criminal Court cast either as "hero" and the African Union as the "villain" or vice versa. From a legal point of view, as Tladi argues, customary international law is silent about immunities for sitting heads of state before international criminal courts and tribunals. Whether it is advisable to include a provision on the exclusion of immunity with a view to combating impunity in Africa, or rather to exclude it to protect state sovereignty, may be debatable, according to Tladi. However, what in his view needs to be stressed is that the creation of the provision on immunity in the Annex to the Malabo Protocol does not in any way affect the jurisdiction by the International Criminal Court over these persons.

The appendix of the book contains a collection of relevant documents. Included among the latter are the Malabo Protocol and its Annex, together with a list of the crimes in the Annex to the Malabo Protocol which are juxtaposed with the provisions of various international treaties after which the crimes were modelled. Included in the appendix, too, are the protocol which merges the African Court of Justice and the African Court on Human and Peoples' Rights ("Maputo Protocol"), the protocol of the African Court of Justice, and the protocol on the establishment of the African Court on Human and Peoples' Rights. The appendix contains, in addition, a collection of the Decisions by the African Union on the establishment of an "African Criminal Court".

Chapter 2
Historical and Political Background to the Malabo Protocol

Ademola Abass

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

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

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2.1 Introduction

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

The resultant draft protocol, which amended the Protocol on the Statute of the Court by extending its jurisdiction to cover international crimes,[3] was endorsed by the African Ministers of Justice and Attorneys General on Legal Matters in May 2012.[4] However, contrary to common expectations, the July 2012 AU Assembly did not adopt the new Protocol. Instead, it requested the Commission in collaboration with the African Court of Human and Peoples' Rights, to "prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the African Court" and urged the Union to adopt a definition of the crime of unconstitutional change of government. The Commission was to submit its report for consideration by the policy organs at the January 2013 Summit.[5]

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

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

[2] Assembly/AU/Dec. 213 (XII) (2012).

[3] EX.CL/731 (XXI)a; (2013).

[4] Min/Legal/ACJHR-PAP/3(II) Rev. 1.5.

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

[6] AfCHPR/LEGAL/Doc. 3, at 4.

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

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

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

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[7] Ibid., at 5.

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

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

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

In addition to a number of practical challenges confronting the ratification of the Annex to the Malabo Protocol, which will not be discussed here, the instrument itself contains several flawed provisions that the AU experts' meeting in Arusha did not deal with, that will severely curtail the ability of the African Court of Justice and Human and Peoples' Rights to prosecute international crimes, should the Court's criminal jurisdiction become operative. First, the combination of civil and criminal jurisdictions through the General Affairs Section, the Human and Peoples' Rights Section, and the International Criminal Section, in a single court is not only almost unprecedented in international judicial practice, but is also fraught with myriad substantive and procedural problems that the Court, under the current proposal, will be unable to handle.[11] Furthermore, the provision of the new protocol on the complementarity principle[12] raises many perplexing questions.

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

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

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[11] The only known instance of combined jurisdiction by an international tribunal, though in particular circumstances, is the Caribbean Court of Justice. Article 4 of the Agreement establishing the Court provides that "subject to para 2, an appeal shall lie to the Court with the special leave of the Court from any decision of the Court of Appeal of a Contracting Party in any civil or criminal matter": available at: www.caribbeancourtofjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf. But see Viljoen 2012, arguing that the African Union's proposition in this regard is unprecedented.

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

2.2 The Grounds for Establishing International Criminal Prosecution in Africa

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

2.2.1 Historical Necessity for Prosecuting International Crimes in Africa

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

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

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

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

[14] See M'Baye 2002, p. 65.

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

International Convention on the Suppression and Punishment of the crime of apartheid[16] already provided for "an international *penal* court" and the United Nations was then considering establishing "an international court to repress crime against mankind".[17]

Thus the proposal to prosecute international crimes in 1970s Africa was primordially motivated by the crime of apartheid in South Africa, which the UN General Assembly had in 1966 labelled a crime against humanity,[18] a determination affirmed by the Security Council in 1984.[19] From 1948 until 1990 apartheid existed as an international crime, but there was no international criminal court that could prosecute it. The international penal court that African states had hoped would be established to prosecute the crime—on the basis of which they forewent providing for such a court in the African Charter of Human Rights—did not materialize.[20] Nor did the special penal court contemplated by the United Nations in the 1980s to try apartheid offences ever materialize. Instead, "it was left to States to enact legislation to enable them to prosecute apartheid criminals on the basis of a form of universal jurisdiction."[21] The impact this "dupe", so to speak, had on Africans was significant, but it underscored the fact that not every crime committed in Africa would be of prosecutorial interest to the rest of humanity.

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

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

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

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

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

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

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

[20] Article V of the Apartheid Convention.

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

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

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

An instructive case on this point is the trial of Hissène Habré, the former president of Chad.[22] Belgium issued an arrest warrant against Habré, who was at that time in asylum in Senegal.[23] Senegal refused to extradite the culprit to Belgium,[24] and with the blessing of the African Union chose to prosecute Habré instead before the Extraordinary African Chambers.[25] The Chambers convicted Habre for crimes against humanity, torture and war crimes, and sentenced him to life imprisonment in May 2016.[26] Although Senegal and Chad were found to possess jurisdiction to try Habré,[27] Senegal refused to yield Habré to Chad based on the claim that, as a former Head of State, Habré enjoyed absolute immunity for crimes he committed while he was in office, a position most African countries indeed subscribe to.[28]

While I am not questioning the African Union's resolve to prosecute Habré in Africa, the fact is that with Senegal not prosecuting him and not giving him up to Chad either, the only remaining option was for the organization to turn to its own courts. The Committee of Eminent African Jurists[29] set up by the African Union specifically to advice on all ramifications of the Habré case reported[30] that neither

[22] See AU Committee of Eminent African Jurists 2006.

[23] See Human Rights Watch 2005.

[24] Ibid.

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

[26] See Amnesty International 2016.

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

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

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

[30] See AU Committee of Eminent African Jurists 2006.

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

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

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

2.2.3 The Obligation to Prosecute Crimes Peculiar to African States

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

There are a number of crimes peculiar to Africa, but one is particularly worth mentioning due to its importance. Unconstitutional changes of government are undoubtedly one of the most common sources of conflict in Africa, howsoever they are brought about.[33] The examples of Zimbabwe's Mugabe, Kenya's Kibaki and Ivory Coast's Gbagbo readily come to mind. The rampant menace of the unconstitutional takeover of government and its direct impact on the peace and stability of African countries drove the African Union to adopt the African Charter on Democracy, Election, and Governance in 2007.[34] The treaty entered into force in February 2012. Through Article 23 of the Charter the African Union lists and criminalizes the various acts constituting the crime of unconstitutional change of government,[35] in the hope of promoting a greater respect for the rule of law and inducing a concomitant reduction in the prevalence of armed conflicts.[36]

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[31] Ibid., para 31.

[32] Ibid., para 34.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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