

Prospects and challenges of extending the African Court's jurisdiction to international crimes

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Summary of the study

The Assembly of the AU adopted the Malabo Protocol which, when in force, will establish a criminal division within the African Court and will empower the court with international criminal jurisdiction. Once the Malabo Protocol comes into operation, the African Court will have the competency to try fourteen international crimes including transnational crimes. This study explores the potential the criminal division of the African Court has to contribute to international criminal law. It is argued that the ICC is biased against African heads of states for crimes and human rights violations committed. This argument is based on the number of cases before the ICC which pertain to Africa. This view encouraged the AU to create an African Court with competence to try international crimes, thereby using their own systems of laws to respond to the crimes and conflicts that occur in Africa. Concerns were raised regarding the extension of the African Court's jurisdiction to international crimes. Therefore, this study discussed the different concerns affecting the extension while determining whether or not the concerns will affect its establishment. The Rome Statute does not have jurisdiction over transnational crimes, which affect most African states. Therefore, the establishment of the criminal division may potentially advance and develop international criminal law to a point where it complements the ICC.

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Chapter 1: Introduction

1.1 Introduction

In June 2014, the Assembly of the African Union adopted the *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (the Malabo Protocol).¹ In its Annex², the protocol includes amendments that empower the African Court of Justice and Human and People's Rights (African Court) with international criminal jurisdiction. Once the Malabo Protocol comes into operation, the African Court will have jurisdiction to try fourteen international crimes.³ This study aims to explore the Prospects and challenges of extending the African Court's jurisdiction to international crimes. The inclusion of international crimes in the African courts' jurisdiction represents an important advancement in Africa and other regional law-making institutions.⁴ Many African states consider crimes such as money laundering, corruption and illicit exploitation of natural resources to be severe crimes and, thus, it is important to include unconventional crimes in the jurisdiction of the African Court.⁵ The prosecution of unconventional crimes should encourage African states to ratify the Malabo Protocol, as it captures the ambition of most African states.⁶ The protocol requires ratification by fifteen AU member states, and, as no state has ratified the Malabo Protocol, it has not yet entered into force.⁷

¹ Amnesty International Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court (2016) <https://www.amnesty.org/en/documents/afr01/3063/2016/en/> (accessed 25 May 2021).

² Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (accessed on 31 May 2021).

³ As above.

⁴ CB Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9(5) *Journal of International Criminal Justice* 11.

⁵ A Abass 'The proposed international criminal jurisdiction for the African Court: Some Problematical Aspects' (2013) 60(1) *Netherlands International Law Review* 39.

⁶ As above 39.

⁷ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (accessed on 31 May 2021).

1.2 Problem statement

The African Union (AU) has adopted the Protocol for the establishment of the criminal division within the African Court as the African Court aims for its jurisdiction to try international crimes.⁸ There are different aspects that will affect the extension of the African Court's jurisdiction, for example, financial and structural implications, the scope of crimes listed in the Malabo Protocol, the legality and grounds for the establishment of the African Court, and the African Court's ability to prosecute the crimes. Thus, this study will address these aspects and determine their effect on the African Court's potential to contribute to international criminal law.

1.3 Research question

This research paper will investigate what are the prospects and challenges of extending the African Court's jurisdiction to international crimes.

It will consist of the following sub-questions:

- How was the Malabo Protocol created?
- Which concerns have been raised regarding the extension of the African Court's jurisdiction?
- Does the African Court's criminal division have the potential to contribute to international criminal law?

1.4 Motivation for the study

The African continent has had many violent conflicts.⁹ Thus, it is critical to consider African legal systems and conflict resolution procedures in the process of addressing African conflicts.¹⁰ The International Criminal Court (ICC) is said to be biased against

⁸ As above.

⁹ R Gilpin 'Understanding the Nature and Origins of Violent Conflict in Africa' (2016) *Minding the gap: African conflict management in a time of change* 21.

¹⁰ B Brock-Utne 'Indigenous Conflict Resolution in Africa. In A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo' (2001) *Institute of Educational Research* 23-24.

African state officials for crimes committed and human rights violations¹¹ and this can be seen in the majority of official cases that appear before the ICC pertaining to Africa.¹² Africa is overrepresented in the overall cases in to which the ICC formally opened investigations.¹³ These include the Democratic Republic of the Congo ('DRC')¹⁴, Kenya¹⁵, Sudan¹⁶ and Uganda.¹⁷ This biased perception raised concerns with the AU¹⁸ and encouraged African states to establish an African court to resolve and respond to crimes in Africa.¹⁹ Conflict occurs for many reasons throughout Africa, and as a result, many people have lost their lives, infrastructure has been damaged, peace and solidarity have been compromised, and socio-economic growth has been strained.²⁰ It is, thus, essential for the continent's recovery and development, as well as the preservation of peace, to establish an African court with the competency to prosecute such crimes and conflicts.²¹ Where the crimes occur in Africa, it is important that the prosecution of the perpetrators takes place in Africa under an African Court with jurisdiction.²² Africa needs a competent court to try international crimes in order to protect human rights and hold the perpetrators of those human rights violations accountable.²³

Different organisations and stakeholders have raised various concerns regarding the extension of the African Court's jurisdiction to include international crimes.²⁴

¹¹ E Okurut 'The Contentious Relationship Between Africa and the ICC' (2018) 2.

¹² A Kiessling 'The Uncertain Fate of the African Court on Human and Peoples' Rights: The Problematic Merger with the African Court of Justice and the Establishment of an International Criminal Law Section' (2014) 57 *German Yearbook of International Law* 560.

¹³ As above 560.

¹⁴ *Prosecutor v Lubanga (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 10 February 2006); *Prosecutor v Katanga (Decision on the Joinder of the Cases against Katanga and Chui)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 10 March 2008).

¹⁵ *Prosecutor v Ruto (Decision on the Prosecutor's Application for Summons to Appear)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-01/11, 8 March 2011).

¹⁶ *Prosecutor v Al Bashir (Second Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 July 2010).

¹⁷ *Situation in Uganda (Amended Warrant of Arrest for Kony)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/05, 27 September 2005).

¹⁸ RJ Cole 'Africa's Relationship with the International Criminal Court: More Political than Legal' (2013) *Melbourne Journal of International Law* 14 (2) 671-672.

¹⁹ K Muigua 'African Court of Justice and Human Rights: Emerging Jurisprudence' (2020) 5-6.

²⁰ T Murithi 'African approaches to building peace and social solidarity' (2006) *African Journal on Conflict Resolution* 6(2) 10-11.

²¹ As above 10-11.

²² Murungu (n 4) 17.

²³ Muigua (n 19) 5-6.

²⁴ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

Therefore, the motivation for this study is to explore the different concerns that will affect the extension of the African Courts' jurisdiction and determine whether or not the concerns will affect the establishment of the first court in Africa to try international crimes.

1.5 Research methodology

This research will be a qualitative desktop study. Primary and secondary sources will be used and these will be critically analysed to develop responses to the research questions. In this study, primary sources such as international treaties, declarations, and decisions adopted by various organizational bodies of the United Nations (UN) and the AU will be used. Secondary sources in the form of literature will also be consulted. In this case, there was the use of accredited journal articles as well as books that were assessed electronically.²⁵ The relevant case law²⁶ and applicable jurisprudence relating to the discussion of the extension of the African Court will be examined and integrated into the different discussions that constitute the study. The data is readily available and accessible using internet research. The objective of the research is to investigate the prospects and challenges of extending the proposed African Court jurisdiction to include international crimes.

1.6 Literature review

There is a myriad of existing literature that examines the proposed criminal division of the African Court and the Malabo Protocol that empowers it. Various scholars are in support of its creation while others criticise it. The study will focus on the criminal division as a tool to advance international criminal law.

²⁵ CR Kothari *Research Methodology: Methods and Techniques* (2004) 8.

²⁶ See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 and *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11.

1.6.1 How the Malabo Protocol was created

The AU has desired the competency to try international crimes as expressed during the drafting of the African Charter.²⁷ The indictment and prosecution of African state officials, either by European domestic courts or the ICC, pushed the AU to initiate the groundwork on materializing its desire for a court with criminal jurisdiction.²⁸ It is, therefore, essential to explore how the protocol was adopted by looking at various aspects that contributed to the AU's desire to add a criminal division in the African Court's jurisdiction. This exploration provides a comprehensive understanding of the purpose of the Malabo Protocol.

Some authors dismiss the view that the AU created the criminal division as a result of the ICC unfairly targeting African states. While it may be true that many cases before the ICC are from the African continent, the perception that it is due to bias against African states is flawed.²⁹ Reason being that many African states have voluntarily referred cases to the ICC. Therefore, the ICC still receives support from the continent and, in response to the AU's call for non-cooperation, many countries in support of the ICC have continuously spoken to the importance of the ICC for Africa.³⁰ This notion started with the perception that the ICC is unfairly targeting Africa with the indictments issued against African heads of state by the ICC Prosecutor. Therefore, the African Court was created to protect African heads of state from the ICC.³¹

The AU Assembly adopted the Malabo Protocol³² to merge the courts in order to establish an effective regional court with the competency to defend the rule of law, human dignity, and Human Rights.³³ By looking at various aspects that contributed to the desire for the extension of the court, exploring how the Malabo Protocol was created provides a comprehensive understanding of its purpose. The existing literature

²⁷ KM Clarke, CC Jalloh et al *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (2019) 1-4.

²⁸ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

²⁹ E Keppler 'Managing Setbacks for the International Criminal Court in Africa' (2011) *Journal of African Law* 6.

³⁰ As above 7-8.

³¹ Murungu (n 4) 2-3.

³² G Werle, M Vormbaum *The African Criminal Court: A Commentary on the Malabo Protocol* (2016) 12-13.

³³ W Fahmy 'From the Establishment of the Court of Justice of the African Union to Malabo protocol: The Defies to the Regional Judicial Mode of Protection of Human Rights' (2019) 7(2) *Russian Law Journal* 167.

that is presented discusses the reasons for the AU's hostility towards the ICC while also addressing the opposing arguments to notions that Africa is being targeted by the ICC.³⁴ The research question aims to provide a detailed discussion from various authors on the background of the Malabo Protocol, thus providing clarity on the need to establish a criminal division within the African Court.

1.6.2 The concerns raised regarding the extension of the African Court's jurisdiction

There are numerous implications of the proposed criminal jurisdiction of the African Court, including the conflict of jurisdiction with the ICC,³⁵ breach of obligation with the Rome statute³⁶, and the absence of statutory guidance from either Rome statute or the Malabo Protocol regarding the jurisdictional overlap.³⁷

Several concerns have been raised regarding the establishment of the African Court.³⁸ Some of the concerns include the financial and structural implications of the extension the African Courts Jurisdiction³⁹, thus, it is essential to assess these implications in order to estimate the resources that will be required to ensure the effective operation of the court.⁴⁰ With the wide jurisdiction of the African Court, it may be challenging to find judges, prosecutors, investigators, and defence counsel with the necessary competence and expertise to handle all the matters covered by the court's

³⁴ Monageng SM 'Africa and the International Criminal Court: Then and Now. In *Africa and the International Criminal Court* (2014) *TMC Asser Press, The Hague*; M Nel, VE Sibiya 'Withdrawal from the International Criminal Court: does Africa have an Alternative? (2017) 17(1) *African Journal on Conflict Resolution*, Murungu CB 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9(5) *Journal of International Criminal Justice*; LS Sunga, 'Has the ICC Unfairly Targeted Africa or Has Africa Unfairly Targeted the ICC? In the International Criminal Court in Search of its Purpose and Identity' (2014) *Routledge* 149; Keppler E 'Managing Setbacks for the International Criminal Court in Africa' (2011) *Journal of African Law*.

³⁵ CS Mabunda 'The Pros and Cons of the Criminal Jurisdiction of the Proposed African Court of Justice and Human Rights' 2013 *Africa Institute of South Africa Briefing* NO 98 3.

³⁶ VO Nmehielle "Saddling' the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?' (2014) 7(1) *African Journal of Legal Studies* 39.

³⁷ K Rau 'Jurisprudential Innovation or Accountability Avoidance-The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights' (2012) *Minn. L. Rev* 97 669.

³⁸ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

³⁹ Abass' (n 5) 28-29.

⁴⁰ Clarke, Jalloh (n 27) 1063.

jurisdiction.⁴¹ The African Court's capacity to deliver on its mandate is called into question, as the jurisdiction of the court will be extended to a point where it may be difficult for the African Court to carry out its duties and functions effectively.⁴²

Some scholars view the creation of the criminal division as potentially more problematic than helpful in providing justice in Africa, as it may compete with the ICC's jurisdiction in relation to core crimes. This will, thus, cause a conflict of obligations for AU members that are party to the Rome Statute.⁴³

The inclusion of the immunity clause in the Malabo Protocol is also a serious concern. The clause⁴⁴ has been said to be the most controversial aspect of the proposed African Court as it would prevent the Office of the Prosecutor from indicting or prosecuting heads of state and senior officials for international crimes committed while they are in office.⁴⁵ The general concern raised by invested organisations and stakeholders is that the immunity clause goes against customary international law and grants heads of states freedom to commit international crimes while they are in office.⁴⁶ Because the AU was against the ICC's prosecution of heads of AU member states, the criminal division was established to serve as an alternative. However, the contrary occurred, in that the immunity clause does not allow heads of state to appear before the African Court for prosecution.⁴⁷ The immunity clause is said to go against the exclusion of immunity from international criminal tribunals and portrays the kind of commitment that the AU has to fighting impunity.⁴⁸

Existing studies have raised concerns that uncover certain issues with the Malabo Protocol, and the research question aims to explore and outline these concerns through existing research.

⁴¹ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

⁴² As above.

⁴³ Murungu (n 4) 27.

⁴⁴ Article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

⁴⁵ M Abaya 'No Place for Immunity: The Arguments Against the African Criminal Court's Article 46BIS' (2016) 30 *Temp Int'l & Comp LJ* 189.

⁴⁶ As above 190.

⁴⁷ M Ssenyonjo, S Nakitto 'The African Court of Justice and Human and Peoples' Rights International Criminal Law Section: Promoting Impunity for African Union Heads of State and Senior State Officials' (2016) 16(1) *International Criminal Law Review* 92.

⁴⁸ As above 100.

1.6.3 The African Court's criminal division has the potential to contribute to international criminal law

The creation of a criminal division within the African Court is viewed by some authors as a benefit to international and continental systems. The current perception of the criminal division as a response against the ICC is incorrect and prejudices the development of international criminal law. Rather, the proposed criminal division should be perceived as the first attempt to establish criminal jurisdiction within its court structure by a regional organisation.⁴⁹ There is space between the international and national court systems that allow for African states to use a complementary regional mechanism to realize their accountability obligations.⁵⁰ Therefore, the proposed criminal division could contribute to the international and continental systems in the areas of accountability, complementarity, international criminal law, and immunity concerns for the 'new treaty-based crimes'. Universal jurisdiction, or the ICC, is not a suitable mechanism for addressing the present situations within Africa, as it ignores central issues and the core crimes that lead to conflicts.⁵¹ These inadequacies create the need for an African regional criminal court that will address the flaws of the African continent, strengthen accountability efforts, and realize the agenda for peace and development on the African continent.⁵²

Other authors believe the Malabo Protocol might bring to light legitimate concerns about the shortcomings of the ICC's decisions on the question of immunities as it highlights critical gaps in the international law provision for African conflicts.⁵³ However, the Malabo Protocol can rather be used as an initial model for other future treaties because its provisions are flawed and need to be revised. The alternative is that the AU could use the Malabo Protocol as a basis for consultations on international criminal law that can address African concerns more effectively.⁵⁴

⁴⁹ D Mystris *An African Criminal Court: The African Union's Rethinking of International Criminal Justice* (2020) 5.

⁵⁰ As above 5.

⁵¹ As above 6.

⁵² As above 6.

⁵³ EY Omorogbe 'The Crisis of International Criminal Law in Africa: A Regional Regime in Response?' (2019) 66(2), *Netherlands International Law Review* 309

⁵⁴ As above 309.

Some scholars hold the view that the African Court may improve the effectiveness of the AU's judicial functioning. Considering the conflicts and wars that the African continent has experienced, the AU's decision to establish a court with the competency to prosecute crimes and human rights violations was an indicator that Africa not only needs to protect human rights but also the importance of Pan-African justice and ending impunity.⁵⁵

In support of this view, other authors believe that the expansion of the African Court's jurisdiction advances the debate that Africa can offer African solutions to African problems as the inclusion of transnational crimes in the African Courts' criminal division brings attention to the types of crimes that have detrimental effects and are of serious threat in the African continent.⁵⁶ Therefore, the inclusion of the crimes in the African Courts jurisdiction is a progressive step.⁵⁷ This view negates the notion that everything that is African is uncivilized and fosters the mentality and understanding that Africans can create an Africa that respects and promotes human rights.⁵⁸

The existing literature gives recognition to the Malabo Protocol for shining a light on the crimes that the African continent struggles with. It also encourages the extension of the African Court's jurisdiction, thereby supporting the argument made by the research question that the establishment of a criminal division in the African Court has the potential to contribute to international criminal law. There are also provisions in support of the argument made in this chapter.

⁵⁵ Fahmy (33) 190.

⁵⁶ Clarke, KM 'Rethinking Liberal Legality Through the African Court of Justice and Human Rights: Re-situating economic crimes and other enablers of violence' in Kastner, P (eds) *International Criminal Law in Context*: (2017) 172.

⁵⁷ Tessema, MT 'African Regional Developments—Challenge or Chance for the International Criminal Court? Three Courts in One: The African Criminal Court. In *The International Criminal Court in Turbulent Times*' (2019) *TMC Asser Press, The Hague* 50.

⁵⁸ H Mbori Otieno 'The merged African Court of Justice and Human Rights (ACJ&HR) as a better criminal justice system than the ICC: Are we Finding African Solution to African problems or creating African problems without solutions?' 18.

1.7 Chapter outline

This is the structure of the paper. The paper consists of the following chapters:

Chapter 1

Chapter one provides background information to the study. The study will be introduced and its significance will be discussed. All the other basic components of the study will be set out in this chapter, including the problem statement, the research questions, the motivation of the study, the literature review, and the methodology.

Chapter 2

Chapter two explores the creation of the Malabo Protocol. It will look at various aspects that lead and contributed to its existence. These include the background to the establishment of the Malabo Protocol, reasons for Africa's hostile behaviour towards the ICC, the AU's decision for non-cooperation with the ICC, and Africa's withdrawal from the ICC to establish an African criminal court.

Chapter 3

Chapter three outlines the concerns raised regarding the extension of the African Court's jurisdiction.

Chapter 4

Chapter four explores the potential that the criminal division of the African Court has to contribute to international criminal law.

Chapter 5

Chapter five makes a concluding summary based on the discussions of the previous chapters. Brief recommendations are also made to encourage the ratification of the Malabo Protocol.

Chapter 2: How the Malabo Protocol was created

2.1 Introduction

Once ratified, the Malabo Protocol will provide the African Court with the competency to prosecute international crimes.⁵⁹ The Malabo Protocol contains values and principles that promote respect for human rights and the sanctity of life as well as the denunciation and rejection of impunity. It also promotes the strengthening of the AU's obligation to encourage continued peace, security and stability, and the prevention of gross human rights violations. The proposed African regional criminal court can contribute greatly to the fight against conflict and impunity on the continent,⁶⁰ and this chapter explores the creation of the Malabo Protocol by looking at various aspects that lead and contributed to its existence while exploring the relations between Africa and the ICC. It also includes a discussion on the complementarity principle.

2.2 African and the International Criminal Court

African states played a role in the establishment of the ICC by holding numerous conferences to confirm their commitment to the establishment of the ICC. For example, the Dakar Declaration for the establishment of the International Criminal Court⁶¹ is a result of a conference held in 1998 in Senegal.⁶² African states not only supported the ICC through declarations but also took part in discussions with the International Law Commission to the UN General Assembly.⁶³ Many African states were also present at the Rome Conference when the Rome Statute was being drafted and voted for the establishment of the ICC. As a result, most African states have

⁵⁹ Werle, Vormbaum (n 32) 12-13.

⁶⁰ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

⁶¹ 67th ordinary session of the OAU Council of Ministers, meeting at Addis Ababa in February 1998, adopted the Dakar Declaration on an International Criminal Court.

⁶² SM Monageng 'Africa and the International Criminal Court: Then and Now. In *Africa and the International Criminal Court* '(2014) TMC Asser Press, *The Hague* 15.

⁶³ Coalition for the International Criminal Court, 'Africa and the International Criminal Court' (Fact Sheet, 25 May 2009). See International Law Commission, Report of the International Law Commission on the Work of Its 46th Session, UN GAOR, 49th sess, Supp No 10, UN Doc A/49/10 (1994) ch II(B)(f) ('Draft Statute for an International Criminal Court').

integrated empowering legislation into their national laws.⁶⁴ African states were among the first to ratify the Rome Statute as the African Commission adopted the Resolution on the Ratification of the Treaty on the International Criminal Court calling the member states to ratify the Rome treaty on the ICC.⁶⁵ With the creation of the ICC, many African states believed that it was a way for them to deal with some of the atrocious ongoing crimes that occur within the continent.⁶⁶ However, with the ICC investigating more cases from Africa than any other continent, they are criticised for being biased against Africa⁶⁷ which has led to harsh criticism regarding selective prosecution from the ICC.⁶⁸ In 2009, the ICC issued an indictment for former Sudanese President, Omar Hassan Al-Bashir, and an arrest warrant was subsequently issued. At that point, the AU and the ICC's relationship turned hostile.⁶⁹ Therefore, with the developments that took place on the African continent at that time, namely the indictment of the former President Al-Bashir, Kenyan President Uhuru Kenyatta, as well as his Deputy, William Ruto, by the ICC,⁷⁰ the AU was motivated to seriously consider adding a criminal jurisdiction to the mandate of the African Court.⁷¹

⁶⁴ Cole (n 18) 674.

⁶⁵ 27 Resolution on the Ratification of the Treaty on the International Criminal Court - ACHPR/Res.27(XXIV)98, The African Commission on Human and Peoples' Rights, meeting at its 24th Ordinary Session from 22 to 31 October 1998 in Banjul, The Gambia. See <https://www.achpr.org/sessions/resolutions?id=91> [accessed on 18 July 2021].

⁶⁶ Okurut (n 11) 2.

⁶⁷ As above 2.

⁶⁸ Kiessling (n 12) 560.

⁶⁹ As above 560.

⁷⁰ The ICC investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. As a court of last resort, it seeks to complement, not replace, national Courts. Governed by an international treaty called the Rome Statute, the ICC is the world's first permanent international criminal court. See <https://www.icc-cpi.int/> [accessed on 4 July 2021].

⁷¹ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

2.3 Background to the establishment of the Malabo Protocol

Article 18 of the Constitutive Act of the African Union⁷² (the Constitutive Act) advocates for the establishment of a Court of Justice. The Constitutive Act in Article 5(1)⁷³ lists the Court of Justice as one of the principal organs of the AU.

In the 1980s, the African Charter on Human and Peoples' Rights (the African Charter) was in the process of being drafted under the Organisation of African Union (the OAU). Submissions were made to the OAU Assembly by experts who proposed the establishment of a criminal court with the competency to prosecute gross human rights violations that constitute international crimes.⁷⁴ Although the proposals were rejected, the calls for the establishment of a criminal division did not cease. In 2004, the idea of establishing an African criminal court gained traction once again.

In 2004, the AU instituted two institutional developments, namely the enforcement of the *Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights*⁷⁵ (the Protocol to the ACHPR) and the adoption of the *Protocol of the Court of Justice of the African Union*⁷⁶ (the Protocol to the ACJ). Article 3 of the Protocol to the ACHPR provides that the African Court on Human and Peoples' Rights (the ACHPR) has jurisdiction on 'all cases and disputes concerning the interpretation and application of the African Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned'.⁷⁷ Therefore, the ACHPR strengthens the human rights protection

⁷² Article 18 *The Court of Justice* states: 1. A Court of Justice of the Union shall be established; 2. The statute, composition and functions of the Court of Justice shall. See Constitutive Act of the African Union https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf [accessed on 18 June 2021].

⁷³ Article 5(1) states: 1 The organs of the Union shall be: (a) The Assembly of the Union; (b) The Executive Council; (c) The Pan-African Parliament; (d) The Court of Justice; (e) The Commission; (f) The Permanent Representatives Committee; (g) The Specialized Technical Committees; (h) The Economic, Social and Cultural Council; (i) The Financial Institutions;. See Constitutive Act of the African Union https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf [accessed on 18 June 2021].

⁷⁴ Clarke, Jalloh *et al* (n 27) 1-4.

⁷⁵ Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and> [accessed on 19 June 2021].

⁷⁶ Protocol of the Court of Justice of the African Union https://au.int/sites/default/files/treaties/36396-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf [accessed on 19 June 2021].

⁷⁷ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights <https://www.achpr.org/legalinstruments/detail?id=45> [accessed on 17 July 2021].

mechanisms in Africa and guarantees respect for and compliance with the African Charter, along with other international human rights structures.⁷⁸ In relation to the ACJ, the AU makes provision for a Court of Justice in the adjudication of disputes between African states. The Protocol to the ACJ was adopted in 2003 and entered into force in 2009 with nineteen ratifications to date.⁷⁹ Although not established, the ACJ was created to be the main judicial organ of the AU⁸⁰ with the competency to preside on matters relating to the interpretation of AU treaties.⁸¹ Before the ACJ could come into existence, a merger of the two courts—the ACHPR and the ACJ—was decided on by the Assembly of the African Union (the AU Assembly).⁸² Once the new court, the African Court, is established, it will be the main judicial organ of the AU.⁸³ The *Protocol on the Statute of the African Court of Justice and Human Rights* (Merger Protocol) established the African Court and joined the two into a single court. It also introduced two new divisions in the constituted Court, a General Affairs Division and a Human Rights Division.⁸⁴ The Merger Protocol was adopted in 2008 and has not yet been ratified as it has eight ratifications to date but requires fifteen ratifications.⁸⁵

Although the Merger Protocol has not yet entered into force, the AU members proposed adding international crimes to the African Court's jurisdiction.⁸⁶ In 2006, the AU Assembly established a committee to discuss a way forward in relation to handling international crimes. The committee provided a recommendation that the proposed African Court should have jurisdiction to prosecute international crimes.⁸⁷ There was,

⁷⁸ Muigua (n 19) 4.

⁷⁹ Protocol of the Court of Justice of the African Union <https://au.int/en/treaties/protocol-court-justice-african-union> [accessed on 17 July 2021].

⁸⁰ Article 2(2) states: the Court shall be the principal judicial organ of the Union. See Protocol of the Court of Justice of the African Union <https://au.int/en/treaties/protocol-court-justice-african-union> [accessed on 17 July 2021].

⁸¹ Protocol of the Court of Justice of the African Union (n 79).

⁸² Decision on the Draft Protocol on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Executive Council, Sixth Ordinary Session, 24-28 January 2005, Abuja, Nigeria, EX.CL/162 (VI) <https://au.int/en/decisions-43> [accessed on 19 June 2021].

⁸³ Protocol on the Statute of the African Court of Justice and Human Rights <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights> [accessed on 19 June 2021].

⁸⁴ Muigua (n 19) 8.

⁸⁵ Protocol on the Statute of the African Court of Justice and Human Rights <https://au.int/sites/default/files/treaties/36396-sl-PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf> [accessed on 18 July 2021].

⁸⁶ Abass (n 5) 31.

⁸⁷ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

however, a concern raised by stakeholders and other organisations regarding the negative effects that the courts' jurisdiction will have on its human rights function.⁸⁸

The drafting of the Malabo Protocol took place during a time when the AU and the ICC had strained relations, caused mainly by the prosecution of African state officials⁸⁹ and the fact that the majority of cases before the ICC pertained to Africa.⁹⁰ During the Twelfth Ordinary Session of the AU Assembly in 2009,⁹¹ the AU Commission, in discussion with the African Commission and the ACHPR, was requested by the AU Assembly to study the implications of empowering the Court to prosecute international crimes.⁹² As a result, in 2010, the AU initiated a process of empowering its court to try international crimes committed in Africa by Africans.⁹³ From 2012 to 2013, meetings were held and reports were submitted to the AU Assembly to review the findings of the African Commission which included the examination of the financial and structural implications as a result of the extension of the African Courts' jurisdiction.⁹⁴ In 2013, the AU Assembly rejected the Draft Protocol prepared by the African Ministers for Justice and Attorneys General but instead recommended that the AU Commission should further explore the meaning of 'popular uprisings', which is not included in the subject-matter jurisdiction of the African Court.⁹⁵ The Draft Protocol was criticised by African civil society organisations and other stakeholders for its impulsiveness and lack of transparency.⁹⁶ However, in 2014, the AU Assembly recalled its decision to

⁸⁸ Final Communiqué of the 36th ordinary session of the African Commission on Human and Peoples' Rights, para 16, https://www.achpr.org/public/Document/file/English/achpr36_fincom_2004_eng.pdf [accessed on 21 June 2021].

⁸⁹ Abass (n 5) 28.

⁹⁰ Okurut (n 11) 3.

⁹¹ Assembly of the African Union at the Twelfth Ordinary Session, Assembly/AU/Dec.213(XII) https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf [accessed on 17 June 2021].

⁹² Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly of the African Union, Twelfth Ordinary Session, 1-3 February 2009, Addis Ababa, Ethiopia Assembly/AU/Dec.213(XII) https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf [accessed on 17 June 2021].

⁹³ Abass (n 5) 28.

⁹⁴ Decision On The Protocol On Amendments To The Protocol On The Statute Of The African Court Of Justice And Human Rights, Assembly of the Union, Nineteenth Ordinary Session, 15-16 July 2012, Addis Ababa, Ethiopia, Assembly/AU/Dec.427(XIX) https://au.int/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf [accessed on 17 June 2021].

⁹⁵ Abass (n 5) 29.

⁹⁶ Human Rights watch 'Joint Letter to the Justice Ministers and Attorneys General of the African States Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights' (2012) <https://www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties> [accessed on 27 October 2021].

extend the African Courts' jurisdiction to try international crimes.⁹⁷ At the twenty-third summit, the AU Assembly adopted the Malabo Protocol with its Annex which contains amendments to the Statute of the African Court of Justice and Human Rights that empower the African Court with jurisdiction to prosecute international crimes.⁹⁸ No state has ratified the Malabo Protocol, and, therefore, it has not yet entered into force as it requires ratification by fifteen AU member states.⁹⁹

2.4 Reasons for the hostile behaviour of AU against ICC

African states were involved in the creation of the ICC and the adoption of the Rome Statute¹⁰⁰ as they believed in the need for a court that is permanent and impartial, capable of prosecuting international crimes.¹⁰¹ African states align with the ICC's values of justice as well as their obligation to fight against impunity and oppression, which was the reason for the African states initially having extended their support.¹⁰² However, the indictment and prosecution of African state officials either by the European domestic courts or the ICC caused the AU to be hostile towards the ICC¹⁰³ which led to the perception that the ICC was unfairly targeting African state officials.¹⁰⁴ More specifically, the indictment of Kenyan President Uhuru Kenyatta¹⁰⁵ and former President, Al-Bashir¹⁰⁶ by the ICC prosecutor.

In Kenya in 2011, President Uhuru Kenyatta (President Kenyatta) and Deputy President William Ruto (Dep. Ruto) were charged with crimes against humanity for the

⁹⁷ Kiessling (n 12) 561.

⁹⁸ Werle, Vormbaum (n 32) 12-13.

⁹⁹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (n 2).

¹⁰⁰ The Rome Statute seeks to establish the permanent International Criminal Court (the ICC) with inherent jurisdiction over serious crimes of international concern namely crime of genocide, crimes against humanity, war crimes and crime of aggression. See <https://pmg.org.za/committee-meeting/95/> [accessed on 5 July 2021].

¹⁰¹ Monageng (n 62) 14-15.

¹⁰² As above 17.

¹⁰³ M Nel, VE Sibiyá 'Withdrawal from the International Criminal Court: does Africa have an Alternative?' (2017) 17(1) *African Journal on Conflict Resolution* 85.

¹⁰⁴ Murungu (n 4) 2-3.

¹⁰⁵ *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11 <https://www.icc-cpi.int/kenya/kenyatta> [accessed on 26 June 2021].

¹⁰⁶ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 <https://www.icc-cpi.int/darfur/albashir> [accessed on 26 June 2021].

violence that took place after the 2007 Presidential elections.¹⁰⁷ However, these charges were later withdrawn and terminated respectively.¹⁰⁸ In 2010, the ICC sanctioned an investigation into the Post-Election Violence¹⁰⁹ and President Kenyatta and Dep. Ruto were amongst the people investigated.¹¹⁰ Kenya ratified the Rome Statute in 2005, thereby accepting its jurisdiction.¹¹¹ The ICC's jurisdiction is not universal, and thus, the ICC can only exercise its jurisdiction in cases where the domestic courts are unwilling or unable to perform the investigations or prosecutions.¹¹² Article 13 of the Rome Statute¹¹³ outlines the circumstances under which the ICC can exercise its jurisdiction. According to Article 13(c), a *proprio motu* investigation is possible where a state or non-states party has—either through ratification of the Rome Statute or a special declaration—consented to the exercise of the ICC's jurisdiction. The investigation by the ICC was *proprio motu*,¹¹⁴ however, the Kenyan government did not cooperate with the ICC¹¹⁵ and rather challenged their jurisdiction.¹¹⁶

In Sudan, President Al-Bashir was indicted by the ICC while the peace negotiations took place.¹¹⁷ The warrant of arrest for President Al-Bashir severely compromised the prospect of establishing peace in Sudan.¹¹⁸ Sudan is not a party to the Rome

¹⁰⁷ *The Prosecutor v. Uhuru Muigai Kenyatta Formerly The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11 <https://www.icc-cpi.int/kenya?ln=en> [accessed on 21 August 2021].

¹⁰⁸ International Criminal Court: Kenya *Situation in the Republic of Kenya* ICC-01/09 <https://www.icc-cpi.int/kenya> [accessed on 21 August 2021].

¹⁰⁹ Report of the Commission of Inquiry into the Post-Election Violence 293, 345 (2008) <http://kenyastockholm.files.wordpress.com/2008/10/the-waki-report.pdf> [accessed on 15 May 2021].

¹¹⁰ SD Mueller 'Kenya and the International Criminal Court (ICC): Politics, the Election and the Law' (2014) 8:1 *Journal of Eastern African Studies* 27.

¹¹¹ Kenya integrated the ICC-listed crimes into their domestic laws through the International Crimes Act of 2008. The Act makes provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions. See Laws of Kenya <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2016%20of%202008> [accessed on 27 June 2021].

¹¹² L Paisner 'Friction between state cooperation and enforcement in Kenyatta and Ruto' (2014) 23(1), *ILSA Quarterly*, 19.

¹¹³ Rome Statute of the International Criminal Court <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [accessed on 27 June 2021].

¹¹⁴ Paisner (n 112) 20.

¹¹⁵ Mueller (n 110) 31.

¹¹⁶ As above 20.

¹¹⁷ P Pillai 'The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability' (2018) *The American Society of International Law* 22.

¹¹⁸ JD Van der Vyver 'Prosecuting the President of Sudan: A Dispute between the African Union and the International Criminal Court' (2011) 11(2), *African Human Rights Law Journal* 683.

Statute,¹¹⁹ however, the ICC has jurisdiction on the basis of Article 5 and Article 13(b) of the Rome Statute.¹²⁰ The United Nations Security Council (UNSC) Resolution 1593 of 2005 also empowered the ICC with jurisdiction over Sudan.¹²¹ The then AU argued that the prosecution of President Al-Bashir would endanger the ongoing peace negotiations and requested the UNSC to invoke Article 16 of the Rome Statute¹²² which would suspend the ICC's proceedings for one year.¹²³

2.4.1 Complementarity principle

The complementarity principle is defined by the substantive rules provided by Article 17 of the Rome Statute¹²⁴ and describes the relationship between the ICC and national jurisdictions. In the complementarity principle, the ICC recognizes the states authority to conduct criminal trials in respect to prosecuting the core crimes in the Rome Statute.¹²⁵ Thus, the complementarity principle places the primary responsibility of prosecuting serious crime on states, thereby making the ICC the court of last resort.¹²⁶ The ICC complements and supplements national jurisdictions when prosecuting international crimes, therefore, the ICC only assumes jurisdiction in the instance where national legal systems are 'unwilling or unable to carry out the investigation or prosecution'.¹²⁷ The implementation of the complementarity principle raises two main issues, namely the issue of admissibility and the issue relating to the exercising of

¹¹⁹ Coalition for the International Criminal Court 'Sudan' <https://www.coalitionfortheicc.org/country/sudan> [accessed 29 June 2021].

¹²⁰ Article 5 and Article 13(b) of the Rome Statute provides that 'a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations', See Rome Statute of the International Criminal Court <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [accessed on 27 June 2021].

¹²¹ United Nations Security Council Resolution 1593 (2005) <https://www.icc-cpi.int/nr/rdonlyres/85feb1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf> [accessed on 29 June 2021].

¹²² Article 16 of the Rome Statute state: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions. See Rome Statute of the International Criminal Court <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [accessed on 27 June 2021].

¹²³ Pati, R 'The ICC and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option' (2008) 15, *UC Davis J. Int'l L. & Pol'y* 265.

¹²⁴ Rome Statute of the International Criminal Court (n 113).

¹²⁵ SD Bachmann, EL Nwibo 'Pull and Push—Implementing the Complementarity Principle of the Rome Statute of the ICC Within the African Union: Opportunities and Challenges' (2018) 43(2) *Brooklyn journal of international law* 467.

¹²⁶ Monageng (n 62) 16.

¹²⁷ Rome Statute of the International Criminal Court (n 113).

jurisdiction by the ICC in the instance where states are unwilling or unable to investigate and prosecute the crime.¹²⁸ Article 17(1)(a) of the Rome Statute¹²⁹ seems to present two sides. The first is that only once it has been confirmed that proceedings at a national level have been initiated, will the question of unwillingness or inability be applicable. Secondly, a case will be rendered before the ICC in the instance that the state with jurisdiction is unwilling or unable to investigate or prosecute the crime. Therefore, on account that a state is not investigating or prosecuting the case, will it be rendered admissible before the ICC.¹³⁰

The issue of admissibility creates an important barrier that provides protection of the states' authority and sovereignty in conducting proceedings in their national courts.¹³¹ The AU's call for the national prosecution of international crimes without the involvement of the ICC highlights inadequacy in implementing the complementarity principle – hence, the AU's efforts to establish a regional criminal court.¹³² Accordingly, African states need to ensure that their national judicial systems and trial procedures comply with international criminal law standards.¹³³ This means incorporating the provision of the Rome Statute into national laws through legislative measures and strengthening the capacity of national jurisdictions to effectively prosecute gross human rights violations.¹³⁴

2.5 Opposing arguments

With the violence taking place in numerous countries in Africa, domestic courts may not be competent enough to prosecute perpetrators. This poses the question of

¹²⁸ F Mégret 'Too much of a good thing? ICC Implementation and the uses of complementarity. ICC Implementation and the Uses of Complementarity (January 15, 2010). The International Criminal Court and Complementarity: From Theory to Practice' (2010) *Carsten Stahn & Mohamed El Zeidy, eds CUP* 4.

¹²⁹ Article 17(1)(a) states: 'the Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'. See Rome Statute of the International Criminal Court <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [accessed on 27 June 2021].

¹³⁰ TO Hansen 'A critical review of the ICC's recent practice concerning admissibility challenges and complementarity' (2012) *13(1) Melbourne Journal of International Law* 219-220.

¹³¹ MM El Zeidy 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2001) *23 Mich. J. Int'l L.* 898.

¹³² Bachmann, Nwibo (n 125) 466.

¹³³ As above 467.

¹³⁴ Monageng (n 62) 16.

whether the ICC has unfairly targeted African states or if African states have targeted the ICC.¹³⁵ With the perception that African states have of the ICC, it is difficult for the ICC to carry out its duties of deterring impunity and ensuring the protection of democracy, rule of law, and human rights.¹³⁶

2.5.1 Self-referrals

While it may be true that many cases before the ICC are from the African continent, the perception that this is due to the ICC unfairly targeting Africa may be flawed in that many African states have voluntarily referred the cases to the ICC.¹³⁷ A number of cases in the African region that are presented for investigations and prosecutions before the ICC are self-referrals, such as the cases of Uganda, the DRC, the Central African Republic (CAR), Mali, Côte d'Ivoire and Burundi.¹³⁸ Article 14 of the Rome Statute provides that a state party may refer a situation for investigation to the ICC prosecutor where one or more crimes within the ICC's jurisdiction have been committed.¹³⁹

With the conflict that took place in Uganda, Articles 13(a) and 14 of the Rome Statute was invoked, thereby giving the ICC jurisdiction to investigate and prosecute perpetrators. Thus, Uganda voluntarily referred the conflict situation to the ICC prosecutor¹⁴⁰ as the crimes committed fell within the ICC's jurisdiction.¹⁴¹

The DRC situation was referred to the ICC prosecutor for investigations by President Kabila in 2004.¹⁴² This means that the referral to the ICC prosecutor was voluntary in terms of Articles 13(a) and 14 of the Rome Statute¹⁴³, and thereby gave the ICC jurisdiction to investigate and prosecute perpetrators. This was also the case in the

¹³⁵ LS Sunga, 'Has the ICC Unfairly Targeted Africa or Has Africa Unfairly Targeted the ICC? In the International Criminal Court in Search of its Purpose and Identity' (2014) *Routledge* 149.

¹³⁶ As above 149.

¹³⁷ Keppler (n 29) 6.

¹³⁸ Nel, Sibiyi (n 103) 85.

¹³⁹ Rome Statute of the International Criminal Court (n 113).

¹⁴⁰ P Akhavan 'The Lord's Resistance Army case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99(2) *American Journal of International Law* 411.

¹⁴¹ As above 411.

¹⁴² GM Musila 'Between Rhetoric and Action: The Politics, Processes and Practice of the ICC's Work in the DRC' (2009) (164) *Institute for Security Studies Monographs* 8.

¹⁴³ Rome Statute of the International Criminal Court (n 113).

CAR¹⁴⁴ and Mali¹⁴⁵ situation, in that both situations were referred to the ICC by the respective governments, therefore the ICC had jurisdiction over crimes committed in both states.

With the Côte d'Ivoire and Burundi situations, the ICC Prosecutor opened *proprio motu* investigations.¹⁴⁶ At the time, although Côte d'Ivoire was not party to the Rome Statute, it accepted the ICC's jurisdiction based on Article 12(3) of the Rome Statute.¹⁴⁷ Burundi, however, had ratified the Rome Statute at the time—although, as from 27 October 2017, it withdrew.¹⁴⁸ Therefore, the ICC only has jurisdiction over crimes committed in Burundi from 1 December 2004 to 26 October 2017.¹⁴⁹

2.6 AU decisions for non-cooperation in respect of Al-Bashir's arrest

In 2009, the ICC issued an arrest warrant for President Al-Bashir. In response, the AU Assembly adopted a decision that addressed their concerns regarding the indictment of Al-Bashir and authorized the AU Commission to send a delegation to the UNSC to recommend the postponement in terms of Article 16.¹⁵⁰ When the UNSC refused the AU's request, the AU, in response, issued a mandate that AU member states will not cooperate in President Al-Bashir's arrest.¹⁵¹

In the decision taken at the fifteenth Ordinary Session in 2012, the AU requested member states to strike a balance between their obligations to the AU and their

¹⁴⁴ International Criminal Court 'Situation in the Central African Republic ICC-01/05' <https://www.icc-cpi.int/car> [accessed on 28 October 2021].

¹⁴⁵ International Criminal Court 'Situation in the Republic of Mali ICC-01/12' <https://www.icc-cpi.int/mali> [accessed on 28 October 2021].

¹⁴⁶ See International Criminal Court Situation in the Republic of Côte d'Ivoire ICC-02/11; Situation in the Republic of Burundi ICC-01/17.

¹⁴⁷ International Criminal Court 'Situation in the Republic of Côte d'Ivoire ICC-02/11' <https://www.icc-cpi.int/cdi> [accessed on 28 October 2021].

¹⁴⁸ International Criminal Court 'Situation in the Republic of Burundi ICC-01/17' <https://www.icc-cpi.int/burundi> [accessed on 28 October 2021].

¹⁴⁹ As above.

¹⁵⁰ Decision On The Protocol On Amendments To The Protocol On The Statute Of The African Court Of Justice And Human Rights, Assembly of the Union, Nineteenth Ordinary Session, 15-16 July 2012, Addis Ababa, Ethiopia, Assembly/AU/Dec.427(XIX) https://au.int/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf [accessed on 17 June 2021].

¹⁵¹ Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, 15th Ordinary Session of the Assembly of the Union, Kampala 27 July 2010 Doc Assembly/AU/Dec 296(XV) https://au.int/sites/default/files/decisions/9630-assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_session.pdf [accessed on 3 July 2021].

obligations to the ICC.¹⁵² This decision clearly presents a competing interest between international and regional legal obligations.¹⁵³ In relation to international legal obligations, Article 86 of the Rome Statute¹⁵⁴ mandates a general obligation for states to cooperate with the ICC. In addition, Articles 89 and 91 of the Rome Statute further mandates cooperation in the surrender and arrest of persons.¹⁵⁵

Looking at the regional legal obligation, Article 23 of the AU's Constitutive Act outlines the consequences of the failure of member states to obey the commands of the AU.¹⁵⁶ However, no provision in the Constitutive Act expressly empowers the AU Assembly to make binding decisions. Furthermore, taking into account Articles 3 and 4 of the Constitutive Act, the AU Assembly sets out the principles and objectives of the AU, and, from that, it is evident that the AU is unable to fulfil its mandate without the ability to make binding decisions.¹⁵⁷ The resolution of the competing international and regional legal obligation lies in the national legal framework of each state.¹⁵⁸

2.7 Withdrawals to establish a competent court

After the indictment of former President Al-Bashir, in addition to the non-cooperation decision¹⁵⁹, the AU also issued the "Withdrawal Strategy". It is not legally binding and does not necessarily encourage AU member states to withdraw from the ICC, but, rather, it lists the issues that the AU has with the ICC and UNSC.¹⁶⁰ This was driven

¹⁵² As above.

¹⁵³ M Du Plessis, C Gevers 'Balancing competing obligations The Rome Statute and AU decisions' (2011) 2011(225) *Institute for Security Studies Papers* 31.

¹⁵⁴ Article 86 of the Rome Statute: States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. See Rome Statute of the International Criminal Court <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [accessed on 27 June 2021].

¹⁵⁵ Rome Statute of the International Criminal Court (n 113).

¹⁵⁶ Article 23 states: [T]he failure of a Member State to comply with decisions of the AU may result in sanctions being imposed on the defaulting state. These include the denial of transport and communications links with other Member States, as well as other measures of a political and economic nature to be determined by the Assembly. See Constitutive Act of the African Union https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf [accessed on 18 June 2021].

¹⁵⁷ Constitutive Act of the African Union https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf [accessed on 18 June 2021].

¹⁵⁸ Du Plessis, Gevers (n 153) 31.

¹⁵⁹ Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, 15th Ordinary Session of the Assembly of the Union, Kampala 27 July 2010 Doc Assembly/AU/Dec 296(XV) (n 152).

¹⁶⁰ MM Mbengue, K McClellan 'The ICC and Africa: Should the Latter Remain Engaged?' (2018) *Ethiopian Yearbook of International Law* 2017 195.

by the perception that the ICC is unfairly targeting African states and does not respect their sovereignty.¹⁶¹ Burundi, Gambia, and South Africa expressed their intentions to withdraw from the ICC but Gambia and South Africa subsequently revoked their notice of withdrawal.¹⁶² Burundi continued with its withdrawal from the ICC.¹⁶³ The move to establish an African court with the competency to prosecute international crimes is due to the incapability of national judiciaries which is the case with conflict and post-conflict states where judicial systems are unable to carry out their mandate.¹⁶⁴ African states resort to the ICC because Africa's national judicial systems are weak, thus, the best solution for African states is to strengthen their national courts and have strong judicial systems to decrease reliance on the ICC.¹⁶⁵

2.8 Conclusion

The establishment of the criminal court in Africa has been long desired by the AU. The Malabo Protocol sets the court into being, and the lengthy process of the Malabo Protocol indicates that Africa wants to take ownership of peace, security and justice. The court is set to try a wide range of crimes, thereby addressing the root causes of conflict. African states must fulfil their obligations by enforcing the AU's decision to have a permanent impact.¹⁶⁶

¹⁶¹ United Nations Africa Renewal 'ICC: Beyond the threats of withdrawal' <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal> [accessed on 5 July 2021].

¹⁶² V Arnould 'A court in crisis? The ICC in Africa, and beyond' (2017) *Egmont Paper 2*.

¹⁶³ Institute for Security Studies 'Will other African countries follow Burundi out of the ICC?' <https://issafrica.org/iss-today/will-other-african-countries-follow-burundi-out-of-the-icc#:~:text=Like%20Kenyan%20politicians%2C%20leaders%20in,the%20sovereignty%20of%20African%20states>. [accessed on 6 July 2021].

¹⁶⁴ Benyera, E 'Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States' (2018) 37(1) *Politeia* 9-10.

¹⁶⁵ As above 10.

¹⁶⁶ The Conversation 'Why a regional criminal court for Africa is a good idea' <https://theconversation.com/why-a-regional-criminal-court-for-africa-is-a-good-idea-123650> [accessed on 6 July 2021].

Chapter 3: Concerns regarding the extension of the African Court's jurisdiction over international crimes

3.1 Introduction

The Malabo Protocol will empower the African Court with the ability to try international crimes once it comes into effect.¹⁶⁷ There are, however, concerns raised by different organisations and stakeholders regarding the extension of the court's jurisdiction that discourage the ratification of the Malabo Protocol. The concerns are not limited to crimes but also range from financial and structural implications to the scope of crimes listed in the Malabo Protocol and the African Court's ability to prosecute the crimes.¹⁶⁸ The issues to be discussed relate to the inclusion of transnational crimes within the court's jurisdiction and the legality of amending a protocol that is not yet in force. The ratification of the Merger Protocol will also be discussed.

3.2 Financial and Structural Implications

One of the reasons for the merger of the two courts is the AU's desire to reduce financial burden, in that merging the two courts will improve its financial ability to operate the African Court effectively.¹⁶⁹ Financial implications, in this instance, relate to the cost of resources required to ensure the proper functioning of the African Court. Although there is no way of determining the exact resources required, an estimation may be done.¹⁷⁰ A complete study must be done on the financial implications of the African Court before the Malabo Protocol is ratified and comes into force.¹⁷¹ This will enable the AU to determine the resources required to maintain the African Court financially.¹⁷²

¹⁶⁷ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (n 2).

¹⁶⁸ Abass (n 5) 29.

¹⁶⁹ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

¹⁷⁰ S Ford 'Between Hope and Doubt: The Malabo Protocol and the Resource Requirements of an African Criminal Court' *The African Court of Justice and Human and Peoples' Rights in Context* (Charles C. Jalloh et al., eds) (2018) Cambridge University Press 2019 3.

¹⁷¹ Clarke, Jalloh et al (n 27) 1063.

¹⁷² As above 1063.

In 2016, AU Assembly took a decision at the Twenty Seventh Ordinary Summit to finance the AU in a manner that is ‘sustainable, equitable and accountable’ with full membership belonging to its member states.¹⁷³ The decision introduced a new method of funding to the AU by employing the ‘0.2 per cent Levy on all eligible imported goods into the continent to finance the African Union Operational, Program and Peace Support Operations Budgets’.¹⁷⁴ In 2017, the committee made up of AU Finance Ministers¹⁷⁵ presented its report to the AU Assembly¹⁷⁶ wherein it was recommended that the Kigali Financing Decision be implemented immediately. It was also recommended that the contributions from external donors should not exceed that of the AU member states as they did in previous years.¹⁷⁷

As of June 2020, only seventeen member states implemented the Kigali Financing Decision into their domestic law.¹⁷⁸ The implementation of the 0.2 per cent levy enables members to determine the appropriate means they will utilise to incorporate the Kigali Financing Decision into their domestic law, however, not many states have accepted the decision. In light of the report, there is some progress on implementing the Kigali Financing Decision, however, it remains a challenge as there is no compliance with their financial obligations to the AU.¹⁷⁹

Nmehielle proposes three ways in which the AU can fund the African Court. First, he proposes that a portion of the funds from the regular budget compiled from the expected member states’ assessed contributions be used for the effective operation of the African Court based on anticipated judicial and other activities every year. Second, he suggests that a trust or donation fund be established and used for future investment in order to provide a sustainable source of funding. Third, voluntary contributions received from member states and willing sponsors would help the court

¹⁷³ Decision on the Outcome of the Retreat of the Assembly of the African Union, Assembly/AU/Dec.605 (XXVII), 1–2, at 1.

¹⁷⁴ Assembly/AU/Dec.605 (XXVII), 1–2, at 1 (n 11).

¹⁷⁵ The Committee of Ten Ministers of Finance established under the 2017 Kigali Financing Decision. See Decision on the Institutional Reform of the African Union Assembly/AU/Dec.606 (XXVII).

¹⁷⁶ See H.E. Paul Kagame, The Imperative to Strengthen our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union, Presented to the African Union Assembly on 29 January 2017 <https://au.int/en/au-reform> (accessed on 4 August 2021).

¹⁷⁷ Decision on the Institutional Reform of the African Union Assembly/AU/Dec.606 (XXVII). See Report on the Proposed Recommendations for the Institutional Reform of the African Union, Presented to the African Union by H.E. Paul Kagame 29 January 2017 14.

¹⁷⁸ Report on Financing of the Union June 2020 https://au.int/sites/default/files/documents/38739-doc-report_on_financing_of_the_union_jun_2020_002.pdf [accessed on 27 September 2021] 2.

¹⁷⁹ As above 9.

in working with ad-hoc projects, or adding temporary expertise that the court may require to improve its capacity.¹⁸⁰

This presents the concern that funding for the AU's operations is a problem as the AU's programmes and institutions mainly receive its funding from external donors.¹⁸¹ Therefore, it was a positive step for the AU to decide to work on its finances rather than depending on external donors.¹⁸² The 0.2 per cent levy decision has the potential to make the AU financially sustainable and enable the AU to adequately finance the African Court.¹⁸³

In relation to structural implications, the concern raised is that the African Court will be a single court that merges two courts with three different jurisdictions.¹⁸⁴ Therefore, it is important to consider the complex nature of the court when assessing the required resources, and this includes the various expertise required for the court to complete its mandate.¹⁸⁵ The criminal division will require the creation of a presidency, a registry, an office of the Prosecutor, and a Defence Office.¹⁸⁶ The Court itself will be made up of 16 judges who are citizens of state parties to the Malabo Protocol, and elected¹⁸⁷ 'from among persons of high moral character, who possesses the qualifications required and the competence and experience in international law, international human rights law, international humanitarian law or international criminal law'.¹⁸⁸ The concern is that, due to the wide scope of jurisdiction, there will be difficulty in finding the required personnel with expertise and competency on the subject matter covered by the African Court's jurisdiction.¹⁸⁹

¹⁸⁰ VO Nmehielle 'Financing and Sustaining the African Court of Justice and Human and Peoples' Rights' in Jalloh, CC *et al*, (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (2019) 1072.

¹⁸¹ Institute for Security Studies 'Africa's international crimes court is still a pipe dream' (2019) https://issafrica.org/iss-today/africas-international-crimes-court-is-still-a-pipe-dream?utm_source=BenchmarkEmail&utm_campaign=ISS_Today&utm_medium=email 27 [September 2021].

¹⁸² VO Nmehielle 'Financing and Sustaining the African Court of Justice and Human and Peoples' Rights' in Jalloh, CC *et al* (n 180) 1073.

¹⁸³ As above 1073.

¹⁸⁴ Clarke, Jalloh *et al* (n 27) 1072.

¹⁸⁵ As above 1064.

¹⁸⁶ As above 1064.

¹⁸⁷ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

¹⁸⁸ Article 4 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

¹⁸⁹ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

3.3 The scope of the crimes listed under the Malabo Protocol ability to prosecute the listed crimes

The Malabo Protocol aims to empower the African Court with jurisdiction to try human rights issues, general matters of international law, and international crimes.¹⁹⁰ Therefore, the concern raised is whether or not the African Court will be able to effectively and efficiently carry out its mandate considering its wide jurisdiction.¹⁹¹ With regards to international crimes, the Malabo Protocol gives the African Court the competency to investigate and prosecute fourteen international crimes under the criminal division.¹⁹² The crimes, listed in the Annex, are namely (1) genocide, (2) crimes against humanity, (3) war crimes, (4) the crime of unconstitutional change of government, (5) piracy, (6) terrorism, (7) mercenarism, (8) corruption, (9) money laundering, (10) trafficking in persons, (11) trafficking in drugs, (12) trafficking in hazardous wastes, (13) illicit exploitation of natural resources, and (14) the crime of aggression.¹⁹³

The African Court will have jurisdiction over the international crimes of genocide, war crimes, crimes against humanity, and the crime of aggression which are also known as core crimes.¹⁹⁴ The Malabo Protocol has based the definitions of these crimes on the Rome Statute, however, changes have been made to the definitions of some of these crimes in order to further develop them.¹⁹⁵ In addition, the African Court will have jurisdiction over other crimes that do not fall within the ICC's jurisdiction, and these are known as transnational crimes.¹⁹⁶ However, as they are not within the ICC's jurisdiction, they do not have any established definitions.¹⁹⁷ These crimes include the crime of unconstitutional change of government, piracy, terrorism, mercenarism,

¹⁹⁰ P Manirakiza 'Complementarity between the International Criminal Law Section and Human Rights Mechanisms in Africa' (2019) 989.

¹⁹¹ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

¹⁹² Clarke, Jalloh *et al* (n 27) 11-12.

¹⁹³ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (n 2).

¹⁹⁴ S Ford 'Between Hope and Doubt: The Malabo Protocol and the Resource Requirements of an African Criminal Court' in Jalloh, CC *et al* (n 170) 6.

¹⁹⁵ Clarke, Jalloh *et al* (n 27) 242.

¹⁹⁶ As above 242.

¹⁹⁷ H Van der Wilt 'Legal Responses to Transnational and International Crimes: Towards an Integrative Approach?' In *Legal Responses to Transnational and International Crimes* (2017) Edward Elgar Publishing 18.

corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and the illicit exploitation of natural resources.¹⁹⁸ The Malabo Protocol has been criticised for its inclusion of both international and transnational crimes in one treaty¹⁹⁹ as a distinction between the two categories is required for a clear understanding of their differences. It is important to note that for the purpose of this thesis, from here onwards both core crimes and transnational crimes are included when referring to international crimes.

Core crimes are defined as the most atrocious crimes that 'threaten the peace, security and well-being of the world, and are therefore of concern to the international community as a whole and must not go unpunished',²⁰⁰ as stated in the Preamble to the Rome Statute of the ICC.²⁰¹ Core crimes are committed under international law within the framework of 'organised violence'.²⁰² They are part of *jus cogens*²⁰³ and are set apart because 'the commission of the crime is a product of state action or a state-favouring policy'²⁰⁴. Therefore, a *jus cogens* crime is considered 'explicitly or implicitly by state-favouring policy or action'²⁰⁵ regardless of the manner in which it is manifested. The origin of *jus cogens* crimes from 'state-favouring policy or action' differentiates the international crimes.²⁰⁶ Therefore, crimes that are not a product of 'state state-favouring policy or action' often do not have the two important features that create the *jus cogens* status of a crime, which is 'a threat to the peace and security of the world' and 'the conduct or consequences that shock the conscience of humanity'.²⁰⁷

Transnational crimes, on the other hand, are crimes that go beyond international borders. They either contravene the domestic laws of several states or have an effect on another state. In most instances, they have trans-border effects which means that

¹⁹⁸ S Ford 'Between Hope and Doubt: The Malabo Protocol and the Resource Requirements of an African Criminal Court' in Jalloh, CC et al (n 170) 6.

¹⁹⁹ CC Jalloh 'The Nature of the Crimes in the African Criminal Court (2017) 15(4) *Journal of International Criminal Justice* 801.

²⁰⁰ Preamble to the Rome Statute of the International Criminal Court, Rome, 17 July 1998, U.N. Doc. A/CONF. 183/9, International Legal Materials, 1998, 999.

²⁰¹ Van der Wilt (n 197) 3.

²⁰² S Sayapin 'Transnational and International Criminal Law' 11.

²⁰³ As above 14.

²⁰⁴ MC Bassiouni 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"' (1996) 59(4) *Law and Contemporary Problems* 69.

²⁰⁵ As above 69.

²⁰⁶ As above 69.

²⁰⁷ As above 70.

the crimes are subject to international conventions that prevent them. However, they have no international criminal jurisdiction as yet.²⁰⁸

Transnational crimes are not yet under the jurisdiction of the ICC and it is still debated whether or not states should expand their international crimes' jurisdiction to include transnational crimes.²⁰⁹ There are provisions in the Rome Statute that allow for a review and amendment of the Rome Statute²¹⁰, thereby stating the possibility of extending the list of crimes contained in Article 5. Other conventions offer detailed definitions that urge state parties to adopt statutory measures that incorporate transnational crimes as criminal offences in their domestic law.²¹¹ Thus, states are not legally prohibited from creating regional or international courts with jurisdiction over transnational crimes.²¹²

3.4 Legality and grounds for establishing a regional court with a criminal division

The definitions of transnational crimes in the Annex to the Malabo Protocol contain little to no alterations from other treaties that are not criminal conventions.²¹³ This is a concern that relates to the legality and grounds for establishing a regional court with a criminal division. Furthermore, the Malabo Protocol has flaws. First, it does not provide grounds that exclude criminal liability. Second, it lacks provisions on the general mental element. Lastly, it fails to state whether the crimes within the African Courts' jurisdiction can be hindered by the statute of limitations.²¹⁴ The African Court has overlapping jurisdiction with the ICC only when it concerns core crimes. The other transnational crimes within the African Courts' jurisdiction do not fall under the Rome Statute's subject matter, thus, the ICC does not have jurisdiction concerning the listed transnational crimes.²¹⁵ The prosecutorial interest taken by Africa in transnational

²⁰⁸ Jalloh (n 199) 229.

²⁰⁹ Van der Wilt (n 197) 16.

²¹⁰ Article 121, section 5 and Article 123, section 1 of the Rome Statute respectively. Article 123, section 1 provides that 'Seven years after the entry into force of this Statute, the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5.'

²¹¹ Van der Wilt (n 197) 18.

²¹² As above 19.

²¹³ Tessema (n 57) 49.

²¹⁴ As above 50.

²¹⁵ As above 50.

crimes is due to the detrimental effects they have on the continent, thus, the inclusion of these crimes in the African Courts jurisdiction is an emerging step.²¹⁶ The African Court will have retrospective jurisdiction, which means that it will have jurisdiction over the crimes once the Malabo Protocol has come into force.²¹⁷

The inclusion of other forms of conduct or transnational crimes in the African Court's criminal division brings attention to the types of crimes that are of serious threat in Africa. The prosecution of certain crimes points to the limitations of international criminal legality in creating terms of a universal system of justice. Therefore, the African Court is using the principles of international criminal law to determine the line between transnational and international criminality as an alternative to pre-existing judicial methods.²¹⁸ The inclusion of these transnational crimes to the African Courts jurisdiction is said to address the gap between the ICC's jurisdictional extent and the incidents happening in most African states that are afflicting the members of the Rome Statute.²¹⁹ It is important to note, however, that although transnational crimes have a devastating impact on the economies and the people of Africa, it is ambitious to raise the crimes to the level of international crimes.

3.5 Impunity clause

Article 46A *bis* (immunity clause) of the Malabo Protocol states that 'no charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity or other senior state officials based on their functions, during their tenure in office'.²²⁰ The immunity clause is said to be controversial and cause for concern as it limits the jurisdiction of the African Court by excluding heads of state and senior government officials from prosecution while they are in office.²²¹

²¹⁶ As above 50.

²¹⁷ As above 50-51.

²¹⁸ KM Clarke 'Rethinking Liberal Legality Through the African Court of Justice and Human Rights: Re-Situating Economic Crimes and Other Enablers of Violence' in Kastner, P (n 56) 172.

²¹⁹ Abass (n 5) 33.

²²⁰ (n 1) Article 46A *bis*.

²²¹ Abaya (n 45) 193-194.

Among others, it is of concern that the AU will use the immunity clause to protect African leaders from accountability for crimes committed.²²² Because the immunity clause prevents the African Court from instituting cases against ‘any serving AU Head of State’, it has created concerns that the Malabo Protocol was formed to defend African leaders from accountability instead of ending impunity.²²³

The Malabo Protocol incorporates universally accepted principles of international criminal law²²⁴ which include ‘right of accused persons,²²⁵ *non bis in idem*,²²⁶ individual criminal responsibility, irrelevance of official position, superior responsibility, and irrelevance of superior orders’.²²⁷ Therefore, according to law, the provisions in the Malabo Protocol apply to all persons equally, regardless of their official position. Consequently, the immunity clause restricts the African Court from exercising its jurisdiction over state officials.²²⁸ The legal concerns hold that the immunity clause violates international law as it opposes customary international law, international court statutes, the AU Constitutive Act,²²⁹ and the national laws of some AU member states.

Numerous African states in their domestic laws show that they eliminate immunity for state officials as in accordance with customary international law. Niger, South Africa, Kenya, Uganda, and the DRC have incorporated the abolition of state official immunity into their domestic laws in a situation where a person in an official state position violates a core international crime.²³⁰ There are decisions in African states that hold that there is no immunity for sitting state officials, an example of which is a decision by the Supreme Court of Appeal of South Africa which held that ‘all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes...’.²³¹

²²² S Ford ‘Between Hope and Doubt: The Malabo Protocol and the Resource Requirements of an African Criminal Court’ in Jalloh, CC et al (n 170) 9.

²²³ As above 9.

²²⁴ Tessema (n 57) 52.

²²⁵ (n 1) Article 45A.

²²⁶ (n 1) Article 46I.

²²⁷ (n 1) Article 28B, 46B and 46C.

²²⁸ Tessema (n 57) 52.

²²⁹ Article 4(o) of the Constitutive Act of the African Union.

²³⁰ Abaya (n 45) 209.

²³¹ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) <http://www.saflii.org/za/cases/ZASCA/2016/17.pdf> [accessed on 16 August 2021].

The arguments presented above show that the immunity clause does, in fact, threaten the domestic and international validity of African leaders and their governments, and therefore, the removal of the immunity clause should be strongly considered.²³²

3.6 Conclusion

While the AU desires to establish the first regional court with competency to try international crimes, due to the proposed jurisdictional scope covered by the African Court, there are several concerns raised. The inclusion of crimes under international law and transnational crimes should be prioritised by the AU to ensure an effective court²³³ and all related organisations and stakeholders from across the continent should take part in ensuring that the African Court is effective. Therefore, if the criminal jurisdiction is granted, the court has a strong statute. Institutional support will also be required in order to ensure that the African Court is effective in prosecuting perpetrators.²³⁴ The Rome Statute does not cover transnational crimes which have an impact on many African States, therefore, it would be in the African Courts' favour to prosecute international crimes.²³⁵ Finally, the immunity clause needs to be strongly reconsidered—as it will be viewed as a statute aimed at protecting state officials from accountability for their crimes,²³⁶ it has the potential to bring the Malabo Protocol into disrepute.

²³² Abaya (n 45) 198.

²³³ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

²³⁴ As above.

²³⁵ Abass (n 5) 49.

²³⁶ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

Chapter 4: The African court's criminal division potential to contribute to international criminal law

4.1 Introduction

There are many conflicting views regarding the establishment of the criminal division of the African Court. However, this study takes a different view; that the extension of the African Court's jurisdiction to international crimes has the potential to contribute to international criminal law and accountability.

4.2 Africa's contribution to international criminal law

Establishing a criminal court in the region of Africa is not a strange idea. The criminal division can be built up from special courts and international criminal tribunals that have previously existed in Africa.²³⁷ According to international agreements that allow states to try both regional and international crimes,²³⁸ independent African states, the Constitutive Act of the AU, and customary international law as a collective have the opportunity to establish a criminal division. The existence of the ICC does not dismiss this prospect.²³⁹ In terms of customary international law, states are allowed to prosecute core and transnational crimes, therefore, it is essential that courts be created, be it at national, regional, or international levels.²⁴⁰ The African Court can preside over several cases including any issue that relates to international law.²⁴¹ This authority²⁴² shows the willingness of African States to resolve their own conflicts, thus contributing to the advancement of international law by taking part in its expansion.²⁴³

²³⁷ Murungu (n 4) 23, *Also see* International Criminal Tribunals for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL).

²³⁸ The Convention against Torture, Arts 5(2) and (7); art VI, Genocide Convention, 1948, (1951) 78 UNTS 227.

²³⁹ Murungu (n 4) 23.

²⁴⁰ As above 23.

²⁴¹ Article 28 of the Protocol on the Statute of the African Court of Justice and Human Rights.

²⁴² As above.

²⁴³ Fahmy (n 33) 170.

4.3 The expansion of the African Court brings attention to crimes that affect Africa

African states have shone a light on crimes that deserve attention by expanding the list of crimes in the Malabo Protocol. Thus, the African Court's expansion to criminal liability may provide justice for crimes that are so prevalent in Africa.²⁴⁴ The extension of the African Court's jurisdiction would mean increased access to justice in Africa.²⁴⁵ It is understood that national systems have a chance of providing better results than regional systems in relation to the protection and promotion of human rights²⁴⁶ and the same goes for regional systems to international systems in that the regional system is closer to the country involved and they can reach the intended societies without difficulty. The African Court will be more accessible than the ICC for the protection and promotion of human rights in Africa.²⁴⁷ Therefore, with regard to international crimes in Africa, it would be more effective to have a court with criminal jurisdiction than an international court such as the ICC.²⁴⁸

The creation of a criminal division is viewed by some authors as a benefit to international and continental systems. The current perception of the criminal division as a response against the ICC is incorrect and prejudices the development of international criminal law. Rather, the proposed criminal division should be perceived as the first attempt at establishing criminal jurisdiction within its court structure by a regional organisation.²⁴⁹ There is space between the international and national court systems that allow for African states to use a complementary regional mechanism to realize their accountability obligations.²⁵⁰ Therefore, the proposed criminal division could further develop the international and continental structure in the context of accountability, complementarity, international criminal law, and concerns of immunity for the 'new treaty-based crimes'.²⁵¹ The universal jurisdiction or the ICC are not suitable mechanisms to address the current accountability situation in Africa in that

²⁴⁴ M Sirleaf 'The African justice cascade and the Malabo Protocol' (2017) *International Journal of Transitional Justice* 11(1) 9.

²⁴⁵ Mabunda (n 35) 3.

²⁴⁶ C Ogwezzy Michael "Challenges and Prospects of the African Court of Justice and Human Rights" (2014) *Jimma University Journal of Law* 6 23-25.

²⁴⁷ As above 22-23.

²⁴⁸ Mabunda (n 35) 3.

²⁴⁹ Mystris (n 49) 5.

²⁵⁰ As above 5.

²⁵¹ As above 6.

they overlook key issues and crimes that lead to conflicts.²⁵² In Africa, the prevalent conflicts are transnational crimes that universal jurisdiction or the ICC do not have international criminal jurisdiction over.²⁵³ These flaws produce the need for a criminal court in the African region that will speak to inadequacies, strengthen efforts of accountability, and realize the African continent's peace and development objective.²⁵⁴ The African Court may improve the efficiency of the AU's judicial role. Considering the conflicts and wars that the African continent has experienced, the decision of the AU to create a court competent to prosecute human rights violations and crimes was an indicator that Africa needs to protect human rights and the independence of justice in Africa as well as end impunity.²⁵⁵

4.4 Provisions in support of the criminal division of the African Court

The Constitutive Act contains provisions that bring to life the AU's desire to create a court at the regional level with the competency to try international crimes.²⁵⁶ According to Article 4(h) of the Constitutive Act, the AU has the right to interfere in a Member State's circumstance subject to a resolution by the AU Assembly in relation to grave crimes.²⁵⁷ Additionally, Article 4(o) makes provision for the respect of human life, denunciation of impunity and politically driven murders, acts of terrorism and rebellious actions²⁵⁸. Therefore, from a legal viewpoint, it can be said that the Constitutive Act offers an inherent basis for the establishment of a criminal court in Africa in which the international criminal division is incorporated.²⁵⁹ While the provisions do not impose a legal obligation to create a court, they show an acceptance by the AU of its obligation to prosecute international crimes.²⁶⁰

The complementarity principle in the Malabo Protocol that exists between the African Court and the national courts encourages national courts to strengthen their systems. The African Court would intervene in instances where the State party is unwilling or

²⁵² As above 6.

²⁵³ Jalloh (n 199) 229.

²⁵⁴ Mystris (n 49) 6.

²⁵⁵ Fahmy (n 33) 190.

²⁵⁶ As above 186.

²⁵⁷ Article 4(h) of the Constitutive Act of the African Union.

²⁵⁸ Article 4(o) of the Constitutive Act of the African Union.

²⁵⁹ Fahmy (n 33) 186.

²⁶⁰ Abass (n 5) 16-17.

unable to prosecute international crimes that have been committed on its territory.²⁶¹ Article 46H of the Malabo Protocol provides that ‘the jurisdiction of the Court shall be complementary to that of the National Courts and to the Courts of the Regional Economic Communities where specifically provided for by the Communities’.²⁶² This encourages domestic and sub-regional courts to develop and empower their systems to prosecute serious crimes. Therefore, by implementing the complementarity principle, the African Court participates in strengthening the national and sub-regional systems which will provide better suppression of the crimes the courts have jurisdiction over.²⁶³

The African Court has the potential to contribute to the development of international criminal law to a point of complementing the ICC. While Article 4(h) of the Constitutive Act²⁶⁴ does not define these terms (crimes against humanity, genocide, or war crimes), they are defined in the Malabo Protocol as they are in international instruments such as the Rome Statute, the Statute of the SCSL, and the Statute of the ICTR.²⁶⁵ Therefore, the Malabo Protocol aims to offer the AU an instrument for judicial intervention and complement these definitions with a regional dimension.²⁶⁶ The Malabo Protocol highlights serious gaps in international law that do not make provision for African conflicts, therefore, it directs a strong message to the ICC regarding the AU’s legitimate concerns on the inadequacies of the ICC’s decisions on undefined international crimes.²⁶⁷

4.5 Some African states still support the ICC

While there are AU members that were previously advocating for the withdrawal of African states from the ICC, there are others that were still in support of the ICC. These included Burkina Faso, Botswana, Ghana, Liberia, Malawi, Nigeria, Senegal, Sierra

²⁶¹ Fahmy (n 33) 188.

²⁶² Article 46H of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

²⁶³ Fahmy (n 33) 188.

²⁶⁴ Article 46H of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (n 262).

²⁶⁵ Omorogbe (n 53) 300.

²⁶⁶ As above 300.

²⁶⁷ As above 309.

Leone, Tanzania, and Zambia.²⁶⁸ These countries still believe in the mandate of the ICC and were not in support of the AU's non-cooperation decision. In fact, many in the UNSC supported the referrals of Sudan and Libya to the ICC,²⁶⁹ as well as the self-referrals by the DRC, Uganda, CAR, Kenya, Côte d'Ivoire, Mali, and Burundi.²⁷⁰ The withdrawal strategy issued by the AU outlines measures that would help remedy the AU's relationship with the ICC. However, implementing these measures would require the African states parties to continue their arrangement with the Rome Statute system.²⁷¹ A number of the AU member states do not support the decision of the withdrawal strategy and have expressed concerns and reservations in this regard. These include Nigeria, Senegal, Cape Verde, Liberia, Malawi, Tanzania, Tunisia, and Zambia.²⁷² After Gambia and South Africa retracted their intention to withdraw, and after Burundi's withdrawal, no other African state has indicated their intention to withdraw from the ICC²⁷³ which indicates the support the ICC continues to have in Africa.

4.6 The African Court is not competing with ICC

Considering the perception that the African Court was not established to compete with the ICC, this brings potential hope for the court in the field of international law. This is because the court cannot exist without the support of the AU Member States and, most especially, the African state parties to the Rome Statute and the ICC.²⁷⁴ The criminal division will not compete with the ICC but instead, it will complement it when dealing with crimes that fall outside its jurisdiction, namely transnational crimes.²⁷⁵ It is important for the African Court to have jurisdiction over transnational crimes

²⁶⁸ SS Tilden 'Africa's Conflict with the International Criminal Court: The African Court of Justice and Human and Peoples' Right as an Alternative to the ICC' (2018) 27(1) *Tulane Journal of International and Comparative Law* 216.

²⁶⁹ Mbengue, McClellan (n 160) 189.

²⁷⁰ International Criminal Court 'Situations Under Investigation' <https://www.icc-cpi.int/pages/situation.aspx> [accessed on 22 September 2021].

²⁷¹ Institute for Security Studies 'The AU's (other) ICC strategy' <https://issafrica.org/iss-today/the-aus-other-icc-strategy> [accessed on 22 September 2021]. Also see Assembly of the Union Twenty-Eighth Ordinary Session 30 - 31 January 2017 Addis Ababa, Ethiopia Assembly/AU/Draft/Dec.1 (XXVIII).

²⁷² Mbengue, McClellan (n 160) 195.

²⁷³ Africa Renewal 'ICC: Beyond the threats of withdrawal' <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal> [accessed on 22 September 2021].

²⁷⁴ Tilden (n 268) 215.

²⁷⁵ Van der Wilt (n 199) 18.

because of their detrimental effects on the African continent. Therefore, the inclusion of international crimes in the African Court's jurisdiction is a progressive step and not in competition with the ICC's jurisdiction.²⁷⁶ The exclusion of certain crimes points to the limitations of international criminal legality in setting a standard for universal systems of justice. Therefore, the African Court is using the principles of international criminal law to determine the line between transnational and international criminality as an alternative to pre-existing judicial methods.²⁷⁷ The criminal division introduces international crimes into the African international criminal law framework and responds to the ICC movement by front lining transnational crimes that threaten the African Continent.²⁷⁸

Therefore, the Malabo Protocol can be seen as the development towards efforts to prosecute international crimes in Africa.²⁷⁹ In 2012, the AU supervised the creation of the Extraordinary African Chambers in Senegal for the prosecution of former Chadian President, Hissine Habre'.²⁸⁰ This was following the creation of the ICTR²⁸¹ and the SCSL²⁸² in association with the UN.²⁸³ The establishment of a permanent African Court with a criminal division empowered by the Malabo Protocol, together with the extension of its jurisdiction to include transnational crimes, can be interpreted as the next stage of the process of enhancing the application of international criminal law within the African region.²⁸⁴

²⁷⁶ Tessema (n 57) 50.

²⁷⁷ KM Clarke 'Rethinking Liberal Legality Through the African Court of Justice and Human Rights: Re-Situating Economic Crimes and Other Enablers of Violence' in Kastner, P (n 56) 172.

²⁷⁸ As above 173.

²⁷⁹ E de Wet 'Proceedings of the Annual Meeting, published by the American Society of International Law' (2017) 111 107.

²⁸⁰ Agreement Between the Government of the Republic of Senegal and the African Union on the Creation of Extraordinary African Chambers within the Courts Senegal.

²⁸¹ United Nations International Residual Mechanism for Criminal Tribunals 'The ICTR in Brief' <https://unictr.irmct.org/en/tribunal> [accessed on 21 September 2021].

²⁸² Human Rights Watch 'The Special Court for Sierra Leone' (2012) <https://www.hrw.org/news/2012/04/11/special-court-sierra-leone> <https://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good> [accessed on 21 September 2021].

²⁸³ de Wet (n 279) 107.

²⁸⁴ As above 107-108.

4.7 Conclusion

While the ICC and the AU have a strained relationship, there are still some African states that support the ICC.²⁸⁵ The extension of the African Court's jurisdiction to international crimes has given rise to concerns, however, of whether the establishment of the criminal division has the potential to contribute to international criminal law.²⁸⁶ The extension of the African Court brings attention to crimes that affect Africa, and, thus, it introduces the regulation of transnational crimes in international criminal law.²⁸⁷ Although the provision in the Constitutive Act does not provide a legal obligation to create a court, it shows an acceptance by the AU of its duty to prosecute international crimes that are committed in Africa by Africans.²⁸⁸ The criminal division should not be seen as competing with the ICC but rather complementing it in areas where the ICC does not have jurisdiction.²⁸⁹

²⁸⁵ Mbengue, McClellan (n 160) 201.

²⁸⁶ Mystris (n 49) 5.

²⁸⁷ KM Clarke 'Rethinking Liberal Legality Through the African Court of Justice and Human Rights: Re-Situating Economic Crimes and Other Enablers of Violence' in Kastner, P (n 56) 172.

²⁸⁸ Abass (n 5) 16-17.

²⁸⁹ Van der Wilt (n 199) 18.

Chapter 5: Conclusion

5.1 Introductory remarks

The purpose of this study is to prospects and challenges of extending the African Courts' jurisdiction to international crimes. To this end, the study sought to answer three specific objectives, set out in chapter one, concerning the extension of the African Court's jurisdiction to international crimes in three specific chapters. In this regard, this study sought to explore the creation of the Malabo Protocol by looking at various aspects that led and contributed to its existence. This, firstly, included a discussion on the relations between Africa and the ICC and the application of the complementarity principle between the African Court and the ICC in chapter two. Secondly, with the establishment of the African Court, there are concerns raised regarding the extension of its jurisdiction to international crimes. This study sought to discuss these concerns in detail in chapter three. Finally, in chapter four, the study sought to explore the contribution that the criminal division of the African Court can make to the advancement of international criminal law. Accordingly, the conclusions arrived at in this study in relation to the above objectives in the respective chapters are the subjects and findings of this study and will, thus, be reflected below.

5.2 Summary of the findings of the study and recommendations

In chapter two, in its exploration of the creation of the Malabo Protocol, this study provided a detailed discussion on the various features that led and contributed to the AU's decision to adopt the Malabo Protocol, empowering the African Court with the competency to prosecute international crimes. As noted in chapter two, the AU has desired to have a regional criminal court and the Malabo Protocol will materialise that desire once it enters into force and becomes operational. Therefore, African states should implement and support the creation of an African court with jurisdiction over international crimes as it will be a step closer to ensuring that African judicial systems are strengthened with no reason to resort to the ICC.²⁹⁰ The ICC's jurisdiction is

²⁹⁰ Benyera (n 164) 10.

complementary, and for that reason, its intervention will only take place where the domestic courts fail to establish suitable mechanisms to prosecute serious crimes.²⁹¹

The argument that the ICC is targeting Africa as it only investigates crimes committed in Africa is dismissed. The Office of the Prosecutor is conducting preliminary investigations in other regions²⁹² and, thus, it can no longer be said that all the cases before the ICC are from Africa.²⁹³ Additionally, the ICC's investigations in Africa were not all due to the court targeting African states but rather because most of the cases were referrals.²⁹⁴ The AU's decision for non-cooperation with the ICC regarding Al-Bashir's arrest was in response to their denied request to postpone the proceedings in terms of Article 16 of the Rome Statute.²⁹⁵ This was followed by AU member states expressing their intentions to withdraw from the ICC, and, to date, only Burundi has successfully withdrawn from the ICC.²⁹⁶ The application of the complementarity principle places the primary responsibility on African states to prosecute serious crimes.²⁹⁷ Therefore, African states have to ensure that their national judicial systems and trial procedures comply with the international criminal law standards to enable them to independently prosecute international crimes committed in Africa.²⁹⁸ For this reason, chapter two concluded that the lengthy process of creating the Malabo Protocol was an indication that Africa wants to take ownership of peace, security, and justice, and that the proposed criminal division can contribute to the fight against conflict and impunity on the continent.²⁹⁹

²⁹¹ Accord 'Withdrawal from the International Criminal Court Does Africa have an alternative?' (2017) <https://www.accord.org.za/ajcr-issues/withdrawal-international-criminal-court/> [accessed on 31 August 2021].

²⁹² in Afghanistan, Bangladesh/Myanmar, Palestine, Philippines, and Georgia. See <https://www.icc-cpi.int/pages/situation.aspx> [accessed 2 October 2021].

²⁹³ JBJ Vilmer, The African union and the international criminal court: Counteracting the crisis. *International Affairs* (2016) 92(6) *International Affairs* 1332.

²⁹⁴ Kepler (n 29) 6.

²⁹⁵ Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, 15th Ordinary Session of the Assembly of the Union, Kampala 27 July 2010 Doc Assembly/AU/Dec 296(XV) (n 153).

²⁹⁶ Institute for Security Studies 'Will other African countries follow Burundi out of the ICC?' (n 181).

²⁹⁷ Monageng (n 62) 16.

²⁹⁸ Bachmann, Nwaba (n 125) 467.

²⁹⁹ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

The Malabo Protocol has not yet been ratified and only fifteen states have signed it.³⁰⁰ This is due to concerns raised regarding the extension of the African Court's jurisdiction to include international crimes, with chapter three outlining these concerns in detail. The study sought to discuss these concerns to show the flaws of the Malabo Protocol that will need to be addressed before its ratification. The financial implications of extending the African Courts' jurisdiction are one of the main concerns in that the AU relies mostly on external donors for funding—thus, the Kigali Financing Decision is the AU's way of addressing these funding issues.³⁰¹ Having a clear funding mechanism in place ensures the sustainable functioning of the AU and, therefore, enables the AU to fund the African Court. The structural implications concerning the wide scope of jurisdiction require the AU to assess the required personnel with expertise and competence on the subject matters covered by the criminal division.³⁰² This concerns the need to create the different offices that will maintain the operation of the criminal division, namely the presidency, the registry, office of the Prosecutor, and a Defence Office.³⁰³

The Malabo Protocol will empower the criminal division to investigate and try fourteen international crimes, including transnational crimes that are not within the jurisdiction of the ICC.³⁰⁴ The inclusion of both core and transnational crimes in the Malabo Protocol raised the concern of whether the criminal division will be able to effectively and efficiently carry out its mandate considering the wide jurisdiction it will have.³⁰⁵

The Malabo Protocol has flaws, as discussed in chapter three. Consequently, the flaws raise concerns that question the legality and grounds for establishing a regional court with a criminal division. Based on the international treaties allowing states to prosecute and punish international crimes,³⁰⁶ however, it is safe to conclude that there is no provision in international law, customary international law, or international criminal law that prohibits the AU from establishing a regional court with competency to try international crimes. Core crimes have detrimental effects on the African continent –

³⁰⁰ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (n 2).

³⁰¹ Report on Financing of the Union June 2020 (n 178) 2.

³⁰² Clarke, Jalloh *et al* (n 27) 1064.

³⁰³ As above 1064.

³⁰⁴ As above 242.

³⁰⁵ Amnesty International 'Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court' (n 1).

³⁰⁶ Preamble to the Rome Statute of the International Criminal Court (n 200).

even more so, transnational crimes. Therefore, the AU saw the need to bring attention to these crimes by having jurisdiction over them.³⁰⁷ The inclusion of these transnational crimes in the African Courts jurisdiction will address the gap between the ICC's jurisdictional extent.³⁰⁸

The immunity clause provided in the Malabo Protocol may create tension between the ICC and the African Court when exercising the complementary jurisdiction in that the Rome Statute allows for the indictment of sitting heads of state, whereas the African court will have jurisdiction only once their term has ended.³⁰⁹ The immunity clause is also one of the main concerns raised as it prevents the African Court from instituting cases against AU heads of state and, thus, creates the perception that the Malabo Protocol was formed to defend African leaders from accountability instead of ending impunity.³¹⁰ The immunity clause threatens the domestic and international validity of African leaders and their governments, and therefore, it is recommended that the removal of the immunity clause be strongly considered.³¹¹

Finally, in chapter four, the study sought to explore the contribution the criminal division of the African Court can make to the advancement of international criminal law. When the African Court comes into operation, its jurisdiction will include matters that concern international criminal law,³¹² therefore, this indicates that African States are willing to resolve their own conflicts, thereby contributing to the advancement of international criminal law by taking part in its expansion.³¹³ The criminal division will fill the space between national and international court systems as it will complement regional mechanisms in realizing their obligations.³¹⁴ The criminal division will contribute more to the international and continental systems³¹⁵ and will also improve the effectiveness of the AU's judicial function. It will, thus, realize the agenda for peace and development on the African continent.³¹⁶ The provisions in the Constitutive Act do

³⁰⁷ KM Clarke 'Rethinking Liberal Legality Through the African Court of Justice and Human Rights: Re-Situating Economic Crimes and Other Enablers of Violence' in Kastner, P (n 56) 171-172.

³⁰⁸ Abass (n 5) 33.

³⁰⁹ Accord 'Withdrawal from the International Criminal Court Does Africa have an alternative?' (n 291).

³¹⁰ S Ford 'Between Hope and Doubt: The Malabo Protocol and the Resource Requirements of an African Criminal Court' in Jalloh, CC et al (n 17) 9.

³¹¹ Abaya (n 45) 198.

³¹² Article 28 of the Protocol on the Statute of the African Court of Justice and Human Rights.

³¹³ Fahmy (n 33) 170.

³¹⁴ Mystris (n 49) 5.

³¹⁵ As above 5.

³¹⁶ As above 6.

not provide an obligation to establish an African criminal court, however, they do provide a basis for the incorporation of a court with an international criminal division.³¹⁷ The Malabo Protocol will offer the AU an instrument for judicial intervention with a regional dimension.³¹⁸ The criminal division will not compete with the ICC but, instead, it will complement it when dealing with transnational crimes that fall outside its jurisdiction.³¹⁹

5.3 The overall conclusion of the study

Overall, adding international crimes to the jurisdiction of the African Court presents an important advancement in Africa and other regional law-making institutions.³²⁰ The adoption of the Malabo Protocol shows the willingness that African states have to prosecute international crimes, thus providing the ICC with limited reasoning to interfere in any state conflict.³²¹ Presently, the balancing nature of the jurisdiction of the ICC only applies to national jurisdictions and not regional jurisdictions. It is, however, probable to either modify the Rome Statute in this respect or create a treaty with the ICC and the African Court. It is, however, preferable that the African Court deal with international crimes themselves and only refer cases to the ICC in the instance that the criminal division is unable to adequately prosecute the crimes.³²² The proposed criminal division is indeed necessary within the African continent. After the criminal division is created, the cases of conflicts and human rights violations might decline, as AU member states would fear being tried by this regional criminal court.³²³ The Rome Statute does not have jurisdiction over transnational crimes, which affect most states in Africa, and this is possibly the strongest point in support of international crimes being prosecuted by the African Court, as well as the point that no law under international law prohibits the existence of the criminal division. Therefore, the creation

³¹⁷ Fahmy (n 33) 186

³¹⁸ Omorogbe (n 53) 300.

³¹⁹ Van der Wilt (n 197) 18.

³²⁰ Murungu (n 4) 11.

³²¹ Vilmer (n 293) 1329.

³²² Accord 'Withdrawal from the International Criminal Court Does Africa have an alternative?' (n 291).

³²³ Mabunda (n 35) 4.

of the African Court's criminal division has the potential to advance and develop international criminal law to a point where it complements the ICC.³²⁴

³²⁴ Tilden (n 268) 215.

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