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The Place of the African Court of Justice and Human and Peoples' Rights in the Prosecution of Serious Crimes in Africa

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1. INTRODUCTION

The present enforcement system of international criminal law essentially rests on three main pillars. First, there are prosecutions of international crimes within the *national courts* of the territorial states where the offense occurred. This could be through the regular criminal courts of those states or so-called "hybrid" or "mixed" chambers specifically created for that purpose by the state alone, or with the help of the United Nations (UN), as was the case in Cambodia, Bosnia-Herzegovina (BiH), East Timor, Lebanon, or Kosovo.[1]

Second, there are prosecutions within *international courts*, whether ad hoc or permanent. The former dates back to the Nuremberg and Tokyo International Military Tribunals. Those pioneers were followed more recently by the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), all of which were either created directly as subsidiary bodies of the UN or authorized by its Security Council under its mandate to ensure the maintenance of international peace and security.[2] There is, of course, also the multilateral treaty-based International Criminal Court (ICC), which as of writing, comprises 123 States Parties from all regions of the world and is endorsed in principle by 15 other signatories.

[1] For a discussion of the presumed benefits of such courts, *see* Laura A. Dickinson, *The Promise of Hybrid* Courts, 97 Am. J. Int'l L. 295 (2003); Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia (Cesare Romano, André Nollkaemper and Jann Kleffner eds. 2004); Sarah Williams, Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues (Michael Bohlander ed. 2006).

[2] For an overview, *see* William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone (2006); *see also* The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law (Charles Jalloh ed. 2014).

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

Lastly, present international criminal law also contemplates prosecutions within the *domestic courts of third states*. Good examples of the latter include Australia, Belgium, Canada, France, and Senegal, all of which have in the past invoked *universal or quasi-universal jurisdiction* in an attempt to investigate and prosecute so-called core international crimes[3] such as genocide, war crimes, and crimes against humanity.[4] This has occurred despite their lack of any of the usual territorial, nationality or other traditional jurisdictional links to the offenses other than the presence of the accused. These types of prosecutions, along with those in the national courts of the *territorial states*, form part of what the late M. Cherif Bassiouni dubs the "indirect enforcement system,"[5] in contrast to international prosecutions which are part of the "direct enforcement system"[6] of international criminal law.

Each of these direct or indirect enforcement models has its benefits and drawbacks. Generally, national prosecutions within the territorial state are considered ideal on legal, pragmatic or legitimacy grounds. But experience teaches that municipal courts do not always prosecute international crimes for all kinds of reasons. It is often the case that, in some situations, the concerned state and its judicial system may have collapsed or lacks the willingness and/or material ability to investigate or prosecute. Though generally relatively inexpensive, when compared to international trials, national judicial processes can also sometimes be manipulated leading to biased prosecutions.

For their part, for various reasons including the prioritizing of the parochial national over the wider community interest, third party states tend to be hesitant to invoke universal jurisdiction to prosecute foreign officials, or due to immunities, may even be legally barred from doing so—at least while the most senior ranking officials of other states are still holding office. For instance, Belgium, initially exceptional for its enthusiasm in seeking the title

[3] These are the kinds of offenses discussed in Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo* v. *Belgium*), (February 14, 2002), Judgment, I.C.J. Rep. 2002 3. For the distinction between "core" from other international crimes, *see* Chapter 8 (in this volume).

[4] There is a tremendous body of literature on universal jurisdiction. *See*, for a small sample, A. Hays Butler, *The Diplomacy of Universal Jurisdiction: A Review of the Literature*, 11 Crim. L. For. 353 (2000). For challenges, *see* Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. Int'l Crim. Just. 589 (2003); Georges Abi-Saab, *The Proper Role of Universal Jurisdiction*, 1 J. Int'l Crim. Just. 596 (2003); Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l. L. 1 (2011); Luc Reydams, *The Rise and Fall of Universal Jurisdiction*, in The Routledge Research Handbook on International Criminal Law 337 (William Schabas and Nadia Bernaz eds. 2011).

[5] Introduction to International Criminal Law 25 (2nd edn. M. Cherif Bassiouni ed. 2013).

[6] Ibid.

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

of "European capital of universal jurisdiction,"[7] famously found itself in a legal and political challenge[8] at the International Court of Justice (ICJ) in the *Arrest Warrant* saga when it indicted the then incumbent Congolese foreign minister.[9] Belgium was reminded that, although legal steps to prosecute serious crimes is not necessarily a bad thing, any such initiatives must be scrupulously compliant with customary international law immunities. The ICJ deemed those applicable at the horizontal level as between co-equal sovereigns.[10] Other more recent cases from certain European courts, such as those of France, Spain and the United Kingdom against Rwandese officials based on the universality principle, have been no less controversial.[11] The end result tends to return us to the all too familiar normalcy of impunity.

Against this backdrop, international penal courts have increasingly come to be perceived as a key if not the ultimate solution to the rampant global impunity for atrocity crimes. The few UN international penal tribunals established by states since the end of the Cold War have to date successfully dispensed justice for the specific situations in the former Yugoslavia and Rwanda that they were mandated to address. The same is true of the Sierra Leone Special Court. Nonetheless, international courts also have their own share of challenges. So international criminal lawyers and states are beginning to raise doubts on whether they could be the magic bullet against individuals who perpetrate atrocity crimes.[12] These include issues concerning their costly nature, their generally lengthy proceedings, and their geographic distance and remoteness from the territories and populations in whose name they seek to render justice.[13]

As to the permanent ICC, in addition to some worries about its slow start in terms of completed trials to date as well as other challenges, it may also lack jurisdiction or the resources to start investigations and to prosecute.

[7] Charles Jalloh, *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, 21 Crim. L. For. 63 (2010).

[8] Steven Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 Am. J. Int'l. L. 888 (2003).

[9] For critical remarks, *see* Neil Boister, *The ICJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law*, 7 J. Conf. and Sec. L. 293 (2002); Antonio Cassese, *When may Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 Eur. J. Int'l L. 853 (2002).

[10] *Arrest Warrant* case, supra note 3 at paras. 58–61.

[11] *See* Jalloh, supra note 7; *see also* Harmen van der Wilt, *Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States*, 9 J. Int'l Crim. Just. 1043 (2011).

[12] Christopher Gosnell, *The Adoption of the Essential Features of the Adversarial System*, in International Criminal Law 332–3 (3rd edn. Antonio Cassese et al. eds. 2008).

[13] Ibid. at 312.

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

Indeed, even where it does possess the jurisdiction and resources to prosecute, the Prosecutor may decline to proceed because the situation as a whole is of insufficient gravity to warrant international intervention. Where she decides to proceed, say against a sitting Head of State, the ICC may, due to perceptions of selectivity in application of its legal regime, fail to muster the state cooperation required to facilitate the rendering of such persons to answer crimes against humanity and genocide charges. The example of President Omar Al Bashir of Sudan comes to mind.[14]

Furthermore, given the sheer number of global hotspots and the magnitude of the atrocities, the ICC was never intended nor realistically expected to be the sole institutional response to provide criminal accountability.[15] That is largely why the Court was predicated on the complementarity principle, which under Article 17 of the Rome Statute of the ICC requires states to act as the first lines of defense in the battle against impunity.[16] In so doing, states placed the responsibility of prosecutions on themselves, consistent with the principles of sovereignty and international law, while undertaking to be the primary actors to investigate or prosecute Rome Statute crimes. But failing that, given the long history of bloodied wars that leave impunity to roam freely around the world, they envisaged the ICC as a back-up system.

[14] *Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05–01/09, Warrant of Arrest (March 4, 2009). For a discussion of the legal issues that arise, *see* Paola Gaeta, *Does President Al Bashir Enjoy Immunity From Arrest?* 7 J. Int'l Crim. Just. 315, *contra* Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities*, 7 J. Int'l Crim. Just. 333 (2009).

[15] For instance, in Sierra Leone, during that country's conflict it is alleged that there were over 32,000 perpetrators of atrocity crimes. Only nine suspects were successfully prosecuted in the SCSL for international crimes between 2002 and 2013. In Rwanda, 15,286 criminals were tried in the ordinary courts for genocide-related offenses over 17 years, while 1,958,634 people faced some accountability under the traditional *gacaca* traditional justice system in 10 years and the ICTR handled 90 indictees of which 80 cases were concluded cases (also in 18 years). The ICC has been involved with, for example, the Democratic Republic of Congo (DRC) since mid-2004. It has only indicted a handful of Congolese suspects. These includes its first case involving Thomas Lubanga, for a conflict that has claimed well over five million deaths. For meaningful justice to be served in the DRC, it seems obvious that the domestic courts would have to step up to their responsibilities in line with the complementarity principle.

[16] Rome Statute of the International Criminal Court, U.N. Doc A/Conf. 183/9 (1998) [hereinafter Rome Statute]. For in-depth discussions of the challenges of implementation, *see* Linda E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?* 12 Wash. U. Global Studies L. Rev. 451 (2013); Mark S. Ellis, Sovereignty and Justice: Balancing the Principle of Complementarity Between International and Domestic War Crimes Tribunals (2014). As to the challenges of application of Article 17 in Africa in the context of the Kenya Situation, *see* Charles Jalloh, *Kenya vs. ICC Prosecutor*, 53 Harv. Int'l L. J. 269 (2012).

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This in practice means that wherever the jurisdiction-bearing state is "unwilling or unable genuinely to carry out the investigation or prosecution,"[17] the ICC could take up that mantle, in behalf of the "international community."[18] This would be the case, at least in respect of a limited group of persons bearing greatest responsibility. Viewed in this wider context, it seems apparent that even in a post-ICC world the impunity gap will be left even larger whenever national court or international tribunal action is unavailable. This irrespective whether for reasons of lack of capacity, political will or other constraints.

Given the presently bifurcated direct and indirect enforcement systems, it seems to be helpful to examine whether international criminal law could benefit from the approach of its sister discipline—international human rights law—to query whether, in addition to the currently available options to prosecute, regional or perhaps even sub-regional courts could also play a useful role in the wider quest to mete out individual criminal responsibility for atrocity crimes. Regional organizations, and their courts, may well offer some of the key advantages associated with national courts and mitigate some of the key disadvantages of international tribunals.

In engaging upon this admittedly preliminary exploration, this chapter will evaluate the work of regional organizations in international peace and security. We focus in particular on ways regional tribunals could supplement the ICC's mandate to prosecute core international and even other serious transnational offenses. An important consideration may be that there are already in place regional human rights courts in Africa, the Americas and Europe, though with varying degrees of effectiveness. Asia and the Middle East, though presently without any human rights courts, could in the future be inspired by the other regions to eventually head in that direction. When they do so, that could make global enforcement of international criminal law through regional courts a potential reality for all regions of the world. In other words, a system of regional criminal law enforcement has the prospect of a universal reach, depending on the progress made toward universalization of regional human rights courts.

The chapter will turn the spotlight on the emerging attempt to regionalize international criminal law enforcement in Africa, the world's second largest continent. This appears fitting for many reasons. Here, we might mention two that immediately come to mind. First, that region has been the source of all but one of the ICC's current situational caseload. Since the States of Africa are presently the main users of the ICC, we might reasonably presume

[17] Rome Statute, art. 17(a).
[18] Rome Statute, preamble, para. 9.

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that they are the ones more likely to explore additional institutional mechanisms for the prosecution of atrocity crimes. This appears to be borne out by the practice.

Second, African States have gone furthest in developing their own court with the African Union (AU)'s recently adopted protocol that would create a criminal chamber with jurisdiction over ICC crimes almost as part of the African government pushback against the permanent ICC.[19] The continent's effort, which is the focus of this volume, appears to have been greeted with general skepticism. In such an environment, where the agenda driving the regional criminal court project has been cast into some doubt by the context in which it emerged, what can and should The Hague-based court do to ensure that its work is actually complementary, instead of competitive, with the future African court and others like it that may be established in other regions?

Structurally, the chapter proceeds as follows. Section B will draw from the early experience of the international human rights system to assess whether there could be a place for regional courts in prosecuting international crimes. It will be argued that the ICC should assume a leadership role by cooperating with states and entities wishing to design courts consistent with its own statute. This would be in line with the object and purpose of the ICC and the policy of "positive complementarity"[20] which the Court itself has advanced over the past few years.

Section C of the chapter will assess the form and shape that the AU effort has taken, regrettably without any ICC engagement, partly because of the unfortunate current tension in the relationship between the Court and some of its African States Parties. In section D, we will examine some of the more

[19] *See* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the Assembly of Heads of State and Government of the African Union, Twenty-Third Ordinary Session, Malabo, Equatorial Guinea (June 27, 2014) [hereinafter Malabo Protocol].

[20] According to the ICC, "positive complementarity refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis." *See* ICC, Assembly of States Parties, *Report of the Bureau on Stocktaking: Complementarity: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap* (March 13, 2010), para. 16. The ICC has continued to reiterate in more recent reports its commitment to the principle of positive complementarity, which can equally apply to cooperation with regional bodies. For an early look at the concept, *see* William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 Harv. Int'l. L. J. 53 (2008).

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innovative aspects of the regional treaty that AU States adopted in June 2014 for their proposed regional criminal court. It will be shown that the particularities of the African context have led to the inclusion of new offenses and even corporate criminal liability in the Malabo Protocol and that these go beyond what is presently contained in the ICC Statute. The idea seemed to be to address, in addition to the core crimes, pressing governance and transnational concerns facing the Africa region but which the Rome Statute framework did not address. These novel elements seem to strengthen the case for the serious consideration of regional court involvement in prosecuting international crimes.

Finally, just before the conclusion and recommendations, section E takes up some questions that may arise about the legal compatibility of regional prosecution mechanisms with prosecutions carried out by the world criminal court. In particular, I suggest that the complementarity principle, though initially conceptualized vis-à-vis the obligations of States Parties to the ICC, appears flexible enough to successfully regulate the jurisdictional relationship with regional criminal courts. Thus no amendment to the Rome Statute is necessarily required. In the main, my overarching argument is that, much as in the international human rights system which is composed of a multilayered national, regional, and international enforcement system, international criminal law would likely in the future benefit from a similar multilevel system of accountability. Africa's opening of this additional approach to tackle impunity seems to suggest that this development may be hard to resist and perhaps even be inevitable. The last part of the chapter focuses on some of the key challenges that the future court might face.

2. THE EVOLUTION OF UNIVERSAL AND REGIONAL ENFORCEMENT OF HUMAN RIGHTS LAW AND POSSIBLE LESSONS FOR INTERNATIONAL CRIMINAL LAW

A. *International Human Rights vs. Regional Human Rights*

The global community's experience with international human rights law, and international peace and security more generally, support the contention that there have always been some intersections and some tensions between the *universal*, *international*, on the one hand, and the *regional*, *particular* on the other hand. The cognate field of international human rights, though not the only example of the increasing regionalization of international law enforcement, appears to give a useful illustration of that latent antagonism. That tension has been in existence for decades and since at least the adoption of the Charter of the United Nations, which eventually capitulated to

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the compromise of coexistence between international and regional arrangements.[21] It would seem, based on that experience, that the lukewarm reception that the African regional criminal court idea has received from the most ardent supporters of the ICC within civil society should not be surprising. Indeed, it may well reflect part of that longer historical trend in international law.

The early days of modern human rights law, which developed dramatically after World War II, apparently reflected similar anxieties about the best way that the international community could give effect to individual rights under international law.[22] There were those who felt that having a purely international system was the best way to guarantee human rights. Another view was that a universal system would be inadequate except if supplemented with regional mechanisms, so long as both worked toward the same goal of protecting fundamental human rights. Dinah Shelton, a leading commentator in human rights law, has identified three main factors that apparently helped to diminish the initial trepidation that the development of regional systems could undermine the creation of an effective *international* human rights system.[23] A review of those three influences appears instructive because they may be helpful to present and future debates about the place of regionalism in the criminal prosecutions of atrocity crimes. The main difference, which must be taken into account in any serious contemporary discussions in the international criminal law arena compared to the human rights system, is that we now have a permanent international criminal court around which regional systems could be anchored.[24]

[21] The text of the United Nations Charter was adopted in 1945 and is a foundational document of modern international law. It can be found online (last accessed 2 February 2019) at www.un.org/en/documents/charter/chapter5.shtml. As to examples of regionalization of international law enforcement, in the areas of money laundering, international fisheries, law, intellectual property, international trade law, among others, *see* William Burke-White, *Regionalization of International Criminal Law Enforcement*: A *Preliminary Exploration*, 38 Tex. Int'l L. J. 725, 731–2 (2003).

[22] Philip Alston and Ryan Goodman, International Human Rights: The Success to International Human Rights in Context 889 (2013); The International Dimensions of Human Rights, vol. 2, 451 (K. Vasak and P. Alston eds. 1982).

[23] Dinah Shelton, *The Promise of Regional Human Rights Systems*, in The Future of International Human Rights 351, 356 (B. Weston and S. Marks eds. 1999).

[24] On the other hand, there have been several proposals for a world court of human rights. That has not yet garnered the support of states, even though they seem willing to create a global criminal court after decades of consideration. So, in a way, we are dealing with a role reversal where we have both universal and regional enforcement mechanisms for human rights but states are more willing to create a standing international criminal tribunal court instead of a standing human rights court. Though this will not be pursued here, it may be that the lessons go the other way too, whereby international human rights law advocates could learn from the

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First, regional human rights systems reflected in a broad way the emergence of a global human rights movement and norms after World War II. Given the mass atrocities experienced during the war, it was not surprising that the state-driven organizations created afterwards sought to address human rights concerns.[25] This was only natural, as the guarantee of minority rights were felt to be part of what might be required to avoid a return to devastating conflict. In a way, this same rationale helps to explain the emergence of international criminal law, under which it is increasingly accepted that victims' rights to have justice must include some type of accountability for at least the senior perpetrators of heinous international crimes. The success of the Nuremberg trials and endorsement of its principles by the international community made that a serious prospect.[26] Guaranteeing some measure of criminal justice, which in some ways reflects the substantive evolution of human rights law protections including the adoption of key post-war treaties such as that aimed at preventing and punishing genocide, was often seen as part of the panoply of measures required for a return to peace and stability.[27] The genocide convention thus incorporated the idea of a standing international penal tribunal to prosecute such crimes as far back as 1948. Though the notion would take half a century to bear fruit, with the adoption of the ICC Statute in July 1998.

Second, various historical and political factors converged to make the development of regional human rights systems possible and perhaps even inevitable.[28] In the Americas, there was a tradition of regional solidarity to address international issues. This led to the establishment of regional organizations whose founding treaties referred to human rights concerns in their charters and the adoption of instruments such as the American Declaration on the Rights and Duties of Man.[29] The latter preceded the UN's adoption of

experience of international criminal law to advocate creation of an international human rights tribunal. *See* Manfred Nowak, *It's Time for a World Court of Human Rights*, in New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures (M. Cherif Bassiouni and William Schabas eds. 2011).

[25] Shelton, supra note 23 at 353.

[26] 2 *Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, Yearbook of the International Law Commission (1950).

[27] *See* for an argument why criminal prosecutions should be part of the remedy for victims of grave violations, Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 Vand. J. Transnat'l L. 1399 (2002).

[28] Shelton, supra note 23 at 353.

[29] *See* ibid. at 354; for further elaboration of that history, Thomas Buergenthal and Dinah Shelton, Protecting Human Rights in the Americas 37–44 (4th edn. 1995). For the regional instrument, see *American Declaration of the Rights and Duties of Man* (1948), in OAS,

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the Universal Declaration of Human Rights.[30] As for Europe, which had experienced the worst mass atrocities in history by that point in the span of just two decades, international human rights norms were seen as requisite components of the rebirth of a new and more democratic and stable region. A regional human rights system was therefore thought to be necessary to help re-establish individual rights and freedoms, and in that way, contribute to helping avoid future conflict and a return to totalitarianism.[31]

In Africa, which had been under the yoke of colonialism for a long period, the ideas of self-determination were central to the struggle by the people of the continent for their fundamental human rights and freedoms.[32] The pan-African struggle for the rights of people and national identity, the continuation of apartheid in South Africa as well as independent Africa's desire to find its place in the world, among other factors, gave increased impetus to governmental concerns about the human rights of African peoples. It would eventually lead to the development of a regional human rights system.[33] The idea of an African Convention on Human Rights was first floated by African jurists in the "The Law of Lagos" in 1961. But the Charter of the Organization of African Unity (OAU) adopted by African States in May 1963 to promote regional integration did not incorporate the proposal.[34] It languished in the margins of Africa-wide government policy until the early 1980s when circumstances were favorable for the adoption of a regional human rights instrument.

It may be that, after about roughly two decades of experience with international criminal law, political pressures toward greater *regional integration* in Europe, the Americas and Africa, might also converge to make the development of regional international criminal law enforcement mechanisms near inevitable. It appears that there is some movement in that direction, although the different regional systems are known to have different levels of engagement on the question of criminal accountability for atrocity crimes. The strength of their cooperation in other areas of common concern, such as on issues of peace and security, economic integration, and free movement of

Basic Documents Pertaining to Human Rights in the Inter-American System, OAS Res. Off. Rec., OEA/Serv. L/V/I.4 Rev. (1965), OEA/Ser.L/VII.92, doc. 31, rev. 3 para. 17, (1996).

[30] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, UN Doc. A/RES/217(III) (December 10, 1948).

[31] Shelton, supra note 23 at 354.

[32] Ibid. at 354–5.

[33] For a comprehensive discussion of the African system, see Frans Viljoen, International Human Rights Law in Africa 420–21 (1st edn. 2007).

[34] See ibid. at 421.

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persons, capital, and labor, continues both to widen and deepen. We have seen this evolutionary phenomenon in all the regions. This process may thus eventually give way to greater harmonization of criminal law and procedure over time. If this happens, this might open the door to integration of substantive prohibitions on penal matters into some regional enforcement regime.

In Africa, the generally bad governance and lack of credible justice and access to the rule of law and the numerous conflicts have already necessitated the adoption of a regional anti-impunity stance. Similarly, in the Americas, the regional human rights court and commission have developed an elaborate body of jurisprudence about the duty of states to investigate and prosecute various gross violations of individual rights. The two regional guardians of human rights have therefore assumed a leadership role in defining the right of victims to receive remedies and reparations for violations like torture or disappearances. The human rights mechanisms in the Americas region have frowned upon amnesties as well as monitored countries in order to ensure that States follow through its innovation of a "quasi-criminal jurisdiction" which has led to the prosecutions of over 150 cases at the national level.[35]

For Europe, as the movement toward greater regional integration advances further and further, the free movement of persons has given rise to increased interest in strengthening mutual legal assistance on criminal law matters. We are even beginning to see aspects of harmonization of criminal and procedural laws across European Union Member States in an attempt to act more effectively to curb transnational criminal activity including terrorism.[36] Particularly significant for this argument has been the shift, within the Council of Europe system, toward a sort of "quasi-criminal review"[37] jurisdiction.[38] On the other hand, this process seems to have suffered some setback with Great Britain's recent referendum in favor of exiting from the European Union. Nonetheless, the EU will continue to be a major harmonizer of criminal law policy for the overwhelming number of European States who will continue with the march toward deeper substantive and practical regional integration.

Third, during the development of the core international legal instruments that became known as the International Bill of Rights which undergird the

[35] Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi Criminal Jurisdiction of the Human Rights Courts*, 107 Am. J. Int'l. L. 1 (2013).

[36] Ibid.

[37] Ibid.

[38] *See*, for a helpful discussion of developments in Europe, Giulia Pinzauti, *The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of Kononov v. Latvia*, 6 J. Int'l Crim. Just. 1043 (2008).

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global human rights system, the UN did not initially embrace the idea of regional human rights mechanisms. There was an initial perception that human rights protections can be better accorded to individuals at the international instead of the national level. Indeed, in such an environment, there was apparently a tendency to paint regional human rights systems as a "breakaway movement, calling the universality of human rights into question."[39] But circumstances forced a change within the context of the bitter rivalries of the Cold War. The failure over a period of 20 years of the East and West to agree on the modalities for the conclusion of a global human rights treaty, including different conceptions of weight to be placed on civil and political rights and economic, social and cultural rights, ultimately indicated that any international enforcement mechanisms agreed upon would prove to be legally weak.

The desire for binding *judicial* procedures to enforce the human rights of individuals thus came to be seen as more likely to be achieved at the regional instead of international level.[40] This became crystal clear after the adoption of the civil and political rights, and economic, social cultural rights covenants in 1966, both of which did not include strong enforcement systems. It therefore seemed as if the international community acquiesced into the idea of regional human rights regimes to enforce such rights, if that was going to be done through judicial or quasi-judicial process of the kind we see today in regional human rights courts and commissions.[41]

This was so much the case that the UN General Assembly, in 1977, could instead of opposing the move to establish regional human rights courts adopt a resolution urging states to develop suitable regional machinery for the promotion and protection of human rights.[42] Today, though all might agree that they have exhibited varying levels of efficacy, there is little if any doubt that the umbrella of protections we have for individuals are stronger as a result of the multilevel human rights enforcement architecture that developed at the regional and universal levels over the last several decades.

[39] 2 The International Dimensions of Human Rights 451 (K. Vasak and P. Alston eds.1982).

[40] Shelton, supra note 23 at 355.

[41] *See* the International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Treaty Doc. No. 9S-2, 999 U.N.T.S. 171 and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[42] *See* UN G.A. Res. 32/127 (December 16, 1977) (appealing to states in regions of the world where regional arrangements for the protection of human rights do not yet exist to consider agreements with the view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights).

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B. *Regionalization Lessons from International Human Rights for International Criminal Law*

Much as the regional human rights systems were "inspired by the agreed universal norms,"[43] international criminal law, at the center of which sits the permanent ICC, could also inspire the prosecution of international and even transnational crimes within regional criminal courts. This makes sense for several reasons, including the links and close relationship between the goals of human rights and criminal law. Of course, the normative legal framework that underpins international criminal law has been in development for several decades with key treaties codifying prohibitions of certain types of conduct as criminal during war,[44] torture,[45] and genocide.[46] Thus, much as in international human rights which also developed a solid corpus of law in the post-World War II period but still generally struggles for stronger enforcement of its edicts through binding judicial process, the more tasking challenging now for international criminal law might be the strengthening of its hodgepodge direct and indirect enforcement systems.[47]

Some of the arguments that have been advanced to justify the existence of regional human rights systems may be helpful in assessing the case for the place of regional courts as an *additional* or *supplementary* means of enforcement of international criminal law. The idea of regional criminal courts could in this context offer some advantages in that it is possible for different regions to have general concerns about atrocities which they share, such as in relation to the heinous crimes of genocide, but at the same time particular issues which could best be accommodated at a regional instead of supra-national level. In this regard, we can recall that it was the push by Trinidad and Tobago for an international mechanism to address drug trafficking which reopened in 1996 the global conversation about the need for a standing international penal court. With that in mind, in the absence of international consensus to include drug trafficking in the subject-matter jurisdiction of the ICC, a regional court

[43] Dinah Shelton et al., Regional Protection of Human Rights 12 (2013).
[44] *See* the 1949 Geneva Conventions (I to IV) and their 1977 Additional Protocols.
[45] *See* the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.
[46] *See* the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.
[47] In addition to the International Bill of Rights, which forms the bedrock, a substantive number of conventions prohibit discrimination at the global as well as regional levels, and address the rights of women, children, persons with disabilities, torture, refugees, etc.

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could serve as a more suitable forum to prosecute such transnational offenses.[48] It is common place that there was no agreement on whether to include that offense at Rome. Nor was there any consensus during the statutory amendments at Kampala. In such a context, the idea of a regional option could mean that the state, whose neighbors might well face the same or similar challenges, would not be left without some type of inter-state cooperation solution. In this way, it might find a to address its core concern as a sovereign wishing to discharge its duty to provide security and good order against drug lords operating within its territory.[49]

Rather than ineffectually act alone, by coming together with countries from the Caribbean and even the Latin America and wider Americas region, Trinidad and Tobago could achieve some of its goals in regulating transnational criminals, say through the expansion of the jurisdiction of the Caribbean Court of Justice or the Inter-American Court of Human Rights (IACtHR) to encompass criminal matters. There is no reason, in principle, why such a criminal jurisdiction could also not include the ICC crimes. Nor is there any reason why it could not include other serious transnational offenses. This is particularly so given the increased interdependence of States and the ability of non-state groups and other actors to more easily cross borders in an increasingly globalized world.

The existence of geographic, historical, and cultural bonds in states of a given region of the world such as Africa or the Americas could imply the existence of common values around which might arise region-specific prohibitions. On the other hand, by accepting the differentiation of regions based on such common characteristics, it could be countered that the notion of *universal international crimes*, in which all of humanity is said to have a vested interest in both prohibition and punishment, could to some extent be undermined. By the same token, this argument should not be overstated, since international criminal law has to date suffered not so much from over-enthusiasm in its application as much as

[48] Trinidad and Tobago, leading a coalition of 16 Caribbean and Latin American States, moved for adoption of a UN Resolution to mandate a study. The initiative is discussed in Summary records of the meetings of the forty-second session, [1990] 1 Y.B. INT'L L. COMM'N 36, UN Doc. A/CN.4/SER.A/1990, at 39. *See also* UN G.A. Res. 44/39, U.N. GAOR, 44th Sess., Supp. No. 49, at 1, UN Doc. A/44/39 (1989). Many years later, upon adoption of the Rome Statute in July 1998, Trinidad welcomed the treaty but expressed disappointment over the non-inclusion of narcotics trafficking offenses and the death penalty.

[49] The country had argued that the transnational drug trade had a devastating effect on its citizens and was a matter deserving international criminalization. It noted that such issues and others of concern to the Caribbean region would be taken up in the future. It resubmitted the proposal again before the Kampala Review Conference, and again failed to garner the support of other states which felt that drugs should be regulated at the national level.

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under-enthusiasm in its enforcement. In any event, as international criminal law matures, it seems to be increasingly recognizing that there is at least a proximity difference among victims of such crimes based on their disproportionate direct impact and effects on the people of a given country or region.

Another argument that could favor the expansion of international criminal law enforcement by using regional courts as a site of prosecutions is one of legitimacy. Here, for complex historical and other reasons the decisions of a regional body, such as the AU, would likely be perceived among the African public as more legitimate vis-à-vis those of a more distant court based in the heart of Europe. The perception might be the same in relation to decisions of an EU established court within the European geographic space. The placement of prosecutions within a regional court might therefore help to anticipate and resolve one of the softer but still important concerns about the present trajectory of international criminal law. From that point of view, though unlikely to be a panacea when dealing with recalcitrant governments, it could be that the work of a regional court might generate greater acceptance by a group of states and thereby generate greater pressure for compliance from the countries in a given geographic region. Here, the sometimes rather convenient claims by some African States that the ICC is a neo-colonial Western project and the pushback on some its indictment and other decisions would suggest that there might be important legitimacy gains in having an additional regional forum to prosecute serious international crimes.

A key benefit here, that at least might partly answer some of the present criticisms of the ICC and tribunals not sitting in the *locus comissi delicti*, could be that the justice dispensed in a regional court would be closer to the people in whose name it was rendered.[50] Globally, we now have just over 20 years of experience with international criminal tribunals. As part of this, we have had the ad hoc ICTY, ICTR, and the SCSL, and of course, the permanent ICC itself. In this regard, one of the main lessons that we have learned is about the significance of locating justice closer to the people. That much seems clear from the report of the UN Secretary-General on transitional justice in post-conflict situations, which rightly observed that, to the extent possible, future tribunals ought to be established as close to the concerned victims as possible.[51]

[50] For more on the tension between the AU and ICC, *see* Charles Jalloh, *Regionalizing International Criminal Law?* 9 Int'l Crim. L. Rev. 445, 462–463 (2009).

[51] The Rule of Law and Transitional Justice in Conflict and Post Conflict Situations: Report of the Secretary-General to the Security Council, Doc. S/2004/616, para. 40 (August 23, 2004) (arguing that if security and independence can be adequately secured, there are key benefits to locating tribunals inside the countries concerned, including easier interaction with the local population, closer proximity to the evidence and witnesses, and being more accessible to victims).

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Relatedly, the publicity that is generated from such efforts would mean that information about trials can be more widely disseminated in a given region. Here, the experience of the international community starting with the ICTY and the ICTR, and now continuing with the ICC, suggests that—on balance—it is better if the prosecution of atrocity crimes can be localized, assuming security and other such considerations can be resolved. This also ties into the notion that trials closer to the victims and perpetrators would help give more visibility to justice. We saw the value of the latter especially in the context of the SCSL which had the advantage of being located in the country where the crimes occurred. If trials cannot occur in the territorial state, for whatever reason, the regional option may be better over the international. It could potentially even enhance the deterrent value of international criminal trials, assuming that the populations in the affected region are more able to partake in regional accountability efforts.

Finally, there is another more prosaic but perhaps equally important reason why it may be beneficial for a regional organization and its courts to get involved with the prosecution of atrocity crimes. This is because, all things considered, the cost of international justice has been a matter of serious concern for the funding countries since the UN set up the ad hoc Chapter VII tribunals.[52] This so-called "tribunal fatigue"[53] provoked the search for inexpensive tribunal models such as the hybrid SCSL and other mixed models embedded within the national courts of the requesting state.

Besides the possible impact that this could have in strengthening the domestic capacity to prosecute, in such contexts it is likely that a regional court sitting in the same region as the situation country would cost a fraction or at least less of what would be required for such justice to be administered by a distant international court. It may also allow a fairer allocation of the financial burdens for such courts, assuming that the states in a given region might more willingly offer the funding and other resources to enable the establishment of their own regional courts. This also offers additional salutary benefits in terms of reducing the costs of international or regional criminal prosecutions. On the other hand, it might still be the case that such efforts may instead reflect the same pressures if they come to rely on the funding largesse of donors from distant more developed regions.

In a nutshell, in this section I have developed some initial thoughts why, although apparently in its nascent stages, international criminal law could be

[52] *See* David Wippman, *The Costs of International Justice*, 100 AJIL 861 (2006); Stuart Ford, *How Leadership in International Criminal Law Is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 St. Louis U. L. J. 953 (2011).

[53] *See* David Scheffer, *International Judicial Intervention*, 102 Foreign Policy 34, 45 (1996).

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moving in the direction of international human rights law toward what may become in the future the partial regionalization of enforcement of its substantive provisions. Going well beyond the present largely direct and indirect penal enforcement systems, through national courts at the horizontal level or international tribunals at the vertical level, it appears that there could be gains from having countries in certain regions come together to achieve economies of scale in carrying out prosecutions of serious crimes. It is submitted that such regimes, where they develop, may help to address some of the actual as well as the perceived shortcomings of centralized international tribunal prosecutions in a single global penal court sitting in The Hague.

Since the present back-up system is anchored by the ICC, which we already have in place and itself is organized around the complementarity principle, whatever develops at the regional level must be guided by and be generally consistent with the obligations assumed under the ICC Statute. The obligations contained in that statute, representing the collective views of many States, whether in terms of definitions of the crimes or general principles of criminal liability at the international level or fair trial guarantees and even core procedural rules derived from it, could serve as a minimum of what the international community would expect for any regional criminal law enforcement system. But the Rome Statute ought to be seen as having established a floor, rather than a ceiling, when it comes to accountability for atrocity crimes. If any region wishes to go further than the provisions of the ICC Statute, then it should be free and indeed even encouraged to do so. For such would no doubt result in better enforcement of international criminal law standards. I have elsewhere suggested that this Rome Statute or ICC Plus should be acceptable. Conversely, adoption of less than what the ICC system provides should not be (i.e. the Rome Statute or ICC Minus).

The next part of this chapter considers how some of these ideas, including the experiences and interactions between the regional and international in the area of human rights law, may be beginning to play out in the practice of one region of the world. Africa is an important place in the present discussion for several reasons. For one thing, though not always successfully, the region is continually experimenting with how best to come to terms with atrocity crimes. For another, the conflicts in the region and the initial wide support for the ICC and self-referrals by African States, among other factors, have led the world penal court to be deeply engaged with questions of criminal justice in it. Later concerns emerged in relation to the Court's practice about the sequencing of global enforcement of justice, in light of ongoing peace initiatives in active conflict situations. These have also fueled various transitional justice policy initiatives in the region, all aimed at what we might call the Africanization of international criminal law.

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C. *The Context Giving Rise to Regional Prosecution of International Crimes in Africa*

Despite the experiences that the international community has had with regionalization of aspects of international law, and the possible openness of some to the idea that international criminal law could also be enforced through regional court mechanisms, it seems fair to conclude that there has been a general reaction of suspicion to this development. This harkens back to the early debates about the pros and cons of universalism vs. regionalism in human rights enforcement in the immediate post-World War II period.[54] Today, as back then, there appears to be a widely held perception that regional criminal accountability efforts might undermine the international project. For this reason, among international criminal lawyers, it appears that the decision of African States to adopt a treaty that would establish a regional criminal court with jurisdiction over the same crimes as those presently prosecutable before the ICC stems solely, or mainly, from the tense relationship between the AU and the ICC.[55]

But such a conclusion, though not perhaps unreasonable when viewed in the context of the present ICC–Africa saga, may be historically inaccurate. In fact, a careful historically sensitive analysis reveals that African States have in the past considered the idea of including a criminal jurisdiction within their regional human rights court since at least 1979.[56] That is to say, around 17 years before the Rome Statute. Thus, although the proposal for a standing international penal court is probably older and possibly dates back to the days of Gustav Moynier in 1860s,[57] the global court only materialized when the

[54] *See*, in this regard, Chacha Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights* 9 J. Int'l Crim. Jus. 1067–88 (2011); *Implications of the African Court of Human and Peoples Rights Being Empowered to Try International Crimes Such as Genocide, Crimes Against Humanity, and War Crimes*, An Opinion submitted by the Coalition for an Effective African Court on Human and Peoples' Rights; Darfur Consortium; East African Law Society; International Criminal Law Center, Open University of Tanzania; Open Society Justice Initiative; Pan African Lawyers Union; Southern African Litigation Center; and West African Bar Association. *Contra* Pacifique Manirakiza, *The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa*, in Africa and the Future of International Criminal Justice 375 (Vincent O. Nmehielle ed. 2012).

[55] *See* the argument of Murungu, ibid. at 1080, and the position of African civil society groups, all of whom question the motives of the AU in creating a regional criminal chamber.

[56] See *Rapporteur's Report of the Ministerial Meeting* in Banjul, The Gambia, Organization of African Unity, at para. 13, OUA Doc. CAB/LEG/67/Draft. Rapt. Rpt (II) Rev. 4, reprinted in Human Rights Law in Africa 1999 (C. Heyns ed. 2002) at 65. For commentary, *see* Frans Viljoen, A *Human Rights Court for Africa, and Africans*, 30 Brook. J. Int'l. L. 1, 4–5 (2004).

[57] *See* Christopher K. Hall, *The First Proposal for a Permanent International Criminal Court*, 322 Int'l Rev. Red Cross 57 (1998).

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multilateral treaty which was widely endorsed by African States was adopted at Rome on July 1, 1998.

With that backdrop in mind, in the next section this chapter will show that it was the combination of at least four separate factors that coalesced to result in the June 2014 adoption of a regional treaty that would establish an "African Criminal Chamber"[58] within the African Court of Justice and Human and Peoples' Rights once the requisite number of 15 ratifications from AU Member States are secured. The analysis will reveal that the AU concern about the work of the ICC on the continent, though not the impetus behind the proposal for a regional criminal court, is relevant. Nonetheless, it is pertinent only to the extent that it served as a catalyst for (not the source of) African governments' advocacy for a regional treaty to prosecute crimes under the slogan of "African solutions to African problems."

3. THE LEGAL DUTY OF AFRICAN STATES TO STRENGTHEN REGIONAL COOPERATION TO ENHANCE HUMAN SECURITY IN AFRICA, INCLUDING THROUGH PROSECUTION OF INTERNATIONAL CRIMES

At the broadest level, the first factor that made near inevitable the notion of a regional criminal court in Africa is a much wider one that speaks to the current positioning of the African continent in global affairs. Here, we are referring to the fateful decision after the end of the Cold War by African States to transform Africa's primary regional organization, formerly known as the OAU which had been in existence since May 1963, into what might be termed a human security-centered organization through adoption of the Constitutive Act of the African Union in July 2001.[59]

The decision to establish the AU was motivated by several complex considerations. These included a desire to shift from the logic of the principle of

[58] I note that, in this chapter, I variously refer to the African Criminal Chamber or the African Criminal Court. However, the actual nomenclature of the new court is the African Court of Justice and Human and Peoples' Rights. The criminal chamber (i.e. International Criminal Law Section) will in fact be only one of three sections of the single, wider court. The other two are the General Affairs Section and the Human Rights Section. This merger of three types of jurisdiction into the mandate of a single court is unprecedented in international and regional law. See, in this regard, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, as adopted by the AU Assembly of Heads of State and Government, Malabo, Equatorial Guinea, June 27, 2014. As of writing, in Janauary 2019, only eleven out of fifty-five African States have *signed* the treaty. None has ratified it.

[59] Constitutive Act of the African Union, art. 3, July 11, 2000, 2158 U.N.T.S. 3 [hereinafter Constitutive Act].

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

non-intervention[60] in the domestic affairs of its Member States, which underpinned OAU policy and action, along with an understandable concern about preserving the territorial integrity of African States. That policy stance, which showed great deference to national sovereignty and rather limited regional level concern about gross human rights abuses within some post-colonial African States, was largely a function of history and where Africa found itself in the aftermath of the defeat of colonialism.

Despite the creation of the OAU, civil wars, bad governance, rampant public corruption, and a weak rule of law continued to plague the continent. This resulted in many countries degenerating into ethnic divisionism and fratricidal wars, and the commission of gross human rights and humanitarian law violations. Much as Europe had suffered the brunt of conflict in the early part of the twentieth century, Africa, as the world's second largest continent with many unstable states seeking to find their own place in the world, became the scene of some of the worst atrocities toward the end of that same century.

The creation of the AU signaled a new type of continental body, legally, politically, and practically. It was to be more proactive in anticipating and addressing the scourge of conflict and commission of gross human rights violations in the region. Indeed, the OAU stance had, though preserving the integrity of the African States effectively, squandered the promising dividends of independence for ordinary people and served as a rather thorny source of insecurity for the continent for several decades. Following the footsteps of Europe and the Americas, African States did start thinking about the need to establish their own regional human rights system in the 1960s. But this idea only matured to governmental endorsement in the late 1970s. This eventually paved the way for discussions and adoption of an African human rights charter, which was heralded for its innovative approach to civil and political alongside economic rights, individual rights, and collective duties.[61]

But the same regional treaty that was greeted with enthusiasm entailed a key difference with other regional systems in that it opted for a *quasi-judicial* instead of *judicial* enforcement system. Specifically, instead of creating a regional rights court as had been done in the Americas and Europe, the main

[60] Ben Kioko, *The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention*, 85 Int'l Rev. Red Cross 807 (2003).

[61] C. Heyns, *The African Regional Human Rights System: The African Charter*, 108 Penn. St. L. Rev. 679 (2004); Fatsah Ougergouz, The African Charter of Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa (2003); Makau Mutua, *The African Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 V. J. Int'l. L. 339 (1995).

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enforcement system was to be the African Commission on Human and Peoples' Rights, which would be based in Banjul, The Gambia. Interestingly, the drafters of the African Charter were uncertain that African governments were ready for a binding judicial system that would give effect to human rights as had been the case in the other regions. They nonetheless suggested that a court to complement the commission should be revisited in the future.[62] This occurred almost two decades later. Interestingly, for our purposes here, the Committee of Legal Experts charged with drafting the African human rights charter did briefly consider a proposal by the Republic of Guinea to establish a regional court that would also have *criminal jurisdiction* to judge crimes against humanity in addition to adjudicating claims relating to human rights violations.[63] Nonetheless, despite the Guinean proposal to include crimes against humanity jurisdiction, it was felt that to do so would be premature for two reasons.[64]

First, one of the main concerns that had influenced the proposal for criminal jurisdiction was to address the South African apartheid policy as a crime against humanity. To this proposal, the principal drafter, Kéba M'baye from Senegal, pointed out that "an international penal court" had already been anticipated as an option in the International Convention on the Suppression and Punishment of the Crime of Apartheid even though states could also prosecute such crimes within their national courts.[65] Second, and seemingly more importantly, the UN was already considering the establishment of "an international court to repress crime against mankind."[66] These two factors, according to the main drafter of the charter, militated in favor of shelving the criminal jurisdiction idea for the African human rights court.

In essence, African States had been active in leading the charge to develop a global treaty to criminalize apartheid due to their concern about the racism rampant in South Africa and its pernicious effect on that country's majority black population.[67] They thus put on hold the inclusion of a criminal chamber that would address a crime of particular concern to Africa because

[62] *See Rapporteur's Report*, supra note 56 at para. 116.
[63] Ibid. at para. 117.
[64] Ibid. at para. 13.
[65] Ibid.; *see also* International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 244, *entered into force* July 18, 1976.
[66] Ibid.
[67] It was a proposal by Guinea and the Union of Soviet Socialist Republics that offered the first draft convention on apartheid on October 28, 1971. Other active African State participants were Nigeria and the United Republic of Tanzania.

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of the hope for international regulation through a permanent international penal court, which idea was then under consideration at the International Law Commission (ILC). As it would happen, neither the special court to prosecute apartheid as a crime against humanity nor the standing world criminal court they had expected were created for a while. It would take until the adoption of the ICC Statute on July 1, 1998 (i.e. 19 years later) and its entry into force on the same date in 2002 (23 years after the fact), that an international criminal tribunal with jurisdiction over apartheid as a crime against humanity would come into being.

The irony of the present suspicions about the motives of the African States in adopting a legal instrument for a regional criminal court, including among local scholars who are divided over the wisdom of the project,[68] is that a reason why African countries held back on that initial proposal at the time related to a preference for international cooperation for an enduring world criminal court. Yet, from another perspective, this historical experience demonstrated to African States that particular crimes of interest to their continent (e.g. apartheid) would not necessarily generate the same interest in legal prohibition for the rest of the international community of states. The thought that they should instead wait for the global penal court meant that they forewent regional action in favor of international coordination, leading one commentator to speculate that this was a "dupe," and that for African States, the experience was "significant" in affirming lack of global attention to Africa's specific concerns.[69]

But besides the African States' preoccupation with addressing apartheid, which took on renewed urgency after the Soweto Uprising of June 1976, the African human rights system established in the early 1980s has in its application through the *commission* based in Banjul generally fallen short of the achievement of its counterparts in Europe and the Americas. There have, of course, been many significant advances under difficult conditions. But the impact on the realization of the human rights of ordinary Africans as guaranteed under well crafted regional instruments has been far from ideal. The lackluster performance, partly due to the non-binding nature of the commission's legal decisions, inadequate resources, and the lack of political will on the part of African States to actually comply with human rights standards,

[68] *See* Ademola Abass, *The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects*, 60 Neth. Int'l L. Rev. 27–50 (2013).

[69] Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects*, 24 EJIL 933, 937 (2013).

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among other factors, would later resuscitate calls for the establishment of an African *Court* on Human and People's Rights.

The protocol for a court, aimed at supplementing the protective mandate of the commission, was eventually adopted in Burkina Faso on June 9, 1998. It entered into force on January 25, 2004.[70] The regional human rights court is presently based in Arusha, Tanzania. But even that institution has, besides the usual start-up problems, failed to receive the strong endorsement of African States. Proof of this can arguably be found in the fact that only over half of African States have ratified its treaty (30 out of 55 states), and of those, an even smaller number of States Parties have, to date, filed the special declarations permitting the court to hear human rights complaints brought by individuals against them (a total of 7 out of the 30 states that already ratified as of this writing).[71]

With this general backdrop in mind, and the explosion of several internecine conflicts on the continent including the 1994 Rwandan genocide and the notoriously brutal conflicts in Liberia and Sierra Leone, it should be no surprise that African States have over the past two decades increasingly turned their minds toward more robust action against those who perpetrate gross human rights violations on the continent. In this regard, the establishment of the AU as a replacement of the OAU had already given rise to the inauguration of various and interlocking institutional mechanisms, forming part of the African Peace and Security Architecture that are all aimed at addressing the prevention and management of conflicts in Africa.[72]

In fact, as part of the growing regional sensitivity against impunity, there was an explicit legal duty in the Constitutive Act of the African Union to take concrete steps against impunity. Under Article 4(o), the AU reaffirmed its commitment to "respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities."[73] The AU further recommitted its members to "respect for democratic principles, human rights, the rule of law and good governance," and the "promotion of gender equality" and "of social justice to ensure

[70] For a critique of the inadequacies of the legal structure for the new court, *see* Makau Mutua, *The African Court Human Rights Court: A Two Legged Stool?* 21 HUM RTS. Q. 342 (1999).

[71] See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Status of Ratifications, (January 28, 2019), www.au.int/en/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_17.pdf.

[72] See, for instance, the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, AU Assembly, 1st Ordinary Sess., July 9, 2002.

[73] Constitutive Act, supra note 59.

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balanced economic development."[74] Article 4(h) of the Constitutive Act, which preceded the entry into force of the ICC Statute by a year, goes even further and confers on the AU the legal "right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[75] The logic of all the above provisions, and the various legal instruments and decisions adopted by the AU since it was founded, is that the continental African body can now act, including through the use of military force but also through other measures, in the defense of civilians in the African territory.[76]

It is notable that the protocol establishing the Peace and Security Council of the AU entrusted with the responsibility of preventing and managing conflicts on the continent was adopted in the same month as the Rome Statute entered into force in July 2002. In other words, taken together, whether as specified in the AU's founding treaty from 2000 or the additional instruments adopted since then, the core principles contained in the Constitutive Act have supplied a legal framework, at the regional level, for the operationalization of the Responsibility to Protect in Africa. This norm has also been endorsed by the international community, including through resolutions of the UN General Assembly. But the inclusion of Article 4(h) in the AU's Constitutive Act appears unique as the first serious attempt to ram down the barriers of state sovereignty in a significant way. It creates a regional carveout of a narrow exception to the non-intervention principle and the prohibition on the use of force against other states articulated in Article 2 of the Charter of the United Nations. All in the name of protecting civilians from war crimes, crimes against humanity and genocide.

In addition, since the days of the OAU and now accelerated under the AU, there has been steadily developing a solid body of African human rights treaties and a web of regional obligations that address the specific human rights needs of women and children, prohibition of mercenarism, corruption, dumping of hazardous wastes on the continent, trafficking in drugs and persons, etc.[77] These regional instruments, forming part of African State

[74] Ibid.

[75] Ibid.

[76] *See* supra note 72.

[77] For a discussion of this "public law of Africa" and its influence on the mainstream, *see* Abdulqawi A. Yusuf, *The Public Law of Africa and International Law: Broadening the Scope of Application of International Rules and Enriching them for Intra-Africa Purposes*, in SHIELDING HUMANITY: ESSAYS IN HONOR OF JUDGE ABDUL G KOROMA 513 (Charles Jalloh and Femi Elias eds. 2015); *see also* Jeremy Levitt, *Africa: A Maker of International Law*, in MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW (Jeremy Levitt ed. 2008).

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practice, highlight greater preoccupation with public regulation on the continent to address particular problems afflicting the Africa region.

One more specific example might suffice to make the point. This relates to the African Charter on Democracy, Elections and Governance, which was adopted on January 30, 2007 at Addis Ababa, and thereafter obligated the AU and its Member States to take several measures to promote democracy on the continent.[78] First, it not only deemed unacceptable any undemocratic means of acquiring power reflecting the preoccupation with coup d'états that have stunted the growth of democracy on the continent, it also anticipated that the perpetrators of unconstitutional changes of government would be barred from participating in the ensuing election.[79]

Second, and going even further, the AU was under this regional treaty empowered by its Member States to prosecute the perpetrators and also provided for their trial at the regional (Africa) level.[80] This, if only implicitly, suggested that there would eventually be a need to adopt new criminal prohibitions that penalize "unconstitutional change of government" and that there would be some kind of competent regional tribunal to try the offenders. For that reason, the decision to include that offense naturally followed when it was proposed to merge the African Court of Justice and the African Court of Human Rights.

In sum, there is nothing in the text of the Constitutive Act and other AU instruments to make the creation of a regional criminal tribunal incompatible with the objects and purposes for which African States created their regional organization. Indeed, far from being only tied to pushback on the ICC, the AU's legal instruments, starting with its founding treaty and several other treaties developed since then, implied there was already emerging a regional legal sensibility and even obligation that the AU States must take robust measures to address gross rights violations and international crimes committed on the continent. This is further than, at least in terms of the normative architecture, any other region has to date accomplished. Indeed, as Ademola Abass has argued, it cannot be the case that the AU would legislate on crimes that it does not intend for its own court to prosecute.[81] That would simply not make any sense. In any event, action at an Africa-wide level to create a judicial

[78] African Charter on Democracy, Elections and Governance. The treaty entered into force on February 15, 2012. *See* for Status of Ratification the AU website: www.ipu.org/idd-E/afr_charter.pdf.

[79] *See*, inter alia, arts. 23 to 26 of the African Charter on Democracy, Elections and Governance.

[80] *See* art. 26(5), providing that "Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union."

[81] Abass, supra note 69 at 938.

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

mechanism becomes even more justified considering the unavailability of appropriate national or international judicial forums to prosecute some of the crimes of special concern to Africans.

4. THE HISSÈNE HABRÉ AFFAIR AND THE COMMITTEE OF EMINENT PERSONS' RECOMMENDATION FOR AN AFRICAN CRIMINAL JURISDICTION

The second more immediate factor that gave rise, at the regional level, to the proposal for a standing African Criminal Court (ACC) comes from the AU's initially unplanned role and involvement in the resolution of the issue relating to the trial of former Chadian president Hissène Habré. Contrary to popular belief, the recommendation to create such a regional criminal court originates in a formal proposal that stemmed from the deliberations about the best forum to try him instead of the ICC–Africa problem.

Habré, by way of quick background, was leader of the Central African State of Chad.[82] After he was deposed from power, he fled to Senegal to seek asylum, following a brief stay in Cameroon. He is alleged to have ordered the torture and deaths of many people during his time in power.[83] While in Senegal, which is a party to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[84] some alleged victims of torture under Habré's regime initiated a criminal complaint in 2000 before an investigative judge at the Dakar high court, claiming that he had committed various offenses including crimes against humanity and torture. An indictment was subsequently issued by the Senegalese authorities against Habré. But it was quashed by the Dakar Court of Appeal based on a finding of lack of jurisdiction. A similar complaint against Habré was subsequently filed in Belgium by a different group of victims. Belgium thereafter issued a warrant and request for his surrender for the purposes of trial on charges of torture and crimes against humanity. Instead of turning him over, Senegal approached the AU for assistance after Belgium sought Habré's extradition.

The Assembly, the highest decision-making organ of the AU comprising the sitting Presidents and Heads of Government, adopted a decision in January 2006 in Khartoum in which they tasked the AU Chairperson to constitute a

[82] Details about the Habré matter are summarized in the Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 2012 I.C.J.

[83] Ibid.

[84] Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, adopted by UN G.A. Resolution 30/46; entered into force June 26, 1987.

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committee of eminent African jurists to study and present options on what to do with former President Habré.[85] The specific mandate of the Committee of Eminent Persons was to "consider all aspects and implications of the Hissène Habré case as well as the options available for his trial."[86] Additionally, the Committee was to make "concrete recommendations on ways and means of dealing with issues of a *similar nature* in the future."[87] In discharging its duties, the experts were to account for various issues, including jurisdiction over the alleged crimes for which Habré should be tried; need for adherence to international fair trial standards; accessibility of the trial to alleged victims as well as witnesses; the independence and impartiality of the proceedings; efficiency in terms of cost and time of trial; and the prioritization of utilization of an African mechanism.[88]

The Committee examined the specific Habré case as well as the wider question regarding the future should such cases arise again. In relation to the former element, it considered that Senegal was best placed to try the former Chadian president because of its international law obligations under the Convention Against Torture. Or, if Senegal was not able to do so, it pointed out that any other African State party to the Torture Convention could also assert jurisdiction to do so. As a last resort, even an ad hoc tribunal sitting in any African State could be established to prosecute him.[89] On the latter more forward-looking aspect, which is of particular interest here, the legal experts recommended a standing mechanism to deal with the impunity problem in Africa. They observed that the African Court on Human and Peoples' Rights, whose protocol had already entered into force, and the Court of Justice of the AU whose treaty was still under the ratification process, did not provide jurisdiction to hear criminal matters at that time. Therefore, neither of those two institutions could prosecute the Habré case.[90]

The Committee thereafter considered the prospects for the creation of the African Court of Justice and Human Rights based on the project to merge the African Court of Human and Peoples' Rights and the African Court of Justice.[91] The Committee proposed that this new body could be granted

[85] *See* Decision on the Hissène Habré Case and the African Union, Assembly/AU/Dec.103 (VI), para. 2.
[86] Ibid., para. 3.
[87] Ibid., paras. 4 and 5 (emphasis added).
[88] Ibid.
[89] See REPORT OF THE COMMITTEE OF EMINENT AFRICAN JURISTS ON THE CASE OF HISSÈNE HABRÉ, PARAS. 27–33.
[90] Ibid.
[91] Ibid.

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

jurisdiction to undertake criminal trials for crimes against humanity, war crimes, and violations of the Torture Convention in Africa.[92] It also observed that there was room for such a development in the Rome Statute, and considered that this would not be a duplication of the work of the ICC. It emphasized that the text of such a treaty should be adopted through the quickest procedures possible.[93]

At the Assembly's summit in July 2006, at the same meeting in Banjul where the Committee's report had been presented, the AU decided that Senegal should try Habré "on behalf of Africa" with all the guarantees of a fair trial.[94] The AU leadership urged all African States to cooperate with Senegal. It further directed the Chairperson to provide the support necessary to enable the effective conduct of the trial. They also pleaded to the international community to assist with resources, especially those of a financial nature. Senegal thereafter proceeded to make amendments to its law, in July 2008, in which it gave effect to this AU decision by including in its penal code certain international crimes including genocide, war crimes, and crimes against humanity, and providing for their retroactive application. This constituted the domestic legal framework that was intended to enable Habré's trial.

But Senegal, which did not receive the financial support of the AU that had been promised and seemed to be dragging its feet for other more political reasons, did not pursue Habré for trial. It was to take two years more, and a new president in Senegal, for the AU to enter into a bilateral treaty with Senegal to create the Extraordinary Chambers in the Courts of Senegal.[95] In the meantime, planning for the trial had been hastened by Belgium's initiation of proceedings against Senegal at the ICJ in February 2009. Belgium alleged that there had been a failure on Senegal's part to carry out its obligations under the Torture Convention either to prosecute Habré or render him over for trial. The ICJ held that the country was in breach of its obligations to properly investigate and prosecute alleged torture committed by Habré.[96]

The Extraordinary African Chamber, which sat in Dakar and was funded by a mix of African and Western donors, was conferred the jurisdiction to prosecute and try the person(s) most responsible for torture and serious violations of international law committed on the territory of Chad from June 7,

[92] Ibid.

[93] Ibid.

[94] Decision of the African Union on the Hissène Habré Case, Assembly/AU/Dec.127 (VII), and in particular, Doc. Assembly/AU/3 (VII), paras. 1–3; 5(i) and (ii).

[95] *See* Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System, signed August 22, 2012.

[96] *See* Belgium v. Senegal, supra note 72.

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1982 to December 1, 1990. President Habré has since faced charges before the tribunal with his trial having opened on July 19, 2015.[97] His case closed on February 12, 2016.[98] The trial judgment was rendered on May 31, 2016. The former Chadian leader was convicted, while charges against up to 27 other alleged accomplices associated with his regime have already been issued by the domestic criminal courts of Chad in N'djamena. Habré's conviction was largely upheld on appeal in April 2017.

To conclude this section, it seems notable that the AU did not immediately endorse the expert committee recommendation to add criminal jurisdiction to the African regional court. Nonetheless, it should by now be uncontroversial that the modern origin of the idea for such extension of jurisdiction was born out of the Habré affair. It can be said to be part of that Chadian case's legacy. No explanation was given by the AU Heads of State for accepting the recommendation relating to the specific case of Habré but not the longer term proposal to create a regional criminal court. It is anecdotally reported that funding constraints played a key role. Yet, as will be seen in the next subsection, developments relating to a separate issue which raised concerns about foreign-administered justice in Africa and against Africans did encourage AU States to revisit the recommendation for a regional criminal jurisdiction.

5. THE "ABUSE" AND "MISUSE" OF UNIVERSAL JURISDICTION

The third factor was not the source of, but did catalyze, AU interest in creating a criminal chamber. This was the indictment of African State officials by the national courts of various European states. These included France, Spain, and Belgium, all of which raised legal and practical concerns for African States with respect to, for example, whether those foreign jurisdictions were complying with customary international law immunities. The practice in this area and how it appears to have even given rise to regional African concerns about the ICC itself has been analyzed elsewhere, so will only be briefly summarized here.[99] A key thing to note about the controversial doctrine of universal

[97] *See* Statement of the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, *Opening of Hissène Habré trial a milestone for justice in Africa*–Zeid. *See*, for more on this, the press release (July 20, 2015), www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16250&LangID=E#sthash.YltBQlkT.dpuf. (stating that the Habré case was "a historic example of regional leadership and willingness to fight against impunity for international crimes").

[98] Thierry Cruvellier, *The Trial of Hissène Habré*, THE NEW YORK TIMES (February 15, 2016), www.nytimes.com/2016/02/16/opinion/the-landmark-trial-of-hissene-habre.html.

[99] Charles Jalloh, *Regionalizing International Criminal Law*? 9 INT'L. CRIM. L. REV. 445 (2009).

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jurisdiction is that this issue predated the establishment of the Committee of Eminent Persons, which had examined the Habré matter and that then recommended the expansion of the jurisdiction of the African Court to include international crimes.

Let us illustrate with reference to the two most well-known controversies regarding "universal jurisdiction" and African States. The first was the Belgian indictment and the issuance of an arrest warrant for the Congolese foreign minister, Abdulayae Yerodia Ndombasi. This famously led the Democratic Republic of Congo (DRC) to initiate proceedings against Belgium at the ICJ in which the DRC alleged that Belgium had violated its obligations under customary international law. In a much-criticized decision, at least among some commentators who lament the majority's decision not to engage with the universality principle, the ICJ ruled in favor of DRC on February 14, 2002, finding that certain immunities are unopposable before the national courts of states even if they are not available to block prosecutions before certain international criminal courts.[100]

What is significant about the *Yerodia* case, from the perspective of our argument here, is that the African government concern about the possible abuse of the principle of universal jurisdiction by foreign courts had predated even the entry into force of the Rome Statute of the ICC. This of course was the case in relation to individual African States on their own, such as the Congo, not necessarily as part of the regional body we now know as the AU. That said, there is of course much interplay in the two. Once Member States have concerns about certain policy matters, including on foreign policy questions, they raise those issues bilaterally with the other states and at the same time pursue action within regional or international clubs that they are part of as a way of mustering political support. They could thus better identify collective solutions to initially individual problems. We have seen that phenomenon with other African States bringing up issues in Addis Ababa and New York, including on topics of international criminal justice. This, of course, is not unique in international relations.

The perfect example of this is the second round of universal jurisdiction-based indictments. These were against Rwandan leaders and led to a strong reaction from the AU that this constituted a blatant "abuse" of the principle of universal jurisdiction.[101] Certain French and Spanish courts had indicted

[100] *Arrest Warrant* case, supra note 3 at paras. 58–61.

[101] AU and EU Ministers agreed at their Troika Meetings in September and November 2008 to establish an ad hoc technical expert group to clarify the meaning of universal jurisdiction. It was constituted in January 2009 with three independent experts appointed by each side. For the AU, the membership was as follows: Mohammed Bedjaoui, Chaloka Beyani, Chris Maina Peter. The EU appointed Antonio Cassese, Pierre Klein, and Roger O'Keefe. The group was

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several high-level Rwandese officials. In the case of the former, this did not include President Paul Kagame, and in the case of the latter, it did. The judges sought warrants for him and 43 others including the Chief of Protocol to the President, Madame Rose Kabuye.[102] This would later lead to a major diplomatic row between Kigali and Paris, especially after Madame Kabuye was arrested in Germany, on a European arrest warrant. The AU subsequently adopted strongly worded resolutions that may have far-reaching implications for the development of state practice respecting universal jurisdiction. Those decisions most notably called for a moratorium on the issuance of arrest warrants against African leaders by European courts; decided to constitute an AU–EU expert group on universal jurisdiction with both African and European experts; and ultimately as of September 2010, seized the UN General Assembly's Sixth Committee of the matter. The Sixth Committee is now undertaking a global study on universal jurisdiction. The study continues as of this writing. In 2018, due in part to the politicization of the topic in the General Assembly and the call of many States for it to assist in bringing greater legal clarity, the International Law Commission added the topic to its long-term program of work based on a proposal of this author.

More pertinent for our purposes tracing the genesis of the criminal jurisdiction for the African Court of Justice and Human and Peoples' Rights, in several later decisions on universal jurisdiction the AU, because of the use of universal jurisdiction against Rwandese officials, directed its commission to explore, in consultation with the Banjul Commission and the African Court, the "implications" of empowering the regional court with jurisdiction "to try international crimes such as genocide, crimes against humanity and war crimes."[103] This decision was further reiterated during their annual 2009 summit in Sirte, Libya.[104] In other words, the African government concern about alleged abuse of universal jurisdiction seemingly returned the AU to more serious consideration of the proposal to endow the African Court,

assisted by a secretariat of in-house counsel comprised of Ben Kioko and Fafré Camara (AU Commission) and Sonja Boelaert and Rafael de Bustamante (EU Commission). *See AU-EU Technical Ad hoc Expert Group Report on the Principle of Universal Jurisdiction*, Doc. 8672/1/09 REV 1, para. 7 (April 16, 2009), www.africa-eu-partnership.org/pdf/rapport_expert_ua_ue_competence_universelle_en.pdf.

[102] For in-depth discussion of that case, *see* Jalloh, supra note 7.

[103] *See* Assembly of the African Union, Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, 12th Ordinary Session, 1–3 February 2009, Assembly/AU/Dec. 213 (XII), para. 9. This decision was reiterated in a subsequent decision of July 2009.

[104] Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.243(XIII) Rev.1.

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which had been initially proposed by the Committee of Eminent Persons, with criminal jurisdiction. Needless to say, the recommendation had essentially been initially put on the shelf. The concern about foreign-imposed justice from universal jurisdiction therefore resuscitated it and later bore other implications for the ICC's work on the continent.

The point I wish to make here is that the recent rounds of universal jurisdiction indictments against African leaders in Europe, most of which seemed to have ultimately been withdrawn, sped up urgency in the AU for an African mechanism that will try African crimes on African soil. Again, the fraught ICC–Africa relationship, which is important and will be considered next, played into this. But, by now, it should be apparent that this additional factor was only one of several aspects that seemed to strengthen the African government resolve to add a regional criminal jurisdiction in the AU's future regional court.

6. THE AFRICA–ICC RELATIONSHIP

The final and perhaps most important single concern that led African States to start fast-tracking their plans for the creation of a criminal jurisdiction stemmed from the African government dissatisfaction with the work of the ICC on the continent, and in particular, the activities of the Office of the Prosecutor (OTP) in the Sudan situation. It is widely known that the decision of the ICC Prosecutor to seek an indictment against the Sudanese Omar President Al Bashir in March 2008 provoked a strong reaction from the AU. In its first decision on the matter, the AU expressed grave concern that the delicate regional efforts to make peace in the Sudan may be impeded if not entirely jeopardized by such a move.[105] This same type of stance was taken by the AU Peace and Security Council when the ICC Pre-Trial Chamber (PTC) finally approved the proposed indictment for the Sudanese leader on charges of crimes against humanity.[106] The AU insisted that it was not against prosecution of anyone, but made clear that in light of the then humanitarian catastrophe that was taking place in Darfur, it was opposed to the timing of the prosecution. It felt that this would render it difficult to find a political solution to the conflict in Sudan. An interesting element of this decision was the

[105] Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan (Decision on the Application of the ICC Prosecutor), Assembly/AU/ Dec.221(XII), para. 1.

[106] Communiqué of the 175th Meeting of the AU Peace and Security Council, March 5, 2009, PSC/PR/Comm. (CLXXV) Rev.1, para. 6.

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direction that the AU Commission convene a meeting of African States Parties to the Rome Statute so that they could exchange views and develop recommendations on the ICC's work in Africa, especially its action "against African personalities."[107]

From the point of view of escalation of concern in the ICC–Africa relationship, the follow-on step was the AU's request for a deferral of the Sudan situation under Article 16 of the Rome Statute. This request was forwarded to New York. It was later reiterated. The repeated deferral request was implicitly rejected.[108] African States thereafter decided, collectively, that in view of the Security Council's implicit refusal to act to address the African government concern, none of them shall cooperate with the ICC in respect of the arrest and surrender of President Al Bashir.[109] This problematic decision, taken on July 3, 2009 at Sirte, Libya, remains on the AU books to this day. It underscored the African government conclusion that the timing of the indictment was wrong and had resulted in what the AU considered to be negative consequences for peace. However, from the perspective of ICC law, this decision arguably puts individual African States-Parties to the Rome Statute in violation of their obligations under the Rome Statute which imposes a general duty on all ICC States-Parties to cooperate with the ICC.

Besides this far-reaching decision framing the future of ICC–Africa relations in relation to non-cooperation in the Sudan situation, which has frustrated the attempts to have Al Bashir arrested to answer charges, the AU leaders also took another less well-known but equally important step in July 2009. It decided that the jurisdiction of the regional court of the continent should be enlarged to entrust it with the mandate "to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity."[110] Subsequent developments since then, including the issuance of indictments arising from the Kenya Situation, have all fueled the political posturing of African countries, insisting that the continent should develop its

[107] Decision on the Application of the ICC Prosecutor, supra note 42 at para 5.

[108] *See*, for detailed assessment of this issue, Charles Jalloh, Dapo Akande, Max du Plessis, *Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court*, 4 Afr. J. Leg. Stud. 5 (2011).

[109] *See* AU Assembly's Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/13(XIII) (July 1–3, 2009).

[110] Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.243(XIII) Rev.1 para. 5.

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own regional criminal justice system to prosecute serious crimes of concern to the continent as a whole.[111]

The upshot of all this for us was that the AU Commission contracted a non-governmental organization, the Pan African Lawyers Union (PALU) located in Arusha, Tanzania, to prepare a detailed study and a draft treaty that would amend the protocol of the Statute of the African Court of Justice and Human Rights. In June 2010, PALU issued its first report and draft legal instrument to the AU Legal Counsel's Office which then requested certain changes. A revised version of the draft treaty was submitted in August 2010 to two validation workshops held in October and November 2010. Legal advisers of African States then held several meetings to consider the draft instrument in March, May, and October/November of 2011, which in turn led to further amendments and adoption of the draft protocol.

Upon approval at the ministerial level, the treaty was then submitted to the AU Assembly in July 2012, and contrary to general expectations that it would be adopted, the Heads of State requested further study of the "financial implications" of the expanded jurisdiction. They also sought clarification of the definition of the novel crime of unconstitutional change of government. A report was subsequently prepared on which further consideration was required, although it glossed over the huge financial costs of international criminal jurisdiction. In the final step, in a May 2014 meeting, the legal advisers of AU States met in the inaugural meeting of the Specialized Technical Committee on Legal Affairs in Addis Ababa where additional amendments to the protocol were made. These were thereafter endorsed by the ministers of justice and then forwarded to the Assembly of Heads of State

[111] Following post-election violence which occurred in Kenya in 2007–2008 in which over 1,300 people were killed, the ICC Prosecutor sought judicial authorization to carry out investigations in Kenya for crimes against humanity. That request was granted by most of the PTC, in March 2010, which was followed by summonses to appear for six high-level Kenyans in December 2010 based on prima facie evidence tending towards crimes against humanity. Four months' later, the judges gave a decision favorable to the Prosecution including in respect of the Deputy Kenyan Prime Minister Uhuru Kenyatta whose charges were confirmed on January 23, 2011. An admissibility challenge was filed by Kenya, which was then rejected by the judges in May 2011 and confirmed three months' later by the Appeals Chamber. The judges committed the suspect to trial and several trial dates were fixed, and after several adjournments were eventually fixed for end of October 2014. Another prosecution request for a subsequent adjournment was rejected by the judges, following which the prosecution withdrew the charges on December 5, 2014, without prejudice. Mr. Kenyatta, running on an anti-ICC platform, had won presidential elections on 10 March 2013. Kenya has contemplated withdrawal from the ICC and is pushing African States towards the idea. *See* for commentary, Charles Jalloh, *Kenya Should Reconsider Proposed Withdrawal from the ICC*, JURIST (September 13, 2013).

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

which adopted the protocol and opened it for signature on June 27, 2014. As of writing, nine African States have signed the treaty. None has yet ratified it.

A. *Innovations in the Criminal Jurisdiction of the African Court of Justice and Human and People's Rights*

This chapter, when it opened, suggested that one of the potential benefits of having regionalized criminal courts, whether within a human rights court as proposed for AU States or independently as part of a standalone criminal jurisdiction, is that the crimes of special concern to a particular region could be addressed in a way that might not be feasible in an international tribunal. An examination of the Malabo Protocol seems to bear this argument out. Even though the treaty is not yet in force, we can anticipate that based on the treaty-making practice in Africa, we will likely see the achievement of the 15 ratifications required to bring the treaty into force in possibly between the next 5 to 10 years. Of course, if there is serious member state push, it is possible for that to occur sooner as well.

1. Expanding the Scope of International Criminal Law

First, besides the fact that the African Court will have a tripartite jurisdiction over civil, general, and criminal matters, which itself is a first in the history of regional and international criminal courts, the protocol contains an expansive subject-matter jurisdiction over serious international crimes like genocide, crimes against humanity, war crimes, and the crime of aggression. The definitions of these crimes used international instruments, in particular the Rome Statute, as the initial inspiration for the codification. This seems appropriate in the sense that, because the ICC has to date been endorsed by 34 African States, it is important that the AU States reflect the consensus definitions of at least a large part of its 55 Member States and the additional 90 countries from other parts of the world that have joined the ICC. Africa being a part of that wider community should ensure its prohibitions help to solidify that arguably emerging body of law.

Nonetheless, as I further discuss in Chapter 8 of this volume, though the Rome Statute was taken as a starting point, it was rather interestingly, from the perspective of the normative development of a strong corpus of international criminal law, not seen as the be-all and end-all. In other words, African States felt that the definitions of those "core international crimes" could, as appropriate, be supplemented by African States to reflect progressive developments in the law. They also naturally accounted for the specificities of the African context

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in fleshing out some of the prohibitions. An example of the former is illustrated by the tweaking of the definition of the crime of genocide. While the definition incorporated into Article 28B of the Malabo Protocol copied verbatim the one contained in Article 6 of the Rome Statute, which itself can be traced back to the widely endorsed 1948 Genocide Convention, AU States decided to add a new paragraph to capture and even expand upon the legacy of the ICTR in the *Akayesu* case in relation to acts of sexual violence by criminalizing "acts of rape or any other form of sexual violence," whenever they are committed in a genocidal context. This codification is an important step forward in the development of the crime and modern international criminal law, especially given the horrific acts of sexual violence in contemporary armed conflicts. It also helps to address a gendered blind spot of international criminal law.

In terms of the latter, another example is the crime of aggression which had not yet entered in force for the ICC. The AU States took the essence of the Rome Statute definition in their criminalization of the crime of aggression in Article 28M. But, here again, they went well beyond it both in terms of the underlying prohibited acts and the persons who can commit the crimes. Though there were other differences in the African definition which could raise questions of inconsistency in the prohibition of aggression vis-à-vis the Rome Statute and other definitions developed under the auspices of the UN, a particularly interesting feature is that the AU version of the offense can be committed not just by a state but also non-state actors. Sayapin discusses these elements in Chapter 11 of this volume.

2. Bridging International and Transnational Crimes

Second, and going much further than the incorporation of certain international crimes into the Malabo Protocol, African States have in their instrument tried to prohibit offenses "of particular resonance on the continent."[112] This means that they have attempted to overcome the barrier, artificially drawn in theory and hard to distinguish in practice, between "international crimes" and "transnational crimes." Thus, in addition to war crimes, genocide, crimes against humanity, and aggression, the Malabo Protocol also contains the crimes of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources. All these crimes are discussed in several standalone chapters of this book.

[112] *See* Pacifique Manirakiza, *The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa*, in AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 375, 388 (Vincent O. Nmehielle ed. 2012).

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What is particularly intriguing about some of these nine additional offenses is that they extend beyond concern about individuals to also addressing environmental issues such as toxic dumping. There is also the collapsing of what we might consider more political crimes and more economic crimes. The predicate context in which governance deteriorates in a given state and on a path toward open conflict is also addressed through crimes like corruption. Moreover, some of these crimes that have historically been of great concern to Africa such as mercenarism and corruption have not generated significant international attention or interest before African action at their internationalization. It should not be surprising therefore that such crimes are prioritized by AU States within the framework of their regional court, since those kinds of offenses tend to be ignored by international criminal tribunals. For countries like Trinidad and Tobago, that apparently continues to advocate for drug trafficking to be treated as a matter of sufficient international concern to merit inclusion in the subject-matter jurisdiction of the ICC, one could see such an alternative approach as we see in Africa offering a potentially more viable solution. Here, instead of unsuccessfully pushing its efforts for criminalization in The Hague, it could seek a regional convention that prosecutes that same transnational crime within a court or tribunal in the Latin America and Caribbean region.

3. Extending Criminal Liability to Corporations Involved in Atrocity Crimes

A third feature of the AU court's treaty is also very significant considering the link between rights violations and resource driven conflicts: criminal responsibility is not just individual in nature, but also can be invoked in respect of corporate entities. Under this scheme, the executives of multinational corporations can be held individually responsible for participating in the commission of the international and transnational offenses codified in the Malabo Protocol, where those are committed in the territory of an African State party. But the corporations that they run could also be prosecutable – as Kyriakakis discusses in Chapter 27. So, to the extent that they aid and abet or instigate or somehow facilitate the commission of gross international and transnational crimes, they can also be held directly accountable in the States Parties to this regional treaty or in the regional court. This will likely be a controversial feature of the court, especially in the parts of the world from which many corporations that fuel third world conflicts come. On the other hand, one only has to think about the examples of contemporary "resource conflicts" such as conflict oil, conflict diamonds, and so on to note the possible significance of this regional crime in a continent whose many wars are somehow always linked to resource or mineral extraction.

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This extension of criminal liability, in recognition of the role played by corporate entities in fueling contemporary conflicts in which atrocity crimes are committed, did in fact lead to a proposal during the Rome conference to include that type of jurisdiction in the permanent ICC. That suggestion apparently failed, due largely to the opposition of some powerful Western States. From the perspective of the developing world, some might perceive this as proof of the predominance of the powerful countries in shaping the form that international law takes to suit their interests. Indeed, as Vincent Nmehielle has argued,

> the inability of international criminal justice mechanisms such as the Rome Statute to address corporate criminal responsibility is indeed a challenge to the credibility of enforcing international criminal law in Africa and in most of the developing world where multinational corporations have not been known to be innocent in allegations of complicity in the commission of atrocity crimes.[113]

Though the parameters of how this corporate criminal liability would work in practice remain to be seen, as with the above discussed and indeed other aspects of the Malabo Protocol, any success in holding corporate or legal persons liable for atrocity or other transnational crimes holds the potential to expand the reach and effectiveness of international criminal law. It will likely spark conversations about the scope and reach of the future of this body of international law in light of the relatively more limited mandate and jurisdiction of the ICC. It could even open the door for other regions of the world, for example Latin America, to potentially use the African Court as a model. To that extent, by unlocking the idea of corporate criminal prosecutions for international and transnational crimes, Africa might well make a useful contribution to the development of international law. For it is plausible, as we have seen in other substantive issue areas, mainstream international law might develop in this direction as well. The ILC's draft convention on crimes against humanity, which was adopted on first reading in the summer of 2017, provides space for liability of legal persons for crimes against humanity in the national jurisdictions of those states that recognize such type of liability.

4. Road-testing the Public Defender Model

Fourth, and turning more to the institutional dimension of the court, it is noteworthy that the Malabo Protocol sought not just to reflect the particular

[113] See Vincent O. Nmehielle, *'Saddling' the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?* 7 Afr. J. Leg. Stud. 7, 30–31 (2014).

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

African concerns but also some of the best practices in the establishment of international criminal tribunals. As the first regional criminal court, and on top of that, one embedded within the framework of a permanent regional court of justice, it was explicitly determined to follow the pretrial, trial, and appellate chamber structure of the ICC for the International Criminal Law Section of its jurisdiction. It is not certain that this was a wise decision, given the practical limits now evident in that model for the world criminal court. Nonetheless, in addition to the usual organs of prosecutor, chambers, and registry, the ACC would be the first permanent regional tribunal to include a full-fledged defense office organ. This last-minute change, at the proposal of the Office of the Legal Counsel of the AU in the May 2014 Addis Ababa meetings (for which one of the present authors had served as an independent expert), is significant. The inattentiveness to defense needs has been an institutional weakness for modern international courts. This includes at the ICC itself, which does not have a full-fledged defense office. Having such a mechanism essentially ensures that the defense office in the future tribunal will be a more co-equal organ to the prosecution and the other organs of the tribunal. It thereby helps to ensure greater equality of arms between the adversarial parties in the proceedings. Taylor thoughtfully discusses the defense office feature in Chapter 24.

7. THE LEGAL RELATIONSHIP BETWEEN THE AFRICAN COURT AND THE INTERNATIONAL CRIMINAL COURT

In this section of this chapter, we consider a question which tends to lurk in the background of the ongoing debates among ICC supporters about the AU's proposed criminal chamber with jurisdiction to prosecute Rome Statute crimes. That is, the nature of the legal relationship that we can begin to expect between The Hague-based court and its African counterpart if and when the latter's treaty comes into force. The answer to this issue is important, not just for the Africa region but also for the argument made here that regional courts from all parts of the world could potentially become integral to an interlocking web of future enforcement regimes for international criminal law.

A. *The Shared Goals of the ICC and the African Criminal Chamber to Tackle Impunity*

The legal texts of the Rome Statute and the Malabo Protocol both contain jurisdiction sorting provisions that would permit the two bodies to function in a manner that is mutually supportive and complementary of each other. The preambulary provisions of both instruments set out the core purposes of the two tribunals. The ICC Statute affirms, among other things, that "the most

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serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." It speaks to a determination to "put an end to impunity for the perpetrators of these crimes and thus to contribute" to their prevention, recalls the "duty of every state to exercise its criminal jurisdiction over those responsible for international crimes," and emphasizes that the ICC "shall be complementary to national criminal jurisdictions." These are the words of the preamble.

For its part, the Malabo Protocol expresses similar sentiments, although in relation to the specific African context. It, among other things, recalls the AU's right to intervene in Member States in grave circumstances where war crimes, genocide, and crimes against humanity have occurred as discussed earlier. It also avers to serious threats to legitimate order in order to restore peace and security, and reiterates respect for some of the core principles contained in the Constitutive Act including the "condemnation and rejection of impunity" generally and in respect of specific crimes such as terrorism and aggression. The preamble further acknowledges that the proposed court can play an important role in securing peace, security, and stability on the continent as well as to promote justice and human rights; and notes that African States were convinced that the adoption of the protocol "will complement national, regional and continental bodies and institutions of human and peoples' rights." It could have mentioned the ICC or any international courts or bodies, but did not do so. Neither, by the same token, did it frown upon them.

B. *Complementarity as a Jurisdiction Regulating Principle*

In addition to expressing the above guiding principles, the ICC Statute explicitly provided in substantive Article 1 that the court has power to "exercise its jurisdiction over persons for the most serious crimes of international concern" and again reiterates that the Court was intended to round out national criminal jurisdictions. This complementarity is given effect in the admissibility provisions, which regulate the ICC's concurrent jurisdiction with its States Parties, and in particular Article 17. The entire scheme rests on the important premise that the Member States enjoy primary jurisdiction and consequently the right to first assert that jurisdiction, whereas the court only has secondary jurisdiction and a right to act as a last resort where certain conditions are met. Thus, the ICC is to deem a case inadmissible before the Court where 1) it is being investigated by a state with jurisdiction and the state has decided not to prosecute, unless that decision to prosecute is a result of unwillingness or inability of the state genuinely to prosecute; 2) where the case has been investigated but a decision is made not to prosecute; 3) the person

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concerned has already been tried for conduct which is the subject of the complaint; and finally, 4) the case is of insufficient gravity to warrant further action. What will constitute unwillingness and inability is further fleshed out in two additional paragraphs of Article 17.

Similarly, inspired by Article 17 though not referring explicitly to the ICC Statute or the ICC itself, the Malabo Protocol also considers that it will be guided by the complementarity principle. In the main, with very few changes to the wording, the ACC also establishes that its jurisdiction "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."[114] The Malabo Protocol goes on to further reflect the admissibility provisions of Article 17 of the Rome Statute in several subsequent paragraphs of Article 46H.

It does not, however, mention specific international criminal jurisdictions like the ICC. Interestingly, the initial PALU draft contained a specific reference to complementarity with the ICC. But that reference was removed from later drafts, likely due to the fraught political climate between the AU and the ICC at the time. Since the two courts will be operating at a horizontal level, as there is no legal hierarchy between them, this would imply that the two bodies would have to work out in advance how they will relate to each other through some type of relationship agreement and/or through their jurisprudence. Managing this up front would redound to the benefit of both institutions. There is precedent for both institutions entering into relationship agreements or memoranda of understanding. The details, of the type found in Articles 18 and 19 of the Rome Statute, in respect of preliminary rulings regarding admissibility and challenges to the jurisdiction of the African Court by African States Parties, were also not addressed in the Malabo Protocol. Presumably, this is because it was felt that these could be better addressed under the rules of procedure.

Clearly, in respect of both the ICC and the ACC, complementarity is envisaged vis-à-vis the national jurisdictions of states parties to the relevant instrument. Under both, as a general rule, the two entities are secondary backup systems to those of the Member States which have the first bite at the apple to investigate or prosecute. Where unwillingness or inability are shown, the international or regional jurisdiction would then be triggered. The major difference in the two relates to the African Court's inclusion of regional economic communities in the calculus. This suggests that a double failure is required, to the extent any of those had provided for jurisdiction over international crimes. As no regional economic community has yet had jurisdiction, even though judges of the Economic Community of West African

[114] Malabo Protocol, art. 46H.

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

States (ECOWAS) Court of Justice have shown interest in advocating for it, we can set aside that discussion for now.

C. *Positive Complementarity for National and Regional Courts*

A legal question arises whether from the perspective of the Rome Statute, the complementarity clauses in the two treaties, both of which contemplate state to court admissibility considerations, can apply to the court of a regional organization. Here, at least two possibilities can be discerned. The first is that we can analyze the complementarity relative to the States Parties of both courts. In this scenario, for all the States Parties of the ICC that also happen to endorse the African Court, the admissibility analysis of complementarity would at the level of the ICC require an examination of whether the state took action to prosecute the Rome Statute crimes. Such an assessment could include whether that was done directly by the state itself, or alternately for example, through a farming out of the work through a self-referral of its own situation to the regional African Court. The question would then arise, where this has happened, whether the regional court's actions amounted to the types of credible or genuine investigations and prosecutions reflecting the kind of active pursuit of the same persons for substantially the same conduct such as to render the situation and cases inadmissible before the ICC.

As a matter of principle, as mentioned above, since the ICC itself including the OTP along with academics have been advocating the policy of proactive or positive complementarity, which basically refers to the court encouraging States Parties as well as non-parties to take effective investigation and prosecution of Rome Statute crimes, it would seem that a flexible reading of the Article 17 requirements would help achieve that goal in the region of Africa. In this way, the ICC, instead of foreclosing the option of regional prosecutions, would support its States Parties and even others to do more to tackle impunity.

Under the ICC Statute, African States, which constitute the largest single regional bloc within the Rome System of justice with 34 members, bear the primary responsibility to prosecute and yet experience serious international or transnational crimes that they are hardly able to prosecute. The over-representation of African States on the ICC situational docket has brought into stark relief the fact that many African States presently lack the substantive capacity to prosecute serious international crimes. The handful that might have capacity such as to fulfill the complementarity requirements might have difficulty adjudicating highly political cases or at least those involving the most powerful government officials.

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One could imagine a scenario then, as we see in Uganda for instance, where there might be a preference to use the domestic courts to harass and imprison opposition leaders. One could imagine such a context rising to persecution of a person and say a particular ethnic group, giving rise to the commission of international crimes. In the ICC itself, if we think of the Kenya situation, we can see some of the challenges that might be involved in the investigation and prosecution of incumbent government officials such as the president or his deputy. That experience perhaps underscores the need for a regional instead of solely a national alternative. The regional jurisdiction would, if this argument is right, complement the international court's reach. Under this argument, each of the African States Parties to the ICC, as well as African non-parties, should be positioned to prosecute the core heinous offenses within the Court's jurisdiction as well as become part of the regional and international mechanism.

There is nothing in the Rome Statute, and international law generally, to prohibit them from doing so individually or through a collective such as a regional body like the AU's criminal court. Nor, for that matter, are there any prohibitions for any other regional body in say Europe and Latin America or Asia to come together to do collectively what each of them can do alone. In this way, the states of the region can, in compliance with their obligations under international law, cooperate whether bilaterally or multilaterally to discharge their duty to prosecute core international crimes. The only caveat might be that they must then do so in line with the principles of the Rome Statute which would not accept sham proceedings aimed merely at shielding the accused. On the other hand, in relation to the situations where overlaps of situational and individual jurisdiction arise between the two courts, some sort of jurisdictional coordination will be required. That is where creative interpretation of both the ICC Statute and the Malabo Protocol could offer practical solutions.

The above interpretation, which advocates that complementarity is flexible enough as a jurisdiction sorting concept to admit of regional bodies such as the future African Court in additional to national jurisdictions, is consistent with the views of some of the ICC's Member States. For instance, on March 14, 2014, Kenya proposed, in light of the AU decision to adopt the protocol, an amendment to the Rome Statute that would explicitly mention regional organizations.[115] Though the issue seems to still be under discussion, it appears

[115] The proposal read, as follows, with the bracketed portion being the new text: "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national [and regional criminal] jurisdictions." *See* Kenya: Proposal of Amendments, UN Doc. C/N/1026/2013/TREATIES/XVIII/10 (Depositary Notification).

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that there is some who find such amendment unnecessary since the present framework can accommodate such a regional body. Chapter 24 assesses in detail the ACC's complementarity principle.

8. KEY CHALLENGES FOR THE FUTURE AFRICAN COURT

In as much as the preceding sections have suggested that there are good reasons favoring the prosecution of international and other crimes within regional courts such as the proposed African Court, this is only one part of the picture that we must assess. The other half of the story is the fear that such a regional project could undermine, if not imperil, the hard-won achievement of a permanent international penal court. So, while due to space I will not consider all the issues, let us now discuss five major concerns that could give cause for pause in terms of the establishment of a criminal chamber within the African Court of Justice and Human Rights. I will attempt to offer some preliminary reflections that could help alleviate some of these concerns.

A. *Practicality of a Criminal Chamber*

The first issue is one of pragmatics. It can be argued that it is unlikely that the proposed criminal chamber will effectively exercise its jurisdiction over international crimes in Africa. The fact is that, idealism and aspiration aside, there is a history of poor performance by continental African institutions. Naming names can be controversial in this respect, but as an example, we could point to the African human rights system itself. That system, by any measure, is seen as underperforming behind its older and more established European and Inter-American counterparts.

Take, for instance, the work of the African Commission on Human and People's Rights based in Banjul and created by the 1982 African Charter on Human and People's Rights. That body, which was considered innovative for combining notion of rights and duties for the first time in a major human rights treaty, was held up for its promise much like we might do today for the innovations we can discern from the Malabo Protocol. But, the practice of that institution has not matched the initial excitement invested in its promise. There has been, among other things, a woeful lack of money and resources, and various operational difficulties that have limited that body's tremendous promise to guarantee human rights in Africa. On top of that, due to the lack of bindingness of its decisions under its communication procedures, that body's work, while generally important in advancing the cause of human rights on the continent, has been stymied with non-compliance on the part of governments found to have violated the human rights of their citizens.

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Relatedly, when the decision was made to improve the Banjul Commission and create a regional court that could enter binding decisions against African State violators of human rights, only a handful of countries have accepted its jurisdiction to hear individual complaints. At last count, there were only seven following the withdrawal of Rwanda's declaration after several cases were failed against it; meaning that the premier human rights court on the continent, has no jurisdiction over the individual human rights concerns of the citizenry of roughly 48 African countries. In fact, only 30 of the 55 AU members have ratified the treaty establishing the human rights court. If we look at the estimated count of the populations of the countries that are covered, and those that are not, we will basically find that of approximately 700 million people, less than roughly 100 million enjoy the protective umbrella of the continent's premier human rights court. It is remarkable that the Court's protective ambit, as limited as that itself could be, excludes approximately 600 million Africans. The end result is that, in well over ten years of its existence, the African Court has so far only had a few cases. Ironically, even the ICC itself has a broader jurisdictional reach in Africa than the Arusha Court, at more than half of the African States Parties.

In the same period, since it was formally established in 1998, the present human rights court has issued only a handful of judgments on the merits. And, even in those instances, it seems uncertain that the countries in issue have implemented those decisions. We also do not appear to have much pressure for compliance from the AU or other African States. On the other hand, as one African commentator who himself has been a member of the Banjul Commission has argued, we must take into account the relative youth of AU institutions starting with the AU itself and its sub-organs and entities such as the Court.[116] The more the AU can strengthen itself, the more likely that its States Parties and sub-regional bodies of African States will become stronger as well. Be that as it may, even if the criminal court is created, it will almost certainly have some of the same organizational start-up problems as we have seen affecting other AU created institutions. Funding constraints will be part of this.

This is only somewhat different, however, from the experiences of the international criminal courts we have had. For example, the ICTY took many years to settle into and even ramp up and then conclude its work. The ICTR, which reflected some of the travails of African institutions in its early years, also took a few years before it could get on track. The SCSL, though it issued its first indictments within six to eight months of the Prosecutor's arrival in Sierra Leone, was only expected to operate for three years. As it closed down it had only

[116] *See* Manirakiza, supra note 113 at 399.

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

completed about ten cases and operated for nearly a decade and a half. The Cambodia tribunal, for its part, is also notorious for its own manifold problems. In other words, though we might hope for something different, the African and other international precedents do not suggest many reasons to be too confident. The wide jurisdiction and the sheer breadth of the project to merge three courts into one may be innovative, in principle, but does not come without their own major institutional headaches.

Lastly, and even more significantly, what about the ICC itself? It has taken the ICC about ten years to finish its first case from investigations to conclusion in the seminal Thomas Lubanga trial. It also, after so many years, just secured its first acquittal and managed to complete a second case, though with some judicial help to the prosecution through recharacterization of the charges. The first point to take away from this discussion is that there will be problems. The second point is that such problems are not unique to Africa. There, they might be particularly acute, but they do also expose the teething problems associated with the development of such complex institutions on which we often place so many high and unreaslitic expectations.

B. *Lack of Political Will to Prosecute Those Most Responsible for Atrocity Crimes*

This will be another concern. Failure of the AU to cooperate with the ICC through its Sirte July 2009 decision, and in the arrest of Bashir, suggests that the AU will not be willing to punish Heads of States that commit crimes within the framework of a regional court. In fact, on this argument, the inclusion of a clause reiterating the immunity of sitting presidents from prosecution, deputy presidents, and other senior government officials in Article 46A*bis* of the Malabo Protocol, can be seen as proof of the intention to exclude real accountability.[117]

Those in the highest positions of government tend to be the ones implicated in fomenting the violence that in turn often leads to the commission of atrocity crimes. A look at the Sudan and Kenya situations as well as those of

[117] See, for concerns about the wisdom of that provision from a policy level for the stability of African States, Charles Jalloh, *Reflections on the Indictment of Sitting Heads of State and Its Consequences for Peace, Stability and Reconciliation in Africa*, 7 Afr. J. Leg. Stud. 43 (2014). For a detailed argument, finding that the provision is often wrongly assumed to be inconsistent with international law which is not necessarily the case, *see* Chapter 29 of this volume, and also Dire Tladi, *The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff*, 13 J. Int'l. Crim. Just. 3 (2015); Adejoké Babington-Ashaye, *International Crimes, Immunities and the Protocol on Amendments to the Protocol of the Merged African Court: Some Observations*, in Shielding Humanity: Essays in Honor of Judge Abdul G Koroma 406 (Charles Jalloh and Femi Elias eds. 2015).

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the DRC, the Central African Republic (CAR), and the various other African situations currently before the ICC, and before that the Rwanda and Sierra Leone conflicts, would bolsters this argument. In other words, from this admittedly skeptical view, there is even risk of political manipulation of any new chamber by self-interested African leaders. This argument again finds some traction in the last-minute AU decision to include a clause conferring temporary immunity for sitting Heads of State and other senior government officials, largely at the behest of Kenya.

But several other factors will be important in a regional criminal justice process in Africa. It may also be that there is reason to be optimistic that we are better off having a regional mechanism as well than if we left prosecutions of international crimes solely to individual African jurisdictions. Political realities and past history suggest that African States, like some others elsewhere, will probably try to influence the work of national justice institutions if they seek to prosecute high-ranking government officials. Similarly, in the same way that international courts are not insulated from the politics of international institutions, it is highly likely that a regional court will have greater independence and impartiality compared to a national court. It might therefore have greater likelihood of non-manipulation by a single state if the cases take place in a regional or international court rather than if prosecutions occurred at the level of the national jurisdiction.

C. *History of Underfunding African Human Rights Institutions*

Third, and leaving aside potential institutional deficiencies and the controversies surrounding immunity, perhaps the biggest constraint that any future ACC will face is a lack of the resources and funding for its effective functioning. This is a significant concern that could stand as a real impediment to the functioning of the criminal chamber. The entirety of the AU receives programmatic support for many activities through donor assistance. And, when it comes to international criminal trials, the AU found it difficult to convince its Member States to marshal the resources necessary for the trial of a single case involving a single person (i.e., Habré in Senegal). If the AU was unable to do more than offer a modest contribution of $1 million of the total funds required to carry out the single Habré trial in Senegal, despite the repeated pledges of some its members to do so, is it realistic or feasible to expect that they will provide the funds required to carry out expensive international investigations and prosecution of crimes across several countries on the African continent? Probably not.

In any event, leaving the Habré case aside in relation to which there was an order for the AU to establish a trust fund to secure reparations for victims which has not been established, the creation of a single regional criminal chamber in Africa does create space for economies of scale. Of course, the unit costs of an

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international criminal trial, at least those done in the current ad hoc international tribunals, appear to be roughly in the neighborhood of between $15 and 20 million per trial. Certainly, African States will not at present be willing to pay such high expenditures for a single criminal trial. A more modest and more realistic system will have to be devised. This should consider the cost of justice in the countries of the continent. But, even if the costs of trials are dramatically lower in the future African Court, the reality is that millions of dollars will still be needed if the court is to play a useful role in the fight against impunity across the region. It would seem that it will obviously be better if African States, themselves impoverished, can come together to marshal the resources required to prosecute the international crimes in their own backyards rather than creating ad hoc tribunals such as the Senegal Extraordinary Chambers or trying to do so alone within the framework of their national courts. Nonetheless, in carrying out investigations in situation countries, some of the same types of challenges that the ICC have faced will likely come up also for the African Court so long as it enjoys jurisdiction spanning several African States. These inter-related concerns will have to be addressed if the institution is to be more than a mere paper tiger. The two chapters on the challenges of financing the future court, in Part 4 of this volume, provide a sobering read.

D. *Fear of Undermining the ICC*

A fourth important challenge for the idea of an effective an African criminal jurisdiction is more philosophical. This is the fear that its very existence could undermine the important ongoing work of the ICC on the continent. Indeed, the wider context of establishment leaves the African Criminal Chamber vulnerable to the perception, whether legitimate or not, that it is nothing but a form of political backlash against the ICC.

At the same time, it has been shown that a coming together of different factors has driven the agenda for a regional court. Consideration of the formal AU decisions in which they continue to condemn some of the ICC's actions tend to lend it some credence. And the AU's failure to repeal some of these decisions, including the July 2009 decision on regional non-cooperation taken at Sirte Libya, does not help matters. Nor does the refusal to allow the ICC to open a liaison office in Addis Ababa. All these might suggest that with a regional court in place, there will likely be a shift of cooperation away from The Hague. This is speculative, as it is hard to tell. In the final analysis, what is clear is that there is a need for dialogue and engagement between the AU and the ICC. Recent developments, including the first amicus curiae application by the AU Commission in 2015 in which one of the present author was involved as external counsel to bring the AU's legal concerns to the Appeals Chamber in the Kenyan cases, is a

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step in the right direction. This opened the door for the ICC Appeals Chamber to, in turn, invite the AU to participate in recent proceedings concerning Al Bashir and the question of immunity and the duties of states to cooperate in his arrest in 2018. These demonstrate that valid legal concerns raised by AU States will be taken seriously by the judges, and still allows the ICC to exercise its independent judicial-making authority to review politically controversial cases.

E. *Regionalism and Fragmentation of International Criminal Law*

A final argument we could raise against the regional criminal jurisdiction is the notion that regionalism is not a good idea because it might lead to the further fragmentation[118] of international criminal law. To the extent that there is conflict in the norms developed in Africa with those in the ICC Statute, this would be undesirable from the perspective of the goals of African States as well as the development of a universal international criminal justice system. The potential mushrooming of regional and sub-regional courts creates the prospect for courts with distinctive legal bases that could have inconsistent and incoherent legal bases, and apply inconsistent interpretations to decisions adjudicating war crimes, crimes against humanity, genocide, and the crime of aggression. This would threaten the unity of international penal law. On the other hand, the African experiment, by taking as a starting point the Rome Statute and progressively building upon it in most instances, implies that there is a desire to ensure that the obligations assumed by African States are at least compliant with the ICC regime. This might help to maintain greater coherence and perhaps even help to avoid fragmentation of regional and international criminal law.

9. CONCLUDING REMARKS AND RECOMMENDATIONS

This chapter has examined whether there could be a viable place for regional courts in the global struggle against impunity. In this view, much as in the international human rights system that has developed over the last half century, international criminal law—which is still trying to find the best ways to dispense justice on behalf of the victims of atrocity crimes—would likely benefit from

[118] The wider topic of fragmentation of international law, which is beyond our limited scope here, has generated great scholarly interest and even attracted detailed study by the International Law Commission. *C.f.*, Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law. Postmodern Anxieties*? 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553 (2002). For a careful study, which also discusses the challenge of regionalism in the context of fragmentation of international law, *see* FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION OF INTERNATIONAL LAW REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION, UN Doc. A/CN.4/L.682 (April 13, 2006).

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regionalization of some of its enforcement of its prohibitions. Each part of that mutually reinforcing enforcement system can play its own role in the fight toward the same goal of combating impunity for serious international crimes. I have suggested in this chapter that, as in the global human rights system, international criminal law could also have at least three layers.

First, consistent with the principles of sovereignty and international law, national courts would continue to act as the first responders to the impunity crisis that we presently face in the international community. In the Africa region, whose overwhelming number are supporters of the Rome Statute for example, the regionalization of the duty to prosecute through an institutional mechanism will help bolster the capacity for countries in the continent to prosecute war crimes, crimes against humanity, genocide, and aggression. Those same national courts would also have jurisdiction over the transnational and other economic offenses that are of particular concern to the African region and that are codified in the Malabo Protocol. By pooling their resources, they would likely be better able to give effect to the fundamental precepts of complementarity and discharge their legal obligations to prosecute.

Second, at the regional level, again as we can tell from the Africa illustration, we could have regional courts endowed with jurisdiction to prosecute the crimes prohibited in the Rome Statute and possibly additional others that have also been condemned by the international community such as torture and terrorism. There is even the possibility, once the regional court door is opened, that we might also see the capacitation of courts embedded in sub-regional bodies such as the East African Court of Justice or the ECOWAS Court of Justice to prosecute such crimes. Other regions and sub-regions of the world might explore this model over time, both for efficiency and other practical reasons. Such a development would seem consistent with the experience of human rights courts, allowing each region of the world the opportunity to give its own unique stamp to the development of a global anti-impunity architecture. There are already strong indications of such potential developments in the Americas region.

Finally, at the international level, we would have an additional back-up system for whenever national courts are unable and or unwilling to prosecute. Here, the ICC will continue in its role as the permanent and premier world criminal court. Its place would be reserved to step in when states, including the ones in the African region, prove to be inactive, unwilling, and/or unable to prosecute the heinous crimes of most serious concern to the international community as a whole, consistent with the complementarity principle contained in the Rome Statute. This role will be crucial when it comes to investigating, trying, and punishing sitting Heads of States, their deputies or

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other senior government officials that are, for one reason or the other, not easily prosecutable at the national or regional court level.

A few preliminary recommendations can be developed from the discussion in this chapter. For the ICC, as its current president Judge Chile Eboe-Osuji (Nigeria) seems to have argued in Chapter 28 of this volume, an important one is that the court should keep an open mind toward working with not just states but also regional organizations, as it develops proactive or positive complementarity. This implies a willingness to engage, whether at the organ or ICC level, with initiatives that might be in development in different regions of the world. Such engagement would help to ensure that whatever regional systems are designed will be compatible with the goals of the Rome Statute and the regime that it is developing. The ICC, which will continue to be at the center of that system wherever national or regional action falls short of the expectations of the international community, must recognize that this will be in its long-term interest. It certainly seems obvious that the Court will in any event be unable to fulfill all the hyper expectations created for it in the minds of victims of atrocity crimes around the world.

The type of engagement with African concerns we saw through the 2013 Assembly of States Parties (ASP) debate or the 2017 hosting of joint seminars with the AU, for instance, are all important in creating mutual trust. In turn, that could lead to deeper conversations about how the Court, without transforming itself into a development agency, could work with African States to turn over a new leaf. On the side of the AU, it could continue to encourage its African States Parties and possibly take decisions in that regard to push for a closer dialogue within the ICC States Parties on positive complementarity and an assessment of the implications of regional court jurisdiction. Consideration should also be given to the role the ICC and other international partners, such as the UN, could play in offering technical assistance in anticipation of more signatures and further ratifications of the Malabo Protocol.

To national jurisdictions that are part of the 123 States Parties of the ICC regime, especially those that are struggling to come out of conflict, consideration should be given to collaborating with other states at the regional or even sub-regional level in order to explore the implications of cooperating to give effect to their duties to prosecute war crimes, genocide, crimes against humanity, and the crime of aggression. In a new spirit of mutual accommodation, the ICC could work out how to meaningfully assist its members to put in place things like the proposed criminal chamber to prosecute ICC offenses. As part of that, The Hague court could, whether through its organs or perhaps more appropriate its ASP, convene a discussion with the judges of regional human rights courts and the States Parties to consider options under which

https://doi.org/10.1017/9781108525343.003 Published online by Cambridge University Press

regionalization could be used to help reinforce the difficult mandate it has to fight impunity at the secondary level under the Rome Statute.

For regional organizations and human rights court systems, including those in Europe and the Americas, some consideration could begin to take place on whether and how criminal jurisdiction could be incorporated into their mandates, at least for certain types of core international offenses. To the extent that transnational crimes are of interest, in a particular region, the feasibility and desirability of considering those should be part of that discussion. As would the implications. A key lesson, based on the African experience, is that greater effort must be made to spell out how to resolve conflicts of jurisdictions. This should provide a framework whereby complementarity, rather than competition, is fostered as a central goal. Such is the way we might ensure that there is a unified global regime that works toward the same principal objective of tackling impunity.

To African and global civil society, which as discussed in another chapter have played an important role in advancing international criminal justice through advocacy, recognition should be given to the reality that the ICC was neither designed nor ever intended to be the panacea to the global scourge of atrocity. In that context, while the world criminal court should continue to receive all our support, it is not inconsistent with that support to appreciate that national and regional mechanisms could be other ways to advance the cause of individual criminal accountability and justice for victims of gross human rights violations around the world.

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