Regional complementarity in international criminal law: making sense of the four-tiered justice paradigm

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CHAPTER 5. PRACTICE OF REGIONAL COMPLEMENTARITY IN THE FULLY-INDEPENDENT STRAND OF REGIONALISM: THE MALABO PROTOCOL

Introduction

This is the second of the two chapters where I investigate the existing practice of regional complementarity. In the previous chapter, I examine how effective the assistance-driven strand of complementarity has been in practice. Secondly, I identify some of the lessons that can be drawn from these newly emerging practices. In this chapter however, I will investigate the same questions, however, in relation to the full and independent strand of regionalism. I use the Malabo Protocol as a case study. I provide some analysis on the historical evolution of Africa's judicial landscape in order to contextualise how regional courts have evolved within the continent. After the historical discussion, I proceed by discussing the establishment, jurisdiction and crimes covered by the protocol establishing the ICL section of the ACJHPR. I conclude with a discussion on complementarity through the lens of the ACJHPR.

1. Africa's international justice project and the roadmap to the Malabo Protocol

Africa's interaction with international justice project has been enmeshed in complexities.[1] In May 2014, the AU adopted an instrument in Malabo, Equatorial Guinea to create the first ever regional criminal tribunal. The Protocol was adopted by the Assembly of the AU on 30 June 2014 at its Twenty-Third Ordinary Session. The Protocol extends the jurisdiction of the yet to be established ACJHR to international and transnational crimes. The initial plan was for the ACJHR to have two sections: a general affairs section and a human rights section. With the adoption of the Malabo Protocol, the world's first regional criminal tribunal has now been established, awaiting the required number of ratifications from states for the protocol to come into force and for the court to become fully operational. Accordingly, the Protocol shall only 'enter into force thirty (30) days after the deposit of instruments of ratification by fifteen (15) Member States.'[2] At the time of

[1] For a discussion on these complexities, see K. M. Clarke 'New frontiers in international human rights: Actionable non-actionables and the (non)performance of perpetual becoming' (2021) *Journal of Human Rights* 2, 152.
[2] Protocol on the Statute of the African Court of Justice and Human Rights' (undated) [available at https://www.african-court.org/pt/images/Basic%20Documents/ACJHR_Protocol.pdf - accessed 1 January 2023].

writing, only fifteen states have signed, but no state has ratified.[3] It is yet to be seen whether the Malabo Protocol (the 2014 protocol) would garner enough ratifications to enter into force, as the Protocol on the Statute of the African Court of Justice and Human Rights (the 2008 merger protocol) that it amends has also not entered into force. As of the date of writing, the 2008 merger protocol has garnered 32 signatures but only seven states have ratified and deposited their instruments of ratification.[4] The ACJHPR was established to serve as Africa's single court and in accordance with article 4, it shall complement the protective mandate of the African Commission on Human and Peoples' Rights. The intention of the AU is to reduce inter-institutional rivalry which may occur as a result of multiple continental institutions with overlapping jurisdictions. Some of such rivalries have already been witnessed between the African Commission and the currently functional African court. The ICL section is therefore created and added to the court by virtue of article 3(1) of the Malabo Protocol. The proposed single court with its ICL section will be housed in Arusha, the United Republic of Tanzania. The protocol was adopted on 27 June 2014. Historical analysis however suggests that the continent had been on a long journey of international justice, before it arrived at this point, and that the proposal to establish an international criminal chamber may have been borne out of a need to protest non-accountability for historical crimes.

Moreover, the African Union (AU), and its predecessor, the Organisation of African Unity (OAU) had always worked through judicial or quasi-judicial mechanisms, among other approaches, in their attempt to entrench international justice. So far, Africa has had four regional courts, which were all at different stages of evolution. The African Court on Human and Peoples' Rights (ACtHPR) came into being as a result of a Protocol adopted by the Organisation of African Unity (OAU) in 1998.[5] The Protocol came into effect in 2004.[6] The court came into being before the AU Constitutive Act was adopted. Upon coming into force, the AU Constitutive Act created the African Court of Justice (ACJ), which was established in 2003.[7] In 2008, ACtHPR became

[3] 'OAU/AU Treaties, Conventions, Protocols & Charters' at https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights.
[4] Protocol on the Statute of the African Court of Justice and Human Rights' (n. 2).
[5] F. Viljoen ''AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol', *AfricLaw,* 23 May 2012, [available at https://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/ - accessed 6 February 2024].
[6] *Ibid.*
[7] *Ibid.*

functional when its judges were elected.[8] The Protocol establishing the ACJ came into effect in 2009 but the ACJ could not function because as at this time, the AU Assembly had already started discussing the possibility of merging the ACtHPR and the ACJ into one single court. On 1 July 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights to merge the ACJ and the ACtHPR. The merged court, which is the third court, is called the African Court of Justice and Human Rights (ACJHR). In essence, this Merger Protocol simply created one court out of the two initial courts. This one court was meant to combine the jurisdictions of the two previous courts.[9]

However, before the coming into force of this Merger Protocol, the AU proposed granting jurisdiction over international crimes to this new single court, and by virtue of the Protocol on the Amendments of the Statute of the African Court of Justice and Human Rights, a new court, which is the fourth court has been created with three jurisdictions, namely: human rights, general affairs and international crimes jurisdiction. This court is the African Court on Justice and Human and Peoples' Rights (ACJHPR). Thus, this court was created by amending a protocol, which had not entered into force.[10] Essentially, in one fell swoop, Africa created for itself its own International Court of Justice (ICJ) and its own International Criminal Court (ICC) as the totality of the mandates of the three different sections of the single court rightly mirrors the combined jurisdictions of the ICJ and the ICC. The Malabo Protocol, if it comes into force, will replace and supersede the 2008 merger protocol.

Given this broad mandate, there are already divergent views on the motivation for the establishment of the International Criminal Law Section within the African Court of Justice and Human and Peoples' Rights. While some say the AU is trying to secure 'regional exceptionalism'[11]

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[8] *Ibid.*
[9] *Ibid.*
[10] A. Abass 'Prosecuting International Crimes in Africa: Rationales, Prospects and Challenges' (2013a) 24 *European Journal of International Law* 933; also A. Abass 'The Proposed International Criminal Jurisdiction for the African Court: Some problematic aspects' (2013b) *Netherlands International Law Review* 27-50; F. Viljoen (n. 5); D. Deya 'Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crimes' [available at http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-don_deya.pdf - accessed 24 January 2023].
[11] M. Du Plessis 'A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes' (2012) [*EJILTalk* available at http://www.ejiltalk.org/a-case-of-negative-regionalcomplementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-overinternational-crimes/ - accessed 24 January 2023].

because of ICC's investigation and prosecution in Africa, others argue that it is part of the regional body's broader commitment to accountability and justice.[12] Those in opposition argue that the establishment of the Criminal Chamber will defeat the object and purpose of the Rome Statute, thereby impeding the work of the ICC to punish individuals who commit international crimes in Africa.[13] Kamari Clarke expresses this controversy aptly when she submits that there is a 'curious paradox between the aspirational aspects of the Malabo Protocol' and the vehement debate about the integrity of the judicial innovations that the international criminal chamber represents.[14]

Whatever the view is, the AU-ICC relationship only served as one of the catalysts for establishing regional frameworks to prosecute international crimes in Africa.[15] The adoption of the Malabo Protocol in 2014 was a continuation of the journey that began decades earlier. In fact, it is Abass' contention that 'Africa first expressed a desire to prosecute international crimes in the 1970s during the discussion on the African Charter on Human and Peoples' Rights.[16] There are long term and short-term factors[17] and some fundamental reasons that necessitated the prosecution of international crimes by an African regional court.[18]

African countries owe a legal duty to strengthen regional cooperation for the purposes of enhancing human security, including through the prosecution of international crimes. This was exemplified by the transformation of the Organisation of African Unity (OAU) to the African Union (AU) just after the Cold War.[19] The transformation was motivated by several factors, chief of which was the desire to shift from the OAU's policy of non-intervention in the domestic affairs of member states.[20] The non-intervention policy showed respect for member states' sovereignty.

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[12] K.M. Clarke *et al* 'Africa and the ICC: An Introduction' in K.M Clarke and ors (eds) *Africa and the ICC: perceptions of justice* (Cambridge University Press 2016) 21.
[13] C.B. Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 5, 1.
[14] K. M. Clarke 'New frontiers in international human rights: Actionable non-actionables and the (non)performance of perpetual becoming' (2021) *Journal of Human Rights* 2, 152.
[15] C. Jalloh 'The Place of the African Criminal Court in the Prosecution of Serious Crimes in Africa' in C. Jalloh & I. Bantekas (eds) *The International Criminal Court and Africa* (Oxford University Press 2017) 304.
[16] A. Abass 'Historical and Political Background to the Malabo Protocol' in G. Werle & M, Vormbaum (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (Asser Press 2017) at 15.
[17] Murungu (n. 13).
[18] Abass (n. 16) 11.
[19] O. Abegunrin 'From Organization of African Unity to African Union' in *Africa in Global Politics in the Twenty First Century* (Palmgrave Macmillan 2009) 141-172.
[20] *Ibid*.

Consequently, the OAU had been unable to intervene in conflicts that had broken out in many member states. This inability ensured that gross rights violations and other abuses went unattended through regional efforts, especially in states that lacked the proper structure to address these violations.[21] The Rwandan Genocide and the conflicts in Sierra Leone and Liberia were sore reminders that Africa needed to do more. It was therefore in a bid to address this and other failings of the OAU that the Constitutive Act established the AU as an organization with objectives to 'encourage international cooperation' and 'promote peace, security, and stability on the continent.'[22] The AU was meant to be more proactive in addressing conflicts and the attendant gross human rights violations as well as serious crimes. This was in furtherance of discussions from as far back as the 1970s on the establishment of an African human rights system through the adoption of an African Charter on Human and Peoples' Rights. This charter was eventually adopted in 1998 and it created the African Commission on Human and Peoples' Rights as its enforcement mechanism.[23] However, because the African Commission cannot make binding decisions,[24] it was conceded that a court that should complement the Commission ought to be created.[25] This court was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[26] The Protocol was adopted in 1998 and came into force in 2004.[27] Discussions on the possibility of establishing an African criminal court resurfaced in July 2004 when the question of election of judges to the African Court on Human and Peoples' Rights came before the AU Assembly.[28]

The Committee of Legal Experts saddled with the responsibility of drafting the African Charter in the early 1980s, briefly considered a proposal by the Republic of Guinea. This proposal was for

[21] Jalloh (n. 15) 305.
[22] Article 3 (e) & (f) of the Constitutive Act of the AU.
[23] Jalloh (n. 15) 304.
[24] *Ibid.*
[25] *Ibid.*
[26] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights [available at https://www.african-court.org/wpafc/wp-content/uploads/2020/04/Protocol-of-the-Establishment-of-the-African-Charter-on-Human-and-Peoples-Rights-.pdf - accessed 12 February 2023].
[27] *Ibid.*
[28] Amnesty International 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court', 22 January 2016.

the establishment of a court with jurisdiction over crimes against humanity. The proposal was however defeated due to two reasons. The first reason was African nations' preference for an international penal court which was already been anticipated as an enforcement mechanism for the International Convention on the Suppression and Punishment of the Crime of Apartheid. Secondly, the UN was already considering the establishment of an international court to repress crimes against humanity, and as such, there was no need to duplicate efforts.[29] The foregoing shows that there was already a 'growing regional sensitivity to impunity' in Africa, considering that several provisions of the AU Constitutive Act reveal a willingness to close the impunity gap by 'intervening in a Member State…in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.'[30]

Thus, various legal instruments adopted from the OAU through the AU years do not only show commitment towards closing impunity gap, but there is also no incompatibility between these instruments and the AU's attempt at prosecuting crimes in the region. If anything, the adoption of these instruments exemplifies the point that the adoption of the Malabo Protocol in 2014 was not the first time that Africa had attempted or discussed the idea of establishing a court with jurisdiction over international crimes. As Abass noted, 'it cannot be the case that the AU legislates on crimes it does not intend its own court to prosecute.'[31]

Also, the 'abuse' and 'misuse' of the principle of universal jurisdiction[32] 're-stimulated' the AU's interest in creating its own regional criminal court.[33] African leaders and state officials were at different times indicted in the domestic courts of certain European countries. French and Spanish judges had issued warrants of arrest for some military and political leaders of Rwanda. French Magistrate Bruguière indicted nine Rwandan officials while Spanish Magistrate Merelles indicted forty Rwandese military and political leaders.[34] In Belgium, an indictment was issued against the Congolese Minister for Foreign Affairs. The government of the DRC opposed this and requested

[29] Jalloh (n. 15) 306.
[30] Article 4(h) of the Constitutive Act of the AU; Jalloh (n. 15) 308.
[31] Abass (n. 16) 17.
[32] For a general understanding of the principle, see X Philippe 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 *IRRC* 862, 375-398.
[33] Jalloh (n. 15) 311.
[34] C. Jalloh 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction' (2010) 21 *Criminal Law Forum* 1-65, 29.

the ICJ to pronounce that the action of the Belgian authorities was against customary international law. The ICJ ruled that

> [G]iven the nature and purpose of the warrant, its mere issuance constituted a violation of an obligation of Belgium towards the DRC, in that it had failed to respect the immunity which Mr. Yerodia enjoyed as incumbent Minister for Foreign Affairs. The Court also declared that the international circulation of the disputed arrest warrant from June 2000 by the Belgian authorities constituted a violation of an obligation of Belgium towards the DRC, in that it had failed to respect the immunity of the incumbent Minister for Foreign Affairs.[35]

Accordingly, the legal issue that these indictments raised was their 'alleged incompatibility' with the well-settled customary international law principles on immunities for heads of states and governments. This same issue prompted the AU, at its 30th Session of the Summit of Heads of State and Governments in January 2018, to among other things,

> Request the African Group in New York to immediately place on the Agenda of the UN General Assembly a request to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other Senior Officials as it relates to the relationship between Articles 27 and 98 and the obligations of States Parties under International Law.[36]

While further actions on the AU's decision to seek an ICJ's advisory opinion appeared to have been dropped, it suffices to state here that the issue of indictments against African leaders on the basis of universal jurisdiction also played a prominent role in accelerating Africa's call for its own international criminal mechanism. Van der Wilt observed that the creation of the Criminal Chamber was an attempt to preempt both the universal jurisdiction of European states and the ICC.

[35] See *The Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.
[36] Decision at the 30th Ordinary Session of the Assembly, 28-29 January 2018, Addis Ababa Ethiopia. AU Doc: Assembly/AU/Draft/Doc.8(XXX) Draft Decision on the International Criminal Court Doc. EX.CL/1008(XXXII).

In his words, 'it is telling that the Preamble of the Malabo Protocol explicitly refers to the African Union Assembly's Decision on the Abuse of the Principle of Universal Jurisdiction.'[37]

One other factor that has been identified as Africa's motivation for seeking its own distinct regional international criminal mechanism is the willingness to prosecute crimes that are peculiar to Africa but over which the ICC has no jurisdiction.[38] In this regard, mention has been made of the AU's adoption of the African Charter on Democracy Election and Governance. The charter criminalises the peculiar act of unconstitutional change of government and explicitly provides for regional prosecution.[39] This certainly is because of the high number of conflicts in Africa that originated from *coup d'etat* and unconstitutional takeover of governments.[40]

Lastly, the pervasive narrative that African leaders are generally afraid of being held accountable and this may have prompted them to establish the Criminal Chamber of the African Court in order to evade prosecution, deserves some attention here. While not holding brief for African leaders, a closer look reveals a different narrative and suggests the need for a more balanced approach which has been described as 'African states *falling out* with the ICC and the ICC *falling in* to patterns of behavior that African states raised legitimate concerns about, and thus sought to guard against, at Rome in 1998.'[41] These legitimate concerns were raised by different African groups in Rome, during the conclusion of the ICC statute.[42] Such concerns included the call for an independent prosecutor; equal treatments of states; respect for complementarity between the court and national mechanisms and lastly, the need for the court to further the ends of peace and justice in the world.[43] Several events since 1998, including the recent inability of the court to hold either Russia or the

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[37] See H.G. Van der Wilt 'Complementary Jurisdiction (Article 46H)' in G. Werle and M. Vormbaum (eds.) *The African Criminal Court: A Commentary on the Malabo Protocol* (Asser Press 2017) 190.
[38] Abass (n. 16) 18.
[39] A. S. Knottnerus and E. de Volder 'International Criminal Justice and the Early Formation of an African Criminal Court' in K.M. Clarke and ors (eds) *Africa and the ICC: perceptions of justice* (Cambridge University Press 2016) 380.
[40] *Ibid*.
[41] See M. Du Plessis & C. Gevers 'The Sum of Four Fears: African States and the International Criminal Court in Retrospect‑Part I' *Opinio Juris*, 8 July 2019, [available at https://opiniojuris.org/2019/07/08/the-sum-of-four-fears-african-states-and-the-international-criminal-court-in-retrospect-part-i/ - accessed 23 May 2021].
[42] *Ibid*.
[43] *Ibid*.

USA accountable in relation to the Georgia[44] and Afghanistan[45] situations respectively, have strengthened doubts that the Court and its prosecutor are independent. Other examples include the ICC's 'failure' to take any concrete actions on Ukraine prior to 2022; the court's failure to hold the UK accountable for alleged war crimes in Iraq and the failure to investigate Israel for alleged war crimes in Palestine.

The ICC-AU relationship was the final straw that broke the camel's back in relation to the AU's effort of establishing its regional mechanism for the purposes of international crimes prosecution and African efforts to establish frameworks for prosecuting international crimes predate the recent ICC-AU debacle. In fact, authors like Kamari Clarke argued that some of the factors that shaped the AU's desire to establish a criminal chamber within its court are traceable to 'historic and contemporary struggle for African state autonomy and Pan-African solidarity.'[46] She concludes that lack of accountability for historic crimes relating to slavery, apartheid, imperialism, colonialism and economic plunder, while there is much focus on other crimes 'within spheres of structural inequality' accounted for the protest court.[47]

2. Jurisdiction, Structure and Crimes in the Malabo Protocol

2.1. Jurisdiction

Article 3(1) of the Malabo Protocol provides that 'the Court is vested with an original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the Statute annexed hereto.' Article 3(2) also provides that 'the Court has jurisdiction to hear matters referred to it in any other agreements that the Member States or the Regional Economic Communities or other international organizations recognized by the African

[44] In its first case outside Africa, the ICC has continued to fail victims as it has been unable to make any progress since the Chamber granted an authorization to the prosecutor to open investigation. For more thoughts on how the ICC is failing victims in the Georgian situation, see N. Jeiranashvili 'The Georgian Experience: A Story of How the ICC is Failing Victims in its First Case Outside Africa', International Justice Monitor, 10 May 2018.
[45] In a decision that has been heavily criticised, the judges of the pre-trial chambers declined to open an investigation stating that it would not be in the interest of justice to do so. See ICC 'ICC judges reject opening of an investigation regarding Afghanistan situation', 12 April 2019.. The OTP however appealed the chamber's decision. See OTP 'Prosecution Appeal Brief' in The Situation in the Islamic Republic of Afghanistan, 30 September 2019.
[46] Clarke (n. 14).
[47] *Ibid.*

Union may conclude among themselves or with the Union.' These provisions suggest that the single court will have and exercise jurisdiction in accordance with the jurisdictional provisions of the three instruments namely the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (which established the ACtHPR), the Protocol on the Statute of the African Court of Justice and Human Rights (the merger protocol), and the Malabo Protocol (which seeks to add an ICL section to the single court). These three instruments also contain provisions on who can access the court. Accordingly, article 15 of the Malabo Protocol adds the Peace and Security Council and the Office of the Prosecutor as the other entities that can access the single court. These are in addition to the entities already mentioned in article 29 and 30 of the 2008 merger protocol. In essence, the following are the entities that can access the three sections of the single court in order to trigger its jurisdiction: AU member states; the AU Assembly; the AU parliament and other organs of the AU authorized by the AU Assembly; a staff member of the AU on appeal in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union; the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organizations accredited to the AU or its organs; African National Human Rights Institutions as well as individuals or relevant NGOs accredited to the African Union or its organs.

Given the large array of the entities that can access the court, as well as its wide jurisdictional mandate, it has been suggested that the single court has 'an ambitious jurisdictional reach' whose scope is 'breathtaking'.[48] Others called it 'an overloaded court'[49] and concerns have been raised over its structure, manpower, budget and relationship.[50] It is exceedingly worrying that the single court will only have a total of 16 judges manning the entire three sections with all the arrays of possible issues that can be brought before the court. While it is understandable that this is a regional court with a limited focus on the continent, it is worrisome that the ICC, which only hears ICL cases for four core crimes, has a larger number of judges compared to the entire single African court. In the same vein, the ICL section with extensive jurisdiction *ratione materiae* may indeed

[48] Du Plessis 'Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes' (2012) 235 *Institute for Security Studies Paper* 5-6.
[49] Amnesty International (n. 28) 24.
[50] Du Plessis (n. 48).

be overloaded since it will only have one judge in its PTC, three judges in its Trial Chamber and five judges in its Appeal Chamber, as per article 10 of the Malabo Protocol. In essence, the long-term effectiveness and efficiency of the court is already in doubt,[51] but since it is yet to become functional, it is difficult to see whether it would, in actual terms, be overloaded.

2.2. Structure of the proposed court

Article 6 of the Malabo Protocol replaces article 16 of the merger protocol and provides that 'the Court shall have three sections: a General Affairs Section; a Human and Peoples' Rights Section; and an International Criminal Law (ICL) Section.' It also provides that the ICL Section of the Court shall have three Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber,[52] thus mirroring the current ICC model.

The General Affairs Section shall have competence to hear cases submitted under article 28 of the Merger Protocol, except the cases assigned to the two other sections. For the Human and Peoples' Rights Section, article 7 of the Malabo Protocol simply states that 'it shall be competent to hear all cases relating to human and peoples' rights' without defining in clear terms what amounts to human and peoples' rights cases. However, guidance can be sought from the Merger Protocol which states in article 28C that the court shall have jurisdiction over cases which relate to 'the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the State Parties concerned.' This then implies that the General Affairs Section will exercise jurisdiction on general issues of a legal nature except those relating to the human rights instruments earlier mentioned. Again, these issues are outlined in article 28 of the Merger Protocol. On its part, the ICL section will have competence to hear cases relating to the crimes specified in the Malabo Protocol. While the other two sections are not divided into different chambers, only the ICL section has three chambers, including an appellate chamber. There is however room for the review of the decisions of the other sections. Article 8 of the Malabo Protocol provides that in the case of the

[51] *Ibid.*
[52] Article 6 of the Malabo Protocol. See also M. Sirleaf 'The African Justice Cascade and the Malabo Protocol' (2017) 11 *International Journal of Transitional Justice* 1. See also K. Magliveras 'Substituting International Criminal Justice for an African Criminal Justice?' (2017) 14 *International Organizations Law Review* 291-320.

two sections, a revision of the judgement from them can be made in terms of article 48 of the merger protocol. Such revisions may be necessitated by the discovery of new facts. On the other hand, in the case of the ICL section, according to article 8 of the Malabo Protocol, an appeal may be lodged by the accused or the prosecutor if there is a procedural error, an error of law or an error of fact.

Given the above, the main difference between the revision and appeal processes is that the decisions of the first two sections may only be revised if there is discovery of a new fact which may substantially affect the decision of the court, while the decision of the ICL section can be appealed on the three grounds of procedure, fact and law. The revision process does not anticipate an error of law.

2.3. Crimes covered in the Protocol

Article 14 of the Malabo Protocol provides for the insertion of article 28A-N and outlines fourteen crimes over which the ICL Section of the court would exercise jurisdiction. Adopting Bassouni's penal characteristics,[53] Jalloh classified this 'mixed basket of crimes into four categories namely: 'international crimes', 'transnational crimes', 'partly international crimes' and 'partly transnational crimes.'[54] The core international crimes of genocide,[55] aggression,[56] war crimes[57] and crimes against humanity[58] are classified as 'international crimes.' These are generally known as core crimes, which are sometimes distinguished from treaty crimes, albeit with much ambiguity.[59] Secondly, piracy,[60] mercenarism,[61] money laundering,[62] trafficking in persons,[63]

[53] Bassiouni developed guidelines for classifying crimes under different headings and also set out characteristics that conducts constituting international crimes must possess. For a description of the five guidelines and ten characteristics, see generally M. C. Bassiouni *Introduction to International Criminal Law* (Martinus Nijhoff 2013).
[54] C. Jalloh 'The Nature of the Crimes in the African Criminal Court' (2017) 15 *JICJ* 799-826.
[55] Art. 28B.
[56] Art. 28M.
[57] Art. 28D.
[58] Art. 28C.
[59] On the distinction between core crimes and treaty crimes, see C. Schwöbel-Patel 'The Core Crimes of International Criminal Law' in K. J. Heller & ors (eds) *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020).
[60] Art. 28F
[61] Art. 28H.
[62] Art. 28Ibis.
[63] Art. 28J.

trafficking in drugs,[64] trafficking in hazardous wastes[65] as well as illicit exploitation of natural resources[66] were classified as 'transnational crimes.' Examples of 'partly international crimes' are terrorism[67] and unconstitutional change of government.[68] Lastly, corruption[69] was cited as an example of 'partly transnational crimes.'[70] From the foregoing, the protocol creates jurisdiction over crimes that are not yet fixed in 'international criminal law firmament'[71] and also caters for future developments in international law. It expressly provides that 'the AU Assembly may extend …. the jurisdiction of the court to incorporate additional crimes to reflect development in international law.' There is no similar provision in the Rome Statute. Article 121 and 123 of the Rome Statute jointly deal with amendment and review and they are both silent about the likely motivation for a review. They do not exactly provide for an amendment to cater for future developments in international law as was expressly done in the Malabo Protocol. This is another example of the progressive and forward-looking nature of the Malabo Protocol.

In analyzing the nature of the crimes in the Protocol, it must first be recalled that international crimes are 'breaches of international rules entailing the personal criminal liability of the individuals concerned' while transnational crimes are 'certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country.'[72] Article 3(2) of the UN Convention Against Transnational Organized Crime also defines transnational crimes as those committed in more than one state; committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; committed in one state but involves an organized criminal group that engages in criminal activities in more than one state or committed in one state but has substantial effects in another state.

Given the definition in article 3(2) of the UNTOC, the drafters of the Malabo Protocol gave little or no regard to the different classifications and nature of the crimes included in the protocol. In international law, these classifications are still muddled up in confusion primarily because states

[64] Art. 28K.
[65] Art. 28L.
[66] Art. 28Lbis.
[67] Art. 28G.
[68] Art. 28E.
[69] Art. 28I.
[70] C. Jalloh 'The Nature of the Crimes in the African Criminal Court' (2017) 15 *JICJ* 799-826.
[71] Du Plessis (n. 48).
[72] *Ibid*.

generally have limited guidance on the appropriate criteria for including crimes in international instruments.[73] Different attempts have therefore been made by scholars in order to bridge this gap and find a doctrinal basis for transnational crimes. For example, Boister argues that re-labelling treaty crimes - which are different from the core international crimes - as 'Transnational Criminal Law' may help to find a doctrinal match for transnational crimes, seeing that the core crimes already enjoy a doctrinal labelling as international criminal law.[74] Thus, in the absence of a firm doctrinal framework for transnational crimes like its counterparts, the core crimes, the Malabo Protocol may have presented opportunities to consider a doctrinal categorization of international and transnational crimes.

Another consideration is whether transnational crimes are better prosecuted by domestic courts rather than regional or international ones. Some have argued that national criminal mechanisms remain the best suited forum for prosecuting transnational crimes.[75] Boister asserts that a state's inability or unwillingness to prosecute are not sufficient grounds to elevate transnational crimes to the same status of core crimes requiring international response.[76] Others however argue that domestic mechanisms are limited and thus, international or regional response may be more appropriate.[77] According to Parrish, unilateral domestic responses are often problematic and can undermine comprehensive and meaningful multilateral efforts.[78] While analysing the challenge with prosecuting ordinary crimes instead of more serious crimes, Kemp and Nortje suggest that 'a prima facie case of apartheid as a crime under customary international law' may exist and certain persons whose actions contributed to apartheid [the bigger crime] could be prosecuted, even when they were not in leadership positions.[79]

[73] Jalloh (n. 70).
[74] N. Boister 'Transnational Criminal Law?' 14 (2003) *EJIL* 953-976.
[75] N Boister 'Responding to transnational crime: the distinguishing features of transnational criminal law' in H. Van der Wilt & C. Paulussen (eds) *Legal Responses to Transnational and International Crimes: Towards an Integrative Approach* (EE Publishing 2017) 48.
[76] *Ibid,* 47.
[77] A. Parrish 'Domestic Responses to Transnational Crime: The Limits of National Law' (2012) 23 *Criminal Law Forum* 4, 275-293.
[78] *Ibid.*
[79] G. Kemp & W. Nortje 'Prosecuting the Crime against Humanity of Apartheid: The Historic First Indictment in South Africa and the Application of Customary International Law' (2023) 21 *Journal of International Criminal Justice* 430.

Given these divergent views, it will appear that while transnational crimes have been included in the Malabo Protocol, there is nothing to suggest that states have been disempowered from prosecuting those crimes if they are criminalized within the domestic system, and where there exists a functional and effective domestic system for such investigation and prosecution. In any case, this is the essence of the principle of complementarity which exists in both the ICC and the emerging system under the Malabo Protocol. While the debate on the appropriateness or otherwise of including transnational crimes in the Malabo Protocol continues, it does not detract from the ability of the domestic system to address these crimes since primacy already inheres in them. In any case, the idea that a single court should prosecute international and transnational crimes is not entirely novel. In the post WWI era, Baron Descamps and Vespasian Pella had argued for the establishment of a single court that could prosecute 'crimes against the international order and transnational offences.[80]

Most of the crimes in the Protocol relate to the common security threats that African countries face.[81] These security challenges may be too politically complex for national mechanisms to handle. Yet, they are not adjudged to be serious enough for an international court like the ICC; hence the need for a mid-level mechanism like the regional court.[82] This reinforces the argument that creating its own criminal court was Africa's way of providing specific African solutions to African problems. This is what has been missing in the ICC context. There is a clear de-linking of international crimes from transnational crimes. There are however some benefits in having transnational and international crimes as part of a common system, as they have a lot of synergy.[83] This is one of the good features of the protocol.

Similar to the last point raised, the protocol extends the jurisdiction of the court to corporate criminal liability. In Article 46C, the Protocol provides that 'for the purpose of this Statute, the Court shall have jurisdiction over legal persons, apart from states.' This also reflects a specific

[80] M. Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (Oxford University Press 2014) 79.
[81] M. Sirleaf 'The African Justice Cascade and the Malabo Protocol' (2017) 11 *International Journal of Transitional Justice* 75.
[82] Kenyans for Peace With Truth and Justice, 'Seeking Justice or Shielding Suspects: An Analysis of the Malabo Protocol', [available at http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf - accessed 12 February 2024].
[83] R. Smith 'Book Reviews: Legal Responses to Transnational and International Crimes: Toward an Integrative Approach' (2018) 46 *International Journal of Legal Information* 3, 200-201.

African reality: the unwholesome impact of the activities of foreign and multinational companies on the human rights landscape as well as the economies of African states. Illegal mining, deforestation, illicit financial outflows, money laundering and corruption are some of the activities that have become major sources of concern in Africa. Thus, the Protocol's extension of the court's jurisdiction is an attempt at curbing these African realities.[84] There is currently no international criminal tribunal with jurisdiction over corporate entities and the Malabo Protocol advances ICL in this regard.[85]

The inclusion of novel crimes in the Malabo Protocol is grounded in certain structural critiques of ICL. The idea that international criminal justice is limited in scope and does not often address the root causes of international crimes appears to be one of the motivations for the creation of the African criminal chamber, and indeed the inclusion of novel crimes in the protocol.[86]

2.4. Innovative crimes jurisdiction of the Court

For the first time, an ICL mechanism will assume jurisdiction over environmental, political as well as economic and financial crimes. As previously argued, the reason for the inclusion of environmental and other crimes in the Malabo Protocol is that the new court responds to specific problems that African countries have had to grapple with, which may not have been wholly or partly addressed by the Rome Statute. I will now discuss one example each of political crime: unconstitutional change of government, economic crime: corruption and financial crime: money laundering.

2.4.1. Unconstitutional change of government (Article 28E)

The Protocol's inclusion of the political crime of unconstitutional change of government was inspired by decades of coups and counter coups that have been experienced by many African states. Since the 1960s, Africa has witnessed countless successful and failed coup attempts in at least,

[84] See generally J. Kyriakakis 'Article 46C: Corporate Criminal Liability at the African Criminal Court' in K. Clarke & C. Jalloh (eds) The *African Court of Justice and Human and Peoples' Rights* (Cambridge University Press 2019).
[85] Sirleaf (n. 81) 76-77.
[86] On the narrow scope of international criminal justice, see M. Renzo 'Crimes against humanity and the limits of international criminal law' (2012) 31 *Law and Philosophy* 4, 443-476.

forty countries.[87] These incidences have also led to many instances of civil wars and attendant war crimes in Africa.[88] The protocol therefore prohibits the crime of unconstitutional change of government which it defines in article 28E to include such acts as:

> a coup d'état against a democratically elected government; intervention by mercenaries, armed dissidents or rebels to replace a democratically elected government; political assassination to replace a democratically elected government; any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution; and any substantial modification to the electoral laws in the last six months before the elections without the consent of the majority of the political actors.

This description, except for the last part on modifying electoral laws, was sourced from article 23 of the AU's African Charter on Democracy, Elections and Governance. This approach of sourcing provisions from other AU instruments, in line with practices at the international level, reflects AU's intention to ensure that its single court sufficiently relies and interprets different AU instruments in the discharge of its functions. Also, the wide variety of acts that have been criminalized under this provision suggest that the Malabo Protocol considers the problem of unconstitutional change of government, and its impact on the political terrain as an issue that requires the full weight of the continent's response using its ICL mechanism. Its importance is also reflected in its place in the protocol. It is the first of the new crimes to be included in the protocol, immediately after the three core crimes. As I mentioned earlier, the commission of the acts that make up the crime of unconstitutional change of government, as it is the case with most transnational crimes, is capable of leading to the commission of any of the three core crimes. Africa is particularly replete with examples of instances where political violence has led to the commission of core crimes. An example is the Nigerian Biafra war of 1967-1970 where hundreds

[87] P. Roessler 'The enemy within: Personal rule, coups and civil war in Africa' in 63 *World Politics* 2, 300-346.
[88] See generally H. van der Wilt 'Unconstitutional Change of Government: A New Crime Within the Jurisdiction of the African Criminal Court' (2017b) 30 *Leiden Journal of International Law* 4.

of thousands of people from the Igbo ethnic groups were killed. The conflict arose as a result of coup and counter coups.[89] Thus, one way of understanding the inclusion of transnational crimes is the direct link that their commission has with core crimes, and as such, if they are not criminalized, they could lead to the perpetration of other core crimes. This thinking is however not entirely novel, and the Malabo Protocol was not the first time that the AU had linked unconstitutional change of government with serious conflict. In the African Charter on Democracy, Election and Governance, which the AU adopted in 2007, it had noted in paragraph eight of the preamble that the AU was 'concerned about the unconstitutional changes of governments that are one of the essential causes of insecurity, instability and violent conflict in Africa.'[90] The AU recognizes the need to not only punish perpetrators of international crimes, but also put in place measures to ensure that predicate conducts are criminalized.

The last point is exceedingly important and may further explain why the criminalization of unconstitutional change of government - and such other 'new crimes' - in the Malabo Protocol ought to be encouraged and applauded. As argued by van der Wilt, 'causal connections between unconstitutional change of government and subsequent core crimes have emerged in the context of inquiries by the ICC Pre-Trial Chambers into the admissibility of cases before the ICC.'[91] On this note, many of the African cases before the ICC emanated as a result of crimes committed over political occurrences, particularly in the context of post-election violence and the struggle to hold on to power. The Kenyan, Libyan and the Ivorian situations are classic examples. At the ICC, states have argued that there is a strong nexus between the crimes that they investigate and/or prosecute and the ones that the ICC seeks to prosecute.[92] These have largely occurred during admissibility challenge. States have always argued that the ICC should find the cases inadmissible because the domestic mechanisms are already investigating or prosecuting them. The ICC, or more specifically the OTP, on the other hand, has always insisted that the acts being investigated do not meet the two-pronged admissibility test. However, in the Ivorian situation, the ICC ruling against

[89] See L. Heerten and A. Dirk Moses 'The Nigeria–Biafra war: postcolonial conflict and the question of genocide' (2014) 16 *Journal of Genocide Research* 169-203. See also C. Korieh *The Nigeria-Biafra War: Genocide and the Politics of Memory* (Cambria Press 2012).
[90] Paragraph 8, Preamble to the African Charter on Democracy, Election and Governance.
[91] H.G. Van der Wilt 'Complementary Jurisdiction (Article 46H)' in G. Werle and M. Vormbaum (eds.) *The African Criminal Court: A Commentary on the Malabo Protocol* (TMC Asser Press 2017) 626.
[92] *Ibid*.

the admissibility challenge reveals that the court at least acknowledges that certain acts or conducts – which are not international crimes themselves may occur preparatory to the commission of international crimes. The ICC only ruled against Ivory Coast for its failure to 'explain, how, in its view, the preparatory nature of the conduct underlying those crimes shows that it is substantially the same conduct as that alleged in the proceedings before the Court…'[93] Conversely, in the Al-Senussi case, both the PTC 1 and the Appeal Chambers agreed with Libya that Al-Senussi's prosecution in Libya was based on the same facts as those for which he was convicted by the Court.[94] In writing about this, van der Wilt submits that '[T]he Chamber acknowledged thus that in both the international and domestic proceedings the core crimes had been inspired by the political motive to repel popular insurrections in the quest to remain in power.'[95] Thus, what the ICC jurisprudence continuously shows is that while the ICC may lack the jurisdictional capacity to entertain many of the crimes against the state that are capable of leading to international crimes, regional courts like the criminal chamber of the African court, if established, may be able to fill in the gap while ensuring that the more serious crimes are left for the ICC. The resultant effect is that impunity for atrocity crimes is discouraged and the overall goal of the Rome Statute and indeed international criminal justice is achieved.

In what ways will the regionalization of the prosecution of the crime of unconstitutional change of government - which may possibly be sufficiently dealt with at a domestic level - qualify as a crime of concern to the international community? This question is valid considering that the wider goal of ICL is to punish crimes which are of concern to the international community.[96] In answering this, I choose to first assess what factors may be considered in order to arrive at a conclusion that a particular conduct will qualify as being of concern to the international community. One of the factors is the impact that the commission of those conducts can have on the states on whose territories the conducts are taking place, and, their impact on neighboring countries. Secondly, I am interested in state practices and whether there is a consensus from states as regards suppressing

[93] In the case of *The Prosecutor v. Simone Gbagbo*: Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" Para. 101.
[94] See ICC PTC 1 Decision on the admissibility of the case against Abdullah Al-Senussi and Abdullah Al-Senussi 11 October 2013 and ICC Appeals Chambers in Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013, 24 July 2014.
[95] Van der Wilt (n. 91) 628.
[96] Para. 4 of the Preamble to the Rome Statute.

these acts. This could be gleaned from the attention that states, acting under a regional or global organization, have given to these conducts through treaties and agreements that have been concluded.

As regards whether a conduct is of concern to the international community, examples abound to show that many of the conducts that are outlined in article 28E have led to upheaval, not only in the countries where they were committed, but also in neighboring countries. The international dimension of their impact is no longer in doubt. For instance, *coup d'etat* in many West African countries in the 1990s have led to displacements of hundreds of thousands, if not millions, thus creating problems of refugees and internally displaced persons within the sub-region.[97] When unchecked, these could lead to instability in many more countries than the country where the conflict originated. An entire region or sub-region could experience a deluge of migrants and refugees where any of the acts outlined in article 28E takes place in one country. Secondly, as argued by Abass, even before the adoption of the Malabo Protocol, African countries have adopted treaties and instruments to outlaw acts described in Article 28E. In his words,

> The acts constituting unconstitutional changes of government, listed under Article 23 of the ACDEG (military coup d'états, the rigging of elections, and so on) have, for a long time, been practices which have been consistently rejected by the majority of African states, as evidenced by myriad treaties and declarations adopted over several decades to outlaw them. The ACDEG is therefore merely a codification of what had become a quintessential custom in Africa: the rejection of UCG.[98]

Having said that, it could be argued that African countries' commitment to outlawing these conducts predates the Malabo Protocol and may have attained the status of 'particular customary international law' within the region. This term has variously been described as 'regional customary international law', 'local customary international law' and 'special customary international law',

[97] P. McGowan 'Coups and Conflict in West Africa, 1955-2004 Part I, Theoretical Perspectives' (2005) 32 *Armed Forces and Society* 1, 5-23.
[98] A. Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects' (2013) 60 *Netherlands International Law Review* at 34.

albeit with slight difference in meaning. The ILC defines the term as 'a rule of customary international law that applies only among a limited number of States.'[99] The ILC further states that 'to determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (opinio juris) among themselves.'[100] Thus, the AU's codification of unconstitutional change of government and the acts that constitute it in the Malabo Protocol and other previous treaties may have attained the status of regional customary international law and the prosecution of such conducts through the regional court is the logical next step.

One counter view is that unconstitutional change of government is not capable of triggering individual criminal responsibility, and should only be viewed as a violation of international law. The argument is that there is no state practice demonstrating criminality, and some argue that it is simply one of the cases of over-criminalization in the Malabo Protocol.[101] Accordingly, this conduct could at best be a treaty-based crime – if and when the protocol comes into force. With recent coup d'états in a number of West African countries, including Mali, Niger, Guinea and Burkina Faso, and the threats of military intervention by ECOWAS, there appears to be a renewed interest in unconstitutional change of government as a crime in international criminal law.[102]

2.4.2. The crimes of money laundering and corruption (Article 28Ibis and 28I)

The protocol's inclusion of the financial/economic crime of money laundering and its predicate crime of corruption in articles 28Ibis and 28I respectively is also novel in that it is again, one of the first instances, where a protocol brings international and transnational crimes under the jurisdictional umbrella of one court. I will discuss the two provisions jointly in this sub-section. The Protocol restricted the crime of money laundering as only capable of emanating from the crime of corruption. As such, in its description of what constitutes money laundering, article 28Ibis

[99] ILC 'Draft conclusions on identification of customary international law, with commentaries' (2018).
[100] *Ibid.*
[101] M. Garcia-Casas 'The Crime of Unconstitutional Change of Government: Concept and Main Hurdles in Its Implementation' (2021) 19 *JICJ* 3, 565-581.
[102] P. Melly 'Niger coup underlies challenge to democracy across West Africa' (2023) [available at https://www.chathamhouse.org/2023/08/niger-coup-underlines-challenge-democracy-across-west-africa - accessed 12 January 2024].

employs the phrase '…such property is the proceeds of corruption' or similar expression on three occasions. The descriptions of the acts that constitute money laundering were sourced from the AU Convention on Preventing and Combating Corruption. Although, as noted by Fernandez, the difference between the provisions in the protocol and the convention is that the former only criminalizes corruption if it is serious enough to affect 'the stability of a state, region or the Union.'[103] The protocol is therefore concerned with the most serious types of corruption, in accordance with the goal of ICL to prosecute only the most serious crimes of concern to humanity. This has been described as 'grand corruption'[104]- the type often perpetrated by high level government officials and private sector leaders.[105] There is therefore no doubt that the AU places certain premium on economic crimes. This is also seen in the fact that five out of the fourteen crimes in the Malabo protocol are economic crimes. These are the crimes of piracy, corruption, money laundering, trafficking in person and trafficking in drugs. This sub-section will therefore explore the AU's real and perceived rationale for aspiring to prosecute money laundering and corruption. It will also attempt to analyze the challenges that may need to be navigated in that quest. Lastly, I will offer certain thoughts on how prosecution of money laundering and corruption can facilitate the prosecution of other core crimes; support the idea behind regional complementarity and contribute to the overall goal of ICL.

2.4.2.1. Rationale for including money laundering and corruption in the Malabo Protocol

The Malabo Protocol was not the first AU treaty that dealt with the subject of money laundering and corruption. Since 2006, the African Union Convention on Preventing and Combating Corruption had entered into force with over forty ratifications from African states.[106] The convention deals with both crimes of corruption and money laundering. Also, a few sub-regions in Africa have also put in place mechanisms to combat these crimes. For example, in the West African sub-region, the ECOWAS had established the Inter-Governmental Action Group against

[103] L.D. Fernandez 'Corruption (Article 28I) and Money Laundering (Article 28Ibis)' in G. Werle & M. Vorbaum (eds) *The African Criminal Court International Criminal Justice Series* (TMC Asser 2017) 92, citing article 28I (1) of the Malabo Protocol.
[104] *Ibid.*
[105] Paraphrasing Transparency International's definition of the term 'grand corruption'.
[106] AU Convention on preventing and combatting corruption 2003.

Money Laundering and Terrorism Financing in West Africa (GIABA). Its stated mandate is to enhance the capacity of member states to prevent and control money laundering and terrorism financing.[107] In Southern Africa too, the Eastern and Southern Africa Anti-Money Laundering Group of countries (ESAAMLG) have committed themselves to put in place effective measures against money laundering.[108] There is therefore no doubt that African countries viewed these crimes as requiring international cooperation for their control and prosecution. According to the preamble of the UN Convention, 'corruption is no longer a local matter but a transnational phenomenon…, making international cooperation to prevent and control it essential.'[109] Recent events in Africa point to this. One of the root causes of the Arab spring is the impact of grand corruption on the living standards of the people.[110] Also, after President Al-Bashir was ousted from power in Sudan, large sums of money running into over 130 million USD were found in his home.[111] The sums are believed to have been corruptly procured and stashed away. The event places in focus the question of corruption by sitting heads of state and government officials. It is a sad reminder of how leaders sometimes corruptly enrich themselves to the detriment of the people they serve; hence a concerted effort at the regional level to address these crimes. Despite being accused of different human rights violations, including allegations of war crimes and crimes against humanity by the ICC; the ex-leader has only been put on trial on corruption charges and was recently sentenced to two years in prison for same.[112]

Anderson had identified the international dimension of the problems that money laundering could create.[113] The effects on both the financial institutions and the economies of countries are not in doubt. African countries have specifically suffered from the effect of money laundering and

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[107] GIABA 'About GIABA'[available at https://www.giaba.org/about-giaba/index_656.html - accessed 12 June 2023].

[108] C. Goredema 'Money laundering in Southern Africa Incidence, magnitude and prospects for its control' (2004) 92 *ISS Paper* 1-12.

[109] Preamble to the UN Convention on Corruption, para 4.

[110] A. Mnawar 'Corruption and the "Arab spring" As one of the main elements leading to revolutions' (2015) 1 *Polish Journal of Political Science* 3 36-49. See also S. Cook & ors. 'Corruption and the Arab Spring' (2012) 18 *The Brown Journal of World Affairs* 2, 21-28.

[111] BBC News, 'Sudan crisis: Cash hoard found at al-Bashir's home' 20 April 2019, [available at https://www.bbc.com/news/world-africa-47997729 - accessed 13 February 2024].

[112] The Guardian 'Ex-Sudan leader Omar al-Bashir sentenced to two years for corruption' 14 December 2019 [available at https://www.theguardian.com/world/2019/dec/14/sudanese-court-sentences-omar-al-bashir-to-2-years-in-prison - accessed 13 February 2024].

[113] M. Anderson 'International Money Laundering: The Need for ICC Investigative and Adjudicative Jurisdiction' (2013) 53 *Virginia Journal of International Law* 1.

corruption, up to the point that they have led to serious conflicts. In the African context, there are already studies that show the link between corruption and money laundering on one hand, and serious conflicts on the other hand.[114] Generally, the studies find that corruption and money laundering may contribute to or perpetuate violent conflicts, especially if the crimes have an international dimension. Again, the preamble to the UN Convention on Corruption stresses that corruption threatens stability and security of societies.[115]

While I have acknowledged the novelty of AU's inclusion of corruption and money laundering provisions in its protocol, Cecily Rose had pointed out that the yet to be functional AU criminal chamber will not be the first ICL mechanism to 'undertake financial investigations in connection with criminal prosecutions.'[116] Accordingly, reference was made to the OTP's investigation of money laundering by armed groups in one of the earliest DRC situations before the court.[117] This shows that there is a strong link between money laundering and/or corruption and core international crimes.[118] At the ICC, the prosecutor had investigated money laundering as predicate crimes to international crimes committed in Ituri. However, in the African court, it will be possible to charge perpetrators wholly on the strength of their commission of money laundering, and not just as a supporting fact to a core crime. The advantages are manifold, with the most obvious being that money laundering can be prosecuted as a stand-alone offence. This then requires that efforts are not scattered to hinge the evidence that are procured from such investigations on other crimes that the prosecutor may be pushing to establish.

2.4.2.2. Challenges to prosecuting money laundering and corruption

There are several jurisdictional and evidentiary challenges that may be thrown up in an attempt to prosecute money laundering and corruption at the African Court. In the first place, money

[114] See for example J. C. Andvig 'Corruption and Armed Conflicts: Some Stirring Around in the Governance Soup' (2007) *Norwegian Institute of International Affairs Working Paper 720*; see also S. Asongu & O. Kodila-Tedika 'Crime and Conflicts in Africa: Consequences of Corruption?' (2013) 2 *European Economic Letters* 2, 50-55.
[115] Para. 1, UN Convention on Corruption.
[116] C. Rose 'Money Laundering and the African Court of Justice and Human and Peoples' Rights' in C. Jalloh and Ors., (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge University Press 2019) 505.
[117] *Ibid.*
[118] See J.D Serio 'Fueling global crime: the mechanics of money laundering' (2007) 18 *International Review of Law, Computers and Technology* 3, 435-444.

laundering and corruption, especially 'grand corruption' as contemplated by the protocol, may prove difficult to establish; often involves senior government officials who perpetuate such crimes in secret, away from the prying eyes of the public; sometimes by just pushing pens or computer keyboards. There are often no witnesses, collaborators and conspirators are often senior government and banking officials who have closed ranks and evidence can be easily destroyed or hidden. In fact, exposing corruption or money laundering 'was regarded as futile and even harmful.'[119] It is capable of being 'hidden in plain sight,' 'hard to pin down' and it 'thrives in the dark'.[120] The modern use of internet and machines to perpetuate these crimes have made it all the more difficult to establish. Not only does it thrive in the dark, 'there are few darker places than the black-box algorithms and embedded artificial intelligence that now control so much of our daily lives.'[121] In essence, any attempt to prosecute corruption and money laundering must be properly thought out to navigate these difficulties.

I have earlier noted that the protocol predicates money laundering on corruption alone. This means that the crime of money laundering can only be committed out of the crime of corruption. However, this restricted view of the crime of money laundering is slightly problematic. It is a known fact that money laundering can emanate from other acts or crimes including some of the ones listed in the protocol like terrorism, piracy, mercenarism, trafficking in drugs, persons and hazardous wastes as well as illicit exploitation of natural resources. In particular relation to terrorism, laundered monies have been a major financing source for terrorism. When the other crimes from which money laundering can emanate are excluded from the ambit of article 28Ibis, it betrays the principle of coherence which should underpin a treaty like the Malabo protocol. The import of this is that many crimes of money laundering which ought to be prosecuted will remain inadmissible so long as the proceeds are from other conducts that are not necessarily linked to corruption. Linked to this is the transnational nature of money laundering presents challenges relating to procuring defendants and witnesses for trials. For instance, imagine where a proceed of corruption moves from several countries in Africa to be domiciled in a bank in Switzerland, having

[119] Transparency International, '25 Corruption Scandals that Shook the World' 5 July 2019.
[120] UK Fraud Advisory Panel, Hidden in plain sight: domestic corruption, fraud and the integrity deficit, 27 October 2023.
[121] *Ibid.*

crisscrossed many jurisdictions and involved many corporate actors. This challenge is exhaustively dealt with in the section on corporate criminal responsibility further in this chapter.

Also, money laundering and corruption are not international crimes under customary international law. There are limited instances where corruption can take the form of crimes against humanity.[122] GOPAC has suggested that grand corruption be established as a crime under international criminal law.[123] Anderson argued that the ICC should adopt frameworks for prosecuting money laundering.[124] In all, the preponderance of opinion is that money laundering and corruption have not attained the status of international crimes. With this view, a likely challenge to the prosecution of these crimes in the African court, is the defence that a person cannot be prosecuted before an international tribunal, for acts that do not constitute international crimes. It is a variant of the principle of *nullum crimen sine lege* which literally translates as 'no crime without law.' The principle has many strands that include the idea that no one can be punished for a crime that is not clearly stated in a statute; and also that laws must not have retroactive effects.[125] It also implies that 'criminal statutes be drafted with precision, to be strictly construed without extension by analogy, and to have ambiguities resolved in favor of the accused.'[126] These strands all undergird the modern day principle of legality, which is used interchangeably with *nullum crimen sine lege*. The principle protects the rule of law and ensures its application in domestic and international criminal proceedings.

A defendant will therefore not be able to claim a defense to corruption or money laundering under the principle of legality or *nullum crimen sine lege* for a number of reasons: that the Malabo protocol criminalises the conducts and lays down appropriate punishment; that such conducts are already criminalised in many of the domestic systems of the parties to the protocol thus attaining a status of regional customary international law; that their commission could be directly and

[122] I. Bantekas 'Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies' (2006) 4 *JICJ* 3, 466-484.
[123] GOPAC 'Prosecuting Grand Corruption as an International Crime' (2013) at http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf.
[124] M. Anderson 'International Money Laundering: The Need for ICC Investigative and Adjudicative Jurisdiction' (2013) 53 *Virginia Journal of International Law.*
[125] Jerome Hall 'Nulla Poena Sine Lege' (1937) 47 *The Yale Law Journal* 2, p. 165.
[126] B. Van Schaack 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 *The Georgetown Law Journal* p. 121.

indirectly linked to the commission of some of the most serious crimes and lastly, that their prosecution advances the wider goals of ICL. These conclusions are premised on the assumption that the provisions of the protocol are already transposed to domestic penal legislation, where such conducts have not previously been criminalised in domestic law.

3. Certain problematic aspects of the Malabo Protocol

3.1. Immunity provisions in the protocol

There are two main provisions dealing with immunities for government officials in the Malabo protocol. They are articles 46Abis and 46B (2). Whereas the first confers immunities on sitting heads of states and governments and on other officials, the latter strips immunities from officials in relation to all crimes in the protocol. The first provision has been heavily criticized.[127]

As a matter of background, article 46Abis entitled 'Immunities' generally protects three categories of persons: 'serving AU Head of State or Government, anybody acting or entitled to act in such capacity and other senior state officials based on their functions during their tenure of office.' The provision emphasizes that these officials only enjoy immunity during their tenure of office. As simple as it sounds, it becomes worrisome when the phenomenon of sit-tight leaders in Africa is taken into cognizance. Recent events in Africa, including the AU's stance against Yahya Jammeh, have pointed to the fact that the AU is progressively against the idea of a sit-tight leader.[128] Also, the protocol does not explain the exact persons who may be entitled to benefit from this provision, seeing that it refers to 'anybody acting or entitled to act' and, 'other senior state officials.' It

[127] There is a belief that the inclusion of the immunity provision in the protocol was for the purposes of shielding African leaders from prosecution and was thus criticized. See for example a letter titled 'Joint Civil Society Letter on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights' which was co-signed by more than 50 CSOs operating in over 20 countries in Africa, [available at https://www.hrw.org/news/2014/05/12/joint-civil-society-letter-draft-protocol-amendments-protocol-statute-african-court – accessed 12 February 2024]. In denouncing what they call 'presidential absolutism and 'the attempts to limit impunity through immunity provisions', C.M Fombad and E. Nwauche reviewed many constitutional reforms in Africa and concluded that immunity provisions in African constitutions must be balanced with the need for accountability. See C.M Fombad & E. Nwauche 'Africa's Imperial Presidents: Immunity, Impunity and Accountability' (2012) 5 *African Journal of Legal Studies* 91–118.

[128] AU press release 'AU expresses grave concern over State of Emergency, insists President Yahya Jammeh must hand-over power to President-elect Adama Barrow' [available at https://au.int/en/pressreleases/20170118 – accessed 10 February 2024].

therefore opens a floodgate for all sorts of state officials to claim immunity under this provision. This immunity that has come to be known as 'immunity ratione personae'[129] only attaches to a person's office while serving in that position. It is some kind of 'status immunity' which protects external representation and exercise of functions that are crucial for state – and not all types of governmental function.

Akande and Shah identify two types of status immunities: the first is absolute and limited to foreign heads of states and governments, including shielding them from prosecution for international crimes, even when they are not on official duties. The second applies to those abroad on special mission and is for the duration of the mission.[130] Akande has also previously argued that this kind of immunity dates back hundreds of years and has taken roots in international law.[131] It traditionally applies to three persons: head of state, head of government and minister of foreign affairs.[132] The inclusion of foreign affairs minister has been open to debate; however, the ICJ had re-affirmed the immunity of foreign affairs ministers in the *Arrest Warrant Case*.[133] These three officials have special status under international law as supported by article 7(2)(a) of the VCLT. They do not even need to present full powers before they can take actions that bind their states, including entering treaties on their state's behalf. This immunity allows them to carry out such duties without undue and unnecessary interference from other states, including their host states. In contrast, 'immunity ratione materiae'[134] or functional immunity attaches to official acts and functions of state representatives. It continues to shield such officials (for acts performed while in

[129] S.D. Murphy 'Immunity Ratione Personae of Foreign Government Officials and other Topics: The Sixty-Fifth Session of the International Law Commission' (2014) 108 *American Journal of International Law* 1-30.
[130] See D. Akande and S. Shah 'Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili' (2011) 22 *EJIL* 3, 857-858.
[131] D. Akande 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 3, 407-433 at 410.
[132] 'Opinion by Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on immunities of State officials from foreign criminal jurisdiction' 27 April 2015, 5.
[133] See M. Ubeda-Saillard 'Foreign Officials Entitled to (Absolute) Personal Immunity during Their Time in Office' in T. Ruys & Ors (eds) *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 481-495. In the Arrest warrant Case, the ICJ had submitted 'that the functions exercised by a Minister for Foreign Affairs were such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoyed full immunity from criminal jurisdiction and inviolability.' Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium).
[134] For thoughts on this, see R. O'Keefe 'Immunity Ratione Materiae from Foreign Criminal Jurisdiction and the Concept of "Acts Performed in an Official Capacity"'[available at https://rm.coe.int/1680097836 – accessed 12 January 2023].

office) even after they have left office. Their acts are deemed to be acts of their states and as such, they cannot be held liable for those acts. This immunity, however, does not cover international crimes.[135] Akande provides two reasons for this: first, that acts amounting to international crimes cannot be deemed as acts of states and, secondly, international crimes constitute a violation of *jus cogens* which are higher in status to the rules of immunity.[136] While this makes sense as a normative argument, I submit that there is no uniform or consistent state practice on this. There are just a few isolated examples of prosecution of former foreign senior state officials, but they are not enough to undermine the customary international law on *ratione materiae* immunity. Most domestic prosecutions that have taken place, were based on charges flowing from the respective states' treaty obligations (e.g., UNCAT), not custom. An example is the Pinochet prosecution that was undertaken based on treaty-derived obligations.[137]

Where does this leave Article 46Abis of the Malabo protocol and is it fair to conclude that the provision gives room for impunity? Kamari Clarke and others have argued that article 46Abis only contemplates immunity *ratione personae* and not functional immunity.[138] But I disagree. The plain reading of the provision reveals that both types of immunity (*ratione personae* and *ratione materiae*) are contemplated in article 46Abis. The first part of the provision references sitting head of state or government or anyone acting in that capacity. Without doubt, this refers to *immunity ratione* personae. The other part provides that 'other senior officials, based on their functions' shall have immunity. This part clearly refers to functional immunity, although, quite innovatively, it restricts it to 'during their tenure of office'. This should not be surprising, seeing that the Malabo protocol innovatively combines transnational and international crimes. Thus, while functional immunity covers an official, even after leaving office, the plain reading of article 46A bis of the protocol restricts it to the tenure of office. This lends credence to the argument that rather than encouraging impunity, the Malabo protocol advances ICL by discouraging impunity in ways hitherto unknown to international law. The converse argument is that this provision may

[135] See also D. Akande 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 3, 413.
[136] *Ibid,* 414.
[137] A. Bianchi 'Immunity vs Human Rights: The Pinochet Case' (1999) 10 *EJIL* 2, 237-277.
[138] K. Clarke and Ors. 'Introduction' in C. Jalloh and Ors., (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (CUP 2019) 33.

incentivize sit-tight leaders to remain in office, long after their constitutional term of office might have elapsed.[139]

Additionally, article 46B (2), which relates to the substantive issue of criminal responsibility, reaffirms that 'subject to article 46Abis, the official position of any accused person' does not matter. The Malabo Protocol had to re-emphasize that irrespective of a person's official position while the act was committed, it shall not relieve criminal responsibility or mitigate punishment. The drafters saw a need to re-emphasize this in order to drive home the point that under the protocol, immunity will not be a reason for impunity, save for the immunities which are already recognized under customary international law and, therefore, settled in law.

The second point is my earlier assertion that the provisions relating to immunity for heads of state in the Malabo protocol better reflect customary international law (CIL) while article 27 of the Rome Statute remains at best, a treaty provision. In fact, over the last decade, the ICC itself has given conflicting decisions on this issue. For instance, Malawi and Chad decisions of 2011 differs from the position the Court took in the 2014 DRC decision. Orina concludes that 'this hardly makes for convincing jurisprudence and has resulted in a great deal of legal uncertainty.'[140] It is therefore my view that article 27 does not reflect customary international law. If this was even in doubt, many states, including leading members of the UNSC have not ratified the Rome Statute. That a rule is contained in treaties, does not qualify that rule as customary international law; it is perhaps the strongest reason why that rule may not qualify as such, seeing that CIL often arises from general, consistent and established international practices. Authors like Bodansky have argued that 'the law of diplomatic immunities remains customary international law because they emerged through a customary law-making process.'[141]

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[140] N. Orina ''Should the ICJ render an advisory opinion on the immunity question re Articles 27 & 98 of the Rome Statute?' *ICJ Africa Blog* (2018) [available at https://www.academia.edu/44290443/Should_the_ICJ_render_an_advisory_opinion_on_the_immunity_question_re_Articles_27_and_98_of_the_Rome_Statute – accessed 21 March 2024].

[141] D.M Bodansky 'The Concept of Customary International Law' (1995) 16 *Michigan Journal of International Law* 3, 667. See also P. Dupuy 'Formation of Customary International Law and General Principles' in D. Bodansky and ors., (eds) *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008).

My position above differs from the ICC Appeal Chamber's finding in *The Prosecutor v Al Bashir*. The Chamber maintained that 'there is neither State practice nor an impelled sense of such a practice as law, which would support the existence of Head of State immunity under customary international law, in relation to an international criminal court in the exercise of its proper jurisdiction.'[142] This is consistent also with the later decision in the Jordanian Appeal where the question arose as to whether the ICC jurisprudence recognizing an 'international tribunal exception' in relation to individuals from non-ICC parties reflects customary law. The Appeals Chamber said no customary law protecting immunity exists in this relation.[143] Further, it will appear that non-applicability of immunities before international courts, (i.e. once the accused ends up in their jurisdiction) is hardly contested. The bone of contention appeared to be how those individuals end up before those courts. It is almost uncontestable that immunity continues to apply in inter-state relations, making the arrest of the head of state and government, as well as foreign minister highly controversial and unlikely. This is therefore a distinction that can be made between article 27 and the issue of state enforcement of ICC arrest warrants, particularly against officials of non-ICC state parties. A look at charters and statutes of international criminal tribunals and how they functioned since Nuremberg, will suggest that article 27 reflects their uniform but admittedly limited practice. State practices also appear to support the provisions of article 27..[144]

3.2. Corporate criminal responsibility in the Malabo protocol

Corporate criminal responsibility (CCR) is codified in article 46C of the Malabo protocol. While this is innovative, it is not the first time that an international organization or states (acting jointly or singly) will contemplate codifying it in an international criminal treaty. It is also not the first time that an international criminal tribunal will attempt to pronounce on it. The *Al Akhbar* case at the Special Tribunal for Lebanon (STL) presents an example of prior adjudication on this theme.

[142] Summary Judgment of the Appeals Chamber in *The Prosecutor v Al-Bashir*, para. 38.
[143] *Ibid.*
[144] Whereas a survey carried out by the ICRC found that about half of the states surveyed (from Europe and the Americas) had constitutional provisions that are compatible with article 27 of the Rome Statute. See ICRC 'Issues raised regarding the Rome Statute of the ICC by national Constitutional Courts, Supreme Courts and Councils of State' (2010) *Advisory Service on International Humanitarian Law*.

It was one of the first cases before an international criminal tribunal in which corporate criminal responsibility was imputed to a corporation and eventually led to its sentencing.[145]

Efforts at codifying and imputing corporate criminal responsibility have been largely contemplated and rejected in different settings. During the Rome Conference leading to the adoption of the Rome Statute, France made a proposal for corporate criminal responsibility to be included in the Statute. The proposal did not succeed owing to lack of support from other states.[146] The lack of support is understandable as many states that participated in the Rome Conference did not have such forms of liability in their domestic systems. Support for it is however growing. The ILC, which had discussed and rejected the idea previously, has included corporate criminal responsibility in its draft Convention on the Prevention and Punishment of Crimes Against Humanity.[147] Article 5(7) of the text provides that '[S]ubject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.' One author argued that the caveats in this provision are a result of 'a compromise between competing views on corporate liability.'[148] The part that urges states to take measures where appropriate, also allows states without corporate liability in their domestic system, to conclude that in the specific case of crimes against humanity, corporations could be made liable.[149] Additionally, trends in Europe reveal that the Council of Europe[150] and the European Union[151] have both adopted measures that included corporate criminal responsibility

[145] See the case of *Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin*, Case. No. STL-14-06/T/CJ, Trial Chamber Judgement, 15 July 2016 (Akhbar, Trial Chamber Judgement). For more thoughts on the case, see also N. Bernaz 'Corporate Criminal Liability under International Law: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon' (2015) 13 *JICJ* 2, 313-330.

[146] See H.G. van der Wilt 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 *Chinese Journal of International Law* 1, 43-77.

[147] See UN Doc: A/71/10, Draft Convention on the Prevention and Punishment of Crimes against Humanity. For an analysis of the provisions of the draft convention, see M. Bergsmo and S. Tianying *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher2014).

[148] Corporate War Crimes, 'Draft convention on crimes against humanity to include provision on corporate liability?' 26 March 2017, [available at https://corporatewarcrimes.com/2017/03/26/draft-convention-on-crimes-against-humanity-to-include-provision-on-corporate-liability/ - accessed 12 January 2023].

[149] *Ibid.*

[150] See the text of its 'Liability of enterprises for offences: Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and explanatory memorandum' (1990) at https://rm.coe.int/16804c5d71.

[151] For thoughts on this, see G. Vermeulen & Ors '*Liability of legal persons for offences in the EU* (Maklu Publishers 2010).

(CCR). Another author had previously traced the origin of CCR to ancient Roman and Medieval eras.[152]

Flowing from this, inclusion of CCR in the Malabo protocol is a reflection of ongoing trends and states' growing interest on the issue. In Africa, there have been instances where corporations have fueled or elongated conflicts. This is one of the reasons why the continental body chose to address this issue through the codification of CCR. Aside from the idea that its codification is a reflection of problems specific to Africa, there are other advantages to codifying the CCR. One of such is the 'pressure' that this codification puts on scholars of international law to speedily clarify the roles of corporations in ICL and how they can be held accountable.[153] It is also noteworthy that 'as the bulk of economic activity nowadays takes place through corporations, so does economic criminality.'[154] Apart from governments and their agents, corporations are the most active actors within our societies.[155] It is therefore necessary that ICL should be extended to include norms that rein in on their actions, when necessary. Hitherto, there have been difficulties in imputing criminal liability to them in ICL.

Glanville Williams classified the difficulties in imputing CCR to corporations into substantive and procedural.[156] On the procedural point, it has been argued that in answering charges, a defendant has to be physically present and a legal person cannot be physically present nor physically punished, upon conviction, in that sense. Substantively, it has been argued that corporations can only act through humans and as such, they could only be principals or agents with vicarious liability. In common law, however, vicarious liability did not apply to crimes, and as such, no criminal responsibility could be imputed to crimes. The other substantive point was that since corporations have no mind of their own, they could technically not have a guilty mind which is a

[152] A. Bassi 'Corporate criminal liability: an analytical study with special reference to penal laws in India' PhD Thesis, Rajiv Gandhi National University of Law Punjab, 2016.

[153] J. Kyriakakis 'Article 46C: Corporate Criminal Liability at the African Criminal Court' in C. Jalloh and Ors., (eds) The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges (CUP 2019) 784-785.

[154] G. Stessens 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 *The International and Comparative Law Quarterly* 3, 493.

[155] K. Balakrishnan 'Corporate criminal liability - Evolution of the concept' (1998) *Cochin University Law Review* 255.

[156] Glanville William *Criminal Law - The General Part* 2ed, (Stevens and Sons 1961) 853.

fundamental requirement in imputation of crimes.[157] Over the decades though, domestic approaches to sanctioning crimes by corporations have evolved, especially in places like the US, and Europe – with specific examples of developments in Germany, France, Italy, and the UK.[158] It became obvious that 'corporate crime is, in the end, committed by individuals.'[159] Thus, the advancement in international corporate criminal responsibility regime has been driven, quite understandably, by development at the national and regional level.

Returning to article 46C of the Malabo protocol, as with many provisions in the Malabo protocol, this provision presents both challenges and opportunities. There are challenges relating to its drafting, model of liability, complementarity with national mechanisms as well as its eventual enforcement, if the protocol comes into force. For example, the provision uses the term 'corporation' and 'legal persons' interchangeably, although the two terms are not the same. 'Legal person' connotes a wider meaning compared to corporation. There are non-corporate legal entities and it is not clear if they can be criminally liable under this provision. Throughout article 46C, with the exception of paragraph 6, the use of the term 'corporation' was consistent. But with the use of the term 'legal persons' in paragraph 6, there is the tendency to think that non-corporate entities are also contemplated in the provision. This is either a case of bad drafting, or the drafters left this ambiguity for the court to pronounce upon.

Also, in terms of the mode of liability under this provision, previous research[160] has revealed that no African country -with corporate criminal liability- has the specific mode of liability such as that is contained in article 46C. A look across countries in Africa that recognize corporate criminal capacity would reveal that the two dominant modes of corporate criminal liability are vicarious

[157] *Ibid.*
[158] E. Brunelle and ors 'Global Enforcement Outlook: Europe's Evolving Corporate Criminal Liability Laws' (2022) [available at https://riskandcompliance.freshfields.com/post/102hh57/global-enforcement-outlook-europes-evolving-corporate-criminal-liability-laws - accessed 10 May 2023]
[159] J. Arlen 'Evolution of Corporate Criminal Liability: Implications for Managers' in R. Gandossy & J. Sonnenfeld (eds) *Leadership and Governance from the Inside Out* (John Wiley &Sons Inc 2004).
[160] See W. Jordash & N Bracq 'Modes of Liability and Individual Criminal Responsibility' in C. Jalloh, K. Clarke and another (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (CUP 2019) 784-785.

liability,[161] and identification model.[162] However, the drafters of the Malabo protocol adopted the 'organizational liability mode' which is specific to Australia. This model of liability makes a corporation guilty of crime because its organizational culture and policies encourage or permit the commission of offence.[163] Since no African country adopts this model of liability, it already presents a compatibility problem between national laws and the Malabo protocol for states who may wish to ratify it. Needless to say, that for the purposes of complementarity, the model of liability also affects the relationship between the ACC and a national mechanism that chooses to prosecute, since the issue then becomes a non-criminal matter if different models of liability are applied. However, a careful reading of article 46H of the Malabo protocol suggests that all that is required for the ACC to find a case inadmissible is an ongoing or a concluded investigation or prosecution, irrespective of the mode of liability recognized or applied by the national mechanism. Paragraph 2C further strengthens this suggestion when it provides that a case shall be held inadmissible 'if the person concerned has already been tried for conduct which is the subject of the complaint.' Emphasis here is on the conduct. As such, once the conduct or acts upon which a corporation is tried by the national mechanism, is the same as the one that the ACC is attempting to investigate or prosecute, irrespective of the mode of liability, the case will be inadmissible at the ACC.

Lastly, in terms of enforcing CCR, the general problems with enforcing ICL remains. However, accountability for international crimes by multinational corporations who are often registered in one country but work through subsidiaries in other countries, may prove more problematic. Previous efforts to hold multinational oil giants like Shell and Chevron accountable for human rights abuses in places like Nigeria have been unsuccessful.[164] The usual scenario is that powerful multinationals hide behind their subsidiaries to avoid accountability. This is an often-recurrent problem in the context of human rights litigation and may, with certainty, re-emerge in an attempt to hold multinationals accountable for international crimes. There have been cases in the UK, for

[161] For thoughts on this mode of liability, see J. Edwards 'Vicarious Liability in Criminal Law' (1951) 14 *The Modern Law Review* 3, 334-340.
[162] See C. de Magalie 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 *Washington University Global Studies Law Review* 3, 547-566.
[163] See J. Fanto 'Organizational Liability' (2010) 19 *Journal of Law and Policy* 45.
[164] For example, see *HRH Emere Godwin Bebe Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2017] EWHC 89 (TCC) where the English High Court decided that it could not impose a duty of care on the parent company as a result of acts carried out by its subsidiary operating in the Niger Delta region of Nigeria.

example, where the court ruled that a parent company cannot be held accountable for the human rights violations of its subsidiary.

Considering that this scenario is rampant, it is surprising that the Malabo protocol does not address this possibility. However, lessons can be drawn from previous approaches that have been adopted by courts across Europe. In *AAA and others v Unilever PLC and Unilever Tea Kenya Limited,* the UK Appeal Court considered the nature and degree of control which the parent company exercised over the subsidiary.[165] While the decision was unfavorable to the appellants, the ACC could, in a future case, decide on a similar situation by considering the relationship between the parent company and their subsidiary, by investigating the nature and degree of control that latter has over the former. Although, this becomes more complex where the parent company exists in a jurisdiction which may not have CCR included in their laws. In this circumstance, the choices before the ACC are limited. It could however still proceed against the subsidiary company while showing that sufficient grounds are available to prove that the subsidiary carried out the act as part of the organizational 'culture' of the parent company, in line with the model of liability under article 46C.

Conclusion

The opportunities and challenges that the inclusion of CCR in the Malabo protocol presents are some of the focus of this chapter. I presented a brief history of the efforts to codify CCR, while tracing its trajectory to current development. I find that the opportunity that this codification in the Malabo protocol presents is manifold, with the most obvious being the pressure it now puts on international law to clarify the roles of legal persons and how the framework for bringing them to ICL can be strengthened.

Moreover, Africa's long journey to international criminal justice has led to the proposal to establish an ICL section in its single court. It is shown that the evolution of regionalism in ICL is traceable to the need to address some of the fundamental structural critiques of international criminal justice. The Malabo Protocol contains a number of innovative features. I found also that these features are

[165] Case No: A2/2017/0721, In the Court of Appeal (Civil Division) on Appeal from the High Court of Justice Queen's Bench Division the Honourable Mrs Justice Elisabeth Laing DBE [2017] EWHC 371 (QB).

included, again to probably address some of those fundamental structural critiques. While the universal system has concentrated largely on civil and political rights, the protocol has also brought social and economic rights into perspective through its criminalization of offences relating to these. The analysis here suggests that the Malabo Protocol is ahead of its time and appears a little more advanced that the ICC system in certain respects. I have shown regional institutions can be a lot more modern and innovative, while they incorporate regional contexts much better than a universal mechanism. On the other hand, regional mechanisms might have certain features which stand in contradiction to certain universal norms, including the *nullum crimen sine lege* argument. There is also the tendency to over-criminalise conducts; a tendency to do too much, as though there is a competition between the regional and the universal. If the African court becomes operationalized, the protocol would provide a rare opportunity for African countries to address crimes that are well known to the continent, but which are subject of very few trials and convictions at the international level. A rationale for the protocol's inclusion of them alongside 'core crimes' would be that 'many of them are capable of destabilizing a state, which in turn leads to the proliferation of core international crimes.'[166] Their prosecution may then 'have a preventative or deterrent consequence…'[167] thus helping to fulfil the overall goal of ICL which is to close the impunity gap. This ties closely to the idea of regional complementarity and the possibility of a regional court dispensing justice within the territory of the region. In all, the analysis on the question as to 'what lessons can be learnt from the Malabo Protocol as an example of a proposed fully independent strand of regionalism in ICL' reveals patterns and practices that may be useful for arranging the relationship between the ICC and any other future or proposed regional or hybrid international criminal tribunal.

[166] M. Sirleaf 'The African Justice Cascade and the Malabo Protocol' (2017) 11 *International Journal of Transitional Justice,* 71-91.
[167] S. Nimigan 'The Malabo Protocol, the ICC, and the idea of 'Regional Complementarity' (2019) 0 *JICJ* 1-25 at 3.