

Exceptional or Exceptionalism?

The Malabo Protocol and ‘Regional Complementarity’

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Introduction

The principle of ‘complementarity’ is a cornerstone of the Rome Statute of the International Criminal Court (ICC)¹ designed to uphold state sovereignty and to help the court operate efficiently. Under the Rome Statute, the primary obligation to prosecute international crimes is at the national level – in other words, the ICC is to be ‘complementary’ to national jurisdictions.² As such, the ICC cannot proceed with a case that is being investigated and prosecuted domestically in good faith. In short, the ICC is understood as a court of ‘last resort,’ which can only intervene if a state is unable or unwilling to prosecute those most responsible for perpetrating international crime.³

Curiously, in 2014 the African Union (AU) expanded the mandate of the African Court on Human and Peoples’ Rights to try international crimes, including the ‘core’ crimes covered in the Rome Statute.⁴ The Rome Statute identifies the ICC as being complementary *only* to domestic courts, which raises questions about the potential to include regional mechanisms within the current structure. This paper maps the AU’s attempt to regionalize international criminal law and considers where it might fit within the scope of the Rome Statute and the international criminal justice project altogether. This paper argues that while it makes sense substantively to support the notion that regional courts could complement national courts and the ICC for various reasons, concerns about jurisdictional gaps in the African example are significant. Strapped with practical challenges concerning capacity and funding, the AU court is unlikely to be the vehicle that drives the inclusion of regional mechanisms under the umbrella of complementarity at the ICC. In the interim, the paper advocates the use of deliberative processes to facilitate ongoing communication between African states, the AU, and the ICC to resolve the key problems which contribute to the ‘regionalist movement’ promoted by the AU.

Synopsis of the Malabo Protocol

In 2009 the AU had identified a need to accelerate the integration of the contents of the Rome Statute at the regional level.⁵ This was to some degree, a response to the AU’s claims that the ICC unfairly targets Africans with selectivity and bias, jeopardizes peace by prioritizing justice, and reinforces a Western power structure, since the United Nations Security Council reserves tremendous control over the ICC

¹ Rome Statute of the International Criminal Court, A/CONF.183/9 (17 July 1998) available at: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

² Article 17 addresses issues of admissibility and identifies three tests: complementarity, double jeopardy (*ne bis in idem*) and gravity. Complementarity will be the focus of this paper. See Article 17 (1) a, b. Complementarity also requires that states parties incorporate the Rome Statute into domestic legislation in the interest of coherence.

³ For a detailed summary of complementarity see: Paul Seils “The Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes,” *International Center for Transitional Justice* (2016), available at: <https://www.ictj.org/publication/handbook-complementarity>

⁴ The core crimes: genocide, crimes against humanity, war crimes, aggression.

⁵ Note that the AU had been working on the idea of including international crimes at the regional level as early as 2004 and therefore, it cannot be framed as a direct response to the operationalization of the ICC; ICC-AU relations led to the AU court being fast tracked.

without being subject to its jurisdiction.⁶ Mostly though, it was in response to ICC's indictment of Sudanese President Omar Al-Bashir and the concerns about its potentially destabilizing effects on the continent.⁷ Therefore, at the 2013 Extraordinary Session, the AU Assembly identified that it:

NOW DECIDES:

(iv) To fast track the process of expanding the mandate of the African Court on Human and Peoples' Rights (AfCHPR) to try international crimes, such as genocide, crimes against humanity and war crimes.⁸

In an effort to fulfill these aims, in June 2014, the AU Assembly adopted the 'Malabo Protocol,' designed to expand the mandate of the already drafted African Court of Justice and Human Rights (ACJHR) to include jurisdiction over fourteen serious international crimes: genocide, war crimes, crimes against humanity, aggression, constitutional change of government, piracy, and other transnational crimes.⁹ The scope of the Malabo Protocol is vast, far greater than any other international criminal justice mechanism. For example, it criminalizes trafficking with respect to humans, drugs, and hazardous waste, terrorism, and corruption, among others. In addition, the Protocol enumerates corporate criminal liability, which is an important and novel inclusion to international criminal justice, particularly in the context of international human rights and international criminal law. The ACJHR is structured to have three sections: General Affairs, Human and Peoples Rights, and the International Criminal Law Sections. This paper focuses solely on the International Criminal Law Section.

At the time of writing the Malabo Protocol has not entered into force, since it has yet to receive the necessary fifteen ratifications by AU member states.¹⁰ This brief outline encapsulates the uniqueness of this new court. It includes crimes covered by the ICC (genocide, war crimes, crimes against humanity, and aggression) but *also* addresses and criminalizes the behaviours that are most relevant on the continent.

Head of State Immunity under the Malabo Protocol

The Malabo Protocol has been heavily criticized by members of the international community, including global civil society and NGOs in particular for Article 46, which gives heads of state and other public officials immunity from investigation and prosecution by the African Court during their time in office.¹¹ In addition, criticisms concerning capacity, funding, and resources have been levied, as well as concern over the selection of judges, which some argue appears to reinforce a "club of old school boys" approach to justice on the continent, rooted in a protectionist agenda rather than fighting impunity.¹² Thus, in

⁶ See: Jean-Baptiste Jeangène Vilmer, "The African Union and the International Criminal Court: counteracting the crisis," *International Affairs* 92.6 (2016): 1319-1342. Generally, the centrality of the ICC in nine out of ten cases at the ICC has led to assertions of neocolonialism, 'white justice,' and reference to the ICC as the 'African Criminal Court;' Tim Murithi, "Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court," in Werle, G., Fernandez L. and Vormbaum, M. (eds.), *Africa and the International Criminal Court*, Asser Press/Springer, (2014).

⁷ AU PSC Communique on Al-Bashir, (21 July 2008), 142nd Meeting. Note that Sudan is a non-signatory to the ICC and the case was referred to the Court by the UN Security Council, raising complex issues about customary international law and head of state immunity.

⁸ The African Union, Decision on Africa's Relationship with the International Criminal Court, Ext/Assembly/AU/Dec.1 (October 2013).

⁹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted at Malabo, Equatorial Guinea, 27 June 2014.

¹⁰ As of May, 2017, 9 countries have ratified the Malabo Protocol: Benin, Chad, Congo, Ghana, Guinea Bissau, Kenya, Mauritania, São Tomé and Príncipe, Sierra Leone. See: <https://www.au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>

¹¹ Ibid, Article 46Abis.

¹² Betu Kajigi, *The International Criminal Court in Africa: NGOs' Perceptions of the ICC's Legitimacy in Uganda*, Lambert Academic Publishing (2012), 75-77.

concert, these criticisms frame the argument that the new court is merely an attempt to skirt justice for leaders who perpetrate the worlds' most egregious crimes. This is incompatible with quintessential rule of law principles: neither the individual nor the state is above the law and courts need to be independent and impartial.

Without devolving into a discussion of customary law with respect to head of state immunity, it is worth noting that the Rome Statute specifically mandates the irrelevance of immunity under Article 27. However, customary law provides immunity for heads of state and other senior government officials both at home and abroad.¹³ Therefore, Article 27 actually undercuts established international legal standards with respect to absolute personal immunity afforded to heads of state, whether at home or in a foreign country on official business.¹⁴

As such, viewing Article 46 of the Malabo Protocol as a digression of international criminal law lacks cogent justification beyond moral appeal. The ICC is the only court that mandates the irrelevance of official capacity universally, and has been entirely unsuccessful at implementing it. While there are normative imperatives for saying that official capacity does not matter, there are also tangible difficulties with implementing such an ideal: the ICC lacks the capacity to function effectively without the cooperation of states. It remains unclear that indicting a sitting head of state carries enough symbolic value on its own to make it inherently valuable.¹⁵ This has been demonstrated by the failed cases concerning Kenyatta (Kenya) and Al-Bashir (Sudan).

Realistic Expectations and the Nexus of Law and Politics

Setting up realistic expectations and reasonable parameters for the operationalization of international criminal law is necessary. Imposing transnational authority is only as effective as the commitment on the part of states to be subject to it. Thus, the evolution of international norms such as the irrelevance of official capacity under international criminal law vis-à-vis the ICC, are contingent upon diffusion at the level of the sovereign nation-state for their effectiveness to be fully realized. Not all norms diffuse evenly, as can be seen with respect to impunity with respect to head of state immunity in the African context. Implementing strategies to facilitate compromise, deliberation, and meaningful dialogue may be useful to reach a shared understanding.¹⁶ However, it is unsurprising that the AU is looking inward to establish legal systems that accurately reflect prevailing norms from its perspective.

¹³ Jutta F. Bertram-Nothnagel, "A Seed for World Peace Growing in Africa: The Kampala Amendments on the Crime of Aggression and the Monsoon of Malabo," in *The International Criminal Court and Africa: One Decade On*, Evelyn A. Ankumah (ed.), (Intersentia: 2016), 369.

¹⁴ Roseanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), 169. See also: Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?" *Journal of International Criminal Justice* 7.2 (2009); Asad Kiyani, "Al-Bashir and the ICC: The Problem of Head of State Immunity," *Chinese Journal of International Law* (2013).

¹⁵ Also note the ICC's difficulty with respect to the indictment of Kenyan President Uhuru Kenyatta and his Deputy President William Ruto. The AU decided that heads of state or heads of government could not be charged before any international court or tribunal during their term of office, thus contributing to formalized noncooperation from the AU with the ICC in such cases. Such noncooperation led to difficulty with evidence gathering, which resulted in the Kenyatta case being dropped. See: The African Union, Decision on Africa's Relationship with the International Criminal Court, Ext/Assembly/AU/Dec.1 (October 2013).

¹⁶ See: Amy Gutmann and Dennis Thompson, *Democracy and Disagreement: Why moral conflict cannot be avoided in politics, and what should be done about it*, (Harvard University Press, 1996); Joseph Besette, 'Deliberative Democracy: The Majority Principle in Republican Government,' in Robert A. Goldwin and William A. Schambra (eds), *How Democratic Is the Constitution?* (American Enterprise Institute for Public Policy Research, 1980); Joshua Cohen and Joel Rogers, *On Democracy: Toward a Transformation of American Society* (Penguin, 1983); See also Marlies Glasius, *The International Criminal Court: A global civil society achievement* (Routledge, 2006), 113: "Although international law-making has not traditionally been a democratic process, there is an increasing sense among national and international diplomats that, as more decisions have moved up to the international level, international decision-making, and international law-making in particular, ought to be (more) democratic."

Considering that the Rome Statute was born out of consensus-based negotiation, compromises were struck in order to ensure its success.¹⁷ Such compromises and built-in statutory ambiguities demand continued conversation in order for the institution to remain legitimate in the eyes of its member states. It also important to consider that “the aim of the Statute is not to negate sovereignty... which illustrates clearly that the concerns of States with respect to their sovereign interests in criminal justice was at the forefront of the negotiations from the earliest stages.”¹⁸ In terms of operationalization of the Court, the ICC remains bound by the limitations of respecting state sovereignty, while at the same time imposing transnational authority. This is a delicate balance, yet the success and longevity of the Court depend on it.

As such, the move to create a regional African court for international crimes was spurred, at least in small part, by the ICC: perceptions of sovereign interference and opposing interpretations of customary international law frame the debate.¹⁹ Yet it is important to consider the potential compatibility of the Malabo Protocol with the Rome Statute. From the outset, the potential jurisdictional gap created by Article 46 of the ACJHR suggests an inherent incompatibility with the Rome Statute; this intuitively blunts any cursory notion of expanding complementarity to include regional courts, least of all the ACJHR.

Working with the ICC and Amendments to the Rome Statute

It is important to note that the AU has made efforts to work with the ICC on the idea of regional complementarity. For example, Kenya has submitted a proposed amendment to the Rome Statute to the Working Group on Amendments with respect to the Preamble of the Rome Statute. At present, the Preamble states, “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”²⁰ Kenya proposed that it be amended to read, “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.”²¹ The Kenyan delegate said that regional complementarity “is not a way to oust the ICC. It is the opposite. The regional jurisdiction gets just the first bite. National jurisdiction may be difficult to exercise. Rather than spring-boarding [from national to international jurisdiction], the ICC would be what it was meant to be, the last resort.”²² The delegation of Kenya also identified that the proposal to include regional courts would “allow judicial proceedings to take place closer to the location where the alleged crimes had been committed.”²³ Through this lens, regional complementarity is a compelling concept.

At present, the status of the amendment is pending. Interestingly, according to an attendee of the Working Group on Amendments, “the meetings left the impression that states were quite open to the substance of the proposed amendment but concerned that the change in the preamble might require maybe

Expanding on this idea, the operation of international law, and more specifically international criminal law, ought to be embodied a similar character in the interest of legitimacy.

¹⁷ See generally: Fanny Benedetti, Karine Bonneau and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome 1994-1998*, Martinus Nijhoff Publishers (2014).

¹⁸ Triffterer, 606.

¹⁹ See Matiangai V.S. Sirleaf, “Regionalism, Regime Complexes, and the Crisis in International Criminal Justice,” *Columbia Journal of Transnational Law*, 54 (2015-2016): this paper argues that the ICC’s institutional crisis created a space for regional intervention and integration.

²⁰ The Rome Statute of the International Criminal Court (1998) available at:

http://legal.un.org/icc/statute/99_corr/preamble.htm

²¹ African Union Withdrawal Strategy, Draft 2 Version 12.01.2017, p.9 available at:

https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf see also United Nations Depository Notification C.N.1026.2013TREATIES-XVIII.10 of 14 March 2014 (Proposal of amendments by Kenya to the Statute).

²² Bertram-Nothnagel, 373.

²³ International Criminal Court Assembly of States Parties, *Report of the Working Group on Amendments*, Fourteenth Session (18-26 November 2015) ICC-ASP/14/34, para. E, p.3.

more complicated amendments in addition.”²⁴ This speaks to the complexities at play; while the substance of the proposed amendment may be agreeable, process restricts behaviour and action: a limiting factor. Treating the Preamble to the Rome Statute like a delicate scarf that might unravel at the slightest tug of a thread highlights the fragility and complexity of the treaty. It also highlights restriction with respect to statutory change at the ICC. Closing the door on a potential mechanism for survivors to see justice done could deny access to many; punishing a greater number of severe crimes at a more local level ought to be encouraged to foster greater transparency with those most affected.

International Criminal Law: Aims and Goals

It is necessary to emphasize that the international criminal justice project is intended to help survivors, deter future crime, and act as a means to heal society within not only an international criminal law framework, but a transitional justice one as well. The law is inherently unemotional and objective, yet the international community takes charged ownership over the core crimes, since they are an affront to humanity altogether. However, these crimes cannot and should not be severed from their local contexts. Often survivors are forgotten in the process. Therefore, it becomes imperative to consider whether or not the ACJHR could effectively contribute to transitional justice. In the context of human rights law, it has been argued that prosecutions deter future violations due to both normative pressures and material punishment: the more prosecutions in a country, the less repressive it is.²⁵ Analogously, the use of regional criminal law mechanisms might result in a similar outcome.

The contemporary standard is one of judicial accountability and punishment for international crimes. As such, states withdrawing from the Rome Statute and signing the ACJHR becomes an important concern: jurisdictional gaps that may result in impunity ought to be avoided. After all, the most fundamental rule of law principle dictates that no individual and no state is above the law. Hypothetically, however, even if states withdraw from the Rome Statute and are bound only by the ACJHR, the UN Security Council could still refer cases dealing with heads of state to the ICC, or any other individual for that matter. Although, with an additional level of complementarity jurisdiction to consider, proving an inability and/or unwillingness to prosecute will be more slow and complex than it already is.²⁶ It is also necessary to point out the difficulties that the ICC has faced with respect to the arrest and surrender of Al-Bashir, which severely questions the notion of universal jurisdiction contained in the Rome Statute altogether. So, while the possibility of regionalizing international criminal law offers unforeseeable potential, it ought to be levied against the potential risks: comparatively less justice for survivors, impunity, and repression. However, the preamble of the Malabo Protocol clearly identifies “respect for democratic principles, human and people’s rights, the rule of law and good governance.”²⁷ This supports the idea that the ACJHR is mindful of international standards. After all, the foundation of international criminal law depends upon universal acceptance of expectations for behaviour. Once general acceptance moves into the stages of interpretation and implementation, disagreement on the part of the relevant actors is predictable and foreseeable.

Arguments for Regionalizing Complementarity

In support of regional complementarity, it has been argued that “a purposive interpretation of the [complementarity] principle can include regional courts. In assessing the admissibility of a case before the Court, it is important to consider whether any action, if any, has been taken not only in the national courts

²⁴ Bertram-Nothnagel, 374, footnote 109.

²⁵ Hun Joon Kim and Kathryn Sikkink, “Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries,” *International Studies Quarterly* 54 (2010).

²⁶ See for example: F. Mégret and M. Samson, “Holding the Line on Complementarity in Libya: The Case for Tolerated Flawed Domestic Trials,” *Journal of International Criminal Justice* 11 (2013): 571-589; H. van der Merwe, “The Show Must Not Go On: Complementarity, the Due Process Thesis and Overzealous Domestic Prosecutions,” *International Criminal Law Review* 15 (2015): 40-75.

²⁷ Malabo Protocol Preamble, paragraph 10.

of the State, but also at regional courts.”²⁸ The idea of purposive interpretation is interesting. Typically, judges employ a literal interpretation by first looking at the wording of the law. Such an approach reinforces the promise of objectivity and neutrality on the part of judges. On the other hand, purposive approaches provide judges with a broader scope to develop the law, since the aim is to determine the “normative message that arises from the text ... interpretation shapes the content of the norm ‘trapped’ inside the text.”²⁹ That is because “the [objective] purpose may exist at varying levels of abstraction, the highest of which is the intent to actualize the legal system’s fundamental values, as they exist at the time of interpretation.”³⁰ Importantly, judges remain bound by the text of the statute: “That language sets the outer limits of any possible interpretation ... one cannot read into them what they do not contain.”³¹ On this basis, it is useful to conceptualize what the ‘fundamental values’ of the Rome Statute are and how its language might allow the ICC to transform abstract norms into tangible outcomes.

Employing a purposive approach to an interpretation of the complementarity principle is necessary yet problematic. Such an approach is left wide open to criticism for its high levels of judicial subjectivity with far-reaching, binding consequences. Even more difficult, the nature of the Rome Statute negotiations resulted in high politicization, compromise, and intentionally built-in ‘constructed’ ambiguities intended to punt interpretation over to judges somewhere down the line.³² In many respects, the most difficult/progressive inclusions in the Rome Statute literally ‘say’ and therefore ‘mean’ nothing. At the same time, the notion that international criminal law ought to be approached with the same rigidity as domestic criminal law is deeply flawed. International criminal law requires a supportive international political environment: international criminal law is only important because the international community says that it is. As such, the legitimacy of the international criminal justice project is subject to scrutiny by individuals, states, organizations, institutions, and beyond. Therefore, although international criminal law is a blown-up version of domestic law, its scope and character is markedly different.³³ Therefore, it becomes important to consider approaching it with a degree of sensible flexibility coupled with ongoing dialectical/deliberative processes to arrive at reasoned interpretations of the law and the standards arising from it.

Such a purposive approach forces an analysis which considers opening up the ‘black box’ of the institution by studying judges themselves because the operationalization of the Rome Statute in many respects depends on how they see the world. At the international level this further complicates key principles of the rule of law: neutrality, objectivity, and fairness since mutual understandings with respect to norms and values, coupled with severance from political influence is difficult if not impossible to achieve. To divorce a judge from her sphere of influence (whether conscious or not) is ambitious, especially if it is their job to reach moral and normative judgments that are not clearly enumerated within

²⁸ Gerhard Werle, Lovell Fernandez and Moritz Vormbaum eds., *Africa and the International Criminal Court* (Asser Press), 2014, Annex 1: Africa and the International Criminal Court – Recommendations, 231.

²⁹ Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press: 2005), 3.

³⁰ Barak, 35.

³¹ Barak, 20.

³² See: Valerie Oosterveld, “Constructive Ambiguity and the Meaning of ‘Gender’ for the International Criminal Court,” *International Journal of Feminist Politics* 16 (2014): 563-580. Also consider the variance in opinion with respect to the apparent statutory conflict between Article 27 and Article 98, most relevant to Chad and Malawi with respect to the non-arrest of al-Bashir. This statutory conflict has been framed as ‘political compromise’ struck by the negotiators in Rome, see: Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd Edition (C.H. Beck/Hart: 2008), at 781. Also consider the significant political compromise with respect to the independence of the Prosecutor and the role of the UN Security Council.

³³ See Mark A. Drumbl, *Atrocity, Punishment, and International Law*, (Cambridge, 2007) xi: “I argue that the punishment of extraordinary international crimes should not uncritically adopt the methods and assumptions of ordinary liberal criminal law that currently underpin international courts ... We need to think hard about transcending existing procedural and institutional frameworks. A sustained process of critique and renewal may provide international criminal punishment with its own conceptual and philosophical foundations, instead of its current grounding on borrowed stilts.”

the text of the law itself. Framed in this way, it is unsurprising that many African states identify the ICC as imperialist, neocolonial, and paternalistic; questions ought to be raised with respect to the universality of shared commitments not only to values and norms *prima facie*, but furthermore, an interpretation of what those actually mean as a matter of practice. In the absence of meaningful deliberation and dialogue as to what an appropriate shared interpretation of these norms might be in light of intentionally vague statutory conflicts/obligations, legitimacy concerns are imminent.³⁴ This lack of dialogue is compounded by the insufficiency of the Assembly of States parties to overcome African complaints, which is especially inexcusable given the ICC's uneven involvement in African situations.³⁵ However, the general makeup of the ICC is worth pointing out: The Prosecutor Fatou Bensouda is Gambian; the first vice-president is a judge from Kenya; four judges are African; and the Assembly of States Parties president a Justice Minister from Senegal. Combined with the fact that African States Parties to the Rome Statute represent the largest regional bloc of signatories, the fabric of the ICC appears to be representative, at least on its surface.

Practically speaking, it seems that a purposive interpretation of the Rome Statute with respect to complementarity requires that the ICC be used fundamentally as a court of 'last resort' and maintain the primacy of state sovereignty. According to former Prosecutor, Luis Moreno-Ocampo: "As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."³⁶ Therefore, less cases at the ICC equals greater success. Facilitating an intermediary level of judicial intervention between the domestic and international levels seems advantageous for the proliferation of justice and the efficacy of international criminal justice overall. However, the idea that a regional body could act as a check on national mechanisms and the responsibility of states to prosecute extraordinary international crime implies a power-sharing arrangement with the ICC, since both will function as supranational institutions with competing mandates. It also requires that the regional court be *effective* and *cooperative* with other relevant institutions in order to function as a true 'complement.'

Yet there seems to be a trend to associate international criminal justice in Africa with the ICC synonymously and interchangeably. These are not mutually exclusive. While the ICC is one vehicle for the operationalization of international criminal justice, it is not necessarily the only one, nor should it be. Consider the expansion of the African Court of Justice and Human Rights as a trade-off: on the one hand, it *may* insulate politically powerful Africans from accountability and wave the flag of impunity for those individuals; on the other, it *will* expand subject matter jurisdiction to include crimes that are especially relevant to the continent and yet beyond the scope of what is captured by the Rome Statute.³⁷ Thus, consideration must be given to the idea that international criminal justice exists outside of the confines of the ICC. Whether or not states or regional groupings of states ascribe to an interpretation of international

³⁴ Glasius, 118: "the idea of deliberative democracy is that proposals can be debated on their merits through rational arguments rather than solely on the basis of representation of interests ... deliberative democracy entails giving and demanding reasons for each position, reasons that would, at least theoretically, be capable of swaying other participants in the debate." and at 120: "deliberative democracy should not be a comfortable place of conversation among those who share language, assumptions, and ways of looking at issues ... while not abandoning their own perspectives, people who listen across differences come to understand something about the ways that proposals and policies affect others differently situated." Within the context of ICC-Africa relations, this type of deliberation can only stand to enrich the international criminal justice project as a whole and lend itself to a deeper understanding of the issues at stake.

³⁵ Nine out of ten cases at the ICC are African (Georgia as the sole exception). Since the ICC has only had a direct impact on African states it is relatively unsurprising that the majority of the complaints and discontent are African.

³⁶ *The Principle of Complementarity in Practice*, informal expert paper available at: <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>

³⁷ *Supra* note 2, international criminal law section includes the following 'new' crimes: the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources.

criminal law in exactly the same way as it is articulated in the Rome Statute, does not challenge their commitment to international criminal justice altogether. Variance in interpretation, application, and operationalization will always be context-dependent across both time and space. The ACJHR's decision to include an international criminal law section answers calls for 'African solutions for African problems.'³⁸ Outright dismissal of the Malabo Protocol seems unreasonably short-sighted. Its utility for the evolution of the international criminal justice norm on the continent has yet to be explored and arguably, its conception of the scope of crimes under its umbrella has the potential to contribute to the advancement of the international criminal justice project if implemented effectively.

Interestingly, the Rome Statute does not specifically address the role of *ad hoc* or special tribunals with respect to complementarity either and although they are typically viewed as an institution of the state, they have a distinct character from usual national courts based especially on their historic ties to the United Nations. This is especially important to consider given the resurgence of hybrid tribunals in recent years.³⁹ For example, the AU committed to establish the Hybrid Court for South Sudan in the 2015 peace agreement.⁴⁰ Yet to be established, it is unclear how this court might fit within the principle of complementarity at the ICC. This is especially interesting since it is sanctioned by the AU, which raises questions about whether or not delicate peace processes and conflict settings change the acceptability of international criminal justice jurisdictions. Nevertheless, contemporary trends in international relations and international criminal law seem to suggest that opening up the discussion with respect to complementarity is not only appropriate, but necessary. On the surface, it is unclear how the primary obligation to prosecute lies with the state, yet an institution governed by a regional grouping of states is inherently insufficient and/or inappropriate to do the same. This is not necessarily a competitive 'one or the other' scenario, or a transfer of authority. Both the ACJHR and the ICC could operate in a mutually beneficial and reinforcing manner if broached correctly from the start; some envision that regional mechanisms such as the ACJHR could be "essential parts of a robust system of global justice."⁴¹

In addition, others offer a more general argument, pointing out that the likelihood of states establishing regional tribunals with overlapping subject-matter jurisdiction with the ICC should be expected over time: "These may be continent wide, as with the African Court, or multilateral, or even bilateral, where two states establish a criminal tribunal to prosecute crimes in a specific conflict."⁴² The untapped potential of expanding the jurisdiction of other regional courts such as the European Court of Human Rights and the Inter-American Court of Human Rights comes to mind. Pragmatically, the ICC is limited with respect to funding, commitments, and resources. After all, the Rome Statute does not restrict its member states from entering other treaties such as regional groupings or organizations with a mandate

³⁸ The African Union's Withdrawal Strategy Document emphasizes this point. See page 12 e. para 35: "In addition to strengthening national and regional mechanisms, member states should endeavor to ratify and domesticate the *Protocol on the Amendments on the Statute of the African Court of Justice and Human Rights* in order to enhance principle of complementarity in order to reduce the deference to the ICC, which furthers the mantra of African solution to African problems." Note that 'reduce the deference to the ICC' does not imply 'do away with' and thus, it is clear that the two instruments are intended to coexist.

³⁹ See Mark Kersten, "As the Pendulum Swings – The Revival of the Hybrid Tribunal," available at:

https://www.academia.edu/32649463/As_the_Pendulum_Swings_-The_Revival_of_the_Hybrid_Tribunal

⁴⁰ Intergovernmental Authority on Development, 'Agreement on the Resolution of the Conflict in the Republic of South Sudan,' Addis Ababa, Ethiopia (17 August 2015) Chapter V, Part 3, p. 43 available at:

https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf

⁴¹ Matiangai V.S. Sirleaf, "Regionalism, Regime Complexes, and the Crisis in International Criminal Justice," *Columbia Journal of Transnational Law* 54 (2015-2016), 703.

⁴² Miles Jackson, "Regional Complementarity: The Rome Statute and Public International Law," *Journal of International Criminal Justice* 14 (2016), 1062.

to address similar things.⁴³ Therefore, a triangulation of complementarity (with the ICC remaining at the top) makes practical sense.

In the context of the ACJHR, it is argued that such an approach undermines the universal commitment to ending impunity, largely because of Article 46.⁴⁴ Levied against the assertion purported by the AU and some African States Parties to the Rome Statute that indicting heads of state and government has detrimental consequences for peace, stability, and reconciliation, many scholars and practitioners say that this approach is contrary to the normative values promoted by the ICC and international criminal law in general.⁴⁵ A built-in loophole that insulates anyone from accountability is fundamentally incompatible with the values and aims of the ICC (and the international community writ large). Therefore, the ACJHR is an insufficient bridge with respect to complementarity and should not be supported – it is that simple.

However, these critiques only scratch the surface of what is at issue: pigeonholing the Malabo Protocol in the immunity provision undersells its potential, not only for ‘Africa,’ but for the international community, victims, and advocates of international criminal justice too. More importantly, the universal jurisdiction (albeit imperfect) of the ICC remains in-tact whether or not the ACJHR is at play. In addition, States Parties to the Rome Statute will continue to have an obligation to cooperate with the ICC. Nevertheless, this skepticism can be explained by situating the Malabo Protocol against the backdrop of the escalating crisis between the ICC and the AU. The strained relationship has had a profound impact on the discourse: “The charged atmosphere appears to have left scant room for a detailed and comprehensive assessment of the drafting of the Malabo Protocol, and for a calm evaluation [of] how the interplay of national, regional and international jurisdiction could best advance the judicial response to crimes of international concern.”⁴⁶ This is a problem that needs to be addressed, since calls for substantive consideration on the issue of integrating regional courts into an understanding of the concept of complementarity with the ICC can be found in AU meeting transcripts as early as 2009.⁴⁷ To be clear, the Malabo Protocol may have been accelerated due to tensing relations between the AU and the ICC, but the AU had been working on it since 2004.⁴⁸ Thus, the tendency to view the ACJHR as an attempt to insulate politically powerful Africans from the ICC is unduly hollow and provides an inaccurate narrative of its trajectory.

Understanding the Relationship between the ICC and the Malabo Protocol

A more interesting question considers the implications of competing obligations of States Parties to both the Rome Statute and the ACJHR. Since a key aspect of complementarity is the integration of the Rome Statute into domestic law, it remains unclear how double signatories might implement competing obligations (e.g. head of state immunity; potential conflicts with respect to the definition of crimes such as terrorism and unconstitutional change of government).⁴⁹ This is a significant point, since the foundation

⁴³ See: Ademola Abass, “Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges,” *European Journal of International Law* 24 (2013): 933-946.

⁴⁴ See: Kristen Rau, “Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights,” *Minnesota Law Review* 9.2 (2012): 669-708.

⁴⁵ Sirleaf, “Regionalism, Regime Complexes, and the Crisis in International Criminal Justice,” 702.

⁴⁶ Bertram-Nothnagel, 360.

⁴⁷ In 2009 the AU summit requested the AU Commission in consultation with the African Court on Human and Peoples’ Rights examine the implications of including international crimes under the court’s jurisdiction.

⁴⁸ African Union, *Strategic Plan of the African Union Commission: vision and mission of the African Union* May 2004, (Addis Ababa).

⁴⁹ Malabo Protocol, Article 28G: Terrorism; Article 28E: Unconstitutional Change of Government; some NGO’s (Amnesty International in particular) have identifies that the definition of terrorism is overly broad, and the definition of unconstitutional change of government may potentially criminalize popular protests; both laws are drafted broadly and “raise serious concerns as to the compliance with the principle of legality established under international law” taken from “Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded

of South Africa's initial withdrawal from the Rome Statute stemmed from their conflicting obligations to the AU and the ICC with respect to the (non)-arrest of al-Bashir.⁵⁰ The decision was made to uphold South Africa's commitment to the AU: this raises tempered suspicion about the nature of competing obligations and African regional political interests and dynamics. The predicted incompatibility between the Malabo Protocol and the Rome Statute in key areas raise questions about competing obligations in the international context as well as the hierarchy/supremacy of competing international judicial institutions and obligations.

This is compounded by the fact that the Malabo Protocol makes no specific reference to the ICC, nor does it outline how the two institutions might work together for States Parties to both. Max du Plessis opines that "it is unfathomable that the draft [Malabo] protocol nowhere mentions the ICC, let alone attempts to set a path for African states that must navigate between these two institutions. Either this is a sign that the AU hopes to sidestep the ICC, or it is a case of irresponsible treaty making."⁵¹ To this point, there is no monolithic AU position on the intended role of the Malabo Protocol. Bertram-Nothnagel identifies three main understandings of the relationship between the ACJHR and the ICC on the part of African states: (1) a full regional replacement for the Rome Statute, calling on states to withdraw from the ICC; (2) complementarity with the ICC with both national *and* regional jurisdiction; (3) wholehearted support for the ICC, yet an identification that the Malabo Protocol fortifies the argument that the Assembly of States Parties must do more to overcome African complaints.⁵²

Most telling, in 2016 at the peak of the 'ICC withdrawal movement' when South Africa, Burundi, and the Gambia had initiated procedures to withdraw from the Rome Statute, the most vocal AU critics also States Parties to the Rome Statute that (predictably) should have followed suit never did (e.g. Kenya, Uganda, Namibia). This is further confused by the fact that the Gambia has reversed its decision by deciding to stay in the ICC, and South Africa has also halted their withdrawal. Thus, Burundi remains the sole dissenter for transparent reasons.⁵³ Burundi's withdrawal was not rooted in an appropriate justification by any standard, it was purely based on self-interest and cowardice. Thus, "Burundi civil society is clear that their government is withdrawing from democracy, human rights and the rule of law, not the ICC."⁵⁴ It is important to emphasize that the ICC is a vehicle for much more than retribution in a vacuum; it is a manifestation of norms and values and a promise to victims that even if domestic systems fail, the rule of law remains and their voices will still be heard. The ICC has maintained their commitment to continue with the investigation in Burundi, therefore reaffirming this promise.

Nevertheless, this demonstrates that African concerns with the ICC outside of Burundi are not generally rooted in a desire to forego international legal obligations, or the rule of law, but are instead a manifestation of unresolved dispute. This is further reflected in the soft language enacted throughout the AU's most recent Proposed Withdrawal Strategy, which reads more like a plea for reasoned deliberation and compromise as opposed to outright abandon.⁵⁵ However, it is important to note that these

African Court," *Amnesty International* (2017), 6. Available at:

<https://www.amnesty.org/download/Documents/AFR0161372017ENGLISH.PDF>

⁵⁰ See Franziska Boehme, "We Chose Africa: South Africa and the Regional Politics of Cooperation within the International Criminal Court," *International Journal of Transitional Justice* (2016).

⁵¹ Max du Plessis, "Implications of the AU decision to give the African Court jurisdiction over international crimes," *Institute for Security Studies* 235 (June 2012), 10.

⁵² Bertram-Nothnagel, 372. Note some states known to be vocal supporters of the ICC: Algeria, Botswana, Côte d'Ivoire, Nigeria, Senegal and Tunisia.

⁵³ See: "Burundi on regressive path following ICC withdrawal vote," *Coalition for the International Criminal Court*, 12 October 2016, available at: http://www.iccnw.org/documents/CICCP_R_BurundiICCwithdrawal_Oct2016.pdf; "Burundi: ICC Withdrawal Major Loss to Victims: Latest Move Shows Government's Disregard for Victims," *Human Rights Watch*, 27 October 2016, available at: <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>

⁵⁴ *Ibid*, "Burundi on regressive path following ICC withdrawal vote."

⁵⁵ "Withdraw Strategy Document," *Human Rights Watch*, January 2017 available at: https://www.hrw.org/sites/default/files/.../icc_withdrawal_strategy_jan_2017.pdf

disagreements are likely better understood by giving consideration to colonial histories and deeply embedded asymmetrical power relations. Such imbalances ultimately shape a mutually constructed skepticism on the part of both ‘Africa’ and ‘the West,’ which will continue to make cooperation and trust difficult in the absence of genuine deliberation.

An Operational, Yet Ineffective Court

More robust critiques of the Malabo Protocol stem from practical concerns rather than substantive ones. For example, with respect to funding, “the unit cost of a single trial for an international crime in 2009 was estimated to be US \$20 million. This is nearly double the approved 2009 budgets for the African Court and the African Commission standing at US \$7 642 269 and US \$3 671 766, respectively.”⁵⁶ For the purpose of comparison, “the ICC budget [in the same year] ... for investigating just three crimes, and not the raft of offences the African Court is expected to tackle – is more than 14 times that of the African Court without a criminal component; and is just about double the entire budget of the AU.”⁵⁷ In 2012, the Pan-African Lawyers Union estimated that it would cost \$4.42 million USD and 211 people to staff the ACJHR.⁵⁸ It can be deduced that investigating and prosecuting international criminal cases on the continent is flagrantly expensive. For example, the ICC’s budget continues to increase annually: in 2016 the approved budget was 17.3% over what it was in 2015.⁵⁹ Such a financial burden is unrealistic for the ACJHR. Staffing and capacitating a court with effective prosecutors, investigators, and judges requires a significant amount of resources. The Protocol lacks a funding breakdown and it remains unclear where the money might come from. This raises concerns with respect to independence from the start. Furthermore, historic AU donors such as the European Union have indicated that they are not willing to finance the ACJHR based on the inclusion of immunity for heads of state.⁶⁰ The widespread disapproval on the part of the international community and global civil society with respect to the immunity provision may prove to be a steep challenge for securing donors, should the Protocol receive enough ratifications to come into force.

Looking internally, “the capacity of African states to muster the resources and will to guarantee these facilities – even as many of them struggle to guarantee the independence of their own domestic judicial institutions – is open to serious question.”⁶¹ Furthermore, for African States Parties to the ICC and the ACJHR, the double burden of funding in addition to domestic obligations would be encumbering. This raises questions not of willingness to prosecute, but of ability. The challenges of practically and effectively regionalizing international criminal justice and providing ‘African solutions for African problems’ make this no simple task.

Given that the majority of African cases at the ICC have resulted from self-referral, most recently by the Government of Gabon for example, it cannot be said that there is a lack of will on the continent to see justice done through international courts. Thus, African states are typically willing to prosecute but

see also: “AU’s Withdrawal Strategy’ Less than Meets the Eye,” *Human Rights Watch*, 1 February 2017 available at: <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye>

Mark Kersten, “Not All it’s Cracked Up to Be - The African Union’s ‘ICC Withdrawal Strategy,’ *Justice in Conflict*, 6 February 2017 available at: <https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/>

Patryk I. Labuda, “The African Union’s Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?” *EJIL: Talk!* 15 February 2017, available at: <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/>

⁵⁶Max du Plessis, “Implications of the AU decision to give the African Court jurisdiction over international crimes,” *Institute for Security Studies* 235 (June 2012), 9.

⁵⁷ *Ibid.*

⁵⁸ Amnesty International, 2017, 9.

⁵⁹ International Criminal Court Assembly of States Parties. 2015. *Proposed Programme Budget for 2016 of the International Criminal Court*. Fourteenth Session ICC-ASP/14/10, 18-26 November 2016. The Hague.

⁶⁰ *Ibid.*

⁶¹Max du Plessis, 10.

are not able. If this could be effectively resolved at the regional level, this appears to be a good thing. However, keeping realistic expectations demands that the focus shift to a healthier relationship between Africa and the ICC for now since the likelihood of the ACJHR being effective is seriously questionable. As du Plessis suggests, “Of course, we should all applaud if the AU were in due course to unveil a comprehensively funded, strongly resourced, legally sound, and politically back African court that fearlessly pursues justice for those afflicted by the continent’s warlords and dictators, at the same time as fulfilling effectively its parallel human rights roles.”⁶² Unfortunately, the Malabo Protocol is unlikely to have the capacity to satisfy each of these requirements at this time.

Conclusion

The challenges and criticisms outlined make the ACJHR a problematic candidate for forging the idea of regional complementarity vis-à-vis the ICC. The troubled relationship between the AU and the ICC, insufficient resources, and unfavourable constructions of African identity couched in rhetoric of corruption and distrust frame the argument that the ACJHR is a form of regional exceptionalism. Against this backdrop, such assumptions are aggravated by the immunity provision contained in Article 46 of the Protocol and the absence of a clearly defined relationship between the ACJHR and the ICC. Each of these concerns makes the likelihood of integrating regional courts, the ACJHR in particular, within the ICC’s complementary framework unlikely.

Nevertheless, evoking a deliberative approach to meaningfully consider African concerns with the ICC is a beneficial strategy in the interim. Keeping open dialogue and pursuing avenues for cooperation will contribute to a proliferation of international criminal justice and will facilitate a better working relationship between the ICC and the AU in the future, both of which remain important goals. African states represent the largest regional bloc of signatories to the ICC and nine of the ten cases at the ICC have been African. These considerations illuminate the significance and importance of bettering the relationship between the ICC and African states, since a cooperative relationship will facilitate better justice for victims now and in the future, especially if ACJHR comes to fruition.

On this basis, it is important to determine how the ICC’s operations are at odds with the expectations of African States Parties and seek to reconcile these differences through deliberative processes. Moves to regionalize international criminal law in Africa are, at least in part, a response to the ICC’s behaviour on the continent and while there are concerns regarding the effectiveness of the proposed ACJHR, substantively the notion that regional courts could act as an intermediary between domestic and international criminal courts seem like a reasonable idea. Offering another avenue for justice to be done (which may or may not be more appropriate than a domestic or international court) is appealing: the primary aim of any proponent of international criminal justice should be to seek as much justice as possible for victims and communities. Thus, offhanded dismissal of the potential of regional mechanisms to work synergistically with domestic and international courts ought to be avoided. Instead, the ICC should maintain its core values while still considering the potential role of regional criminal courts (the ACJHR included) and how they might fit within the principle of complementarity going forward.

⁶² Max du Plessis, “A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes,” *EJIL: Talk!* (27 August 2012), available at: <https://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>