Appeals infrastructure

The Malabo Protocol represents a significant innovation in international law, vesting – for the first time ever – three distinct branches of international law in a single court. This expanded African Court will have three chambers, each with its own distinct jurisdiction: (1) human and peoples’ rights, (2) general affairs, and (3) international criminal law. Combining these three jurisdictions – which in other regions are addressed by separate courts – would create a powerful opportunity for cross-fertilization on international law issues, as well as an unprecedented ability to holistically ensure accountability for human rights violations and international crimes by both states and individuals. The following discussion explore these three jurisdictions, beginning with an overview of the tri-partite nature of the court and then examining in detail the advantages of, and critiques raised, with respect to each of the three sections.

a. Description of relevant provisions of the Malabo Protocol

i. Structure of the Court

The Malabo Protocol establishes a court with a tri-partite structure. Although officially a single court, the court will be divided into three autonomous sections: (1) a General Affairs Section, (2) a Human and Peoples’ Rights Section, and (3) an International Criminal Law Section.\(^1\) The International Criminal Law Section is further divided into three chambers: (1) a Pre-Trial Chamber, (2) a Trial Chamber, and (3) an Appellate Chamber.\(^2\) This is the only section of the Court with an Appellate Chamber, as described in more detail below. In addition, each of these sections may choose to create one or more chambers, consistent with the Rules of the Court.\(^3\)

ii. Assignment of cases

As cases are received by the expanded African Court, they will be assigned to one of these three sections based on their subject matter. Cases relating to the crimes specified in the Court’s statute will be assigned to the International Criminal Law Section, cases relating to human and peoples’ rights will be assigned to the Human and Peoples’ Rights Section, and all other cases will be assigned to the General Affairs Section.\(^4\)

iii. Original and appellate jurisdiction

In addition to its grant of subject matter jurisdiction, the Malabo Protocol also provides that the African Court shall have both an original and appellate jurisdiction.\(^5\) Only three types of appeals, however, are permitted under the Malabo Protocol. First, certain criminal decisions –such as decisions based on errors or decisions on the guilt of a defendant – may be appealed to the

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\(^2\) Id. annex art. 6 (replacing art. 16 of the Statute).

\(^3\) Id. annex art. 9 (replacing art. 19 of the Statute).

\(^4\) Id. annex art. 7 (replacing art. 17 of the Statute).

\(^5\) Id. art. 3(1).
International Criminal Law Section’s Appellate Chamber. Second, the African Court may hear appeals by staff members of the African Union regarding employment disputes. Since such disputes concern neither crimes nor human rights, they will be assigned to the General Affairs Section. Finally, the Malabo Protocol permits Member States, Regional Economic Communities, and International Organizations recognized by the African Union to conclude agreements to refer appeals to the African Court. Assignment of these cases to a particular section will depend on the subject matter of the case.

Decisions of the General Affairs and Human and Peoples’ Rights Sections of the African Court, unlike those of the International Criminal Law Section, cannot be appealed. Although the original Merger Protocol provided for referral of some cases to the Full Court, the Malabo Protocol removes this provision. In its [missing word]stead, the Malabo Protocol has an article on revision and appeals. That provision provides that cases within the General Affairs and Human and Peoples’ Rights Sections may only be revised. There has been considerable confusion over this aspect of the Protocol, and this issue is analyzed in greater detail in the analysis section below.

For ease of reference, the exact language of the relevant sections, as amended by the Malabo Protocol, is provided below:

**Article 3**

*Jurisdiction of the Court*

1. 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.

2. The Court has jurisdiction to hear such other matters or appeals as may be referred to it in any other agreements that the Member States or the Regional Economic Communities or other international organizations recognized by the African Union may conclude among themselves, or with the Union.

**Article 16 of the Statute (as amended)**

*Structure of the Court*

1. The Court shall have three (3) Sections: a General Affairs Section, a Human and Peoples’ Rights Section and an International Criminal Law Section.

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6 Malabo Protocol, *supra* note 1, annex art. 8 (replacing art. 18 of the Statute).
8 Malabo Protocol, *supra* note 1, annex art. 7 (replacing art. 17 of the Statute).
9 *Id.* art. 3(2).
10 *Id.* annex art. 8 (replacing art. 18 of the Statute).
12 Malabo Protocol, *supra* note 1, annex art. 8 (replacing art. 18 of the Statute).
13 *Id.*
14 *Id.*
2. The International Law Section of the Court shall have three (3) Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.

3. …

**Article 17 of the Statute (as amended)**

**Assignment of matters to Sections of the Court**

1. The General Affairs Section shall be competent to hear all cases submitted under Article 28 of the Statute except those assigned to the Human and Peoples’ Rights Section and the International Criminal Law Section as specified in this Article.

2. The Human and Peoples’ Rights Section shall be competent to hear all cases relating to human and peoples’ rights.

3. The International Criminal Law Section shall be competent to hear all cases relating to the crimes specified in this Statute.

**Article 18 of the Statute (as amended)**

**Revision and Appeals**

1. In the case of the General Affairs Section and the Human and Peoples’ Rights Section, a revision of a judgement shall be made in terms of the provisions of Article 48.

2. In the case of the International Criminal Law Section, a decision of the Pre-Trial Chamber or the Trial Chamber may be appealed against by the Prosecutor or the accused, on the following grounds:

   (a) A procedural error;
   (b) An error of law;
   (c) An error of fact.

3. An appeal may be made against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction.

4. The Appellate Chamber may affirm, reverse or revise the decision appealed against. The decision of the Appellate Chamber shall be final.

b. Analysis

The Malabo Protocol does something never before attempted in international law – it establishes a court with simultaneous jurisdiction over human rights, international criminal law, and general international law issues.\(^\text{15}\) This unprecedented step has a number of advantages over the traditional

\(^{15}\) The only other *supra*-national court with a partially combined jurisdiction is the Caribbean Court of Justice. That court has an original jurisdiction similar to that of the general affairs section of the African Court, and may permit
framework of separate courts divided by subject matter, such as the European Court of Justice and the European Court of Human Rights. Some of these advantages formed part of the rationale for merging the current court and the African Court of Justice, including, for example, the reduced cost to operate shared resources, such as a court library. Others, however – such as the potential for cross-fertilization between the branches of law – have not been deeply analyzed. This section reviews those advantages, as well as the concerns that have been raised about whether a single court can manage three separate jurisdictions.

i. The establishment of a tri-partite court enhances cross-fertilization between branches of international law

One of the most intriguing aspects of the Malabo Protocol is the opportunity for cross-fertilization between branches of international law that will be enhanced by the African Court’s new tri-partite structure. Although public international law, international human rights law, and international criminal law are often treated as separate and distinct branches of law, they are in fact highly inter-related.

In particular, the modern fields of international criminal law and international human rights law share several features: both fields developed in reaction to the atrocities of World War II, both protect a myriad of human rights, from the right to life to freedom from torture to freedom from slavery, and both seek to end severe violations by imposing accountability on those responsible (though they differ as to the subjects of that accountability). As a result, over the years, these fields have simultaneously shaped and been shaped by one another. Many international crimes are derived from human rights. For example, several of the acts that constitute human rights violations (such as slavery, torture, and persecution) may, under certain circumstances, constitute crimes

appeals of criminal cases from national jurisdictions. Such appeals are not of right, however, nor are they cases of international crimes investigated and tried at the international level. Agreement Establishing the Caribbean Court of Justice, arts. XII and XXV(4) (Feb. 14, 2001), http://www.caribbeancourtsojustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf.


against humanity. Human rights norms also have been incorporated into international criminal law, including the principle of legality (nullum crimen sine lege), the presumption of innocence, and numerous procedural guarantees. And both international criminal tribunals and human rights courts have referred to caselaw of the other in determining the elements of a crime or violation or whether a crime or violation was committed. As these examples demonstrate, both bodies of law have benefitted and can benefit from reference to the other.

By establishing a court with jurisdiction over three bodies of international law, the Malabo Protocol increases the opportunity for these bodies of law to inform one another’s development. This could happen in a number of ways. First, judges of the expanded African Court may informally seek guidance from judges of the other sections about legal precepts from the other areas of international law. Second, in particularly complex cases concerning questions that span more than one area of international law, one section could refer a portion of the case to another section. For example, if the international criminal law section is adjudicating a particular defendant who claims to have immunity as a senior state official, the international criminal law section could refer the question of immunities to the general affairs section for a decision. Once that decision has been rendered, the case would return to the original section.


22 Such referrals would be permitted under article 53 of the expanded African Court’s Statute, which permits “any other organ of the Union” – a category which plainly includes the Court itself – to request an advisory opinion from the Court. See Merger Protocol, supra note 1, annex art. 53. In this case, the requesting section would simply indicate that the request is to go to a different section of the expanded African Court. Referrals are commonly used
Establishing a court with tri-partite jurisdiction not only facilitates cross-fertilization between branches of international law, but also enables more robust judicial discussion on shared legal issues so that such integration is appropriate and thoughtful. Some commentators have criticized the use of caselaw between branches of international law, arguing that such caselaw has been taken out of context or misapplied. Limiting cross-fertilization, however, would be the wrong remedy, as integration carries a number of benefits, including: promotion of the harmonization of legal rules across different branches of the law, thereby simplifying and clarifying them; consideration of the consequences of a decision from multiple angles; and the ability to draw on a wider variety of doctrines as needed. Instead of limiting cross-fertilization, courts should therefore seek more opportunities for judges of different fields to talk with and learn from one another. The Malabo Protocol inherently does this by establishing a court with multiple jurisdictions and bringing the judges together on a regular basis.

ii. The addition of the International Criminal Law Section enhances the African Court’s human rights mandate

Establishing an international criminal law section within the African Court complements and strengthens the existing human rights jurisdiction of the Court by ensuring that the perpetrators of human rights abuses are held criminally accountable. It is now beyond dispute that many, if not most, human rights violations are also criminal offenses. Abuses such as trafficking in persons, war crimes, and genocide are the subject of international conventions that require states to criminalize these acts. And decisions by regional and international human rights bodies,


including the African Commission and the existing African Court on Human and Peoples’ Rights, frequently require states to investigate and criminally prosecute the individuals responsible for the human rights violations in the cases before them. Indeed, the failure to investigate, prosecute, and punish the perpetrators of human rights offenses can, in itself, constitute an additional human rights violation.

Ensuring both individual criminal and state responsibility is therefore necessary to comprehensively address human rights violations. First, the addition of individual criminal accountability alongside the existing state accountability model offers more enforcement of human rights norms than State accountability alone. In the ideal situation, this is true because a multi-jurisdictional court like the expanded African Court could accept multiple cases related to a particular human rights incident, holding the responsible individuals accountable through the international criminal law section and holding the State responsible through the human rights section. Even in less ideal situations, such as where a State has not ratified the Malabo Protocol and is therefore not subject to the jurisdiction of the African Court, a State may be willing to refer particular incidents to the African Court’s international criminal law section, such as incidents of piracy or mercenarism, thereby granting the African Court a limited jurisdiction over those crimes and creating some accountability where none would otherwise exist.

Second, by adjudicating both human rights and criminal cases relating to the same violations, the African Court can ensure more comprehensive accountability and promote greater positive change. A human rights court, although valuable, cannot bring justice to those victims who wish to see the perpetrators of the violence against them held accountable through trials and punishment. In the absence of such justice, individuals and communities may be more likely to engage in vengeance and retaliation, leading to a cycle of conflict and human rights violations. By channeling this desire for vengeance into the legal system, criminal trials of individual perpetrators help to prevent further violence and abuses. This does not mean, however, that the human rights section is devalued. Because they focus on the responsibility of individual perpetrators, individual


31 Mohammed, supra note 30, at 357.
criminal trials often do not investigate or describe key aspects of the violations unrelated to the specific perpetrator before the court, nor are they likely to detail or address the root causes of the violations. State accountability is therefore necessary to complete the process of truth-telling, accountability, and reconciliation. In addition, a broader range of remedies is available against a State as compared with an individual, as States can be ordered to amend laws, provide rehabilitative services to victims, and undertake guarantees of non-repetition. As a result, both individual and state accountability are necessary to fully address human rights violations.

Finally, the two sections may mutually reinforce one another. For example, in examining cases of human rights violations, the Human Rights Section may receive information about specific individuals responsible for those abuses. The Human Rights Section could share that information with the International Criminal Law Section for potential investigation and prosecution under the Prosecutor’s *proprio motu* powers. And the Human Rights Section could consider any convictions of state officials by the International Criminal Law Section as one of many factors in determining whether state responsibility exists for particular human rights violations.

For all of these reasons, criticisms that the addition of a criminal law section will “divert attention from state responsibility” are misplaced. The International Criminal Law Section and the Human Rights Section reinforce and complement one another, enabling accountability at multiple levels. It is therefore unsurprising that the African Commission has “welcom[ed]” the Malabo Protocol and its grant of “criminal jurisdiction over international crimes affecting Africa” and urged African States to ratify the Protocol.

### iii. The International Criminal Law Section is compatible with the other sections

Perhaps the most frequent criticism of the proposed International Criminal Law Section is that it is incompatible with the other two sections of the expanded African Court. According to some commentators, the International Criminal Section has a different mandate, as it is concerned with individual criminal responsibility rather than state responsibility; will apply different evidentiary

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32 Id. at 331.
34 Malabo Protocol, *supra* note 1, annex art. 15 (revising art. 19 of the Statute) & art. 22 (adding arts. 46F(3) and 46G(1)).
35 See Nollkaemper, *supra* note 30, at 615.
standards; and has a seriousness threshold not applicable to the other sections. For these reasons, some commentators argue that these functions should not be combined in one Court.

In fact, there is nothing unusual about combining criminal and civil functions in a single court. Many countries in Africa and around the world have judicial systems in which the same courts and judges are responsible for hearing both civil and criminal cases. Based on this common structure, early ideas for an international criminal court initially proposed adding a criminal chamber to the International Court of Justice. Indeed, this was seen as preferable to the creation of an independent international criminal court. Ultimately, however, plans for a separate court were pursued due to the perceived difficulties of amending the Statute of the ICJ.

The existence of dual civil-criminal courts in domestic systems and the history of the proposed criminal chamber within the ICJ demonstrate that arguments about differences between the civil and criminal jurisdictions of the expanded African Court have been overstated. Nevertheless, to


41 Pella, supra note 40, at 59; see also HIRAD ABTAHI & PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES 246 (2008) (Donnedieu de Vabres, the French judge to the International Military Tribunal at Nuremberg, was in favor of creating a criminal chamber within the ICJ to try crimes of genocide).

42 Pella, supra note 40, at 59.

43 The concerns about incompatibility significantly overstate the differences between the sections. First, the mandate of the International Criminal Law Section – namely to hold responsible those who commit human rights violations – complements and strengthens the human rights section, as described above. Second, although the International Criminal Law Section would use an additional evidentiary standard – namely, the beyond a reasonable doubt standard – it also would use the preponderance of the evidence standard applicable to the other sections for a number of issues, such as entitlement to reparations. See Prosecutor v. Lubanga, Judgment on the appeals against the Decision establishing the principles and procedures to be applied to reparations, Annex A, ¶ 65 & n.37 (Mar. 3, 2015), https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3129. Third, the seriousness thresholds for crimes before the International Criminal Law Section generally affect decisions by the prosecutor about which cases to pursue, rather than the jurisprudence of the section itself. For example, the definition of war crimes urges, but does not require, that prosecutions should be focused on “crimes committed as part of a plan or policy or as part of a large scale commission of such crimes.” Malabo Protocol, supra note 1, annex art. 14 (adding art. 28D). As a result, the prosecutor of the expanded African Court is likely to incorporate threshold considerations in
the extent there are differences, judges of the expanded African Court will typically be assigned to one section and thus will apply and develop their expertise in the unique mandates, evidentiary standards, and thresholds applicable to their section. The use of different standards or thresholds by one section will not affect the development and application of law in another section.

### iv. The International Criminal Law Section will not oversee appeals from the other sections

Several commentators have expressed concern that appeals from the civil sections of the African Court – namely the General Affairs Section and the Human and Peoples’ Rights Sections – will be decided by the Appellate Chamber of the International Criminal Law Section. Under this argument, decisions by the civil sections could be overturned by an appellate criminal chamber “that is not well-versed in the issues at hand.”

The confusion arises from revised article 18 of the Court’s Statute. Paragraph 1 of that article unambiguously applies to the General Affairs and Human Rights Sections, while paragraph 2 unambiguously applies to the International Criminal Law Section. Sections 3 and 4, however, do not specify which sections they apply, leaving some to speculate that they may permit appeals of decisions from all three chambers.

A careful review of the history of the African Court and of the full Statute, however, clarifies that decisions of the General Affairs and Human Rights Sections cannot be appealed. First, decisions from the general affairs and human rights jurisdictions of the African Court have never been appealable. Rather, earlier protocols for the African Court specified that the Court’s decisions were final and “not subject to appeal.” Instead, they could only be revised on the basis of new facts. The Malabo Protocol continues this structure, specifying that decisions from the Human Rights and General Affairs sections may only be revised. This is consistent with other determinations about whether to charge particular defendants. The Court itself, however, will not need to evaluate this threshold since it is not a requirement.

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45 Viljoen, *supra* note 38.

46 Malabo Protocol, *supra* note 1, annex art. 8 (replacing art. 18).


49 Malabo Protocol, *supra* note 1, annex art. 8 (revised art. 18(1)); Merger Protocol, *supra* note 7, annex art. 48.
international human rights bodies; for example, decisions of the Inter-American Court of Human Rights are not appealable.\textsuperscript{50}

The International Criminal Law Section is different because, under international law, a criminal defendant must have an opportunity to appeal a conviction.\textsuperscript{51} Addition of the Criminal Law Section therefore necessitated the creation of an appellate chamber within the African Court. Nearly every reference to the appellate chamber, however, refers to it in the context of the Criminal Law Section, indicating that it is intended to adjudicate appeals from that section only.\textsuperscript{52}

Although the drafting could have been clearer, paragraphs two through four of the new article 18 of the Statute permit appeals only from the International Criminal Law Section.\textsuperscript{53} Paragraph two unambiguously refers to appeals by the International Criminal Law Section only, and paragraphs three and four continue to describe that appellate jurisdiction. Indeed, some of the types of appeals, such as for convictions or acquittals, can only be exercised in the context of the International Criminal Law Section, further indicating that this was not meant to be a general provision.

The only other reference to appellate jurisdiction is in article 3 of the Malabo Protocol, which vests the African Court with an appellate jurisdiction and specifies that the African Court may receive appeals between Member States, Regional Economic Communities, or international organizations.\textsuperscript{54} However, these would be appeals of decisions made by a different institution, and therefore would be directly referred to the appropriate section. For example, the States comprising ECOWAS could decide to permit appeals from the Community Court of Justice of ECOWAS to the African Court. That court has jurisdiction over issues of human rights and general affairs, and thus any case of human rights would be referred to the Human Rights Section, while cases raising general affairs issues would be referred to the General Affairs Section.\textsuperscript{55}

As the foregoing analysis demonstrates, there is simply no basis for concluding that the Malabo Protocol creates an unprecedented ability for parties to appeal human rights or general affairs decisions. This was not permitted in any other iteration of the African Court, and there is no provision of the Malabo Protocol that plainly establishes such a right of appeal. Because there is

\textsuperscript{50} American Convention on Human Rights, art. 67, (Nov. 22, 1969), https://www.cidh.oas.org/basics/english/basic3.american%20convention.htm


\textsuperscript{52} E.g., Malabo Protocol, supra note 1, annex art. 6 (revised art. 16(2)); id. annex art. 9 Bis (adding art. 19 Bis(6)); id. annex art. 10(5).

\textsuperscript{53} E.g., id. annex art. 8 (revised art. 18(2)-(4)).

\textsuperscript{54} E.g., id. art. 3.

\textsuperscript{55} The Malabo Protocol also permits staff members of the AU to appeal disputes about the terms and conditions of their employment to the African Court. Merger Protocol, supra note 7, annex art. 29(1)(c). As these appeals concern neither human rights nor criminal offenses, they would be referred to the General Affairs Section. Malabo Protocol, supra note 1, annex art. 7 (replacing art. 17 of the statute).
no right of appeal for such decisions, there is no concern that an appellate chamber devoted to criminal issues will decide appeals from the other sections.

v. The Malabo Protocol does not create an all-or-nothing choice

Finally, some critics of the Malabo Protocol have expressed concern about the perceived all-or-nothing choice presented by the Protocol, suggesting that states may decide not to ratify the Malabo Protocol because they do not want to submit to the jurisdiction of all three sections. According to these commentators, expansion of the human rights jurisdiction of the African Court will be hindered because States which might have decided in the future to ratify the African Court’s current protocol may be unwilling to ratify the protocol for the enlarged African Court.

There is, however, no reason that States must submit to all three jurisdictions of the expanded African Court. Although that is plainly preferable, a State could submit a reservation specifying that it is submitting to the jurisdiction of only one or two sections of the expanded African Court. This would be permissible under international law, which, pursuant to the Vienna Convention on the Law of Treaties, permits a state to make a reservation to a treaty provision unless (1) the reservation is prohibited by the treaty, (2) the treaty provides that only specified reservations may be made and the proposed reservation is not among them, or (3) the reservation is incompatible with the object and purpose of the treaty. Neither the Malabo Protocol nor the revised Court Statute prohibit reservations or provide that only specified reservations may be made. Accordingly, AU member states may submit reservations to the Malabo Protocol provided that the particular reservation would not be incompatible with the object and purpose of the treaty.

A reservation specifying that a State accepts the jurisdiction of only one or two sections of the African Court, while unusual, would not be incompatible with the object and purpose of the treaty. The purpose of the Malabo Protocol is to create a single supra-national African Court that has the capacity to hear all of the types of international cases that might emerge from the continent, rather than a multiplicity of courts. That does not mean, however, that each State which becomes a member of the Court must accept that full jurisdiction. Indeed, the Malabo Protocol itself recognizes that jurisdiction may be limited with respect to some States in article 6bis. That article permits the expanded African Court to exercise its human rights jurisdiction, its general affairs jurisdiction, or both over States that have ratified one or more of the earlier protocols but have not yet ratified the Malabo Protocol. Moreover, States can continue to achieve the exact same effect today by ratifying the original African Court Protocol and the ACJ Protocol, while declining to ratify the Malabo Protocol. Since a State could submit to the human rights section and/or the general affairs section by ratifying these earlier protocols, it should be able to ratify the Malabo Protocol with a reservation specifying that it accepts the jurisdiction of certain, but not all, sections.


58 Malabo Protocol, supra note 1, art. 6bis.

59 Id.