

International Criminal Jurisdiction

Of all of the innovations in the Malabo Protocol, perhaps the most significant is the creation of a first of its kind regional criminal court. Not only will this court have jurisdiction over the four core international crimes – which traditionally have been the subject matter of international criminal tribunals – it will also have jurisdiction over transnational crimes that, with very limited exceptions, have never been within the jurisdiction of any supra-national tribunal. Cases involving these crimes will be heard by the International Criminal Law Section of the expanded African Court. This Section will be divided into three chambers: a Pre-Trial Chamber, a Trial Chamber, and an Appellate Chamber.¹

Specifically, the crimes included in the Malabo Protocol are:

Core International Crimes

- Genocide
- Crimes against humanity
- War crimes
- The Crime of Aggression

Additional Transnational 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

The Malabo Protocol also permits the AU Assembly, upon the consensus of States Parties to the Protocol, to extend the jurisdiction of the African Court to cover additional crimes.² Modes of liability for these crimes are specified in article 28N, and include inciting, instigating, organizing, directing, facilitating, financing, counseling or participating as a principal, co-principal, agent, or accomplice in any of the offenses listed above.³

¹ AU, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 27, 2014) [hereinafter Malabo Protocol], annex art. 6 (replacing art. 16 of the Statute), <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

² *Id.* annex art. 14 (adding art. 28A(2)).

³ *Id.* art. 14 (adding art. 28N).

The next sections explore the jurisdiction of the expanded African Court over the four core international crimes.

a. Core international crimes

International law recognizes four “core” international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. All of these crimes have been subject to international criminal sanctions since at least the end of World War II,⁴ and they have routinely been included in the statutes of international and hybrid criminal tribunals established since.⁵ Over the years, hundreds of individuals have been internationally prosecuted for and convicted of these crimes.⁶

Consistent with international law, the Malabo Protocol defines and criminalizes these four core international crimes. As described in the following sections, these definitions largely replicate those found in the Rome Statute of the International Criminal Court. As such, they are consistent with current international law and with domestic laws of African States that have implemented the Rome Statute. The following sections provide a more detailed description of the relevant provisions of the Malabo Protocol and an analysis of those provisions, including the extent to which they depart from current international law.

i. Description of relevant provisions of the Malabo Protocol

⁴ See Charter of the International Military Tribunal, art. 6 (Aug. 8, 1945) (providing for jurisdiction over crimes against peace, which was the equivalent of the crime of aggression; war crimes; and crimes against humanity), http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf; Charter of the International Military Tribunal for the Far East, art. 5 (Jan. 19, 1946) (providing for jurisdiction over crimes against peace, war crimes, and crimes against humanity),

http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf.

Genocide, as a legal concept, came into existence after the Nuremberg trials with the adoption of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. Acts of genocide, however, were prosecuted at Nuremberg under the category of crimes against humanity.

⁵ See, e.g., Statute of the International Criminal Tribunal for Rwanda, arts. 2-4 (Nov. 8, 1994) [hereinafter Statute of the ICTR], http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf; Statute of the Special Court for Sierra Leone, art. 2-4 (Jan. 16, 2002) [hereinafter Statute of the SCSL], <http://www.rscsl.org/Documents/scsl-statute.pdf>; Statute of the Extraordinary African Chambers, art. 4 (Aug. 22, 2012), <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 2-5 (Sept. 2009) [hereinafter Statute of the ICTY], http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, arts. 4-6 (Oct. 27, 2004) [hereinafter Law on the Establishment of the ECCC], https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

⁶ See, e.g., UN Mechanism for International Criminal Tribunals, International Criminal Tribunal for the former Yugoslavia, *Infographic: ICTY Facts & Figures* (161 persons were indicted by the ICTY, and 90 were sentenced), <http://www.icty.org/en/content/infographic-icty-facts-figures>; UN Mechanism for International Criminal Tribunals, *The ICTR in Brief* (93 persons were indicted by the ICTR, and 62 were sentenced), <http://unictr.unmict.org/en/tribunal>; TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, Vol. 1, at 366-67 (1974) (convicting and sentencing 19 persons), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf; U.S. Library of Congress, Military Legal Resources, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (providing materials for trials of nearly 200 defendants), https://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html.

Article 28A of the Malabo Protocol grants the African Court jurisdiction over the four core international crimes, namely genocide, crimes against humanity, war crimes, and the crime of aggression.⁷ These crimes are defined in articles 28B (genocide), 28C (crimes against humanity), 28D (war crimes), and 28M (the crime of aggression).⁸

For ease of reference, the exact language of the relevant sections is provided below.

Article 28A of the Statute (as amended)
International Criminal Jurisdiction of the Court

1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have the power to try persons for the crimes provided hereunder:
 - 1) Genocide
 - 2) Crimes Against Humanity
 - 3) War Crimes
 - ...
 - 14) The Crime of Aggression

...

Article 28 B of the Statute (as amended)
Genocide

For the purposes of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group;
- f) Acts of rape or any other form of sexual violence.

Article 28 C of the Statute (as amended)
Crimes Against Humanity

1. For the purposes of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack or enterprise directed against any civilian population, with knowledge of the attack or enterprise:
 - a) Murder;

⁷ Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28A).

⁸ *Id.* (adding, *inter alia*, arts. 28B, 28C, 28D, and 28M).

- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) Torture, cruel, inhuman and degrading treatment or punishment;
- g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;
- i) Enforced disappearance of persons;
- j) The crime of apartheid;
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.

2. For the purposes of paragraph 1:

- a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- b) ‘Extermination’ includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- c) ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- d) ‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- e) ‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- f) ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- h) ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

- i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Article 28 D of the Statute (as amended)
War Crimes

For the purposes of this Statute, 'war crimes' means any of the offences listed , in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.

- a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - i. Wilful killing;
 - ii. Torture or inhuman treatment, including biological experiments;
 - iii. Wilfully causing great suffering, or serious injury to body or health;
 - iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - v. Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - vi. Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - vii. Unlawful deportation or transfer or unlawful confinement;
 - viii. Taking of hostages.

- b) Grave breaches of the First Additional Protocol to the Geneva Conventions of 8 June 1977 and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which

would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

- v. Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated;
- vi. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- vii. Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- viii. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- ix. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- x. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- xi. Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- xii. Killing or wounding treacherously individuals belonging to the hostile nation or army;
- xiii. Declaring that no quarter will be given;
- xiv. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- xv. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- xvi. Compelling the nationals of the hostile party to take part in the operations of war directed against their own State, even if they were in the belligerent's service before the commencement of the war;
- xvii. Pillaging a town or place, even when taken by assault;
- xviii. Employing poison or poisoned weapons;
- xix. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- xx. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

- xxi. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict
- xxii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- xxiii. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- xxiv. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- xxv. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- xxvi. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- xxvii. Conscripting or enlisting children under the age of eighteen years into the national armed forces or using them to participate actively in hostilities;
- xxviii. Unjustifiably delaying the repatriation of prisoners of war or civilians;
- xxix. Willfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.
- xxx. Making non-defended localities and demilitarised zones the object of attack;
- xxxi. Slavery and deportation to slave labour;
- xxxii. Collective punishments;
- xxxiii. Despoliation of the wounded, sick, shipwrecked or dead;

c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- iii. Taking of hostages;
- iv. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

d) Paragraph c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

- e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - v. Pillaging a town or place, even when taken by assault;
 - vi. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - vii. Conscripting or enlisting children under the age of eighteen years into armed forces or groups or using them to participate actively in hostilities;
 - viii. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - ix. Killing or wounding treacherously a combatant adversary;
 - x. Declaring that no quarter will be given;
 - xi. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - xii. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
 - xiii. Employing poison or poisoned weapons;
 - xiv. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - xv. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - xvi. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies;

- xvii. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- xviii. Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage;
- xix. Making non-defended localities and demilitarised zones the object of attack;
- xx. Slavery;
- xxi. Collective punishments;
- xxii. Despoliation of the wounded, sick, shipwrecked or dead.

f) Paragraph e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

g) Using nuclear weapons or other weapons of mass destruction

Article 28M of the Statute (as amended)
Crime of Aggression

- A. For the purpose of this Statute, “Crime of Aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state or organization, whether connected to the state or not of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union and with regard to the territorial integrity and human security of the population of a State Party.”
- B. The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organizations of States, or non-State actor(s) or by any foreign entity:
- a) The use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations.
 - b) The invasion or attack by armed forces against the territory of a State, or military occupation however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of a State or part thereof.
 - c) The bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.
 - d) The blockade of the ports, coasts or airspace of a State by the armed forces of another State.
 - e) The attack by the armed forces of a State on the land, sea or air forces, or marine and fleets of another State.

- f) The use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the African Union Non-Aggression and Common Defence Pact or any extension of their presence in such territory beyond the termination of the agreement.
- g) The action of a State in allowing its territory, which it has placed at the disposal of another State to be used by another State for perpetrating an act of aggression against a third State.
- h) The sending or materially supporting by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

ii. Analysis

The Malabo Protocol’s definitions of the core international crimes generally reflect customary international law.⁹ They also are nearly identical to those under the Rome Statute of the International Criminal Court, with slight variations primarily due to the Malabo Protocol following customary international law developments that have arisen since the Rome Statute was adopted. A brief description and analysis of the Malabo Protocol’s provisions on the core crimes is below. In addition, for ease of reference, a side-by-side comparison of the provisions of the Malabo Protocol, the Rome Statute, and other applicable treaties on core international crimes is provided in Annex 1.

(a) Genocide

Genocide was first defined under international law in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).¹⁰ The Rome Statute of the ICC adopted verbatim the definition of genocide contained in the Genocide Convention, and the Malabo Protocol replicates this definition.¹¹ The only difference between the definition in the Malabo Protocol and these earlier definitions is that the Malabo Protocol adds an additional act – acts of rape or any other form of sexual violence – to the list of crimes that may constitute genocide, provided all of the other elements are met. Although that act is not included in the Genocide Convention or the Rome Statute, it is already well recognized under international law that acts of rape and sexual violence may constitute genocide. For example, the International

⁹ Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* 34 (2016), at 16.

¹⁰ UN Convention on the Prevention and Punishment of the Crime of Genocide, art. V, 78 U.N.T.S. 278 (Dec. 9, 1948) [hereinafter “Genocide Convention”], <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>.

¹¹ Compare *id.* art. II, with Rome Statute of the International Criminal Court, art. 16 (July 17, 1998), art. 6, https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, with Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28 B).

Criminal Tribunal for Rwanda convicted a former mayor who encouraged the rape of Tutsi women of aiding and abetting genocide, holding that “rape and sexual violence . . . constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.”¹² Since then, other international tribunals¹³ and the United Nations Security Council¹⁴ have concurred that rape and sexual violence may rise to the level of genocide. These developments all came after the adoption of the Genocide Convention and the Rome Statute, explaining why they were not included in these earlier documents. The Malabo Protocol thus represents the most current understanding of genocide and is consistent with the current state of customary international law.¹⁵

(b) War crimes

The concept of war crimes has ancient roots,¹⁶ but the modern definition arises out of the 1949 Geneva Conventions¹⁷ and their 1977 Additional Protocols.¹⁸ The Rome Statute of the ICC

¹² Prosecutor v. Akayesu, Case No. ICTR-96-4-T, International Criminal Tribunal for Rwanda, Trial Judgement, ¶¶ 706, 731-34 (Sept. 2, 1998), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>. Subsequent decisions by the ICTR in other cases confirmed that rape and sexual violence may constitute acts of genocide. See, e.g., Prosecutor v. Kayishema et al., Case No. ICTR-95-1-T, International Criminal Tribunal for Rwanda, Trial Judgement, ¶ 108 (May 21, 1999), <https://www.legal-tools.org/doc/0811c9/pdf/>.

¹³ E.g., Prosecutor v. Karadžić, Case No. IT-95-5/18-T, International Criminal Tribunal for the former Yugoslavia, Public Redacted Version of Judgement Issued on 24 March 2016, Vol. I, ¶ 545 (Mar. 24, 2016) (“Examples of serious bodily or mental harm as an act of genocide include . . . sexual violence including rape”), <https://www.legal-tools.org/doc/173e23/pdf>; Prosecutor v. Tolimir, Case No. IT-05-88/2-T, International Criminal Tribunal for the former Yugoslavia, Judgement, ¶ 737 (Dec. 12, 2012), <http://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>.

¹⁴ UN, Security Council Resolution 1820, ¶ 4 (June 19, 2008) (“rape and other forms of sexual violence can constitute . . . a constitutive act with respect to genocide”), https://www.un.org/ruleoflaw/files/women_peace_security_resolution1820.pdf.

¹⁵ Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, *supra* note 9, at 16.

¹⁶ See, e.g., Major Patrick Walsh & Lieutenant Colonel Joshua F. Berry, *Expanding Command Responsibility Beyond War: The Application of the Doctrine of Command Responsibility to Human Rights Law*, 11 LIBERTY U.L. REV. 423, 426-27 (2016) (describing over 2500 years of history that military commanders are responsible for their troops’ misdeeds); Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (1907), art. 1, *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICT 63 (1988); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, art. 26, 118 L.N.T.S. 303 (July 27, 1929), <http://hrlibrary.umn.edu/instreet/1929b.htm>; Convention Relative to the Treatment of Prisoners of War, art. 18, 118 L.N.T.S. 343 (July 27, 1929), <http://hrlibrary.umn.edu/instreet/1929c.htm>.

¹⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, 75 U.N.T.S. 31 (Aug. 12, 1949), <https://treaties.un.org/doc/Publication/UNTS/Volume%2075/v75.pdf>; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 50, 75 U.N.T.S. 85 (Aug. 12, 1949), <https://treaties.un.org/doc/Publication/UNTS/Volume%2075/v75.pdf>; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, 75 U.N.T.S. 135 (Aug. 12, 1949), <https://treaties.un.org/doc/Publication/UNTS/Volume%2075/v75.pdf>; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, 75 U.N.T.S. 288 (Aug. 12, 1949), <https://treaties.un.org/doc/Publication/UNTS/Volume%2075/v75.pdf>;

¹⁸ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 1125 U.N.T.S. 3 (June 8, 1977) [hereinafter Additional Protocol I to the Geneva Conventions], <https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17512-english.pdf>; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of

included a significant portion of these crimes in its definition, and the Malabo Protocol mirrors the Rome Statute, including the 2010 Kampala Amendments on war crimes in non-international armed conflicts.¹⁹

Although most of the Malabo Protocol definition of war crimes is identical to that in the Rome Statute, the Malabo Protocol adds to this definition several new acts that may constitute war crimes, including slavery,²⁰ apartheid,²¹ and collective punishments.²² A complete list of these additional acts is provided in annex 2.

The additional acts in the Malabo Protocol reflect customary law, as they are primarily drawn from the additional protocols to the Geneva Conventions. For example, the Malabo Protocol crime of “[u]njustifiably delaying the repatriation of prisoners of war or civilians”²³ is nearly identical to one of the grave breaches added by Additional Protocol I, namely an “[u]njustifiable delay in the repatriation of prisoners of war or civilians.”²⁴ Likewise, the Malabo Protocol crime of “[w]ilfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”²⁵ mirrors the provision in Additional Protocol I prohibiting “[p]ractice of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.”²⁶ A complete side-by-side comparison of the additional acts included in the Malabo Protocol and their corresponding international law provisions is provided in annex 3. The additional protocols to the Geneva Conventions have been widely ratified, including by most African States,²⁷ and many of their

victims of non-international armed conflicts (Protocol II), 1125 U.N.T.S. 609 (June 8, 1977) [hereinafter Additional Protocol II to the Geneva Conventions], <https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17513-english.pdf>.

¹⁹ Compare Rome Statute of the ICC, *supra* note 11, art. 8, with Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28 D); see also Amendment to article 8 of the Rome Statute of the International Criminal Court, 2868 U.N.T.S. 195 (June 10, 2010) [hereinafter Kampala Amendments to the Rome Statute of the ICC], <https://treaties.un.org/doc/source/docs/RC-Res.5-ENG.pdf>. The Kampala Amendments to the Rome Statute of the ICC entered into force in 2012 and, as of March 5, 2018, had been ratified by 36 States. UN Treaty Collection, Status of Amendment to article 8 of the Rome Statute of the International Criminal Court, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-a&chapter=18&clang=en.

²⁰ Malabo Protocol, *supra* note 1, annex art. 14 (adding arts. 28D(b)(xxxi) & 28D(e)(xx)).

²¹ *Id.* (adding art. 28D(b)(xxix)).

²² *Id.* (adding arts. 28D(b)(xxxii) & 28D(e)(xxi)).

²³ *Id.* (adding art. 28D(b)(xxviii)).

²⁴ Additional Protocol I to the Geneva Conventions, *supra* note 18, art. 85(4)(b).

²⁵ Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28D(b)(xxix)).

²⁶ Additional Protocol I to the Geneva Conventions, *supra* note 18, art. 85(4)(c).

²⁷ Additional Protocol I has 177 States Parties, while Additional Protocol II has 168 States Parties. International Committee of the Red Cross, Treaties, States Parties and Commentaries, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470; International Committee of the Red Cross, Treaties, States Parties and Commentaries, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.

provisions are now recognized as customary international law – including the ones incorporated in the Malabo Protocol.²⁸

The limited criticism of the additional war crimes provisions in the Malabo Protocol have focused on the extent to which they are perceived to depart from the provisions of the protocols and customary law, but these criticisms are in error. For example, one author criticizes the Malabo Protocol provision that criminalizes the launch of an attack against works or installations containing dangerous forces, incorrectly comparing it to article 56 of Additional Protocol I.²⁹ The more exact match is article 85(3)(c). Moreover, contrary to his criticism, the Malabo Protocol does not imply an absolute prohibition on such attacks different from the Additional Protocol – the Malabo Protocol prohibits only those attacks that can be expected to cause damage “excessive in relation to the concrete and direct military advantage anticipated” (which is plainly not an absolute prohibition), and is, in fact, the exact language used in Additional Protocol I.³⁰ Indeed, the International Committee of the Red Cross – whose work led to the adoption of the Geneva Conventions and the Additional Protocols – concluded in a comprehensive study that *all* of the international law provisions on which the Malabo Protocol’s additional war crime acts are based (except two discussed below) are now part of customary international law.³¹ Accordingly, the additional acts included in the Malabo Protocol’s definition of war crimes better represent the current state of customary international law than the older Rome Statute.³²

Finally, the Malabo Protocol makes two changes from the Rome Statute definition that do not necessarily represent customary international law but which reflect commitments already made by the vast majority of African States. First, the provisions on conscription or enlistment of children are more protective of the rights of the child than the corresponding provisions in the Geneva Conventions and the Rome Statute, as the Malabo Protocol requires an individual to have attained

²⁸ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 37, 120-21, 122, 139, 186, 308-11, 327, 337, 374, 451-52 (2009), <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

²⁹ Kai Ambos, *Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)*, in GERHARD WERLE & MORITZ VORMBAUM, THE AFRICAN CRIMINAL COURT 31, 43 (2017).

³⁰ See side-by-side comparison of all of these provisions at page 5. A similar criticism is leveled against article 28D(b)(xxi) for departing from the language in the Rome Statute. Kai Ambos, *Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)*, in GERHARD WERLE & MORITZ VORMBAUM, THE AFRICAN CRIMINAL COURT 31, 43 (2017), at 44. But the Malabo Protocol provision actually follows more closely the comparable provision in the Additional Protocol than does the Rome Statute, and is therefore more reflective of customary international law. Compare Additional Protocol I to the Geneva Conventions, *supra* note 18, art. 35(2), with Rome Statute of the ICC, *supra* note 11, art. 8(2)(b)(xx), with Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28D(b)(xxi)); see also ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES, *supra* note 475, at 237.

³¹ See also JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES, 37, 120-21, 122, 139, 186, 308-11, 327, 337, 374, 451-52 (2009), at, 37, <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

³² ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 60 (2003) (observing that the Rome Statute definition of war crimes is narrower than the customary law definition).

the age of 18, three years more than the other conventions.³³ This higher age requirement corresponds to that in the African Charter on the Rights and Welfare of the Child,³⁴ which has been ratified by 48 African States.³⁵ Second, the Malabo Protocol creates the new war crime of “[u]sing nuclear weapons or other weapons of mass destruction,”³⁶ consistent with the African Nuclear-Weapon-Free Zone Treaty.³⁷ Accordingly, the incorporation of these acts into the Malabo Protocol’s definition of war crimes represents the regional consensus on these crimes which is more protective of human rights, and thus are an appropriate deviation from customary international law.³⁸

(c) Crimes against humanity

Unlike genocide and war crimes, there are no global treaties or conventions dedicated to crimes against humanity, although a draft convention is currently under consideration.³⁹ The definition of crimes against humanity in the Malabo Protocol, however, mirrors that in the Rome Statute, with only a handful of differences.⁴⁰

First, the language in the chapeau (or general elements) has been modified to add the term “enterprise” – that is, a crime against humanity under the Malabo Protocol requires “a widespread or systematic attack *or enterprise* directed against any civilian population, with knowledge of the attack *or enterprise*.”⁴¹ Although the Protocol does not define “enterprise,” it appears intended to encompass the kind of widespread and systematic mistreatment of a civilian population that traditionally has been recognized as crime against humanity but for which the term “attack” is ill-

³³ Compare Malabo Protocol, *supra* note 1, annex art. 14 (adding arts. 28D(b)(xxvii) & 28D(e)(vi)), with Rome Statute of the ICC, *supra* note 11, arts. 8(2)(b)(xxvi) & 8(2)(e)(vii), with Additional Protocol I to the Geneva Conventions, *supra* note 18, art. 77(2), and with Additional Protocol II to the Geneva Conventions, *supra* note 18, art. 4(3)(c).

³⁴ OAU, African Charter on the Rights and Welfare of the Child, arts. II & XXII. (July 1, 1990), https://au.int/sites/default/files/treaties/7773-treaty-0014_-_african_charter_on_the_rights_and_welfare_of_the_child_e.pdf.

³⁵ AU, List of Countries which have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child, https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf.

³⁶ Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28D(g)).

³⁷ OAU, The African Nuclear-Weapon-Free Zone Treaty (Pelindaba Treaty) (Apr. 11, 1996), <https://au.int/en/treaties/african-nuclear-weapon-free-zone-treaty-pelindaba-treaty>. Forty-one states have ratified the treaty as of March 6, 2018. AU, List of Countries which have Signed, Ratified/Acceded to the African Nuclear-Weapon-Free Zone Treaty, https://au.int/sites/default/files/treaties/7777-sl-the_african_nuclear-weapon-free_zone_treaty_the_treaty_of_pelindaba_3.pdf.

³⁸ Criticisms that these provisions are improper because they depart from customary international law, *see* Ambos, *supra* note 29, at 48, are misplaced. States may – and frequently do – depart from customary international law in treaty provisions, provided that the customary law norm has not attained the status of a *jus cogens* norm. *See*, Vienna Convention on the Law of Treaties, art. 40(2), 1155 U.N.T.S. 332 (May 23, 1969), art. 53, <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

³⁹ Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity (Aug. 2010), <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>; Crimes Against Humanity Initiative, Initiative Fact Sheet, <http://law.wustl.edu/WashULaw/crimesagainsthumanity/about/fact-sheet-about-the-crimes-against-humanity-initiative/>.

⁴⁰ Compare Rome Statute of the ICC, *supra* note 11, art. 7, with Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28 C).

⁴¹ Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28 C) (emphasis added).

suited.⁴² For example, international criminal tribunals have held that forced sterilizations,⁴³ forced medical experimentation,⁴⁴ and systems of apartheid⁴⁵ may all constitute crimes against humanity. To better encompass this diversity of crimes, not all of which fit into typical definitions of violence or use armed force that may be expected with the term “attack,” some courts previously used the term “campaign” or “operation.”⁴⁶ It seems likely that the term “enterprise” was simply meant to clarify the existing state of customary international law. However, it is also possible that the term “enterprise” expands the definition of crimes against humanity in unknown ways.⁴⁷

Second, in its list of acts that may rise to the level of a crime against humanity, the Malabo Protocol includes the additional crime of “cruel, inhuman and degrading treatment or punishment.”⁴⁸ It is already well recognized under international law that such acts may rise to the level of crimes against humanity,⁴⁹ and the addition of this language simply codifies customary international law.

Finally, with respect to the crime of persecution, the Malabo Protocol removes the Rome Statute requirement that the persecution occur “in connection with any act referred to in” the definitions of crimes against humanity, genocide, or war crimes.⁵⁰ The Rome Statute definition was criticized as departing from customary international law and thus unnecessarily limiting the crime of

⁴² See Prosecutor v. Taylor, Case No. SCSL-03-01-T, Special Court for Sierra Leone, Trial Judgment, (May 18, 2012), ¶ 506 [hereinafter Taylor Trial Judgment], <https://www.legal-tools.org/doc/8075e7/pdf/>; Prosecutor v. Nuon, Case No. 002/19-09-2007/ECCC/TC, Extraordinary Chambers in the Courts of Cambodia, Case 002/001 Judgement, ¶ 178 (Aug. 7, 2014), <https://www.legal-tools.org/doc/4888de/pdf/>.

⁴³ The Medical Case, II TRIALS OF WAR CRIMINAL BEFORE THE NUERNBERG MILITARY TRIBUNALS 171, 177 (1946-49) (judgment of the Nuremberg military tribunal describing the charges of war crimes and crimes against humanity for, *inter alia*, forced sterilizations), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-II.pdf; *id.* at 223, 226, 228 (finding defendant Gebhardt guilty of crimes against humanity for his role in forced sterilizations); *id.* at 235, 238, 241 (finding defendant Brandt guilty of crimes against humanity for his role in forced sterilizations); *id.* at 277-79, 281 (finding defendant Brack guilty of crimes against humanity for his role in forced sterilizations).

⁴⁴ *Id.* at 189-98 (finding defendant Brandt guilty of crime against humanity for his role in forced medical experiments); *id.* at 198-207 (finding defendant Handloser guilty of crime against humanity for his role in forced medical experiments); *id.* at 210-17 (finding defendant Schroeder guilty of crime against humanity for his role in forced medical experiments); *id.* at 217-22 (finding defendant Genzken guilty of crime against humanity for his role in forced medical experiments); *id.* at 223-28 (finding defendant Gebhardt guilty of crime against humanity for his role in forced medical experiments); *id.* at 235-41 (finding defendant Brandt guilty of crime against humanity for his role in forced medical experiments).

⁴⁵ Akayesu Trial Judgement, *supra* note 12, at ¶ 581; Prosecutor v. Musema, Case No. ICTR-96-13-A, International Criminal Tribunal for Rwanda, Trial Judgement and Sentence, ¶ 205 (Jan. 27, 2000), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict96-13/trial-judgements/en/000127.pdf>.

⁴⁶ Taylor Trial Judgment, *supra* note 42, at ¶ 506; Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 75 (June 15, 2009), <https://www.legal-tools.org/doc/07965c/pdf/>.

⁴⁷ Ambos, *supra* note 29, at 41 (speculating that “enterprise” might have been intended to refer to corporations); Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, *supra* note 15, at 17 (arguing that the term “enterprise” is unclear).

⁴⁸ Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28C(1)(d)).

⁴⁹ Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, International Criminal Tribunal for the former Yugoslavia, Trial Judgment, ¶ 566 (Jan. 14, 2000), <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>; Prosecutor v. Nuon et al., Case No. 002/19-09-2007-ECCC/SC, Extraordinary Chambers in the Courts of Cambodia, Appeal Judgment, ¶¶ 656-57 (Nov. 23, 2016), <https://www.legal-tools.org/doc/e66bb3/pdf/>.

⁵⁰ Compare Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28C(1)(f)), with Rome Statute of the ICC, *supra* note 11, art. 3(1)(h).

persecution.⁵¹ By returning to the customary law definition, the Malabo Protocol ensures that the crime of persecution is not limited to persecutory murder, rape, and other acts already covered by the Court's statute, but that it extends to the violation of other fundamental rights as well, provided that they meet the requirements of a crime against humanity, such as being widespread or systematic and committed pursuant to a state or organizational policy. Meanwhile, the requirement that such persecution must result in "the intentional and severe deprivation of fundamental rights contrary to international law"⁵² will continue to ensure that the crime of persecution remains limited to serious crimes meriting supra-national prosecution. The Malabo Protocol omits a definition of gender, which was included in the Rome Statute.⁵³

(d) Aggression

As with the other core crimes in the Malabo Protocol, the definition of aggression – or "illegal war"⁵⁴ – is based on the definition contained in the Rome Statute⁵⁵ and generally reflects customary international law.⁵⁶ The Malabo Protocol, however, adopts several innovations that better respond to the particular context of conflict and aggression on the African continent.

First, the Malabo Protocol encompasses acts of aggression carried out by either State or by *non-State actors*.⁵⁷ This is a dramatic evolution, but one that is in line with international law, which increasingly recognizes that non-State actors can commit international crimes.⁵⁸ It also better

⁵¹ *E.g.*, ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 93-94 (2003).

⁵² Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28C(2)(g)). This is the same approach taken by the ICTR, SCSL, and ICTY, and it is therefore consistent with international law. Statute of the International Criminal Tribunal for Rwanda, arts. 2-4 (Nov. 8, 1994) [hereinafter Statute of the ICTR], art. 3(h), http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf; Statute of the Special Court for Sierra Leone, art. 2-4 (Jan. 16, 2002) [hereinafter Statute of the SCSL], art. 2(h), <http://www.rscsl.org/Documents/scsl-statute.pdf>; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 2-5 (Sept. 2009) [hereinafter Statute of the ICTY], art. 5(h), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; *see also* Prosecutor v. Nahimana, Case No. ICTR-99-52-A, International Criminal Tribunal for Rwanda, Judgement, ¶¶ 985-88 (Nov. 28, 2007), <https://www.legal-tools.org/doc/04e4f9/pdf/>; Prosecutor v. Stanišić, Case No. IT-08-91-A, International Criminal Tribunal for the former Yugoslavia, Judgement, ¶ 594 (June 30, 2016), <https://www.legal-tools.org/doc/e414f6/pdf/>.

⁵³ Rome Statute of the ICC, *supra* note 11, art. 7(3).

⁵⁴ Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 1 (2009).

⁵⁵ Compare Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28M), with Rome Statute of the ICC, *supra* note 11, art. 8*bis*.

⁵⁶ *See* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), International Court of Justice, Judgment, ¶ 195 (June 27, 1986) (noting that at least portions of the definition of aggression were already part of customary international law in 1986), <http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>.

⁵⁷ Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28M(A)) ("Crime of Aggression' means the planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a state or organization, whether connected to the state or not of an act of aggression"). The Malabo Protocol also makes a handful of conforming changes to the definition of the crime of aggression to ensure that it is applicable to aggression by non-State actors, such as by removing the requirement that the use of armed force be committed "by a State." Compare Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28M(B)(1)), with Rome Statute of the ICC, *supra* note 11, art. 8*bis*(2).

⁵⁸ *See, e.g.*, Rome Statute of the ICC, *supra* note 11, art. 7(2)(a) (defining crimes against humanity to include attacks by State or non-State actors). Indeed, the idea that non-State actors can be involved in acts of aggression goes back as far as Nuremberg, when several financiers and industrialists were prosecuted for aiding and abetting aggression.

reflects the changing nature of war, in which state-on-state warfare has increasingly been displaced by *non-international* armed conflicts.⁵⁹ Of the 55 armed conflicts that took place in 2017, for example, nearly 70% were *non-international* armed conflicts.⁶⁰ As a result, the Rome Statute definition of aggression has been criticized as “outdated” and “irrelevant” because it remains stuck in the old paradigm of conflict between two States and fails to account for these newer forms of warfare.⁶¹ By including non-State actors among the potential perpetrators of aggression, the Malabo Protocol ensures that those who illegally initiate non-international armed conflicts can be held criminally responsible in the same way as those who illegally initiate international armed conflicts and therefore addresses the criticisms raised against the Rome Statute.

Second, the Malabo Protocol covers acts of aggression that constitute manifest violations of the UN Charter *or* the Constitutive Act of the African Union with respect to the territorial integrity and human security of a State Party.⁶² This is consistent with the inclusion of non-state actors, as the AU’s Constitutive Act has a broader understanding of aggression, including, for example, acts of unconstitutional change of government (many of which can be perpetrated by non-State actors) and does not limit concerns about sovereignty, territorial integrity and independence of member States to international conflicts, as the UN Charter does.⁶³ Although some concerns have been raised about the compatibility of incorporating the AU’s Constitutive Act based on the argument that the UN Charter grants the Security Council the right to determine whether an act of aggression

See, e.g., Control Council Law No. 10, art. II(2) (1945) (providing that persons holding high positions “in the financial, industrial or economic life” of a country can be responsible for committing any crime in paragraph 1 of the article, which includes aggression), <https://www.legal-tools.org/doc/ffda62/pdf/>; United States v. Krupp, Judgment, in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 390, 393 (1950) (holding that industrialists could be guilty of aggression, but that the elements had not been proven in the case at hand), http://loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IX.pdf.

⁵⁹ Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 1 (2009), at 13-14; Anouk T. Boas, *The Definition of the Crime of Aggression and its Relevance for Contemporary Armed Conflict* 1, 4 (2013), <http://www.internationalcrimesdatabase.org/upload/documents/20131030T045349-ICD%20Brief%201%20-%20Boas.pdf>. Under international law, an international armed conflict includes an armed conflict between two States, an invasion or occupation of one State by another, an act of armed force by one State against another State, armed conflict by a people against colonial domination, or state support of a non-state actor when that support is so substantial as to be deemed overall control. By contrast, a non-international armed conflict is a protracted armed conflict between a State and organized armed groups, or between two or more organized armed groups. Annyssa Bellal, *The War Report: Armed Conflicts in 2017*, 18, 20, 22, 24 (2017), <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202017.pdf>.

⁶⁰ Annyssa Bellal, *The War Report: Armed Conflicts in 2017*, 18, 20, 22, 24 (2017), at 17, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202017.pdf>.

⁶¹ *See* Weisbord, *supra* note 59, at 24, 27, 28; Anouk T. Boas, *The Definition of the Crime of Aggression and its Relevance for Contemporary Armed Conflict* 1, 4 (2013) at 1, 4, 12, <http://www.internationalcrimesdatabase.org/upload/documents/20131030T045349-ICD%20Brief%201%20-%20Boas.pdf>.

⁶² Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28M(A)). Kai Ambos criticizes the inclusion of the term “territorial integrity or human security” because, he claims, it removes the requirement of a manifest violation of the UN Charter for a violation of these ambiguous terms. Ambos, *supra* note 29, at 49. This criticism ignores that the Malabo Protocol still requires a manifest violation of the AU Constitutive Act, and that the term “territorial integrity or human security” is intended to limit the types of violations of that document that may be considered aggression, since the Constitutive Act covers a number of other areas, such as political and socio-economic integration, the violation of which should plainly not be included in the definition of aggression. Moreover, the Malabo Protocol clearly lists the types of acts that constitute aggression, such that any ambiguity in the term “human security” is offset by the clarity of the acts required.

⁶³ AU, Constitutive Act of the African Union, art. 5(1)(d) (July 11, 2000), art. 3(b), <https://au.int/en/constitutive-act>.

has occurred,⁶⁴ there is, in fact, no conflict. The UN Charter explicitly recognizes the complementary role that regional organizations may play in the maintenance of peace and security, and it is therefore entirely appropriate for the Malabo Protocol to reference the AU's Constitutive Act.⁶⁵ Moreover, these concerns are based on an incorrect understanding of the role of Security Council. It is not true – as the author argues – that the right to determine whether the crime of aggression has occurred rests exclusively with the Security Council.⁶⁶ To the contrary, even the ICC has the ability to determine whether an act of aggression has occurred in the absence of a determination by the Security Council.⁶⁷ With respect to the African Court, which will have jurisdiction over acts of aggression perpetrated in *non-international* armed conflicts not addressed by the UN Charter or the ICC, the African Court plainly has an independent role to determine the existence such crimes irrespective of their characterization by the UN's Security Council.⁶⁸

Finally, the Malabo Protocol encompasses not only the sending by one State into another of armed bands, groups, irregulars or mercenaries, but also their *material support*. The African experience demonstrates that States do not necessarily send fighters into another State, but may instead support those planning acts of aggression and other crimes. For example, former Liberian President Charles Taylor provided material support to RUF fighters in the lead-up to their invasion of Sierra Leone⁶⁹ – a crime that could have been characterized as aggression under the Malabo Protocol definition, but not under the Rome Statute definition.

For all of these reasons, the Malabo Protocol's definition of aggression, though differing somewhat from that in the Rome Statute, better accounts for recent changes in warfare and the needs of African countries.

⁶⁴ Ademola Abass, *The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects*, NETHERLANDS INTERNATIONAL LAW REVIEW 27, 45 (2013), at 35, http://collections.unu.edu/eserv/UNU:9/NILR_2013-1_Abass.pdf.

⁶⁵ Charter of the United Nations, art. 52 (June 26, 1945), <http://www.un.org/en/sections/un-charter/un-charter-full-text/>.

⁶⁶ Abass, *The Proposed International Criminal Jurisdiction for the African Court*, *supra* note 64, at 35-36. Indeed, other scholars have explicitly opined that “international courts should not be bound by any decision taken by a political body,” including the UN Security Council, with respect to whether an act of aggression has occurred. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 117 (2003).

⁶⁷ Rome Statute of the ICC, *supra* note 11, art. 15bis(6)-(8).

⁶⁸ Renowned international law scholar Antonio Cassese, writing about the role of the Security Council with respect to the crime of aggression, also has argued that “national or international courts should not be bound by any decision taken by a political body.” ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 117 (2003).

⁶⁹ Taylor Trial Judgment, *supra* note 42, at ¶ 2337. Although the Prosecution alleged that Taylor had been part of a conspiracy to send the RUF into Sierra Leone, the Special Court for Sierra Leone found that this allegation was not proven. *Id.* ¶¶ 2231, 2258, 2389, 2392. Although there was evidence that Taylor supported the invasion, *id.* at ¶¶ 2378, 2390, this likely would be insufficient to find that he committed the crime of aggression by sending armed groups to Sierra Leone. It would, however, likely be sufficient to find that he materially supported the aggression.

b. Transnational crimes

i. Description of relevant provisions of the Malabo Protocol

Article 28A of the Malabo Protocol grants the African Court jurisdiction over ten transnational crimes,⁷⁰ namely the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources.⁷¹ These crimes are defined in articles 28E through 28L Bis.⁷² For ease of reference, the exact language of the relevant sections, as amended by the Malabo Protocol, is provided below.

Article 28A of the Statute (as amended) International Criminal Jurisdiction of the Court

1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have the power to try persons for the crimes provided hereunder:

...

- 4) The Crime of Unconstitutional Change of Government;
- 5) Piracy
- 6) Terrorism
- 7) Mercenarism
- 8) Corruption
- 9) Money Laundering
- 10) Trafficking in Persons
- 11) Trafficking in Drugs
- 12) Trafficking in Hazardous Wastes
- 13) Illicit Exploitation of Natural Resources

...

Article 28E of the Statute (as amended) The Crime of Unconstitutional Change of Government

1. For the purposes of this Statute, ‘unconstitutional change of government’ means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:

- a) A putsch or coup d’état against a democratically elected government;

⁷⁰ This article uses the term “transnational crimes” in order to distinguish the ten new crimes for which the Malabo Protocol grants jurisdiction from the four core international crimes more typically within the jurisdiction of the international criminal tribunals. Although the term “transnational crime” is now widely used, there is no consensus on the exact meaning of this term or how a transnational crime differs from an international crime.

⁷¹ AU, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 27, 2014) [hereinafter Malabo Protocol], annex art. 14 (adding art. 28A), <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

⁷² *Id.* (adding arts. 28E to 28 L Bis).

- b) An intervention by mercenaries to replace a democratically elected government;
 - c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
 - d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
 - e) 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;
 - f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.
2. For purposes of this Statute, “democratically elected government” has the same meaning as contained in AU instruments.

Article 28F of the Statute (as amended)
Piracy

Piracy consists of any of the following acts:

- a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private boat, ship or a private aircraft, and directed:
 - i. on the high seas, against another boat, ship or aircraft, or against persons or property on board such boat, ship or aircraft;
 - ii. against a boat, ship, aircraft, persons or property in a place outside the jurisdiction of any State
- b) any act of voluntary participation in the operation of a boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft;
- c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 28 G of the Statute (as amended)
Terrorism

For the purposes of this Statute, ‘terrorism’ means any of the following acts:

- A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
 2. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
 3. create general insurrection in a State.
- B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to(3).
- C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.
- D. The acts covered by international Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.
- E. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.

Article 28H of the Statute (as amended)
Mercenarism

1. For the purposes of this Statute:
 - a) A mercenary is any person who:
 - i. Is specially recruited locally or abroad in order to fight in an armed conflict;
 - ii. Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;
 - iii. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - iv. Is not a member of the armed forces of a party to the conflict; and
 - v. Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
 - b) A mercenary is also any person who, in any other situation:

- i. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 1. Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;
 2. Assisting a government to maintain power;
 3. Assisting a group of persons to obtain power; or
 4. Undermining the territorial integrity of a State;
 - ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;
 - iii. Is neither a national nor a resident of the State against which such an act is directed;
 - iv. Has not been sent by a State on official duty; and
 - v. Is not a member of the armed forces of the State on whose territory the act is undertaken.
2. Any person who recruits, uses, finances or trains mercenaries, as defined in paragraph (1) (a) or (b) above commits an offence.
 3. A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence.

Article 28I of the Statute (as amended)
Corruption

1. For the purposes of this Statute, the following shall be deemed to be acts of corruption if they are of a serious nature affecting the stability of a state, region or the Union:
 - a) The solicitation or acceptance, directly or indirectly, by a public official, his/her family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
 - b) The offering or granting, directly or indirectly, to a public official, his/family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
 - c) Any act or omission in the discharge of his or her duties by a public official. his/her family member or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
 - d) The diversion by a public official, his/her family member or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;

- e) The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;
 - f) The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;
 - g) Illicit enrichment;
 - h) The use or concealment of proceeds derived from any of the acts referred to in this Article.
2. For the purposes of this Statute "Illicit enrichment" means the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.

Article 28I Bis of the Statute (as amended)
Money Laundering

1. For the purposes of this Statute, 'Money Laundering' means: any act of –
- i. Conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action.
 - ii. Concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences;
 - iii. Acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences
 - iv. Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.
2. Nothing in this article shall be interpreted as prejudicing the power of the Court to make a determination as to the seriousness of any act or offence.

Article 28J of the Statute (as amended)
Trafficking in persons

For the purposes of this Statute:

1. “Trafficking in persons” means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2. Exploitation shall include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
3. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (1) of this article shall be irrelevant where any of the means set forth in subparagraph (1) have been used;
4. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (1) of this article;

Article 28K of the Statute (as amended)
Trafficking in drugs

1. For the purposes of this Statute, trafficking in drugs means:
 - a) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;
 - b) The cultivation of opium poppy, coca bush or cannabis plant;
 - c) The possession or purchase of drugs with a view to conducting one of the activities listed in (a);
 - d) The manufacture, transport or distribution of precursors knowing that they are to be used in or for the illicit production or manufacture of drugs.
2. The conduct described in paragraph 1 shall not be included in the scope of this Statute when it is committed by perpetrators for their own personal consumption as defined by national law.
3. For the purposes of this Article:
 - A) “Drugs” shall mean any of the substances covered by the following United Nations Conventions:
 - a) the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs of 1961;
 - b) The 1971 Vienna Convention on Psychotropic Substances.

B. "Precursors" shall mean any substance scheduled pursuant to Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

Article 28L of the Statute (as amended)
Trafficking in Hazardous Wastes

3. For the purposes of this Statute, any import or failure to re-import, transboundary movement, or export of hazardous wastes proscribed by the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted in Bamako, Mali, in January 1991 shall constitute the offence of trafficking in hazardous waste.
4. The following substances shall be "hazardous wastes" for the purpose of this statute:
 - a) Wastes that belong to any category contained in Annex I of the Bamako Convention;
 - b) Wastes that are not covered under paragraph (a) above but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the State of export, import or transit;
 - c) Wastes which possess any of the characteristics contained in Annex II of the Bamako Convention;
 - d) Hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the State of manufacture, for human health or environmental reasons.
3. Wastes which, as a result of being radioactive, are subject to any international control systems, including international instruments, applying specifically to radioactive materials are included in the scope of this Convention.
4. Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, shall not fall within the scope of this Convention.
5. For the purposes of this Article, "failure to re-import" shall have the same meaning assigned to it in the Bamako Convention.
6. The export of hazardous waste into a Member State for the purpose of rendering it safe shall not constitute an offence under this Article.

Article 28L Bis of the Statute (as amended)
Illicit Exploitation of Natural Resources

For the purpose of this Statute, "Illicit exploitation of natural resources" means any of the following acts if they are of a serious nature affecting the stability of a state, region or the Union:

- a) Concluding an agreement to exploit resources, in violation of the principle of peoples' sovereignty over their natural resources;
- b) Concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned;
- c) Concluding an agreement to exploit natural resources through corrupt practices;
- d) Concluding an agreement to exploit natural resources that is clearly one-sided;
- e) Exploiting natural resources without any agreement with the State concerned;
- f) Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and
- g) Violating the norms and standards established by the relevant natural resource certification mechanism.

ii. Analysis

(a) The Malabo Protocol provides the African region with a long-awaited criminal court dedicated to crimes of special concern to the continent

The need for African solutions to African problems is nowhere more critical than in the realm of international criminal law. History demonstrates that the international community is not prepared to address the specific challenges that Africa faces. In the 1970s, for example, during the height of apartheid, the international community pledged to create an international penal court to try crimes of apartheid.⁷³ Based on this commitment, representatives of African countries then drafting the African Charter on Human and Peoples' Rights chose to forego the creation of a regional criminal tribunal to prosecute apartheid and other crimes of regional interest.⁷⁴ The promised court, however, never came into existence. Likewise, during negotiations over the ICC, African (and other) countries repeatedly advocated for the inclusion in the Court's jurisdiction of additional crimes of interest to Africa, including terrorism, drug trafficking, money laundering, and trafficking in hazardous wastes.⁷⁵ But those calls were not heeded.⁷⁶ The lesson has been clear – “not every crime committed in Africa would be of prosecutorial interest to the rest of humanity.”⁷⁷

The establishment of an expanded African Court with international criminal jurisdiction addresses this gap in international law by ensuring a forum for the prosecution of crimes of special interest to the African continent.⁷⁸ The crimes falling within the jurisdiction of the expanded African Court, such as piracy, trafficking in persons, and unconstitutional changes of government, are ubiquitous in Africa and have had devastating effects on the continent.⁷⁹ Yet although these crimes are far more common than war crimes, genocide, and aggression – which can be prosecuted before the ICC – there is no supra-national penal court in which these crimes of concern to Africa can be

⁷³ International Convention on the Suppression and Punishment of the Crime of Apartheid, art. V (Nov. 30, 1973), <https://treaties.un.org/doc/publication/unts/volume%201015/volume-1015-i-14861-english.pdf>; Ademola Abass, *Historical and Political Background to the Malabo Protocol*, in GERHARD WERLE & MORITZ VORMBAUM, *THE AFRICAN CRIMINAL COURT* 11, 22 (2017) at 16.

⁷⁴ Abass, *Id.*; Kenyans for Peace with Truth & Justice, *Seeking Justice or Shielding Suspects?* 10 (2016) at 5, <http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf>.

⁷⁵ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, p. 73 ¶ 18, U.N. Doc. A/CONF.183/13 (Vol. II) (June 15-July 17, 1998) (statement of Algeria), http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf; *id.* p. 101 ¶ 82 (statement of Libya); *id.* p. 107-08 ¶ 31 (statement of Madagascar); *id.* p. 111 ¶ 86 (statement of Nigeria)

⁷⁶ Indeed, at least some Western countries attempted to placate African and other nations by suggesting that the ICC's jurisdiction be expanded to include such crimes at another date. *Id.* p.101 ¶ 71 (suggestion by France that the addition of jurisdiction over drug trafficking be considered in the future). Once again, these Western promises have not come to fruition.

⁷⁷ Abass, *Historical and Political Background to the Malabo Protocol*, *supra* note 4, at 16; *see also* Manirakiza, *supra* note 4, at 389.

⁷⁸ Ademola Abass, *The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects*, *NETHERLANDS INTERNATIONAL LAW REVIEW* 27, 45 (2013), at 33, http://collections.unu.edu/eserv/UNU:9/NILR_2013-1_Abass.pdf.

⁷⁹ *Id.*

prosecuted.⁸⁰ Vesting the African Court with jurisdiction over transnational crimes places control over international criminal law back in African hands, thereby providing a mechanism for Africa to create its own solutions to problems that have so far been left unaddressed.

(b) The transnational crimes included in the Malabo Protocol are sufficiently serious for supra-national prosecution

Some commentators have questioned whether the transnational crimes included in the Malabo Protocol are serious enough to warrant supra-national prosecution.⁸¹ Under this argument, only the core international crimes of aggression, genocide, war crimes, and crimes against humanity are worthy of international prosecution because only these crimes “threaten the peace, security, and well-being of the world.”⁸² By contrast, the argument goes, transnational crimes affect the interests of more than one state, but do not seriously jeopardize international peace and security.

These arguments are little more than an extension of the international community’s exclusive focus on crimes relevant to the West, while ignoring crimes of equal importance to Africa. The crimes included in the Malabo Protocol have caused widespread devastation in Africa equally serious to those caused by core international crimes, as even a brief review demonstrates:

- **Unconstitutional Change of Government:** In September 2009, after a group of military officers who had seized power in Guinea the previous year reneged on a pledge to hold elections in which they would not run for office, tens of thousands of people turned out in protest. In an effort to maintain their undemocratic power, Guinea’s leaders ordered security forces to attack the protesters. During the attack, at least 150 people were massacred, over 1000 were injured, and more than 100 women were raped.⁸³
- **Terrorism:** In 2015, nearly 30,000 people were killed in terrorist attacks, with several African countries – including Libya, Egypt, Somalia, and Nigeria – among the hardest hit.⁸⁴ Nearly 8000 people were killed that year in Nigeria, Cameroon, Chad, and Niger by Boko Haram alone.⁸⁵
- **Trafficking in Hazardous Wastes:** In 2006, UK company Trafigura illegally dumped hazardous waste at over a dozen sites in Abidjan, Cote d’Ivoire, injuring over 100,000. The

⁸⁰ *Id.* at 36-37.

⁸¹ *Id.* at 33-34.

⁸² Rome Statute of the International Criminal Court, art. 16 (July 17, 1998), preamble, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

⁸³ See generally Human Rights Watch, *Bloody Monday: The September 28 Massacre and Rapes by security Forces in Guinea* (Dec. 17, 2009), <https://www.hrw.org/report/2009/12/17/bloody-monday/september-28-massacre-and-rapes-security-forces-guinea>; Global Security, Guinea, <https://www.globalsecurity.org/military/world/africa/gn-camara.htm>.

⁸⁴ Dominic Dudley, *The Ten Countries Most Affected by Terrorism*, FORBES (Nov. 18, 2016), <https://www.forbes.com/sites/dominicdudley/2016/11/18/countries-most-affected-by-terrorism/#2f23f8ef30d9>.

⁸⁵ Salem Solomon, *Terrorism Deaths in Africa Falling After Hitting Record Highs*, VOICE OF AMERICA (July 9, 2017), <https://www.voanews.com/a/africa-terrorism-deaths-falling/3934505.html>.

inability to prosecute those responsible has been described as a failure of international law.⁸⁶

Not only are such crimes destructive in themselves, but they often lead to additional international crimes. As one analysis stated, many of the Malabo Protocol crimes “are capable of destabilising a state, which in turn leads to the proliferation of core international crimes.”⁸⁷ For example, the illicit exploitation of natural resources has fueled conflicts across the African continent, from Sierra Leone to the Democratic Republic of the Congo.⁸⁸ Unconstitutional changes too often have led to chaos and the commission of further crimes, as the example of Guinea demonstrates.⁸⁹ By providing a forum for redress of these transnational crimes, an expanded African Court may help to combat the commission of both transnational and core international crimes on the continent, and thus represents a unique opportunity to address the root causes of conflict.⁹⁰

The idea that the crimes included in the Malabo Protocol are not sufficiently grave is also refuted by the repeated recognition of their serious status at both the regional and international level. Many of these crimes have been recognized by the United Nations as threats to international peace and security,⁹¹ and all are subject to regional and/or international conventions that recognize their serious nature and impose duties on States to criminalize them.⁹² Several of these crimes also have been included or considered for inclusion in the statutes of supra-national criminal tribunals. Indeed, it was a request in 1989 for the creation of an international court with jurisdiction over

⁸⁶ See generally Greenpeace & Amnesty International, *The Toxic Truth* (2012), <https://www.amnesty.org/download/Documents/AFR310022012ENGLISH.PDF>.

⁸⁷ *Seeking Justice or Shielding Suspects?*, *supra* note 5, at 13.

⁸⁸ See Prosecutor v. Taylor, Case No. SCSL-03-01-T, Special Court for Sierra Leone, Trial Judgment, ¶ 506 (May 18, 2012) [hereinafter Taylor Trial Judgment], at ¶¶ 586, 635, 640-41, 663, 1468, 1654, 1658, 1753 <https://www.legal-tools.org/doc/8075e7/pdf/>; see generally International Alert, *The Role of the Exploitation of Natural Resources in Fuelling and Prolonging Crises in the Eastern DRC* (2010), http://www.international-alert.org/sites/default/files/publications/Natural_Resources_Jan_10.pdf.

⁸⁹ *Seeking Justice or Shielding Suspects?* *supra* note 5, at 13.

⁹⁰ *Id.*

⁹¹ E.g., UN Security Council, Statement by the President of the Security Council, Doc. No. S/PRST/2012/16 (Apr. 25, 2012) (describing terrorism, piracy, drug trafficking, and human trafficking as “threats to international peace and security”), <https://www.un.org/en/sc/documents/statements/2012.shtml>; UN Resolution 52/112 on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination (Dec. 12, 1997) (describing mercenarism as a threat to peace and security), <https://www.un.org/ga/documents/gares52/res52112.htm>. Other crimes also are increasingly being recognized as threats to international peace and security by other *supra*-national bodies and by scholars. See, e.g., African Commission on Human and Peoples’ Rights, Resolution 213 on the Unconstitutional Change of Governments (May 2, 2012), <http://www.achpr.org/sessions/51st/resolutions/213/>; Sarah Chayes, *Corruption: The Unrecognized Threat to International Security* (2014), https://carnegieendowment.org/files/corruption_and_security.pdf; Transparency International, *Corruption as a Threat to Stability and Peace* (2014), http://ti-defence.org/wp-content/uploads/2016/03/2014-01_CorruptionThreatStabilityPeace.pdf.

⁹² E.g., Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, art. 5 (Nov. 15, 2000) [hereinafter UN Trafficking Protocol], art. 5, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art. 5(3), 2163 U.N.T.S. 75 (Dec. 4, 1989), https://treaties.un.org/doc/Treaties/1989/12/19891204%2008-54%20AM/Ch_XVIII_6p.pdf; African Union Convention on Preventing and Combating Corruption, art. 5 (July 1, 2003), https://au.int/sites/default/files/treaties/7786-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf.

drug trafficking that revived the idea of an international criminal court⁹³ and eventually led to the adoption of the Rome Statute of the ICC.⁹⁴ Both drug trafficking and terrorism were ultimately recommended for later inclusion in the jurisdiction of the ICC once an acceptable definition could be decided upon.⁹⁵ Other courts, such as the Special Tribunal for Lebanon and the Scottish High Court of the Judiciary in the Netherlands, already exercise or have exercised jurisdiction over acts of terrorism.⁹⁶ And the United Nations Security Council has called for the creation of a regional tribunal with jurisdiction to prosecute the crime of piracy.⁹⁷

Ultimately, attempts to expand international criminal jurisdiction to new crimes often meet with opposition that the proposed crimes are not appropriate for supra-national prosecution. Even the idea of conducting supra-national prosecutions of war crimes and crimes against humanity – now recognized as core international crimes – was initially criticized on the grounds that these crimes were not international crimes subject to punishment in an international court.⁹⁸ Yet as the foregoing analysis demonstrates, the crimes included within the Malabo Protocol are serious crimes of international concern that, like the core international crimes, are a threat to international peace and security and have caused great devastation on the African continent and elsewhere. As a result, they are appropriate for supra-national prosecution.⁹⁹

⁹³ There have been multiple proposals for international criminal courts over the years, including the 1937 proposal for a court to try crimes of terrorism. UN, International Law Commission, *Historical Survey of the Question of International Criminal Jurisdiction*, at 3-4, 16-18 (1949), U.N. Doc. A/CN.4/7/Rev.1, http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf.

⁹⁴ UN General Assembly, *Request for the Inclusion of a Supplementary Item in the Agenda of the Forty-Fourth Session: International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs and Across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction Over Such Crimes* (Aug. 21, 1989), http://repository.un.org/bitstream/handle/11176/145000/A_44_195-EN.pdf?sequence=3&isAllowed=y; UN General Assembly, Resolution 44/39, *International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes* (Dec. 4, 1989), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/44/39.

⁹⁵ UN, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 8 (July 17, 1998), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/241/85/PDF/N9824185.pdf?OpenElement>.

⁹⁶ Statute of the Special Tribunal for Lebanon, arts. 1-2 [hereinafter Statute of the STL], <https://www.stl-tsl.org/en/documents/statute-of-the-tribunal/223-statute-of-the-special-tribunal-for-lebanon>; Michael P. Scharf, *A Preview of the Lockerbie Case*, 5 ASIL INSIGHTS 5 (May 4, 2000), <https://www.asil.org/insights/volume/5/issue/5/preview-lockerbie-case>.

⁹⁷ UN Security Council, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal*, ¶ 80 (July 26, 2010), <http://www.securitycouncilreport.org/atf/cf/%7B65BF99B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S2010%20394.pdf>.

⁹⁸ Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INTERNATIONAL LAW JOURNAL 665, 670-71 (1996) at 669-70 (describing arguments of the American members of the post-WWI Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1390&context=cilj>.

⁹⁹ Some scholars contend that international crimes are those which are directly criminalized under international law, while transnational crimes are those that are criminalized under domestic law (although they may be the subject of international treaties directing States to criminalize the relevant conduct). See, e.g., Fatuma Minde-Silungwe, *Trafficking in Persons (Article 28J) and Trafficking in Drugs*, in GERHARD WERLE & MORITZ VORMBAUM, THE

(c) The definitions of the transnational crimes closely adhere to their definitions under international law

The definitions of the ten transnational crimes in the Malabo Protocol reflect the current state of international law on these crimes because they are drawn from pre-existing AU or UN treaties. This reliance on current treaty definitions, some of which are codifications of customary international law, ensures consistency between the jurisprudence of the African Court and current international law.¹⁰⁰ Moreover, because these treaties generally require States Parties to enact domestic legislation criminalizing the conduct covered by the treaty,¹⁰¹ domestic laws on these crimes are likely to be modeled upon the language in the treaties. The Malabo Protocol's use of treaty definitions therefore increases the likelihood that the Malabo Protocol definition is consistent with definitions of these same crimes contained in the national laws of African States.

Despite the advantages of using existing treaty definitions, some commentators have criticized the Malabo Protocol for using the definitions in existing AU or UN conventions.¹⁰² According to this criticism, treaty definitions are generally not specific enough and must be modified to create penal provisions.¹⁰³ This lack of precision may raise “concerns as to compliance with the principle of legality.”¹⁰⁴

A review of domestic laws, however, contradicts this argument, as many countries incorporate treaty provisions into their criminal codes with little or no modification. For example, the crime of piracy in Kenya is nearly identical to that in the U.N. Convention on the Law of the Sea, which also is the basis for the Malabo Protocol definition.¹⁰⁵ Similarly, the crime of human trafficking in Botswana and Sierra Leone is nearly identical to that in the 2000 Protocol to Prevent, Suppress,

AFRICAN CRIMINAL COURT 109, 112 (2017). Under this argument, however, all that is necessary to raise a transnational crime to the international level is an international treaty that directly criminalizes the conduct. That is exactly what the Malabo Protocol does. According to this argument, there is therefore no impediment to the *supra*-national prosecution of the crimes in the Malabo Protocol because these crimes are now international crimes.

¹⁰⁰ See, e.g., Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* 34 (2016), at 15, <https://www.amnesty.org/en/documents/afr01/6137/2017/en/>.

¹⁰¹ E.g., UN Trafficking Protocol, *supra* note 23, art. 5; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art. 5(3), 2163 U.N.T.S. 75 (Dec. 4, 1989), art. 5(3),

https://treaties.un.org/doc/Treaties/1989/12/19891204%2008-54%20AM/Ch_XVIII_6p.pdf; African Union

Convention on Preventing and Combating Corruption, art. 5 (July 1, 2003),

https://au.int/sites/default/files/treaties/7786-treaty-0028_-

[african union convention on preventing and combating corruption e.pdf](#).

¹⁰² E.g., Jebberger, *Piracy (Article 28F), Terrorism (Article 28G) and Mercenarism (Article 28H)*, in GERHARD WERLE & MORITZ VORMBAUM, *THE AFRICAN CRIMINAL COURT* 71, 84 (2017); see also Patricia Pinto Soares, *Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Pluralism*, 23 *CRIMINAL LAW FORUM* 161, 162 (2012) at 181.

¹⁰³ Jebberger, *Piracy (Article 28F), Terrorism (Article 28G) and Mercenarism (Article 28H)*, in GERHARD WERLE & MORITZ VORMBAUM, *THE AFRICAN CRIMINAL COURT* 71, 84 (2017), at 84.

¹⁰⁴ Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, Snapshots* 6 (2017), <https://www.amnesty.org/en/documents/afr01/6137/2017/en/>.

¹⁰⁵ Compare Kenya, Merchant Shipping Act, art. 369(1)(a) (2009),

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MerchantShipping%20Act%20No.%204of2009.pdf>, with

Malabo Protocol, *supra* note 2, art. 14 (adding art. 28F), and with UN Convention on the Law of the Sea, preamble, 1833 U.N.T.S. 3 (Dec. 10, 1982) [hereinafter UNCLOS], art. 101,

<https://treaties.un.org/doc/Publication/UNTS/Volume%201833/v1833.pdf>.

and Punish Trafficking in Persons, Especially Women and Children.¹⁰⁶ As these examples demonstrate, it is both common and appropriate to use a treaty definition as the basis for a criminal provision; indeed, the United Nations has specifically recommended that potential regional courts set up to prosecute transnational crimes, such as piracy, rely on the definitions in these treaties.¹⁰⁷

Others argue more specifically that because regional and international conventions leave criminalization to domestic states, the definitions they contain do not necessarily include all of the elements necessary in a penal provision, such as *mens rea*, *actus reus*, and penalties.¹⁰⁸ These arguments, however, rest on a misconception of international criminal law. It is common for the statutes of international criminal tribunals to describe the acts necessary to impose liability without specifying all of the elements or appropriate penalties, leaving those elements to later clarification in either a guidance document on the Elements of Crimes or caselaw.¹⁰⁹ For example, where international rules do not indicate the appropriate *mens rea*, the proper intent is that “prescribed in most legal systems of the world for the underlying offence.”¹¹⁰ A court may also look to customary international law, including as codified in international conventions and treaties, to fill in the elements.¹¹¹ Thus, *none* of the statutes of the ICTR, SCSL, ICTY, IMT, or STL had a specific *mens rea* provision, and none specified the appropriate lengths of imprisonment or other punishments for various offenses.¹¹²

¹⁰⁶ Compare Botswana, Anti-Human Trafficking Act, art. 9 (2004), <http://www.osall.org.za/docs/2011/03/Botswana-Anti-Human-Trafficking-Act-32-of-2014.pdf>, and Sierra Leone, Anti-Human Trafficking Act, art. 2 (2005), <http://www.sierra-leone.org/Laws/2005-7p.pdf>, with Malabo Protocol, *supra* note 2, art. 14 (adding art. 28J), and with UN Trafficking Protocol, *supra* note 23, art. 3.

¹⁰⁷ UN Security Council, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal*, ¶ 82 (July 26, 2010), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S2010%20394.pdf>.

¹⁰⁸ Fatuma Mninde-Silungwe, *Trafficking in Persons (Article 28J) and Trafficking in Drugs*, in GERHARD WERLE & MORITZ VORMBAUM, *THE AFRICAN CRIMINAL COURT* 109, 112 (2017), at 109, 119-20 (2017); Jebberger, *supra* note 33, at 77, 84.

¹⁰⁹ ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 145-46 (2003) (noting, among other things, that “most international rules proscribing conduct as criminal do not specify the *subjective* element of the crime,” or *mens rea*); *id.* at 159 (“It is not easy to identify the various forms and shades of *mens rea* in international criminal law” because “substantive rules concerning crimes often do not specify the subject element required for each specific offence”).

¹¹⁰ *Id.* at 58.

¹¹¹ *Id.* For example, with respect to Article 28I *Bis*(1)(ii), which criminalizes the “[c]oncealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences,” the expanded African Court might look to the UN Convention on Corruption or the UN Convention Against Transnational Organized Crime, both of which specify a *mens rea* that the accused “know[] that such property is the proceeds of crime.” United Nations Convention against Corruption, art. 23(1)(a)(ii) (Oct. 31, 2003), https://treaties.un.org/doc/Treaties/2003/12/20031209%2002-50%20PM/Ch_XVIII_14p.pdf; United Nations Convention Against Transnational Organized Crime, art. 6(1)(a)(ii) (Nov. 15, 2000), https://treaties.un.org/doc/Treaties/2000/11/20001115%2011-11%20AM/Ch_XVIII_12p.pdf.

¹¹² See, e.g. Statute of the International Criminal Tribunal for Rwanda, arts. 2-4 (Nov. 8, 1994) [hereinafter Statute of the ICTR], http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf; Statute of the Special Court for Sierra Leone, art. 2-4 (Jan. 16, 2002) [hereinafter Statute of the SCSL], <http://www.rscsl.org/Documents/scsl-statute.pdf>; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 2-5 (Sept. 2009) [hereinafter Statute of the ICTY], http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; Charter of the International Military

Nonetheless, although not required by international law, some of the transnational crimes in the Malabo Protocol do, in fact, specify the requisite *mens rea* and *actus reus*. For example, the crime of unconstitutional change of government requires a person to have the “aim” of illegally accessing or maintaining power, which is equivalent to a *mens rea* of purpose,¹¹³ and defines six acts that incur criminal liability.¹¹⁴

(d) Examples of specific crimes

In order to more deeply explore potential concerns regarding the transnational crimes in the Malabo Protocol, this section explores three specific crimes: unconstitutional change of government (UCG); piracy; and trafficking in persons. These examples were chosen because they represent a range of levels and kinds of concerns. Based on these examples, potential options for dealing with such concerns – whether for the three example crimes or for the other transnational crimes in the Malabo Protocol – are then outlined in the following section.

(i) Unconstitutional change of government

One of the key innovations of the Malabo Protocol is to elevate to the international level crimes of particular concern to the African continent. Perhaps no crime is more reflective of these concerns than the crime of unconstitutional change of government (UCG). Although all regions of the world have, at one time or another, experienced such problems,¹¹⁵ the African continent continues to face significant challenges from UCGs,¹¹⁶ such as the 2015 coup d'état in Burkina Faso¹¹⁷ and the 2016 refusal of then-President Yahya Jammeh to relinquish office after he lost the election in The

Tribunal, http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.

¹¹³ Gerhard Kemp & Selemani Kinyunyu, *The Crime of Unconstitutional Change of Government (Article 28E) in* GERHARD WERLE & MORITZ VORMBAUM, *THE AFRICAN CRIMINAL COURT* 57, 67-68 (2017) (explaining that the term “aim” used in article 28E is equivalent to purpose).

¹¹⁴ Malabo Protocol, *supra* note 2, art. 14 (adding art. 28E).

¹¹⁵ See Millbrook Commonwealth Action Program on the Harare Declaration, art. 3 (1995) (addressing “unconstitutional overthrow of a democratically elected government” in Commonwealth countries), <http://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/Millbrook.aspx>; Organization of American States, Resolution 1080 on Representative Democracy, AG/RES.1080 (XXI-O/91) (1991) (addressing “the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization’s member states”), <http://www.oas.org/juridico/english/agres1080.htm>; Organization of American States, Inter-American Democratic Charter, arts. 19-21 (Sept. 11, 2001) (regarding “unconstitutional interruption of the democratic order”), http://www.oas.org/charter/docs/resolution1_en_p4.htm.

¹¹⁶ See Issaka K. Souaré, Institute for Security Studies, *The AU and the challenge of unconstitutional change of government in Africa* 6 (Aug. 2009) (listing instances of UCG between 2000 and 2009), <https://issafrica.org/amp/research/papers/the-au-and-the-challenge-of-unconstitutional-changes-of-government-in-africa/download-paper-no-197-pdf>; J. Shola Omotola, *Unconstitutional Changes of Government in Africa: What Implications for Democratic Consolidation?* 7-8, 11-13, 21-24 (2011) (listing instances of UCG between 2008 and 2010, and describing history of UCG on the African continent), <http://www.diva-portal.org/smash/get/diva2:478511/FULLTEXT01.pdf>.

¹¹⁷ Rakotomalala & Nadia Karoui, *The rise and fall of Burkina Faso’s coup: what you need to know*, THE GUARDIAN (Sept. 24, 2015), <https://www.theguardian.com/world/2015/sep/24/burkina-faso-coup-rise-and-fall-of-what-you-need-to-know>.

Gambia.¹¹⁸ These unconstitutional changes of government “are a threat to peace and security” on the continent,¹¹⁹ contravene the right of a people to choose their governments,¹²⁰ and impede socio-economic development.¹²¹ Ending UCG is therefore critical to consolidating good governance, promoting human rights, building stable governments and strong economies, and preventing conflict, as the AU and its predecessor have recognized.¹²²

For years, African States have engaged in efforts to consolidate democracy and respect for the rule of law, including through the elimination of unconstitutional changes of government.¹²³ These principles are enshrined in the AU’s Constitutive Act¹²⁴ and have been incorporated into other key components of the AU’s peace and governance architecture, including NEPAD and the Peace and Security Council.¹²⁵ As part of these responses, the AU and the OAU agreed to impose significant penalties on perpetrators of UCG, including suspension from participation in the policy organs of the OAU and the AU, as well as sanctions such as visa denials and trade restrictions,¹²⁶ and have

¹¹⁸ Dionne Searcy & Jaime Yaya Barry, *Yahya Jammeh, Gambian President, Now Refuses to Accept Election Defeat*, THE NEW YORK TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/world/africa/yahya-jammeh-gambia-rejects-vote-defeat-adama-barrow.html>; AU, Peace and Security Council, Communiqué, PSC/PR/COMM. (DCXLVII) (Jan. 13, 2017), <http://www.peaceau.org/uploads/647.psc.comm.gambia.13.01.2017-1.pdf>.

¹¹⁹ OAU, Assembly of Heads of State and Government, Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5(XXXVI) (2000), <http://www.peaceau.org/uploads/ahg-decl-5-xxxvi-e.pdf>; *see also* ¹¹⁹ AU, African Charter on Democracy, Elections and Governance, preamble (describing UCG as “one of the essential causes of insecurity, instability and violence conflict in Africa”) (Jan. 30, 2007), <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>.

¹²⁰ *See, e.g.*, OAU, African Charter on Human and Peoples’ Rights, art. 30 (June 1, 1981) art. 13, <https://au.int/sites/default/files/treaties/7770-treaty-0011 - african charter on human and peoples rights e.pdf>; OAU, Assembly of Heads of State and Government, Declaration on the Principles Governing Democratic Elections in Africa, art. IV(1)AGH/Decl.1 (XXXVIII) (2002), <https://www.eisa.org.za/pdf/au2002declaration.pdf>; Inter-Parliamentary Council, Universal Declaration on Democracy (Sept. 16, 1997), <http://archive.ipu.org/cnl-e/161-dem.htm>.

¹²¹ *See* The New Partnership for Africa’s Development, Declaration on Democracy, Political, Economic and Corporate Governance, AHG/235(XXXVIII), http://www.chr.up.ac.za/chr_old/hr_docs/arpm/docs/book2.pdf; J. Omotola, *supra* note 47, at 16, 37.

¹²² OAU, Assembly of Heads of State and Government, Decision, AHG/Dec.141(XXXV) (1999), http://archive.au.int/collect/auassemb/import/English/AHG%20Decl%201-2%20XXXV_E.pdf.

¹²³ *See, e.g.*, OAU, Council of Ministers, Decision, CM/Dec.356(LXVI) (1997), <http://www.peaceau.org/uploads/cm-dec-356-lxvi-e.pdf>; OAU, Assembly of Heads of State and Government, Decision, AHG/Dec.142(XXXV) (1999),

http://archive.au.int/collect/auassemb/import/English/AHG%20Decl%201-2%20XXXV_E.pdf; OAU, Assembly of Heads of State and Government, Decision on Unconstitutional Changes of Government in Africa, AHG/Dec.150 (XXXVI) (2000), <http://www.peaceau.org/uploads/ahg-dec-150-xxxvi-e.pdf>; Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, *supra* note 50.

¹²⁴ AU, Constitutive Act of the African Union, art. 5(1)(d) (July 11, 2000), art. 4, <https://au.int/en/constitutive-act>.

¹²⁵ AU, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 7(g), (July 9, 2002), <https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union>; African Charter on Democracy, Elections and Governance, *supra* note 50, arts. 24-25 (recognizing the role of the Peace and Security Council in combating UCG); The New Partnership for Africa’s Development, Declaration on Democracy, Political, Economic and Corporate Governance, AHG/235(XXXVIII), http://www.chr.up.ac.za/chr_old/hr_docs/arpm/docs/book2.pdf, ¶ 13.

¹²⁶ Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, *supra* note 50; AU Constitutive Act, *supra* note 55, art. 30; Omotola, *supra* note 47, at 32-33.

not hesitated to impose these penalties as appropriate.¹²⁷ These efforts have been supported by similar initiatives at the sub-regional level.¹²⁸

In 2007, faced with continuing violations of democratic governance, the AU adopted the African Charter on Democracy, Elections, and Governance in 2007.¹²⁹ The Charter provides a comprehensive definition of UCG,¹³⁰ confirms the key role of the Peace and Security Council in combating UCG, and reiterates and strengthens the sanctions available against perpetrators of UCG, including a prohibition on participating in transitional elections, suspension from participation in the activities of the AU, and punitive economic measures.¹³¹ The Charter entered into force in 2012 and, as of March 15, 2018, had 30 States Parties.¹³²

Importantly, the Charter further provides that perpetrators of UCG may be tried before “the competent court of the Union.”¹³³ At the time the Charter was adopted, however, no such court existed.¹³⁴ The establishment of the expanded African Court will, for the first time in the region and internationally, provide a forum for the prosecution of such cases. No other regional or international court – not even the ICC – currently has jurisdiction over such crimes.¹³⁵

The crime of UCG in the Malabo Protocol adopts nearly verbatim the definition of UCG contained in the Charter on Democracy, Elections, and Governance. Under the Charter, five acts qualify as UCG:

- (1) Any putsch or coup d’Etat against a democratically elected government;
- (2) Any intervention by mercenaries to replace a democratically elected government;
- (3) Any replacement of a democratically elected government by armed dissidents or rebels;
- (4) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
- (5) Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.¹³⁶

¹²⁷ See Morris Kiwinda Mbondenyei, *Institutional Mainstreaming and Rationalisation*, in MANISULI SSENIONJO, THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM 422, 442-43 (2012), at 428.

¹²⁸ ECOWAS, Protocol A/SPI/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security [hereinafter ECOWAS Protocol on Democracy and Good Governance], arts. 1(b)-(e), 9 (Dec. 21, 2001), http://www.internationaldemocracywatch.org/attachments/350_ECOWAS%20Protocol%20on%20Democracy%20and%20Good%20Governance.pdf.

¹²⁹ See generally African Charter on Democracy, Elections and Governance, *supra* note 50.

¹³⁰ *Id.* art. 23.

¹³¹ *Id.* arts. 24-25.

¹³² AU, List of Countries which have Signed, Ratified/Acceded to the African Charter on Democracy, Elections and Governance, https://au.int/sites/default/files/treaties/7790-sl-african_charter_on_democracy_elections_and_governance_8.pdf.

¹³³ African Charter on Democracy, Elections and Governance, *supra* note 50, art. 25(5).

¹³⁴ See Abass, Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 933, 942 (2013), at 940 (noting the “absurd situation” currently prevailing in which no AU court can prosecute a crime that AU member states have repeatedly recognized as a serious crime in the region).

¹³⁵ See generally Rome Statute of the ICC, *supra* note 13.

¹³⁶ African Charter on Democracy, Elections and Governance, *supra* note 50, art. 23.

All five of these acts are included in the crime of UCG in the Malabo Protocol, ensuring the availability of a competent African Court for their prosecution. This definition reflects the regional understanding of what constitutes UCG, as this definition already has been approved by the African Union's Assembly and adopted by the more than half of AU member States that have ratified the Charter.¹³⁷ Moreover, the inclusion of acts not only by mercenaries or rebels but also by incumbent governments demonstrates the intent of African leaders to hold accountable all those who interfere with a people's right to the democratically elected government of their choice.¹³⁸

In addition to the five acts included in the Charter, the Malabo Protocol adds three acts for which a person may be held criminally responsible. First, to the provision that a democratically elected government may not be replaced through intervention by mercenaries, it adds that such governments may not be replaced through political assassination.¹³⁹ Assassinations of elected leaders are plainly undemocratic and unconstitutional,¹⁴⁰ and this provision appears to be uncontroversial. Second, the Malabo Protocol criminalizes any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.¹⁴¹ This provision is drawn from ECOWAS's Protocol on Democracy and Good Governance, which contains a nearly identical prohibition.¹⁴² Because last-minute changes in electoral laws may too often represent attempts by incumbent governments to hold onto power illegally, this prohibition appears consistent with the definition of UCG. Changes to election laws may still be enacted if they have the support of the majority of political actors, thereby demonstrating that those changes are legitimate and democratic.

Thus, the only potentially problematic change from the Charter's definition of UCG appears in article 28E(1)(e). The Charter version of that provision prohibits "[a]ny amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government."¹⁴³ This is a key form of UCG, as many incumbent rulers attempt to illegally remain in office beyond their terms by enacting constitutional amendments.¹⁴⁴ The Malabo Protocol, however, adds an additional prohibited act to the Charter definition, providing criminal responsibility for "any amendment or revision of the Constitution or legal instruments . . . which is inconsistent with the Constitution."¹⁴⁵ As currently worded, this provision applies not only to constitutional amendments that infringe upon democratic principles, but also to those that reinforce and expand upon democratic principles.¹⁴⁶ This is particularly problematic since African countries still grappling with conflict, autocratic leaders, and other governance issues may have

¹³⁷ List of Countries which have Signed, Ratified/Acceded to the African Charter on Democracy, Elections and Governance, *supra* note 50.

¹³⁸ See Abass, *The Proposed International Criminal Jurisdiction for the African Court*, *supra* note 9, at 29.

¹³⁹ Malabo Protocol, *supra* note 2, annex art. 14 (adding art. 28E(1)(c)).

¹⁴⁰ OAU, Communiqué of the 73rd ordinary Session of the Central Organ of the OAU mechanism for conflict Prevention, management and resolution (Jan. 29, 2001) (condemning the assassination of the President of the DRC as a flagrant violation of the OAU's decision on UCG), <https://reliefweb.int/report/democratic-republic-congo/dr-congo-communiqu%C3%A9-73rd-ordinary-session-central-organ-oau>.

¹⁴¹ Malabo Protocol, *supra* note 2, annex art. 14 (adding art. 28E(1)(e)).

¹⁴² ECOWAS Protocol on Democracy and Good Governance, *supra* note 59, art. 2(1).

¹⁴³ African Charter on Democracy, Elections and Governance, *supra* note 50, art. 23.

¹⁴⁴ Omotola, *supra* note 47, at 26.

¹⁴⁵ Malabo Protocol, *supra* note 2, annex art. 14 (adding art. 28E(1)(e)).

¹⁴⁶ See Gerhard Kemp & Selemani Kinyunyu, *The Crime of Unconstitutional Change of Government (Article 28E) in GERHARD WERLE & MORITZ VORMBAUM, THE AFRICAN CRIMINAL COURT 57, 67-68 (2017)*, at 67.

anachronistic provisions in their Constitutions that unnecessarily limit democratic participation. Although the African Court could interpret this provision to limit it to constitutional changes that infringe upon democratic principles, it would be prudent to explicitly address this issue.

Three additional concerns have been raised regarding the crime of UCG contained in the Malabo Protocol:

- ***Lack of definitions.*** The Malabo Protocol does not define many of the terms used in Article 28E, including “putsch,” “coup d’état,” “democratically elected government,” and “principles of democratic change of government.”¹⁴⁷ This is problematic because there is room for disagreement about many of these terms. For example, a “coup d’état” has been defined, *inter alia*, as “a sudden violent seizure of power from a government,”¹⁴⁸ “the violent overthrow or alteration of an existing government by a small group,”¹⁴⁹ and the “quick and decisive extra-legal seizure of governmental power by a relatively small but highly organized group of political or military leaders.”¹⁵⁰ These definitions vary in whether they impose a limitation on the size of the group, whether political or military leaders must be involved, and whether violence must be used.¹⁵¹ Without more precise definitions, a defendant could raise a legality challenge, arguing that the crime was insufficiently clear under international law to impose criminal sanctions.¹⁵² In addition, and as discussed further below, concerns have been raised that the lack of definitions could lead to the over-broad application of this crime to legitimate acts, such as popular protests, or could result in an insufficient application due to an overly narrow interpretation of democratic principles. For all of these reasons, the omission of definitions should be addressed.
- ***Criminalization of popular protests.*** By far, the most damning critique of the Malabo Protocol definition of UCG is that it could lead to the criminalization of, and thus prosecution of participants in, popular protests.¹⁵³ Under this argument, such protests were protected by earlier drafts of the Malabo Protocol, which included a provision that “any act of a sovereign people peacefully exercising their inherent right shall not constitute an offence under this article,” but the removal of that provision opened the

¹⁴⁷ Malabo Protocol, *supra* note 2, art. 14 (adding art. 28E); *see also* Kemp & Kinyunyu, *supra* note 77, at 66 (expressing concern at the attempt to define “democratically elected government” by reference to other unnamed treaties).

¹⁴⁸ CONCISE OXFORD ENGLISH DICTIONARY 327 (2002).

¹⁴⁹ MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/coup%20d%27%C3%A9tat>.

¹⁵⁰ PAUL M. JOHNSON, A GLOSSARY OF POLITICAL ECONOMY TERMS, http://www.auburn.edu/~johnspm/gloss/coup_d_etat.

¹⁵¹ Other definitions exist and introduce other potential requirements. As one scholar has observed, “experts have been attempting to define the term coup d’etat for centuries.” Eric Schmitz, *Foreign Aid in Egypt: The Legality of Continued Financial Support to the Egyptian Military After Mohammed Morsi’s Removal from Power*, 21 UNIVERSITY OF MIAMI INTERNATIONAL & COMPARATIVE LAW REVIEW 349, 370 (2014).

¹⁵² Amnesty International, *Malabo Protocol Snapshots*, *supra* note 35, at 6.

¹⁵³ *Id.* (expressing concern that broadly defined crimes, such as terrorism and unconstitutional change of government, may be “used to clamp down on the legitimate exercise of freedom of expression, association, assembly and human rights”).

door to criminalization and prosecution.¹⁵⁴ In fact, it is highly unlikely that leaders of or participants in a popular protest could be prosecuted for UCG. *None* of the acts constituting UCG in the Malabo Protocol cover popular protests. For example, popular protests do not use mercenaries or rebels, nor are they used to assist an incumbent government that refuses to relinquish power. The closest act under the Malabo Protocol that might apply to a popular protest would be a putsch or coup d'état, but even these do not quite fit. Although there are a range of definitions for both terms, as noted above, both generally denote a secretly planned takeover of the government by a small group of individuals¹⁵⁵—criteria that do not describe a popular uprising. It is thus highly improbable that the African Court would decide that leaders of or participants in a popular protest could be prosecuted for UCG.

- ***Omission of other undemocratic acts.*** The Malabo Protocol “focuses almost exclusively on the overthrow of a government by force”¹⁵⁶ and thus does not criminalize all undemocratic acts, such as holding fraudulent elections or failing to hold any elections at all. Such acts would appear to be on par with, if not worse than, an incumbent government that holds free and fair elections and then refuses to relinquish power to the winner.¹⁵⁷ Nonetheless, as a new international crime, it is reasonable for the Malabo Protocol to limit the definition of UCG to those acts which already have been accepted by a large number of African States in an earlier charter. This provides a well-accepted core of the crime that can be later expanded upon through amendment if and when the AU recognizes other acts as constituting UCG.
- ***Immunities.*** Although the immunities provision applies to all crimes, it has been particularly criticized in relation to certain crimes, like UCG, that critics claim are committed more frequently by those in office.¹⁵⁸ With respect to UCG, however, this criticism is misplaced. Of the six acts that constitute the crime of UCG in the Malabo Protocol, at least three – use of mercenaries; coup d'état; and use of armed dissidents, rebels, or political assassination¹⁵⁹ – are much more likely to be committed by non-state actors trying to overthrow the state than by senior state officials. The Malabo Protocol's immunity provision would therefore not apply to them.¹⁶⁰ Even if the acts were successful and these individuals seized power, under customary international law,

¹⁵⁴ *Seeking Justice or Shielding Suspects?*, *supra* note 50, at 18; Garth Abraham, South African Institute of International Affairs, *Africa's Evolving Continental Structures: At the Crossroads?*, 8 (2015), at 20 n.48, <https://www.saiia.org.za/occasional-papers/669-africa-s-evolving-continental-court-structures-at-the-crossroads/file>; Kemp & Kinyunyu, *supra* note 77, at 68-69; Amnesty International, *Malabo Protocol Snapshots*, *supra* note 35, at 6.

¹⁵⁵ *Supra* notes 78-82 & accompanying text; *see also* MERRIAM-WEBSTER DICTIONARY ONLINE (defining “putsch” as “a secretly plotted and suddenly executed attempt to overthrow a government”), <https://www.merriam-webster.com/dictionary/putsch>; Schmitz, *supra* note 82, at 370; Ved Nanda, *Revolution, Democracy, and the Critical Role of Constitution-Making: Some Preliminary Thoughts*, 89 DENVER UNIVERSITY LAW REVIEW 581, 581 (2012) (social revolutions and coups are two different types of regime change).

¹⁵⁶ Stephen Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 UNIVERSITY OF MIAMI LAW REVIEW 417, 454 (2007).

¹⁵⁷ *See* Malabo Protocol, *supra* note 2, annex art. 14 (adding art. 28E(1)(d)).

¹⁵⁸ Kemp & Kinyunyu, *supra* note 77, at 69.

¹⁵⁹ Malabo Protocol, *supra* note 2, art. 14 (adding art. 28E(1)(a)-(c)).

¹⁶⁰ *Id.* art. 22 (adding article 46A bis).

immunity would likely not attach so long as their “government” remained unrecognized.¹⁶¹ With respect to the remaining acts constituting the crime of UCG, although the African Court would not be able to prosecute heads of state and other senior state officials during their tenure in office, they could be held accountable after leaving office. Recent events demonstrate a growing willingness – by the AU, regional communities, and civil society – to intervene to end such unconstitutional governments. For example, shortly after then-President Yahya Jammeh indicated that he intended to remain in office despite losing the recent elections,¹⁶² both ECOWAS and the African Union moved to intervene, declaring the President’s actions untenable and warning of “serious consequences” if he refused to leave office.¹⁶³ Shortly thereafter, Yahya Jammeh stepped down. If the criminal jurisdiction of the African Court had been in place, he could then have been held accountable before the Court. Even if the AU’s intervention had been unsuccessful, however, the AU’s decision to cease recognizing Yahya Jammeh as President would likely have stripped him of any immunity,¹⁶⁴ thereby enabling prosecution (though again, this would only have been relevant if the criminal jurisdiction already had been in place). And in Burkina Faso, then-President Blaise Compaoré’s attempt to revise the constitution to enable him to stay in office led to a popular uprising that forced him to resign.¹⁶⁵ As these examples show, the environment in Africa is rapidly shifting and there is an opportunity for swift justice even for heads of state and senior state officials who are increasingly being forced from office when they attempt to unconstitutionally prolong their power.

(ii) Piracy

Like UCG, piracy is not unique to the African region, but the resurgence of piracy off both the Eastern and Western coasts of Africa over the past two decades has made the crime one of special concern to the continent. Recent reports have documented the immense toll piracy takes on the region, in both human and economic terms. In 2016, for example, there were 95 reported incidents of piracy in the West African region alone, affecting states from Sao Tome and Principe to Guinea.¹⁶⁶ The East African region was also substantially affected, with 27 reported incidents from Djibouti to Mozambique.¹⁶⁷ During these attacks on both coasts, 24 people were killed or

¹⁶¹ UN, Yearbook of the International Law Commission, vol. II, ¶¶ 122-24 (2008), <https://www.legal-tools.org/doc/34dfa0/pdf/>.

¹⁶² Searcy & Barry, *supra* note 49.

¹⁶³ AU, Peace and Security Council, Communiqué, PSC/PR/COMM. (DCXLVII) (Jan. 13, 2017), <http://www.peaceau.org/uploads/647.psc.comm.gambia.13.01.2017-1.pdf>.

¹⁶⁴ UN, Yearbook of the International Law Commission, vol. II, ¶¶ 122-24 (2008), <https://www.legal-tools.org/doc/34dfa0/pdf/>.

¹⁶⁵ David Smith, *Power struggle in Burkina Faso after Blaise Compaoré resigns as President*, THE GUARDIAN (Nov. 1, 2014), <https://www.theguardian.com/world/2014/oct/31/burkina-faso-president-blaise-compaore-ousted-says-army>.

¹⁶⁶ Oceans Beyond Piracy, *The State of Maritime Piracy 2016: Assessing the Economic and Human Cost, West Africa* (2017) [hereinafter *Oceans Beyond Piracy West Africa Report*], <http://oceansbeyondpiracy.org/reports/sop/west-africa>.

¹⁶⁷ Oceans Beyond Piracy, *The State of Maritime Piracy 2016: Assessing the Economic and Human Cost, East Africa* (2017) [hereinafter *Oceans Beyond Piracy East Africa Report*], <http://oceansbeyondpiracy.org/reports/sop/east-africa>.

injured, and another 144 were taken hostage.¹⁶⁸ These attacks also are estimated to have had an economic cost of nearly \$2.5 billion U.S. dollars.¹⁶⁹ These estimates, however, do not appear to take into account the cost of losses in non-maritime industries, such as the cost on tourism and fishing. One report estimated that these losses could be as high as 4% of GDP for some African countries.¹⁷⁰ Piracy also has an impact on humanitarian assistance because it impedes the delivery of food aid and other necessities to countries on the continent.¹⁷¹

Piracy is an ancient crime, with roots dating back at least 2000 years.¹⁷² The modern definition of piracy, however, is contained in the UN's Convention on the Law of the Sea (UNCLOS),¹⁷³ and codifies customary international law.¹⁷⁴ The Malabo Protocol mirrors this definition with just one change – in addition to applying to ships and aircraft, it also applies to boats. Although there is little difference between the terms “ships” and “boats,” it is unclear whether the term ship applies to smaller boats, such as the type used by small-scale subsistence fishermen along the African coast. Indeed, the UNCLOS explicitly excludes certain vessels from international regulation on account of their small size.¹⁷⁵ While this exclusion may make sense with respect to regulation, the addition of the term “boat” in the definition of piracy ensures that any attack by or upon such vessels could be prosecuted before the expanded African Court.

Although the Malabo Protocol crime of piracy has been subject to less scrutiny than some others, like UCG, there are nonetheless a number of criticisms that can or have been raised, including:

- **Lack of definitions.** Many of the terms used in the definition of piracy are not defined, such as “illegal acts of violence” and “voluntary participation.” As scholars have noted, it is “remarkably unhelpful to posit a definition of crime in the international legal order

¹⁶⁸ Oceans Beyond Piracy, *The State of Maritime Piracy 2016: Assessing the Economic and Human Cost, East Africa* (2017) [hereinafter *Oceans Beyond Piracy East Africa Report*], (1 killed and 16 injured), <http://oceansbeyondpiracy.org/reports/sop/east-africa>; Oceans Beyond Piracy, *The State of Maritime Piracy 2016: Assessing the Economic and Human Cost, West Africa* (2017) [hereinafter *Oceans Beyond Piracy West Africa Report*], (7 injured and 144 taken hostage), <http://oceansbeyondpiracy.org/reports/sop/west-africa>.

¹⁶⁹ Oceans Beyond Piracy East Africa Report, *id.* (nearly \$800 million); Oceans Beyond Piracy West Africa Report, *id.* (\$1.7 billion).

¹⁷⁰ Kennedy K. Mbekeani & Mthuli Ncube, *Economic Impact of Maritime Piracy* 1, 6 (2011),

https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Maritime%20Piracy_Maritime%20Piracy.pdf

¹⁷¹ *Id.* at 2, 5.

¹⁷² Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANNUAL SURVEY OF INTERNATIONAL & COMPARATIVE LAW 43, 45 (2009),

<https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1127&context=annlsurvey>; Andrew Clapham, *Human rights and international criminal law*, in WILLIAM A. SCHABAS, *THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW* 11, 15 (2015), at 11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2596659.

¹⁷³ UNCLOS, *supra* note 36, art. 101; *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia*, *supra* note 38, at ¶ 84.

¹⁷⁴ United Nations Office on Drugs and Crime, *Combating Transnational Organized Crime Committed at Sea* 8 (2013), <https://www.legal-tools.org/doc/17e006/pdf/>; Azubuike, *supra* note 103, at 49.

¹⁷⁵ See UNCLOS, *supra* note 36, art. 94 (certain vessels are excluded from international regulation on account of their small size); George K. Walker & John E. Noyes, *Definitions for the 1982 Law of the Sea Convention – Part II*, 33 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 191, 318 (2002), <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1175&context=cwilj>.

resting upon an undefined notion of illegality.”¹⁷⁶ Without more precise definitions, a defendant could raise a legality challenge, arguing that the crime was insufficiently clear under international law to impose criminal sanctions.¹⁷⁷ In addition, the lack of definitions could lead to the over-broad application of this crime to legitimate acts or an insufficient application due to an overly narrow interpretation of the terms.

- **Omission of certain acts from the definition of piracy.** The UNCLOS definition of piracy, and by extension the Malabo Protocol definition, has been the subject of criticism that it does not encompass all acts of piracy. First, the UNCLOS and Malabo Protocol definitions of piracy apply only to acts committed on the high seas and/or outside the jurisdiction of a State.¹⁷⁸ Many acts of piracy, however, occur within the territorial waters of a State, such as incidents that happen at ports or in a country’s territorial waters.¹⁷⁹ For example, in 2016, there were five attacks at the Takoradi port in Ghana.¹⁸⁰ There have also been numerous attacks in the territorial waters off of Somalia over the past two decades.¹⁸¹ These incidents do not fall within the Malabo Protocol’s definition of piracy and therefore could not be prosecuted before the African Court under the current definition. Second, the UNCLOS and Malabo Protocol limit the definition of piracy to acts committed for “private ends.”¹⁸² Yet not all piracy is conducted for private gain. To the contrary, some States have historically sponsored pirates as a means of attacking enemy States and acquiring wealth.¹⁸³

(iii) Trafficking in Persons

¹⁷⁶ ALFRED P. RUBIN, *THE LAW OF PIRACY* 380 (1998).

¹⁷⁷ *Id.*

¹⁷⁸ Malabo Protocol, *supra* note 2, art. 14 (adding art. 28F(a)); United Nations Office on Drugs and Crime, *Combating Transnational Organized Crime Committed at Sea* 8 (2013), <https://www.legal-tools.org/doc/17e006/pdf/>, at 9; Azubuike, *supra* note 103, at 49; *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia*, *supra* note 38, at ¶ 85; Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 *THE EUROPEAN JOURNAL OF INTERNATIONAL LAW* 399 (2009), https://watermark.silverchair.com/chp027.pdf?token=AQECAHi208BE49Ooan9kkhW_Ercy7Dm3ZL_9Cf3qfKAc485ysgAAAaAwggGcBgkqhkiG9w0BBwagggGNMIIBiQIBADCCAYIGCSqGSIb3DQEHATAeBglghkgBZQMEAS4wEQQMfK2ZMZ5BQFAXloZPAgEQgIIBUxjqwZ7R47pozgBJ1PA4fDyz-HqeRTChlzf1wRTjBCtciJHAvhNFL6D6g2hq1PYIIaHrg-m_Tv2enVyAlc4uZYHAXhzGkd8pH-72K0WqvrXwNROssfY1RNdPOw3uSOLpvXxDfwhzMJ4HXTWsqGwx1dY2xBhNpEH-hD0j4efGW1M9TEPkYuW5HrLFCMyVT4ZVdsX77PpbCdDFUM8ULcavN0WYbswsMxIWFiiFcGG-tCC8Rm1TZy9rCSIXcV7BSZpz3PAqa8XEUcuqTWMmZDkq4rRWnBY42et0V3p7qJJO1qxscKyFIKWxtK0F8iXxbgb7hV-SeWslU_CuU462tNEbDHRO_pAd15hg9yMgz1c027ygPEjLeeBYOt9kIFtKy9DAMuQhoPu8Y6LKIHnsdfdnPvbbOdyvG0l4mqo61EUVihMaxf8DOhquCPc38WewddwsUZxDRw.

¹⁷⁹ UNODC, *Combating Transnational Organized Crime Committed at Sea*, *supra* note 109, at 9.

¹⁸⁰ Oceans Beyond Piracy West Africa Report, *supra* note 97.

¹⁸¹ *Somali Piracy Exposes Weaknesses in UN Law of the Sea*, VOICE OF AMERICA (Nov. 2, 2009), <https://www.voanews.com/a/a-13-2009-04-08-voa67-68785907/411065.html>.

¹⁸² Malabo Protocol, *supra* note 2, art. 14 (adding art. 28F(a)).

¹⁸³ Azubuike, *supra* note 103, at 45-46.

Trafficking in persons is widely recognized as the modern-day equivalent of slavery.¹⁸⁴ Worldwide, more than 24 million people are currently estimated to be victims of human trafficking, and more than 80 million people were victimized just during the period from 2012 to 2016.¹⁸⁵ Africa is a major source of trafficking victims to other regions of the world, particularly the Middle East and Europe.¹⁸⁶ Africa also is home to many victims who have been trafficked within their country of origin or to other African countries,¹⁸⁷ and it is estimated that over 3.7 million persons in Africa are currently forced to labor against their will.¹⁸⁸ A majority of detected victims in Africa are children, who are used as beggars, as child soldiers, and for forced labor, particularly in mines, in agriculture, in fishing, and as domestic servants.¹⁸⁹

Both slavery and trafficking in persons have been subject to international condemnation for 100 years,¹⁹⁰ but the modern definition of human trafficking comes from the 2000 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children.¹⁹¹ This protocol is

¹⁸⁴ See, e.g., International Organization for Migration, *Human trafficking is a modern-day form of slavery*, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/train_the_trainers_manual_1.pdf; U.S. Department of State, *Trafficking in Persons Report*, 6 (2007), <https://www.state.gov/documents/organization/82902.pdf>; United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* 6 (2009), http://www.unodc.org/documents/Global_Report_on_TIP.pdf.

¹⁸⁵ International Labour Office, *Global Estimates of Modern Slavery*, 19, 22, 25, 29 (2017) (figures on forced labor), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf.

¹⁸⁶ See U.S. Department of State, *Trafficking in Persons Report* 334, 347, 411 (2017) (describing Qatar, Saudi Arabia, and the United Arab Emirates as destination countries for African trafficking victims) [hereinafter 2017 *Trafficking in Persons Report*], <https://www.state.gov/documents/organization/271339.pdf>; UNODC *Global Report on Trafficking in Persons*, *supra* note 109, at 5.

¹⁸⁷ UNODC *Global Report on Trafficking in Persons*, *supra* note 115, at 5.

¹⁸⁸ International Labour Office, *Profits and Poverty: The Economics of Forced Labour* 7 (2014), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf.

¹⁸⁹ UNODC *Global Report on Trafficking in Persons*, *supra* note 115, at 11, 25, 64, 112-13.

¹⁹⁰ African Charter on Human and Peoples' Rights, *supra* note 101, art. 5; AU, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 4(g) (July 1, 2003), <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>; OAU, African Charter on the Rights and Welfare of the Child, arts. 32, 42 (July 1, 1990), art. 29, https://au.int/sites/default/files/treaties/7773-treaty-0014_-_african_charter_on_the_rights_and_welfare_of_the_child_e.pdf;

Convention on the Suppression of the Traffic in Women (1921), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-3&chapter=7&clang=en; Slavery Convention (1926), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx>;

Convention Concerning Forced or Compulsory Labour (ILO No. 29) (1930), https://www.un.org/ruleoflaw/files/ILO_Convention_29.pdf; Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf;

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Mr. 21, 1950), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>;

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Apr. 30, 1956), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>;

Convention Concerning the Abolition of Forced Labour (ILO No. 105) (June 25, 1957), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C105; International Covenant on Civil and Political Rights, art. 8 (Dec. 16, 1966), <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>;

Convention on the Elimination of All Forms of Discrimination Against Women, art. 6 (Dec. 18, 1979), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>;

Convention on the Rights of the Child, art. 35 (Nov. 20, 1989), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

¹⁹¹ UN Trafficking Protocol, *supra* note 23.

one of the most widely ratified, with 173 States Parties,¹⁹² demonstrating the widespread acceptance of the protocol's definition of human trafficking.

The Malabo Protocol adopts verbatim the definition of human trafficking contained in the 2000 Protocol.¹⁹³ The only relevant difference between the two is that the UN Protocol includes a definition of child which was omitted in the Malabo Protocol. Since other provisions in the Malabo Protocol define a child to be a person under the age of 18,¹⁹⁴ and since other African conventions contain similar definitions,¹⁹⁵ there can be little doubt that the African Court would interpret the trafficking provisions related to children to apply to persons under the age of 18. Accordingly, the Malabo Protocol definition of the crime of trafficking in persons is completely consistent with current international law.

Annex 1

Comparison of the Definitions of Core International Crimes in the Malabo Protocol, UN Treaties, and the Rome Statute of the ICC

¹⁹² UN Treaty Collection, Status of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-12-a&chapter=18&lang=en.

¹⁹³ Compare Malabo Protocol, *supra* note 2, annex art. 14 (adding art. 28J), with UN Trafficking Protocol, *supra* note 23, art. 3.

¹⁹⁴ See, e.g., Malabo Protocol, *supra* note 2, annex art. 14 (adding arts. 28D(b)(xxvii) & 28D(e)(vi)).

¹⁹⁵ See, e.g., African Charter on the Rights and Welfare of the Child, *supra* note 121, arts. II & XXII.

Crime	Definition in the Malabo Protocol	UN Treaty	Definition in the UN Treaty	Definition in the Rome Statute of the ICC
Genocide	<p>Article 28 B</p> <p>For the purposes of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:</p> <ul style="list-style-type: none"> a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group; f) Acts of rape or any other form of sexual violence. 	<p>Convention on the Prevention and Punishment of the Crime of Genocide</p> <p>http://www.un.org/en/genocideprevention/genocide.html</p>	<p>Article II</p> <p>In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:</p> <ul style="list-style-type: none"> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. 	<p>Article 6</p> <p>For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:</p> <ul style="list-style-type: none"> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.
Crimes Against Humanity	<p>Article 28C</p> <p>For the purposes of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack or enterprise</p>	<p>Proposed International Convention on the Prevention and Punishment of Crimes</p>	<p>Article 3</p> <p>1. For the purpose of the present Convention, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic</p>	<p>Article 7</p> <p>For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any</p>

	<p>directed against any civilian population, with knowledge of the attack or enterprise:</p> <p>a) Murder;</p> <p>b) Extermination;</p> <p>c) Enslavement;</p> <p>b) Deportation or forcible transfer of population;</p> <p>c) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;</p> <p>d) Torture, cruel, inhuman and degrading treatment or punishment;</p> <p>e) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;</p> <p>f) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;</p> <p>g) Enforced disappearance of persons;</p> <p>h) The crime of apartheid;</p> <p>i) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.</p> <p>2. For the purpose of paragraph 1:</p> <p>a) ‘Attack directed against any civilian population’</p>	<p>against Humanity</p> <p>http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf</p>	<p>attack directed against any civilian population, with knowledge of the attack:</p> <p>(a) Murder;</p> <p>(b) Extermination;</p> <p>(c) Enslavement;</p> <p>(d) Deportation or forcible transfer of population;</p> <p>(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;</p> <p>(f) Torture;</p> <p>(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;</p> <p>(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes;</p> <p>(i) Enforced disappearance of persons;</p> <p>(j) The crime of apartheid;</p> <p>(k) Other inhumane acts of a similar character intentionally causing</p>	<p>civilian population, with knowledge of the attack:</p> <p>(a) Murder;</p> <p>(b) Extermination;</p> <p>(c) Enslavement;</p> <p>(d) Deportation or forcible transfer of population;</p> <p>(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;</p> <p>(f) Torture;</p> <p>(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;</p> <p>(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;</p> <p>(i) Enforced disappearance of persons;</p> <p>(j) The crime of apartheid;</p> <p>(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.</p> <p>2. For the purpose of paragraph 1:</p>
--	--	--	---	--

	<p>means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;</p> <p>b) ‘Extermination’ includes the intentional infliction of conditions of life, <i>inter alia</i> the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;</p> <p>c) ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;</p> <p>d) ‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;</p> <p>e) ‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the</p>		<p>great suffering, or serious injury to body or to mental or physical health.</p> <p>2. For the purpose of paragraph 1:</p> <p>(a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;</p> <p>(b) “Extermination” includes the intentional infliction of conditions of life, <i>inter alia</i> the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;</p> <p>(c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;</p> <p>(d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without</p>	<p>(a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;</p> <p>(b) “Extermination” includes the intentional infliction of conditions of life, <i>inter alia</i> the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;</p> <p>(c) ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;</p> <p>(d) ‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;</p> <p>(e) ‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in</p>
--	--	--	---	---

	<p>control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;</p> <p>f) ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;</p> <p>g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;</p> <p>h) ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;</p> <p>i) ‘Enforced disappearance of persons’</p>		<p>grounds permitted under international law;</p> <p>(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;</p> <p>(f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;</p> <p>(g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;</p> <p>(h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression</p>	<p>the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;</p> <p>(f) ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;</p> <p>(g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;</p> <p>(h) ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;</p> <p>(i) ‘Enforced disappearance of persons’</p>
--	--	--	---	---

	<p>means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.</p>		<p>and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; (i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.</p> <p>3. For the purposes of the present Convention, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.</p>	<p>means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.</p> <p>3. For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.</p>
War Crimes	<p>Article 28D For the purposes of this Statute, ‘war crimes’ means any of the offences listed , in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.</p>	<p>The Geneva Conventions and the Additional Protocols to the Geneva Conventions</p>	<p>The provisions of the Geneva Conventions and the Additional Protocols to the Geneva Conventions are too lengthy to reproduce here. Relevant provisions are described in the report and/or included in Annex B.</p>	<p>Article 8 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.</p>

	<p>a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:</p> <ul style="list-style-type: none"> i) Wilful killing; ii) Torture or inhuman treatment, including biological experiments; iii) Wilfully causing great suffering, or serious injury to body or health; iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; vii) Unlawful deportation or transfer or unlawful confinement; viii) Taking of hostages. <p>b) Grave breaches of the First Additional Protocol to the Geneva Conventions of 8 June 1977 and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of</p>			<p>2. For the purpose of this Statute, ‘war crimes’ means:</p> <p>(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:</p> <ul style="list-style-type: none"> (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages. <p>(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:</p>
--	---	--	--	---

	<p>international law, namely, any of the following acts:</p> <ul style="list-style-type: none"> i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; 			<ul style="list-style-type: none"> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings
--	---	--	--	---

	<p>v) Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated;</p> <p>vi) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;</p> <p>vii) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;</p> <p>viii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;</p> <p>ix) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the</p>			<p>which are undefended and which are not military objectives;</p> <p>(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;</p> <p>(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;</p> <p>(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;</p> <p>(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;</p> <p>(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or</p>
--	---	--	--	--

	<p>occupied territory within or outside this territory;</p> <p>x) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;</p> <p>xi) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;</p> <p>xii) Killing or wounding treacherously individuals belonging to the hostile nation or army;</p> <p>xiii) Declaring that no quarter will be given;</p> <p>xiv) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;</p> <p>xv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;</p>			<p>scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;</p> <p>(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;</p> <p>(xii) Declaring that no quarter will be given;</p> <p>(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;</p> <p>(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;</p> <p>(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;</p> <p>(xvi) Pillaging a town or place, even when taken by assault;</p> <p>(xvii) Employing poison or poisoned weapons;</p> <p>(xviii) Employing asphyxiating, poisonous or other gases, and all</p>
--	---	--	--	--

	<p>xvi) Compelling the nationals of the hostile party to take part in the operations of war directed against their own State, even if they were in the belligerent's service before the commencement of the war;</p> <p>xvii) Pillaging a town or place, even when taken by assault;</p> <p>xviii) Employing poison or poisoned weapons;</p> <p>xix) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;</p> <p>xx) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;</p> <p>xxi) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict</p> <p>xxii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;</p> <p>xxiii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced</p>			<p>analogous liquids, materials or devices;</p> <p>(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;</p> <p>(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;</p> <p>(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;</p> <p>(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;</p>
--	---	--	--	---

	<p>sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;</p> <p>xxiv) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;</p> <p>xxv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;</p> <p>xxvi) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;</p> <p>xxvii) Conscripting or enlisting children under the age of eighteen years into the national armed forces or using them to participate actively in hostilities;</p> <p>xxviii) Unjustifiably delaying the repatriation of prisoners of war or civilians;</p> <p>xxix) Willfully committing practices of apartheid and other</p>			<p>(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;</p> <p>(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;</p> <p>(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;</p> <p>(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.</p> <p>(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including</p>
--	--	--	--	--

	<p>inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.</p> <p>xxx) Making non-defended localities and demilitarised zones the object of attack;</p> <p>xxxii) Slavery and deportation to slave labour;</p> <p>xxxiii) Collective punishments;</p> <p>xxxiiii) Despoliation of the wounded, sick, shipwrecked or dead;</p> <p>c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:</p> <p>i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;</p> <p>ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;</p> <p>iii) Taking of hostages;</p>			<p>members of armed forces who have laid down their arms and those placed <i>hors de combat</i> by sickness, wounds, detention or any other cause:</p> <p>(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;</p> <p>(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;</p> <p>(iii) Taking of hostages;</p> <p>(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.</p> <p>(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.</p> <p>(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework</p>
--	---	--	--	--

	<p>iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.</p> <p>d) Paragraph c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.</p> <p>e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:</p> <p>i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;</p> <p>ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;</p>			<p>of international law, namely, any of the following acts:</p> <p>(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;</p> <p>(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;</p> <p>(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;</p> <p>(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;</p>
--	--	--	--	--

	<p>iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;</p> <p>iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;</p> <p>v) Pillaging a town or place, even when taken by assault;</p> <p>vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;</p> <p>vii) Conscripting or enlisting children under the age of eighteen years into armed forces or groups or using them to</p>			<p>(v) Pillaging a town or place, even when taken by assault;</p> <p>(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;</p> <p>(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;</p> <p>(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;</p> <p>(ix) Killing or wounding treacherously a combatant adversary;</p> <p>(x) Declaring that no quarter will be given;</p> <p>(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out</p>
--	--	--	--	--

	<p>participate actively in hostilities;</p> <p>viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;</p> <p>ix) Killing or wounding treacherously a combatant adversary;</p> <p>x) Declaring that no quarter will be given;</p> <p>xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;</p> <p>xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;</p> <p>xiii) Employing poison or poisoned weapons;</p> <p>xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;</p>			<p>in his or her interest, and which cause death to or seriously endanger the health of such person or persons;</p> <p>(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;</p> <p>(xiii) Employing poison or poisoned weapons;</p> <p>(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;</p> <p>(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.</p> <p>(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.</p> <p>3. Nothing in paragraph 2 (c) and (e) shall affect the</p>
--	---	--	--	---

	<p>xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;</p> <p>xvi) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies;</p> <p>xvii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;</p> <p>xviii) Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage;</p> <p>xix) Making non-defended localities and demilitarised zones the object of attack;</p> <p>xx) Slavery;</p> <p>xxi) Collective punishments;</p> <p>xxii) Despoliation of the wounded, sick, shipwrecked or dead.</p> <p>f) Paragraph e) applies to armed conflicts not of an international character</p>			<p>responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.</p> <p>[Sub-articles 8(2)(e)(xiii) to (xv) were added following amendment to Article 8 adopted on 10 June 2010 at the Review Conference of the Rome Statute in Kampala, Uganda]</p>
--	---	--	--	--

	<p>and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.</p> <p>g) Using nuclear weapons or other weapons of mass destruction</p>			
Aggression	<p>Article 28 M</p> <p>A. For the purpose of this Statute, “Crime of Aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state or organization, whether connected to the state or not of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union and with regard to the territorial integrity and human security of the population of a State Party.”</p> <p>B. The following shall constitute acts of</p>	<p>African Union Non-Aggression and Common Defence Pact</p> <p>https://au.int/sites/default/files/treaties/7788-treaty-0031_-_african_union_non-aggression_and_common_defence_pact_e.pdf</p>	<p>Article 1(c)</p> <p>In this pact . . . “Aggression” means the use, intentionally and knowingly, of armed force or any other hostile act by a State, a group of States, an organization of States or non-State actor(s) or by any foreign or external entity, against the sovereignty, political independence, territorial integrity, and human security of the population of a State Party to this Pact, which are incompatible with the Charter of the United Nations or the Constitutive Act of the African Union. The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States,</p>	<p>Article 8bis</p> <p>1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.</p> <p>2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with</p>

	<p>aggression, regardless of a declaration of war by a State, group of States, organizations of States, or non-State actor(s) or by any foreign entity:</p> <ol style="list-style-type: none"> 1. The use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations. 2. The invasion or attack by armed forces against the territory of a State, or military occupation however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of a State or part thereof. 3. The bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State. 4. The blockade of the ports, coasts or airspace of a State by the armed forces of another State. 5. The attack by the armed forces of a State on the land, sea or air forces, or marine and fleets of another State. 		<p>organization of States, or non-State actor(s) or by any foreign entity:</p> <ol style="list-style-type: none"> i. the use of armed forces against the sovereignty, territorial integrity and political independence of a Member State, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations; ii. the invasion or attack by armed forces against the territory of a Member State, or military occupation, however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of a Member State or part thereof; iii. the bombardment of the territory of a Member State or the use of any weapon against the territory of a Member State; iv. the blockade of the ports, coasts or airspace of a Member State; v. the attack on the land, sea or air forces, or marine and fleets of a Member State; vi. the use of the armed forces of a Member State which are within the territory of another Member State with the agreement of the latter, in contravention of the 	<p>the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:</p> <ol style="list-style-type: none"> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or
--	--	--	---	--

	<p>6. The use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the African Union Non-Aggression and Common Defence Pact or any extension of their presence in such territory beyond the termination of the agreement.</p> <p>7. The action of a State in allowing its territory, which it has placed at the disposal of another State to be used by another State for perpetrating an act of aggression against a third State.</p> <p>8. The sending or materially supporting by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.</p>		<p>conditions provided for in this Pact;</p> <p>vii. the action of a Member State in allowing its territory, to be used by another Member State for perpetrating an act of aggression against a third State;</p> <p>viii. the sending by, or on behalf of a Member State or the provision of any support to armed groups, mercenaries, and other organized trans-national criminal groups which may carry out hostile acts against a Member State, of such gravity as to amount to the acts listed above, or its substantial involvement therein;</p> <p>ix. the acts of espionage which could be used for military aggression against a Member State;</p> <p>x. technological assistance of any kind, intelligence and training to another State for use in committing acts of aggression against another Member State; and</p> <p>xi. the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent trans-national organized crimes against a Member State.</p>	<p>any extension of their presence in such territory beyond the termination of the agreement;</p> <p>(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;</p> <p>(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.</p>
--	--	--	--	---

Annex 2
Acts included in the Malabo Protocol's definition of war crimes that do not have a corresponding provision in the Rome Statute

In an international armed conflict

- Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated;¹⁹⁶
- Unjustifiably delaying the repatriation of prisoners of war or civilians;¹⁹⁷
- Wilfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;¹⁹⁸
- Slavery and deportation to slave labour;¹⁹⁹

In a non-international armed conflict

- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies;²⁰⁰
- Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;²⁰¹
- Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage;²⁰²
- Slavery;²⁰³

In both international and non-international armed conflicts

- Making non-defended localities and demilitarised zones the object of attack;²⁰⁴
- Collective punishments;²⁰⁵ and
- Despoliation of the wounded, sick, shipwrecked or dead.²⁰⁶

¹⁹⁶ Malabo Protocol, *supra* note 19, Annex art. 14 (adding article 28D(b)(v)).

¹⁹⁷ *Id.* (adding article 28D(b)(xxviii)).

¹⁹⁸ *Id.* (adding article 28D(b)(xxix)).

¹⁹⁹ *Id.* (adding article 28D(b)(xxx)).

²⁰⁰ *Id.* (adding article 28D(e)(xvi)).

²⁰¹ *Id.* (adding article 28D(e)(xvii)).

²⁰² *Id.* (adding article 28D(e)(xviii)).

²⁰³ *Id.* (adding article 28D(e)(xx)).

²⁰⁴ *Id.* (adding article 28D(b)(xxx) and 28D(e)(xix)).

²⁰⁵ *Id.* (adding articles 28D(b)(xxxii) 28D(e)(xxi)).

²⁰⁶ *Id.* (adding articles 28D(b)(xxxiii) and 28D(e)(xxii)).

Annex 3

Comparison of the additional acts included as war crimes in the Malabo Protocol with their corresponding international law provisions

Malabo Protocol Provision	Corresponding International Law Provision ²⁰⁷	Language of Corresponding International Law Provision
<p>Article 28D(b)(v)</p> <p>Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated</p>	<p>Additional Protocol I Article 85(3)(c); and</p> <p>Article 57(2)(a)(iii)</p>	<p>“launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii”</p> <p>“refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”</p>
<p>Article 28D(b)(xxviii)</p> <p>Unjustifiably delaying the repatriation of prisoners of war or civilians</p>	<p>Additional Protocol I Article 85(4)(b)</p>	<p>“unjustifiable delay in the repatriation of prisoners of war or civilians”</p>
<p>Article 28D(b)(xxix)</p> <p>Willfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination</p>	<p>Additional Protocol I Article 85(4)(c)</p>	<p>“practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.”</p>

²⁰⁷ The Geneva Conventions are available at: <https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>. Additional Protocols I and II to the Geneva Conventions are available at: https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf. The Statute of the International Criminal Tribunal for the former Yugoslavia is available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

Article 28D(b)(xxxii) Slavery and deportation to slave labour	Additional Protocol II Article 4(2)(f) ²⁰⁸	“slavery and the slave trade in all their forms”
Article 28D(e)(xvi) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies	Additional Protocol II Article 14	“Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.”
Article 28D(e)(xvii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations	Additional Protocol I Article 51(7) ²⁰⁹ Geneva Convention III Article 23 Geneva Convention IV Article 28	“The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.” “No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.”

²⁰⁸ Additional Protocol II applies to non-international armed conflicts, while Malabo Protocol annex article 28D(b)(xxxii) applies to international armed conflicts. Nonetheless, the ICRC has concluded that the prohibition against slavery applies to international armed conflicts, based on the jurisprudence of international criminal tribunals, military manuals and codes, national laws, and international human rights law. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 327-29 (2005), <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

²⁰⁹ Additional Protocol I applies to international armed conflicts, while Malabo Protocol annex article 28D(e)(xvii) applies to non-international armed conflicts. Nonetheless, the ICRC has concluded that the use of human shields is prohibited in non-international armed conflicts, based on more general provisions in Additional Protocol II related to the protection of civilians from the dangers of military operations; the prohibition on the taking of hostages, which has been equated with the use of human shields; state military manuals applicable to non-international conflicts; national laws criminalizing the use of human shields in non-international armed conflicts; and the condemnation by States and the United Nations of the use of human shields in non-international armed conflicts with respect to, *inter alia*, the conflicts in Liberia, Rwanda, Sierra Leone, Somalia, Tajikistan, and the former Yugoslavia. ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES, *supra* note 477, at 337-38.

		“The presence of a protected person may not be used to render certain points or areas immune from military operations.”
Article 28D(e)(xviii) Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage	Additional Protocol I Article 85(3)(b) ²¹⁰	“launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii)”
Article 28D(e)(xx) Slavery	Additional Protocol II Article 4(2)(f)	“[s]lavery and the slave trade in all their forms”
Articles 28D(b)(xxx) and 28D(e)(xix) Making non-defended localities and demilitarised zones the object of attack	Additional Protocol I Article 85(3)(d) ²¹¹ Statute of the ICTY Article 3(c)	“making non-defended localities and demilitarized zones the object of attack” “attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings”
Articles 28D(b)(xxxii) and 28D(e)(xxi) Collective punishments	Additional Protocol I Article 75(2)(d) Additional Protocol II Article 4(2)(b)	“collective punishments” “collective punishments”

²¹⁰ Additional Protocol I applies to international armed conflicts, while Malabo Protocol annex article 28D(e)(xviii) applies to non-international armed conflicts. Nonetheless, the ICRC has concluded that indiscriminate attacks are prohibited in non-international armed conflicts, citing to more recent treaties that have included this prohibition, military manuals, domestic laws, official statements, international condemnation of violations of this rule, and the jurisprudence of international criminal tribunals. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES, *supra* note 477, at 37-40. In addition, some have argued that the prohibition on indiscriminate attacks is implicitly included in the prohibition against making the civilian population the object of attack, which is contained in Article 13(2) of Additional Protocol II. *Id.* at 38-39 (citing MICHAEL BOTHE, KARL JOSEPH PARTSCH, & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 677 (1982)).

²¹¹ Additional Protocol I applies to international armed conflicts, while Malabo Protocol annex article 28D(e)(xix) applies to non-international armed conflicts. Nonetheless, the ICRC has concluded that the prohibition on attacks against non-defended localities applies to non-international armed conflicts: “[w]hile the concept of non-defended localities was specifically developed for international armed conflicts, it applies to non-international armed conflicts as well. This is especially so since the idea of prohibiting attacks on non-defended localities is based on the more general concept of military necessity: there is no need to attack a town, village, dwelling, or building that is open for occupation. This rule is an application of the principle that no more destruction may be wrought upon an adversary than absolutely necessary.” ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES, *supra* note 477, at 122-24.

<p>Articles 28D(b)(xxxiii) and 28D(e)(xxii)</p> <p>Despoliation of the wounded, sick, shipwrecked or dead</p>	<p>Geneva Convention I Article 15</p> <p>Geneva Convention II Article 18</p> <p>Geneva Convention IV Article 16</p> <p>Additional Protocol II Article 8</p>	<p>“At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.”</p> <p>“After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.”</p> <p>“The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.</p> <p>As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect against pillage and ill-treatment.”</p> <p>“Whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.</p>
---	---	---

Annex 3