

## African Court v. ICC

Consistent with the statutes of other regional and international courts, the Malabo Protocol enshrines the concept of **complementarity**, meaning that the court is designed to supplement—not displace—the work of national, sub-regional, and international courts to hold accountable perpetrators of grave crimes. The importance of the complementarity concept is highlighted in provisions throughout the Malabo Protocol, from the preamble to the substantive articles (arts. 46H,46I). For example, the preamble states that the “present protocol will complement national, regional, and continental bodies and institutions in preventing serious and massive violations of human and peoples’ rights in keeping with Article 58 of the Charter and ensuring accountability for them wherever they occur.”

One of the significant innovations of the Malabo Protocol is that it explicitly provides for complementarity not only with respect to national courts, but also with respect to regional African courts. Although other tribunals—such as the ICC—have complementarity provisions in their statutes, all are limited to complementarity with State courts.

At the moment, none of the courts of the African regional economic communities have jurisdiction over international crimes. There are, however, several regional courts whose jurisdiction could be so enlarged, including the ECOWAS Community Court of Justice and the East African Court of Justice. Once a regional court is vested with criminal jurisdiction, the African Court will be able to take a case only if both the relevant State and the relevant regional court fail to investigate and prosecute. These provisions ensure that the African Court remains a court of “last resort”—meaning that the Court will step in to try a case only where no State or regional court is pursuing, or previously pursued, the case.

In contrast to the provisions on complementarity with state and regional courts, no provision of the protocol explicitly addresses the relationship between the African Court of Justice and Human and Peoples’ Rights and the International Criminal Court. Despite this omission, the expanded African Court is intended to complement—not displace—the International Criminal Court. These two courts have substantially different jurisdictions, much of which is not overlapping. The existence of two courts will therefore promote accountability by ensuring that the broadest array of persons responsible for grave crimes can be prosecuted. To the extent the jurisdictions of the two courts overlap, the provisions of both the Rome Statute and the Malabo Protocol are adequate to ensure that there would be no competing obligations on States and that no person is tried twice for the same conduct before both courts. In fact, the Malabo Protocol’s *non bis in idem* provision (art.46I), which refers to any court, would plainly prohibit the African Court from trying any person for the same conduct for which that person was already tried before the ICC, unless one of the specific exceptions were satisfied. Also, article 46L of the Malabo Protocol permits the African Court to seek the cooperation or assistance of any international court, including the ICC. The silence of the Malabo Protocol on the relationship between the African Court and the ICC is not, therefore, a concern, but rather an opportunity for the two courts to determine for themselves the best way for them to work together.

## The Relationship of the African Court to other Regional and International Tribunals

### a. Description of relevant provisions of the Malabo Protocol

Consistent with the statutes of other regional and international courts, the Malabo Protocol enshrines the concept of complementarity, meaning that the court is designed to supplement—not displace—the work of national, sub-regional, and international courts to hold accountable perpetrators of grave crimes. The importance of the complementarity concept is highlighted in provisions throughout the Malabo Protocol, from the preamble to the substantive articles. For example, the preamble states that the “present protocol will complement national, regional, and continental bodies and institutions in preventing serious and massive violations of human and peoples’ rights in keeping with Article 58 of the Charter and ensuring accountability for them wherever they occur.”<sup>1</sup> Similarly, the protocol confirms that “[t]he Court shall, in accordance with the Charter and this Protocol, complement the protective mandate of the African Commission on Human and Peoples’ Rights.”<sup>2</sup>

Two provisions, however, are critical for understanding how the principle of complementarity will work in practice at the African Court. First, article 46H, entitled “Complementary Jurisdiction,” explicitly provides that the African Court’s jurisdiction is complementary to that of both national courts and courts of regional economic communities and lays out specific criteria for determining when a case shall be inadmissible before the African Court because it is or has already been investigated or prosecuted by a State.<sup>3</sup> Essentially, under these criteria, the African Court is prohibited (with limited exceptions) from exercising jurisdiction if the person implicated already has been tried for the same conduct or if the relevant State has investigated the person and chosen not to pursue prosecution.<sup>4</sup> Second, article 46I contains the protocol’s *non bis in idem* (or double jeopardy) provision. This article provides that a person who already was tried by another court may not be tried before the African Court for that same conduct unless the prior trial was held to shield the person for criminal responsibility or was not independent, impartial, or consistent with an intent to bring the person to justice.<sup>5</sup> The term “same conduct,” which appears in both articles 46H and 46I, is not defined by the protocol.

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<sup>1</sup> 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], <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>, preamble.

<sup>2</sup> *Id.* art. 4; *see also id.* preamble (“bearing in mind the complementary relationship between the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights, as well as its successor, the African Court of Justice and Human and Peoples’ Rights”).

<sup>3</sup> *Id.* annex art. 22 (adding art. 46H). The criteria for determining when a case is inadmissible do not explicitly mention courts of regional economic communities. The implications of this omission are considered below in the analysis section.

<sup>4</sup> *Id.* annex art. 22 (adding art. 46H (2)). The African Court may, however, exercise jurisdiction if the State was unable or unwilling to carry out the investigation or prosecution. Pursuant to the provisions of the Malabo Protocol, a State is unable or unwilling if the proceedings were carried out in order to shield the individual, there has been an unjustified delay in the proceedings inconsistent with an intent to bring the person to justice, the proceedings were not independent and impartial, or the State is unable to obtain the accused or carry out its proceedings due to the substantial or total collapse or unavailability of the national judiciary. *Id.* annex art. 22 (adding art. 46H (3) & (4)).

<sup>5</sup> *Id.* annex art. 22 (adding art. 46I (2)). The article also prohibits the African Court from conducting a second trial of a person who already was acquitted or convicted by the African Court if the second trial would be for the same conduct. *Id.* annex art. 22 (adding art. 46I (1)).

In contrast to the provisions on complementarity with state and regional courts, no provision of the protocol explicitly addresses the relationship between the African Court of Justice and Human and Peoples' Rights and the International Criminal Court. However, article 46L permits the African Court to seek the cooperation or assistance of any international court, including the ICC. In addition, the Malabo Protocol's *non bis in idem* provision, which refers to any court, would plainly prohibit the African Court from trying any person for the same conduct for which that person was already tried before the ICC, unless one of the specific exceptions were satisfied.<sup>6</sup>

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

**Article 46H of the Statute (as amended)**  
**Complementary Jurisdiction**

1. The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.
2. The Court shall determine that a case is inadmissible where:
  - a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;
  - b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute;
  - c) The person concerned has already been tried for conduct which is the subject of the complaint;
  - d) The case is not of sufficient gravity to justify further action by the Court.
3. In order to determine that a State is unwilling to investigate or prosecute in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
  - a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
  - b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
  - c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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<sup>6</sup> *Id.* annex art. 22 (adding art. 46I).

4. In order to determine that a State is unable to investigate or prosecute in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

**Article 46I of the Statute (as amended)**  
*Non bis in idem*

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. Except in exceptional circumstances, no person who has been tried by another court for conduct proscribed under Article 28A of this Statute shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court:
  - a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
  - b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.
3. ...

**Article 46L of the Statute (as amended)**  
**Co-operation and Judicial Assistance**

1. ...
2. ...
3. The Court shall be entitled to seek the co-operation or assistance of regional or international courts, non-State Parties or co-operating partners of the African Union and may conclude Agreements for that purpose.

**b. Analysis**

**i. Relationship of the African Court with regional economic courts**

One of the significant innovations of the Malabo Protocol is that it provides for complementarity not only with respect to national courts, but also with respect to regional African courts.<sup>7</sup> Although other tribunals—such as the ICC—have complementarity provisions in their statutes, all are limited to complementarity with State courts.<sup>8</sup>

<sup>7</sup> *Id.* annex art. 22 (adding Article 46H(1)).

<sup>8</sup> Rome Statute of the International Criminal Court, preamble, arts. 17-20, (July 17, 1998), [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

At the moment, none of the courts of the African regional economic communities have jurisdiction over international crimes. There are, however, several regional courts whose jurisdiction could be so enlarged, including the ECOWAS Community Court of Justice and the East African Court of Justice.<sup>9</sup> In fact, in 2013, the Heads of State of the East African Community approved the extension of the jurisdiction of the East African Court of Justice to include crimes against humanity,<sup>10</sup> although that change has not yet taken effect.

Under the Malabo Protocol's admissibility criteria, the African Court will be able to take a case only if no State or regional court is currently investigating or prosecuting the crime or previously investigated the crime and chose not to prosecute.<sup>11</sup> These provisions ensure that the African Court remains a court of "last resort"—meaning that the Court will step in to try a case only where no State or regional court is pursuing, or previously pursued, the case.<sup>12</sup> The only exceptions would be if the State or regional court were "unwilling or unable to carry out the investigation or prosecution" or if the decision not to prosecute by the State or regional court "resulted from the unwillingness or inability . . . to prosecute."<sup>13</sup>

To ensure that the African Court is aware of whether any of the foregoing bases for inadmissibility apply, the Malabo Protocol requires the Court's registrar to provide notice of the case to all concerned parties and the Chairperson of the AU Commission.<sup>14</sup> A State with an ongoing or prior investigation or prosecution would then be able to notify the Court of that fact. Under the Malabo

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<sup>9</sup> See generally ECOWAS, Protocol A/P.I/7/91 on the Community Court of Justice (July 6, 1991), [http://www.courtecowas.org/site2012/pdf\\_files/protocol.pdf](http://www.courtecowas.org/site2012/pdf_files/protocol.pdf); Treaty for the Establishment of the East African Community (Nov. 30, 1999), [http://eacj.org/?page\\_id=33](http://eacj.org/?page_id=33).

<sup>10</sup> East African Community, Communique of the 15th Ordinary Summit of the EAC Heads of State, ¶ 16 (Nov. 30, 2013), [http://repository.eac.int/bitstream/handle/11671/546/Annex%20VI-COMMUNIQUE%20OF%20THE%2015TH%20ORDINARY%20SUMMIT%20OF%20HEADS%20OF%20STAT E.pdf?sequence=1&isAllowed=y](http://repository.eac.int/bitstream/handle/11671/546/Annex%20VI-COMMUNIQUE%20OF%20THE%2015TH%20ORDINARY%20SUMMIT%20OF%20HEADS%20OF%20STAT%20E.pdf?sequence=1&isAllowed=y).

<sup>11</sup> Malabo Protocol, *supra* note 1, annex art. 22 (adding art. 46H(2)). The African Court also would be prohibited from considering a case if the accused had previously been tried for the same conduct – an issue which is considered in more detail below.

<sup>12</sup> Under international jurisprudence, this has been interpreted to mean that both the accused and the conduct must be the same. See, e.g., Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, International Criminal Court, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ¶¶ 37-40 (Feb. 10, 2006) [hereinafter Lubanga Arrest Warrant Decision], <https://www.legal-tools.org/doc/c60aaa/pdf/>. Thus, a person who was prosecuted for one crime (such as war crimes) at the national level could be prosecuted for an entirely different crime (such as corruption) before an international court. Although the African Court is free to develop its own jurisprudence, it is likely to develop similar rules since the language of the admissibility provisions in the Rome Statute and the Malabo Protocol is nearly identical.

<sup>13</sup> Malabo Protocol, *supra* note 1, annex art. 22 (adding art. 46H(2)). These provisions are nearly identical to those in the Rome Statute, except that the Rome Statute requires that the State be "genuinely" unable or unwilling to investigate or prosecute. Rome Statute of the ICC, *supra* note 8, art. 17. That single word change is unlikely, however, to result in a difference in admissibility decisions between the two courts because the Malabo Protocol and the Rome Statute have identical definitions for the meaning of "unwilling" or "unable." Compare *id.* art. 17(2) & (3), with Malabo Protocol, *supra* note 1, annex art. 22 (adding art. 46H(3) & (4)). Thus, even without the word "genuinely," the African Court will be required to define the terms "unwilling" or "unable" in the same manner as does the ICC.

<sup>14</sup> Malabo Protocol, *supra* note 1, annex art. 17 (adding art. 34(A)(2)). This provision serves a similar purpose to article 18 of the Rome Statute of the ICC.

Protocol, once notified, the African Court would be required to rule the case inadmissible unless an exception applied.<sup>15</sup>

Compared with the Rome Statute, the Malabo Protocol provides significantly more flexibility for the African Court to consider questions of admissibility, consistent with the peace and justice sequencing approach discussed in other briefs. First, unlike the Rome Statute, the Malabo Protocol does not provide a time limit within which a State must inform the African Court that it is investigating or has investigated the case, giving a State more time to review its position and enabling it to contest admissibility at a later time if it later determines that the investigation or prosecution is impairing peace efforts.<sup>16</sup> Second, unlike the Rome Statute, the Malabo Protocol does not have a provision limiting the types of parties that may challenge the admissibility of a case.<sup>17</sup> This potentially permits a larger set of parties, such as the AU Assembly, Parliament, and the Peace and Security Council, to object to the admissibility of a case. In addition, the Malabo Protocol does not prohibit a person, State, or regional court from re-contesting admissibility if circumstances change, as the Rome Statute does.<sup>18</sup> Thus, even if the African Court initially finds a case admissible because there is no current state or regional investigation, the State could potentially request review of that decision if it begins an investigation or prosecution.

Finally, there is no risk that a person who was genuinely tried before a State or regional court would be retried for the same conduct before the African Court. The Malabo Protocol has two separate prohibitions preventing re-trial. First, article 46H(2)(c) requires the African Court to reject a case as inadmissible where the “person concerned has already been tried for conduct which is the subject of the complaint.”<sup>19</sup> Second, article 46I also contains the Protocol’s *non bis in idem* principle, which prohibits the Court from prosecuting a person for any conduct for which the person has already been tried by another court, unless the other trial was “for the purpose of shielding the person concerned from criminal responsibility” or was otherwise “inconsistent with an intent to bring the person concerned to justice.”<sup>20</sup> Importantly, because both provisions refer generally to prosecutions by any other court, without limitation, the provisions apply not only to

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<sup>15</sup> Malabo Protocol, *supra* note 1, annex art. 22 (adding art. 46H(2)). It is therefore irrelevant that the Malabo Protocol omits the language in article 18(2) of the Rome Statute requiring the Court to defer to the State’s prosecution, as this is already required by the terms of article 46H in the Malabo Protocol.

<sup>16</sup> Compare Rome Statute of the ICC, *supra* note 8, art. 18(2), with Malabo Protocol, *supra* note 1, annex art. 22 (adding art. 46H(3) & (4)). See also Prosecutor v. Katanga, Case No. ICC-01/04-01/97, International Criminal Court, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ¶¶ 49-50 (June 16, 2009) (limiting admissibility challenges almost exclusively to the period of time before the charges are confirmed), [https://www.icc-cpi.int/CourtRecords/CR2009\\_05171.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_05171.PDF).

<sup>17</sup> See Rome Statute of the ICC, *supra* note 8, art. 19(2).

<sup>18</sup> See *id.* art. 19(4). Technically, the Rome Statute permits up to two challenges: one at the investigation stage, *id.* art. 18(2), and, if there are “additional significant facts” or a “significant change of circumstances,” again at the time a specific case is undertaken against a specific defendant, *id.* art. 19(4). However, once a decision on admissibility has been made with respect to a specific case, it cannot be re-challenged. *Id.* The Appeals Chamber of the ICC has suggested that “a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States.” Prosecutor v. Katanga, Case No. ICC-01/04-01/07, International Criminal Court, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 56 (Sept. 25, 2009), [https://www.icc-cpi.int/CourtRecords/CR2009\\_06998.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_06998.PDF). To date, however, the ICC has never held that a formerly admissible case has become inadmissible.

<sup>19</sup> Malabo Protocol, *supra* note 1, annex art. 22 (adding art. 46H(2)).

<sup>20</sup> *Id.* annex art. 22 (adding art. 46I(2)). These provisions are nearly identical to the *non bis in idem* provisions of the Rome Statute. See Rome Statute of the ICC, *supra* note 8, art. 20(3).

trials by States Parties to the Malabo Protocol, but also to those of other AU member states, courts of the regional economic communities, and the ICC.

## ii. Relationship of the African Court with the International Criminal Court

The expanded African Court is intended to complement—not displace—the International Criminal Court.<sup>21</sup> As described in more detail below, these two courts have substantially different jurisdictions, much of which is not overlapping. The existence of two courts will therefore promote accountability by ensuring that the broadest array of persons responsible for grave crimes can be prosecuted. To the extent the jurisdictions of the two courts overlap, the provisions of both the Rome Statute and the Malabo Protocol are adequate to ensure that there would be no competing obligations on States and that no person is tried twice for the same conduct before both courts. The silence of the Malabo Protocol on the relationship between the African Court and the ICC is not, therefore, a concern, but rather an opportunity for the two courts to determine for themselves the best way for them to work together.

### (a) The Rome Statute does not prohibit the establishment of regional criminal courts

Some commentators have questioned whether the Rome Statute of the ICC allows the establishment of regional criminal courts.<sup>22</sup> As these commentators note, the Rome Statute addresses only the jurisdiction of national courts and “does not expressly allow or even imply that regional courts such as the proposed Criminal Chamber [may] be conferred with jurisdiction to try international crimes that are under the jurisdiction of the ICC.”<sup>23</sup> Based on this, they conclude there is no “clear legal basis” for a regional criminal court under the Rome Statute.<sup>24</sup>

The idea that the establishment of a regional court must have a legal basis in the ICC’s Statute is without merit and confuses issues of complementarity and legal authority.<sup>25</sup> The Rome Statute addresses the jurisdiction of national courts not because it bestows some legal authority on them to prosecute international crimes – that authority is inherent in the State itself – but rather to determine the admissibility of cases and avoid multiple investigations and prosecutions of the same

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<sup>21</sup> Pacifique Manirakiza, *The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa*, in VINCENT O. NHEMIELLE, *AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 385-386, (2012).

<sup>22</sup> E.g., Chacha Bhoke Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights*, 9 *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 1067, 1081 (2011).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Vincent O. Nhemielle, *Saddling the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient*, 8 *AFRICAN JOURNAL OF LEGAL STUDIES* 24 (2014) (explaining that such arguments “miss[] the point and confuse[] issues of complementarity . . . with legal authority or ability”); see also Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*, 24 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 933, 942 (2013) (describing the view that the legality of the African Court must be evaluated with respect to the Rome Statute as “fallacious, mistaken and unscrupulous in international law”), <https://academic.oup.com/ejil/article/24/3/933/481582>.

perpetrators.<sup>26</sup> Its silence on the jurisdiction of regional criminal courts indicates nothing about the potential legal authority for such courts, and instead reflects the simple fact that no regional criminal courts existed or were contemplated when the Rome Statute was being drafted.

The Malabo Protocol, and its ratification by a sufficient number of States, constitutes the legal basis for the addition of international criminal jurisdiction to the African Court. No provision of the Rome Statute addresses the validity of such regional treaties. Nor does any provision of the Rome Statute prohibit the establishment of other courts with jurisdiction over international crimes.<sup>27</sup> Meanwhile, international law unquestionably permits the conclusion of multiple treaties on the same subject matter.<sup>28</sup>

A review of other supra-national fora demonstrates that it is both common and proper for multiple supra-national bodies to have jurisdiction over the same matters.<sup>29</sup> For example, the African Commission on Human and Peoples' Rights and the existing African Court on Human and Peoples' Rights "co-exist harmoniously" with the UN Human Rights Committee, the Committee against Torture, and the Committee on the Elimination of Discrimination Against Women.<sup>30</sup> Similarly, the European Court of Justice co-exists with the International Court of Justice, both of which are mandated to hear certain inter-state disputes. And the ICTY, the SCSL, and ICTR all functioned concurrently with the ICC. The idea that the establishment of any of these bodies depended on permission from another is preposterous.

Moreover, the establishment of multiple criminal fora is vital to ending impunity since the ICC, in the words of its own prosecutor, "can only address a handful of cases."<sup>31</sup> The ICC has thus indicated that it "welcomes" initiatives "at the global, regional and national level" to end impunity.<sup>32</sup> Expanding the jurisdiction of the African Court to encompass international and transnational crimes is vital to ending impunity on the continent—particularly for crimes that disproportionately affect Africa and are not within the jurisdiction of the ICC—and thus should be welcomed by the ICC.

### **(b) The establishment of multiple fora is beneficial to the development of international law**

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<sup>26</sup> Nmehielle, *Saddling the New African Regional Human Rights Court with International Criminal Jurisdiction*, *supra* note 25, at 25.

<sup>27</sup> Abass, *Prosecuting International Crimes in Africa*, *supra* note 25, at 942.

<sup>28</sup> *See, e.g.*, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332 (May 23, 1969), art. 30 (providing rule on successive treaties relating to the same subject matter), <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>; Nmehielle, *Saddling the New African Regional Human Rights Court with International Criminal Jurisdiction*, *supra* note 25, at 24-25.

<sup>29</sup> Ademola Abass, *Historical and Political Background to the Malabo Protocol*, in GERHARD WERLE & MORITZ VORMBAUM, *THE AFRICAN CRIMINAL COURT* 11, 22 (2017).

<sup>30</sup> Don Deya, *Is the African Court worth the wait*, OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA (Mar. 6, 2012), [http://www.osisa.org/sites/default/files/is\\_the\\_african\\_court\\_worth\\_the\\_wait\\_-\\_don\\_deya.pdf](http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-_don_deya.pdf).

<sup>31</sup> ICC, Office of the Prosecutor, Strategic Plan 2016-2018, ¶ 96 (July 6, 2015), [https://www.icc-cpi.int/iccdocs/otp/070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf).

<sup>32</sup> *Id.*



A close variant of the previous argument is that the African Court and ICC are “incompatible” because they relate to the “same subject matter.”<sup>33</sup> Under this version of the argument, the establishment of a multiplicity of fora “fragments” jurisdiction and risks the creation of “conflicts of laws.”<sup>34</sup>

The experience of other supra-national bodies demonstrates, however, that a multiplicity of fora enhances the protection of human rights.<sup>35</sup> First, the existence of multiple fora provides victims with a choice of fora when their rights are violated. This is important because different fora may have different advantages and constraints, leading victims to prefer one over another. One common advantage, for example, is geographic proximity. Victims in West Africa may, therefore, prefer to bring claims before the African Commission or the ECOWAS Court, both of which are located in the region, while victims in East Africa may express a preference for the African Court, which is closer to them. States and victims also might consider different courts’ procedural requirements, fees, familiarity with the legal issues in the case, and backlog, among other things, in deciding where to bring a claim or refer a case. By establishing multiple fora, States and victims can decide for themselves which supra-national body is best able to address their needs. The Malabo Protocol ensures that States considering prosecutions for international crimes will have a multiplicity of options to choose from to prevent impunity, including domestic courts, the courts of regional economic communities, the African Court, and the ICC.

Second, the establishment of multiple fora contributes to the development of international jurisprudence. International and regional bodies frequently cite the decisions of other jurisdictions that already have considered similar issues, drawing on their experience and insight. The current African Court on Human and Peoples’ Rights, for example, has cited decisions of the African Commission on Human and Peoples’ Rights,<sup>36</sup> the UN Human Rights Committee,<sup>37</sup> the European Court of Human Rights,<sup>38</sup> and the Inter-American Court of Human Rights,<sup>39</sup> among others. These other bodies have likewise referred to one another’s jurisprudence in their own decisions.<sup>40</sup> Such cross-fertilization is especially helpful when one region has a highly developed jurisprudence in an area that others are only beginning to grapple with. For example, the Inter-American Court of Human Rights developed a robust jurisprudence on enforced disappearances well before other

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<sup>33</sup> See, e.g., Jacky Fung Wai Nam, *Jurisdictional Conflicts Between the ICC and the African Union – Solutions to the Dilemma*, 44 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 41, 49, 64 (2015).

<sup>34</sup> For such concerns leveled against the African Court, see, e.g., *id.* at 41.

<sup>35</sup> See, e.g., Gerhard Werle & Moritz Vormbaum, *Creating an African Criminal Court*, in GERHARD WERLE & MORITZ VORMBAUM, *THE AFRICAN CRIMINAL COURT* 3, 4 (2017).

<sup>36</sup> E.g., Konate v. Burkina Faso, Application No. 04/2013, African Court on Human and Peoples’ Rights, Judgment, ¶¶ 148-51 (Dec. 5, 2014), <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf>.

<sup>37</sup> *Id.* ¶¶ 152-53.

<sup>38</sup> *Id.* ¶¶ 154, 158.

<sup>39</sup> *Id.* ¶¶ 154, 159.

<sup>40</sup> See, e.g., Maharjan v. Nepal, Communication No. 863/2009, Human Rights Committee, Views, ¶ 5.2 n.25 (July 19, 2012) (citing decisions of the African Commission on Human and Peoples’ Rights), <http://juris.ohchr.org/Search/Details/1238>; Dvorski v. Croatia, Application No. 25703/11, European Court of Human Rights, Judgment, ¶ 4 (Oct. 20, 2015) (joint concurring opinion citing caselaw of the African Commission on Human and Peoples’ Rights, the Inter-American Court of Human Rights, and the UN Human Rights Committee), <http://hudoc.echr.coe.int/eng?i=001-158266>.

courts due to the prevalence of that crime in the region.<sup>41</sup> Later, as the European Community admitted new members where that crime was committed, the European Court drew on the Inter-American Court's jurisprudence in determining how to decide legal issues specific to that crime.<sup>42</sup>

An expanded African Court with jurisdiction over international crimes will contribute dramatically to the evolution of international criminal law. As with other courts, jurisprudence of the African Court will contribute to the dialogue between courts on key issues of international human rights law and international criminal law. In addition, because the African Court will be the first supra-national court vested with jurisdiction over certain crimes, such as unconstitutional changes of government, it will have an opportunity to develop jurisprudence in these areas that other courts might later find useful. For all of these reasons, the Malabo Protocol is a positive step forward in enhancing the protection of human rights.

### **(c) Expansion of the African Court will not undermine Africa's strong relationship with the ICC**

African States have long been strong supporters of the International Criminal Court.<sup>43</sup> During negotiations over the Rome Statute, African countries advocated for an independent and powerful court.<sup>44</sup> An African State—Senegal—was the first to ratify the Rome Statute,<sup>45</sup> and today 33 African States are members of the ICC, more than any other region.<sup>46</sup> These high numbers were achieved, in part, by the strong support for ratification by several pan-African institutions, including the Organization of African Unity and the African Commission on Human and Peoples'

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<sup>41</sup> See, e.g., Velásquez-Rodríguez v. Honduras, Inter-American Court of Human Rights, Judgment (Merits) (July 29, 1988), <https://www.legal-tools.org/doc/18607f/pdf/>; Godínez-Cruz v. Honduras, Inter-American Court of Human Rights, Judgment (Merits), ¶¶ 93-98 (Jan. 20, 1989), <https://www.legal-tools.org/doc/9b66c3/pdf/>.

<sup>42</sup> See, e.g., Varnava and Others v. Turkey, Application No. 16064/90, European Court of Human Rights, Judgment, (Sept. 18, 2009), <http://hudoc.echr.coe.int/eng?i=001-94162>.

<sup>43</sup> As many have noted, Africa had a particular interest in the establishment of the Court, having been the site of atrocities perpetrated by the West over hundreds of years – from slavery to colonial violence to apartheid. For example, Professor Maluwa, then Legal Counsel of the OAU, reportedly stated during the opening sessions of the Rome Conference that “Africa had a particular interest in the establishment of the Court, since its peoples had been the victims of large-scale violations of human rights over the centuries: slavery, wars of colonial conquest and continued acts of war and violence, even in the post-colonial era. The recent genocide in Rwanda was a tragic reminder that such atrocities were not yet over but had strengthened OAU's determination to support the creation of a permanent, independent court to punish the perpetrator of such acts.” James Nyawo, *Historical Narrative of Mass Atrocities and Injustice in Africa*, in Vincent O. Nhemiele, *AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 125, 130 (2012). Similar remarks were made by South Africa's Minister for Justice, Abdula Mohamed Omar. *Id.*

<sup>44</sup> DAPO AKANDE, MAX DU PLESSIS & CHARLES CHERNOR JALLOH, POSITION PAPER: AN AFRICAN EXPERT STUDY ON THE AFRICAN UNION CONCERNS ABOUT ARTICLE 16 OF THE ROME STATUTE OF THE ICC 5 (2010), at 7, <http://www.elac.ox.ac.uk/downloads/AkandeDuPlessisJallohICCPositionPaper.pdf>; see also Charles Chernor Jalloh, *Regionalizing International Criminal Law*, 9 INT'L CRIM. L. REV. 445 (2009), at 446-47; Hassan Jallow & Fatou Bensouda, *International Criminal Law in an African Context*, in MAX DU PLESSIS, *AFRICAN GUIDE TO INTERNATIONAL CRIMINAL JUSTICE* 15, 41 (2008); Solomon A. Dersso, *The ICC's Africa Problem*, in KAMARI CLARKE, ABDEL S. KNOTTNERUS, & EEFJE DE VOLDER, *AFRICA AND THE ICC: PERCEPTIONS OF JUSTICE* 61, 68-69 (2016), at 62.

<sup>45</sup> ICC, States Parties – Chronological List, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/states%20parties%20\\_%20chronological%20list.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx).

<sup>46</sup> ICC, The States Parties to the Rome Statute, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

Rights.<sup>47</sup> Since the Rome Statute entered into effect in 2002, several African States have self-referred situations in their countries to the ICC for investigation and prosecution,<sup>48</sup> underscoring the continent's commitment to the ICC and to the principle of justice.

The desire to create a regional criminal court did not spring from dissatisfaction with the ICC's treatment of situations in Africa. To the contrary, the idea of an African criminal court dates back to at least the 1970s, when it was proposed during the drafting of the African Charter on Human and Peoples' Rights as a way to address continent-specific criminal challenges, particularly apartheid.<sup>49</sup> More recently, as African scholars have observed,<sup>50</sup> the idea of expanding the jurisdiction of the African Court arose out of three specific issues:

- fulfillment of AU treaty obligations

Foremost among these was the African Charter on Democracy, Elections and Governance, which was adopted by the AU in 2007. That charter provides that perpetrators of an unconstitutional change of government may "be tried before the competent court of the Union,"<sup>51</sup> but at the time of the Charter's adoption there was no continental court with the competence to try such crimes. In order to ensure that this provision would not be a dead letter, it was necessary to endow the African court with criminal jurisdiction. In addition, the Constitutive Act of the AU provides for "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against

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<sup>47</sup> African Commission on Human and Peoples' Rights, Resolution 59: Resolution on the Ratification of the Statute of the International Criminal Court by OAU Member States (May 16, 2002) (urging African States to ratify the Rome Statute of the ICC), <http://www.achpr.org/sessions/31st/resolutions/59/>; Dersso, *The ICC's Africa Problem*, *supra* note 44, at 62.

<sup>48</sup> ICC, *President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC* (Jan. 29, 2004), <https://www.icc-cpi.int/Pages/item.aspx?name=president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20resistance%20army%20lra%20to%20the%20icc>; ICC, *Prosecutor receives referral of the situation in the Democratic Republic of the Congo* (Apr. 19, 2004), <https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo>; ICC, *Prosecutor receives referral concerning Central African Republic* (Jan. 7, 2005), <https://www.icc-cpi.int/Pages/item.aspx?name=otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic>; ICC, *ICC Prosecutor Fatou Bensouda on the Malian State referral of the situation in Mali since January 2012* (July 18, 2012), <https://www.icc-cpi.int/Pages/item.aspx?name=pr829>. Even Kenya considered referring its situation to the ICC, but the prosecutor moved forward with a *proprio motu* investigation instead. ICC, *Kenyan High-Level Delegation meets ICC Prosecutor* (July 3, 2009), <https://www.icc-cpi.int/Pages/item.aspx?name=pr431>; Situation in the Republic of Kenya, Case No. ICC-01/09, International Criminal Court, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 2 (Mar. 31, 2010), [https://www.icc-cpi.int/CourtRecords/CR2010\\_02399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF).

<sup>49</sup> Kenyans for Peace with Truth & Justice, *Seeking Justice or Shielding Suspects?* 10 (2016), at 5; Abass, *Prosecuting International Crimes in Africa*, *supra* note 27, at 936-37.

<sup>50</sup> Deya, *supra* note 30.

<sup>51</sup> AU, African Charter on Democracy, Elections and Governance, art. 25(5) (Jan. 30, 2007), <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>.

humanity,”<sup>52</sup> a provision which implied, among other forms of intervention, the need for a continental criminal court.<sup>53</sup>

- the prosecution of Hissène Habré

Former President Hissène Habré’s brutal rule over Chad was marked by extensive torture, illegal detentions, rape, and massacres.<sup>54</sup> After he was deposed in 1990, he went into exile in Cameroon and then Senegal, where he was later indicted.<sup>55</sup> When the trial failed to materialize, however, he was re-indicted by Belgium.<sup>56</sup> The African Union convened a committee of eminent African jurists to consider the issue, which recommended that Habré be tried by an African State<sup>57</sup> – a recommendation that was later fulfilled by his prosecution before and conviction by the Extraordinary African Chambers.<sup>58</sup> However, the Committee also recommended that the “African Court should be granted jurisdiction to try criminal cases” in order to address similar cases in the future.<sup>59</sup>

- the perceived misuse of the principle of universal jurisdiction by European courts

In the 1990s, various European states started indicting high-ranking members of African governments, including heads of state, for alleged crimes that had no connection to Europe, in some instances indicting as many as 40 officials from a single government.<sup>60</sup> The African Union repeatedly expressed concerns about the abuse of

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<sup>52</sup> AU, Constitutive Act of the African Union, art. 4(h) (July 11, 2000), <https://au.int/en/constitutive-act>.

<sup>53</sup> Abass, *Prosecuting International Crimes in Africa*, *supra* note 27, at 937-38.

<sup>54</sup> *See generally* Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories (May 7, 1992), <https://www.usip.org/sites/default/files/file/resources/collections/commissions/Chad-Report.pdf>; Human Rights Watch, *La Plaine des Morts: Le Tchad de Hissène Habré* (2013), [https://www.hrw.org/sites/default/files/reports/chad1013frwebwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/chad1013frwebwcover_0.pdf).

<sup>55</sup> Nmehielle, *Saddling the New African Regional Human Rights Court with International Criminal Jurisdiction*, *supra* note 25, at 14; Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal* (May 3, 2016), <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal#1>.

<sup>56</sup> Garth Abraham, South African Institute of International Affairs, *Africa’s Evolving Continental Structures: At the Crossroads?*, 8 (2015), <https://www.saiia.org.za/occasional-papers/669-africa-s-evolving-continental-court-structures-at-the-crossroads/file>.

<sup>57</sup> AU, Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, ¶¶ 1, 27-28 (2006), [https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA\\_Report0506.pdf](https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Report0506.pdf); AU, Decision on the Hissene Habre Case and the African Union, Doc. Assembly/AU/Dec. 103(VI) (Jan. 23-24, 2006), [https://au.int/sites/default/files/decisions/9554-assembly\\_en\\_23\\_24\\_january\\_2006\\_auc\\_sixth\\_ordinary\\_session\\_decisions\\_declarations.pdf](https://au.int/sites/default/files/decisions/9554-assembly_en_23_24_january_2006_auc_sixth_ordinary_session_decisions_declarations.pdf).

<sup>58</sup> Ministère Publique c. Hissène Habré, Chambre Africaine Extraordinaire d’Assises, Jugement (30 mai 2016), [http://www.forumchambresafriaines.org/docs/JugementCAEd’Assises\\_Penal&Civil\\_.pdf](http://www.forumchambresafriaines.org/docs/JugementCAEd’Assises_Penal&Civil_.pdf).

<sup>59</sup> AU Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, *supra* note 57, at ¶¶ 35, 39; *see also* Deya, *supra* note 30 (observing that the time necessary to resolve whether and how the courts of Senegal could prosecute Habré, and then to set up an appropriate court within Senegal’s domestic courts, led to substantial delay in Habré’s prosecution and that the establishment of a continent-wide criminal court ensures that the AU can refer cases to its own court rather than having to rely on domestic courts).

<sup>60</sup> *See, e.g.*, Garth Abraham, South African Institute of International Affairs, *Africa’s Evolving Continental Structures: At the Crossroads?*, 8 (2015), at 7, <https://www.saiia.org.za/occasional-papers/669-africa-s-evolving->

universal jurisdiction.<sup>61</sup> In an attempt to resolve the issue, the AU and EU held several high-level meetings and convened a committee of experts to address the issue.<sup>62</sup> Those experts explicitly recommended empowering the African Court with criminal jurisdiction.<sup>63</sup>

It is true that the relationship between the African Union and the ICC has recently deteriorated. AU has been deeply concerned about the effect of the ICC's indictments of Sudanese officials on the delicate peace process in the Sudan, as well as the UN Security Council's refusal to defer those cases and the cases related to Kenya.<sup>64</sup> Yet even as the African Union has criticized the ICC, it has repeatedly expressed a desire to reform and improve the ICC, including through amendments to the Rome Statute, the creation of guidelines to inform prosecutorial discretion, clarification of certain provisions, and working group discussions at the Assembly of States Parties and with the

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continental-court-structures-at-the-crossroads/file, (describing the indictment of 40 senior officials in Rwanda by a single court in Spain); Chris Maina Peter, *Fighting Impunity: African States and the International Criminal Court*, in EVELYN A. ANKUMAH, *THE INTERNATIONAL CRIMINAL COURT AND AFRICA: ONE DECADE ON* 1, 5 (2016).

<sup>61</sup> See, e.g., Assembly of the African Union, Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.243(XIII) Rev.1 (July 1-3, 2009), [https://au.int/sites/default/files/decisions/9560-assembly\\_en\\_1\\_3\\_july\\_2009\\_auc\\_thirteenth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion\\_0.pdf](https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf); Assembly of the African Union, Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.271(XIV) (Feb. 2, 2010),

[http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20271%20\(XIV\)%20\\_E.PDF](http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20271%20(XIV)%20_E.PDF); Assembly of the African Union, Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.292(XV) (July 27, 2010),

[http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20292%20\(XV\)%20\\_E.pdf](http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20292%20(XV)%20_E.pdf); Assembly of the African Union, Decision on the Abuse of the Principle of Universal Jurisdiction,

Assembly/AU/Dec.335(XVI) (Jan. 30-31, 2011), [https://au.int/sites/default/files/decisions/9645-assembly\\_en\\_30\\_31\\_january\\_2011\\_auc\\_assembly\\_africa.pdf](https://au.int/sites/default/files/decisions/9645-assembly_en_30_31_january_2011_auc_assembly_africa.pdf); see also *Seeking Justice or Shielding Suspects?*, *supra* note 49, at 6; Council of the European Union, The AU-EU Expert Report on the Principle of Universal Jurisdiction, ¶¶ 34-38 (2009), [http://www.africa-eu-partnership.org/sites/default/files/documents/rapport\\_expert\\_ua\\_ue\\_competence\\_universelle\\_en\\_0.pdf](http://www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf).

<sup>62</sup> Council of the European Union, The AU-EU Expert Report on the Principle of Universal Jurisdiction, at ¶¶ 1-3. (2009), [http://www.africa-eu-partnership.org/sites/default/files/documents/rapport\\_expert\\_ua\\_ue\\_competence\\_universelle\\_en\\_0.pdf](http://www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf).

<sup>63</sup> *Id.*, Recommendation 3.

<sup>64</sup> See For example, the joint AU-UN mediator on Darfur stated that “the process to find a political solution to the crisis in Darfur has been significantly slowed and even compromised” by the ICC’s issuance of an arrest warrant for Sudan’s President. Patrick Worsnip, *Darfur mediator says Bashir warrant imperils talks*, REUTERS (Mar. 26, 2009), <https://www.reuters.com/article/us-sudan-darfur-un/darfur-mediator-says-bashir-warrant-imperils-talks-idUSTRE52P7FO20090326>.

The African Union likewise has expressed “grave concern” about the effect of premature prosecutions “on the delicate peace processes underway in The Sudan,” which are “undermin[ing] the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.” see also Assembly of the African Union, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan, Doc. Assembly/AU/Dec.221(XII) (Feb. 1-3, 2009), [https://au.int/sites/default/files/decisions/9559-assembly\\_en\\_1\\_3\\_february\\_2009\\_auc\\_twelfth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion.pdf](https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf);

Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/Dec.245(XIII) Rev.1 (July 3, 2009), [https://au.int/sites/default/files/decisions/9560-assembly\\_en\\_1\\_3\\_july\\_2009\\_auc\\_thirteenth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion\\_0.pdf](https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf);

Assembly of the African Union, Decision on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.334(XVI) (Jan. 30-31, 2011), [https://au.int/sites/default/files/decisions/9645-assembly\\_en\\_30\\_31\\_january\\_2011\\_auc\\_assembly\\_africa.pdf](https://au.int/sites/default/files/decisions/9645-assembly_en_30_31_january_2011_auc_assembly_africa.pdf).

UN Security Council.<sup>65</sup> For example, the African Union has supported efforts by Kenya to amend the preamble of the Rome Statute to explicitly enshrine the principle of complementarity with respect to regional criminal courts.<sup>66</sup> Even the AU's early 2017 nonbinding decision adopting an ICC withdrawal strategy included requests for changes to the ICC, confirming that the AU continues to view reform and support of the ICC as a viable option.<sup>67</sup>

Consistent with the principle of State sovereignty, each African State may decide for itself whether it wishes to join or continue to support the ICC, or whether it will withdraw, as some States have chosen to do.<sup>68</sup> The African Union is continuing to push for reforms at the ICC, however, in the hope that an improved institution can continue to support the fight against impunity.

**(d) There is little to no risk of competing State obligations to the ICC and the African Court**

The idea of competing State obligations to the ICC and the African Court rests on the presumption of overlapping jurisdictions. In fact, the vast majority of their jurisdictions do not overlap. The ICC does not have jurisdiction over 10 of the 14 crimes within the jurisdiction of the African Court.<sup>69</sup> It is thus impossible for a State to have competing obligations to the ICC and the African Court with respect to any of these 10 crimes.

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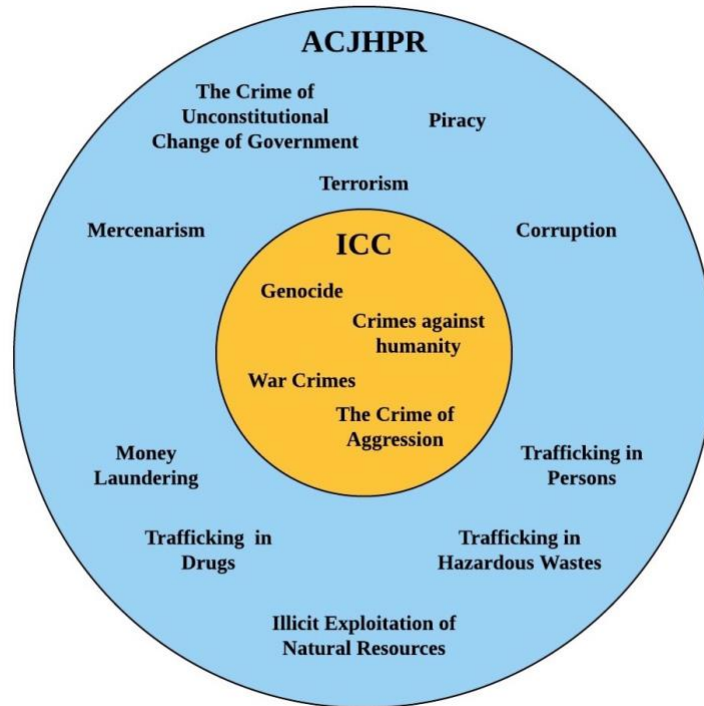
<sup>65</sup> See, e.g., Assembly of the African Union, Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC), Assembly/AU/Dec.270(XIV) (Jan. 31-Feb. 2, 2010), [https://au.int/sites/default/files/decisions/9561-assembly\\_en\\_31\\_january\\_2\\_february\\_2010\\_bcp\\_assembly\\_of\\_the\\_african\\_union\\_fourteenth\\_ordinary\\_session.pdf](https://au.int/sites/default/files/decisions/9561-assembly_en_31_january_2_february_2010_bcp_assembly_of_the_african_union_fourteenth_ordinary_session.pdf); Assembly of the African Union, Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.493(XXII) (Jan. 30-31, 2014), [https://au.int/sites/default/files/decisions/9659-assembly\\_au\\_dec\\_490-516\\_xxii\\_e.pdf](https://au.int/sites/default/files/decisions/9659-assembly_au_dec_490-516_xxii_e.pdf); see also Solomon Dersso, *The AU's Extraordinary Summit decisions on Africa-ICC Relationship*, EJIL: TALK! (Oct. 28, 2013) (observing that the AU has made an "effort ... to delicately balance between 'sending a firm message to [the] ICC/UNSC' and continu[ing] to engage [the] ICC"), <https://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/#more-9684>.

<sup>66</sup> AU, Withdrawal Strategy Document, Draft 2, ¶¶ 29-30 (Jan. 12, 2017), [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan.\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf).

<sup>67</sup> Assembly of the African Union, Decision on the International Criminal Court, Assembly/AU/Dec.622(XXVIII) (Jan. 30-31, 2017), [https://au.int/sites/default/files/decisions/32520-sc19553\\_e\\_original\\_-\\_assembly\\_decisions\\_621-641\\_-\\_xxviii.pdf](https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf); AU Withdrawal Strategy Document, *supra* note 66, at ¶¶ 29-38.

<sup>68</sup> ICC, Burundi (noting that Burundi withdrew from the ICC effective Oct. 27, 2017), <https://www.icc-cpi.int/burundi>.

<sup>69</sup> Specifically, the ICC does not have jurisdiction over the crimes of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources. See Rome Statute of the ICC, *supra* note 8, art. 5.



The jurisdiction of the ICC and the expanded African Court varies in several other important ways. First, the ICC does not have jurisdiction over crimes committed by corporations, and therefore there can be no competing obligations with respect to any cases against corporations brought before the African Court. The temporal jurisdiction of the two courts varies. The ICC has jurisdiction with respect to crimes committed after its protocol went into effect in 2002, or, for States that ratified the Rome Statute after it went into effect, on the date that the Statute took effect for that particular State. By contrast, the Malabo Protocol has not yet taken effect and, because it has only prospective, not retrospective, effect,<sup>70</sup> it will have jurisdiction with respect only to crimes that take place after it enters into force. Even if the Malabo Protocol were to receive the requisite 15 ratifications in 2018, it would not have jurisdiction over any crimes prior to 2018. The Malabo Protocol therefore will not affect any of the investigations or cases currently before the ICC concerning crimes already committed since the expanded African Court will not have jurisdiction over any crimes committed before 2018, at the earliest. The following table highlights the similarities, and differences, in the jurisdictions of the two courts.

Jurisdiction	International Criminal Court	International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights
Crimes	Genocide War Crimes Crimes against humanity The Crime of Aggression	Genocide War Crimes Crimes against humanity The Crime of Aggression

<sup>70</sup> Malabo Protocol, *supra* note 1, art. 11.

		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
<b>Perpetrators</b>	Natural persons	Natural and legal persons, including corporations but excluding States
<b>Temporal</b>	Crimes committed after July 2002 <sup>71</sup>	Crimes committed after the Malabo Protocol enters into force (2018, at the earliest)

For all of the above reasons, the concern about overlapping jurisdictions<sup>72</sup> has been overblown. Even where the African Court and the ICC have overlapping jurisdictions—i.e., on the core international crimes of genocide, crimes against humanity, war crimes, and aggression committed after the Malabo Protocol enters into force—the risk of competing obligations is low. Many of the cases before the ICC concern situations that were self-referred by the States in question.<sup>73</sup> Such States can avoid competing obligations by referring situations to only one, and not both, courts. Thus, the only way a State could be subject to competing obligations would be if, despite the situation already being under review by one court, (1) the AU or UN Security Council nonetheless referred the situation to the African Court or ICC, respectively, or (2) the prosecutor of the African Court or ICC initiated an investigation *proprio motu*. Both, however, are unlikely for the reasons that follow.

First, although the Rome Statute would not require the ICC to defer to investigations by the African Court, it is highly likely that it would do so. The prosecutor’s office of the ICC has explicitly stated that where investigations or prosecutions against particular persons have been conducted or are ongoing, the prosecutor will not select that case for further investigation and prosecution.<sup>74</sup> Although the prosecutor’s office was referring to investigations or prosecutions by national authorities, there is no reason why such a policy would not also be applied to investigations or prosecutions by the African Court. As the prosecutor’s office has observed, it “can only address

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<sup>71</sup> For States that ratified the Rome Statute of the ICC after it entered into force, the temporal jurisdiction of the ICC typically begins on the date that the Statute took effect for that particular State.

<sup>72</sup> See, e.g., Max du Plessis, *A case of negative complementarity?*, *Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes*, EJIL: TALK! (Aug. 27, 2012), <https://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>.

<sup>73</sup> See ICC, Situations under investigation (listing 5 situations that were self-referred), <https://www.icc-cpi.int/pages/situations.aspx#>.

<sup>74</sup> ICC, Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, ¶ 31 (Sept. 15, 2016), [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf).



a handful of cases” due to limited human and financial resources.<sup>75</sup> It would not make sense for the prosecutor’s office to focus its limited resources on cases that are already being investigated or prosecuted before another body. If the ICC’s prosecutor were to open a *proprio motu* investigation of the same crimes, he or she would almost certainly focus on different perpetrators.

In addition, the ICC’s prosecutor could defer to investigations or prosecutions before the African Court under the “interests of justice” provision in the Rome Statute.<sup>76</sup> Under this provision, the prosecutor of the ICC should decline to initiate an investigation where there are “substantial reasons to believe that an investigation would not serve the interests of justice.”<sup>77</sup> In light of the ICC’s limited resources, it is plainly contrary to the interests of justice to focus on one perpetrator who is already being held to account where that would mean the court could not take on the case of a different perpetrator who is not being investigated or prosecuted by any court, leaving his or her victims without any recourse.<sup>78</sup>

These same provisions would apply to any referral by the UN Security Council. Although the ICC’s prosecutor might feel obligated to commence an investigation, the prosecutor would still maintain discretion over which individuals to investigate and prosecute. As a result, the prosecutor would almost certainly limit such investigations and prosecutions to individuals not under investigation by the African Court to avoid the duplication of efforts and resources described above.

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<sup>75</sup> ICC, Office of the Prosecutor, Strategic Plan 2016-2018, ¶ 96 (July 6, 2015), [https://www.icc-cpi.int/iccdocs/otp/070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf); see also Manirakiza, *supra* note 21, at 384.

<sup>76</sup> Rome Statute of the ICC, *supra* note 8, art. 53(1)(c).

<sup>77</sup> *Id.*

<sup>78</sup> See *id.* (requiring the prosecutor to take into account the interests of victims).

**(e) The peace and justice sequencing approach could, however, increase the likelihood that prosecutions will proceed before the ICC rather than the African Court**

ICC deference to the African Court would only be likely, however, with respect to situations or individuals that are under active investigation or prosecution by the African Court. There is therefore a risk that the peace and justice sequencing approach of the AU, which may delay prosecutions in favor of broader transitional justice initiatives and peace negotiations, could provide an opening for the ICC to proceed first, thereby monopolizing international criminal prosecutions in Africa. Worse, where such prosecutions are commenced *proprio motu* or based on a referral by the UN Security Council, ICC proceedings may “‘crowd out’ alternative ways of dealing with political violence,” including those mechanisms most preferred by the affected communities.<sup>79</sup>

Because many, though not all, of the African situations before the ICC were self-referred, one way that African countries can reduce, though not eliminate this risk, is to refrain from referring cases to either court until they are ready to pursue prosecutions. Due to limited resources, the ICC prosecutor’s office does not have the ability to commence *proprio motu* investigations into all potential situations. If, nonetheless, the ICC prosecutor commences a *proprio motu* investigation into a particular situation or receives a referral from the UN Security Council, one strategy to suspend the ICC case would be for the country involved to make an immediate referral to the African Court. As the AU’s Transitional Justice Policy acknowledges, limited mechanisms for criminal accountability, such as preliminary investigations, are often possible during negotiations for peace.<sup>80</sup> The African Court could therefore begin its investigations, thereby providing a basis for the ICC prosecutor to defer investigations, as explained in the preceding section.

**(f) There is no risk of an individual being tried before both the ICC and the African Court for the same conduct, and the risk of multiple prosecutions for different crimes can be minimized**

In addition, although the ICC’s complementarity provisions apply only to “States” and not to regional courts, like the African Court,<sup>81</sup> there is no risk of double prosecutions by the ICC and the African Court of the same person for the same conduct. Both the Malabo Protocol and the Rome Statute have explicit provisions prohibiting a person from being tried twice for the same conduct.<sup>82</sup> Moreover, both provisions apply to trials before *any* court, not merely national courts or courts of AU member states.<sup>83</sup> As such, any case tried before the African Court would become ineligible for prosecution before the ICC and vice versa, provided that the two cases concerned the same person and same conduct (rather than different crimes) and the prosecuting court had been assured adequate independence and impartiality.

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<sup>79</sup> Solomon A. Dersso, *supra* note 44, at 67.

<sup>80</sup> AU, Draft Transitional Justice Policy, ¶ 23 (on file with the author).

<sup>81</sup> Rome Statute of the ICC, *supra* note 8, art. 17.

<sup>82</sup> Malabo Protocol, *supra* note 1, annex art. 22 (adding art. 46I); Rome Statute of the ICC, *supra* note 8, art. 20(3).

<sup>83</sup> Malabo Protocol, *supra* note 1, annex art. 22 (adding art. 46I); Rome Statute of the ICC, *supra* note 8, art. 20(3).

The ICC has had little opportunity thus far to interpret the *ne bis in idem* provision in article 20 of the Rome Statute. Nonetheless, relevant principles can be adduced from the ICC's interpretation of similar provisions in articles 17 through 19. Under those articles, the ICC has focused on whether the charges before the ICC concern "substantially the same conduct" for which the individual was already under investigation.<sup>84</sup> The charges need not be identical, so long as the crimes that would come before the ICC were encompassed by or could be taken into account by the other court in either the prosecution or sentencing phase of the case.<sup>85</sup> For example, in the *Al-Senussi* case, the ICC held that charges for the international crime of persecution were inadmissible because the domestic Libyan courts were already prosecuting Al-Senussi for domestic crimes of civil war, stirring up hatred between the classes, and assault on the political rights of citizens, among others.<sup>86</sup> Although these crimes were not identical to persecution, they arose out of the same context and the elements of persecution could be taken into account in the sentencing phase of the domestic case.<sup>87</sup> By contrast, in *Lubanga*, the ICC held that the accused could be prosecuted before the ICC for conscripting, enlisting and using child soldiers because the domestic charges pending against him in the Democratic Republic of the Congo concerned completely different crimes, namely genocide and crimes against humanity.<sup>88</sup> Although these cases were not decided under article 20, similar reasoning suggests that the ICC would be barred under article 20 from prosecuting any person for a crime that was substantially the same as one already prosecuted before another court, even if the two crimes were not identical.

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<sup>84</sup> Prosecutor v. Muthaura et al., Case No. ICC-01/09-02/11, International Criminal Court, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," ¶¶ 1, 39 (Aug. 30, 2011), [https://www.icc-cpi.int/CourtRecords/CR2011\\_13819.PDF](https://www.icc-cpi.int/CourtRecords/CR2011_13819.PDF); Prosecutor v. Saif Al-Islam Gaddafi et al., Case No. ICC-01/11-01/11, International Criminal Court, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi," ¶ 63 (May 21, 2014), [https://www.icc-cpi.int/CourtRecords/CR2014\\_04273.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_04273.PDF).

<sup>85</sup> Prosecutor v. Saif Al-Islam Gaddafi et al., Case No. ICC-01/11-01/11, International Criminal Court, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi," ¶¶ 119-122 (July 24, 2014), [https://www.icc-cpi.int/CourtRecords/CR2014\\_06755.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_06755.PDF).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Lubanga* Arrest Warrant Decision, *supra* note 12, at ¶¶ 33, 37-40.