

THE PROPOSED INTERNATIONAL CRIMINAL JURISDICTION FOR THE AFRICAN COURT: SOME PROBLEMATIC ASPECTS

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1. Introduction
2. The international criminal jurisdiction of the African Court
 - 2.1 Conferring the African Court with international criminal jurisdiction
 - 2.2 The International Criminal Law Chamber of the African Court
 - 2.2.1 General matters
 - 2.2.2 The scope of crimes covered: too much too soon?
3. Some challenges to the prosecution of international crimes in Africa
 - 3.1 Possible non-adoption or ratification of the Draft Protocol
 - 3.1.1 Source of a treaty: UN or non-African treaties
 - 3.1.2 Subject-matter of a treaty
 - 3.1.3 Treaties that ‘threaten’ the sovereignty of African states
 - 3.1.4 *Raison d’être* of a treaty: the case of ‘protest treaties’
 - 3.2 The AU Assembly *versus* the Office of the Prosecutor of the African Court
 - 3.3 The admissibility criteria of the African Court: a court of ‘last resort’ or a ‘court of first recourse’?
4. Can an unratified protocol be amended?
5. The ICC and the African Court: the case for cooperation
6. Conclusion

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Abstract

This article discusses some problems arising from the proposed conferral of international criminal jurisdiction on the African Court of Justice and Human Rights. While it is uncertain whether the AU will ever adopt the Draft Protocol amending the Statute of the Court, it is worthwhile examining certain provisions of the Protocol which, in addition to the myriad political hurdles that will militate against the adoption and/or entry into force of the Protocol, will most likely prevent the Court from exercising that jurisdiction. The article concludes that the future of international criminal justice in Africa lies not in the duplication of international criminal justice systems, but in the AU ensuring that its member states take the prevention and domestic prosecution of international crimes more seriously, and in the ICC improving its modus operandi vis-à-vis its member states.

1. INTRODUCTION

The rancour between the African Union (AU) and the International Criminal Court (ICC),¹ apparently warranted by the latter's issuance of arrest warrants against sitting African heads of state and senior government officials,² induced the AU to take several 'retaliatory' measures against the ICC, culminating in its conferring international criminal jurisdiction on its court. In 2010, the AU instigated a process aimed at empowering its court to prosecute international crimes committed by Africans in Africa. In May 2012, the African Ministers for Justice and Attorneys General adopted the Draft Protocol on Amendments to the Protocol on the Statute

1. C. Kreß, 'The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case', 7 *Journal of International Criminal Justice (JICJ)* (2009) p. 297; P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 7 *JICJ* (2009) p. 312; T. Ginsburg, 'The Clash of Commitments at the International Criminal Court', 9 *Chi. JIL* (2009) p. 499; A.T. Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide', 6 *JICJ* (2008) p. 829; R. Pati, 'The ICC and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option?', 15 *University of California at Davis Journal of International Law and Policy* (2009) p. 265; D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 7 *JICJ* (2009) p. 333; S. Oola, 'Bashir and the ICC: The Aura or Audition of International Justice in Africa?', in Oxford Transitional Justice Research, *Debating International Justice in Africa: OTJR Collected Essays, 2008-2010* (Oxford 2010) pp. 63-65, available at <www.fljs.org/uploads/documents/Justice_in_Africa.pdf>; D. Akande, 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?', in *ibid.*, pp. 87-89.

2. *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11. On 22 November 2011, Pre-Trial Chamber I formally terminated the case against Muammar Gaddafi due to his death. See Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, *Gaddafi* (ICC-01/09-01/11), Pre-Trial Chamber I, 22 November 2011, available at <www.icc-cpi.int/iccdocs/doc/doc1274559.pdf>.

of the African Court of Justice and Human Rights (hereafter, the Draft Protocol), which extended the jurisdiction of the African Court to international crimes.³

The summit of the Assembly of African Heads of State, which was held in January 2013, did not adopt the Draft Protocol. However, it recommended that the AU Commission should further consider the meaning of ‘popular uprisings’, which is excluded from the jurisdiction *ratione materiae* of the Court, and ascertain who has the authority to determine the legitimacy of such. The Assembly also asked the Commission to report on the financial and structural implications of extending the Court’s jurisdiction to international crimes.

It would be recalled that, at the height of expectation in 2012 that the AU Assembly summit of July 2012 would adopt the Draft Protocol, following the instrument’s endorsement by African Ministers for Justice two months earlier, the Assembly had requested the AU Commission to seek a definition of the crime of Unconstitutional Change of Government (UCG), and also to consider the financial and structural implications of the expansion of the Court’s jurisdiction. The crime of UCG, as enshrined in the African Charter on Democracy, Election and Governance (ACDEG),⁴ and the amended Statute of the African Court of Justice and Human Rights, include not only situations whereby military juntas overthrow democratically elected governments, but also – and arguably to the chagrin of many African leaders – instances in which incumbent governments refuse to relinquish powers after suffering electoral defeats, or where such governments extend their terms of office through unlawful constitutional amendments.⁵

At the time of writing, it is impossible to speculate whether the AU will adopt the Draft Protocol amending the Court’s Statute and extending the Court’s jurisdiction to international crimes. Nonetheless, several questions arise, assuming that the AU Assembly adopts the Protocol in the future, whether the instrument has any real prospect of being ratified and, should that feat be achieved, whether the African Court can effectively prosecute international crimes.

For a start, the scope of crimes covered by the Statute seems rather unwieldy, and makes one wonder if the AU, in its bid to retain international criminal jurisdiction for its Court, has not bitten off for that Court more than it can chew. And it is no less worrisome that the amended Statute invests the Court with jurisdiction over civil and criminal matters. Such a development is not only a rarity in the international legal system, but it is also one that, in the particular context of Africa, could spell an early end for the international criminal jurisdiction of the Court.

In the second section, we consider the international criminal jurisdiction of the African Court. While the Court’s Statute incorporates such orthodox international crimes as war crimes, crimes against humanity and genocide, it also contains such unaccustomed, arguably ‘international’ crimes as mercenarism, money laundering,

3. EX.CL/773(XXII), Executive Council, Twenty-Second Ordinary Session, 21-25 January 2013, Addis Ababa, Ethiopia.

4. See <www.ipu.org/idd-E/afr_charter.pdf> (visited on 11 February 2013).

5. Art. 23(4), (5), ACDEG.

and corruption, among others. A discussion of the inclusion of the latter crimes in the Court's jurisdiction is crucial to an evaluation of the chances of the Court's ability to prosecute international crimes. However, given the constant mutation of the African regional court, it is apposite to prelude a discussion of the Court's jurisdiction with a determination of *which* of the numerous African courts in existence is entrusted with prosecuting international crimes.

The third section discusses some cogent political and legal constraints on the projected effectiveness of the African Court. Although many constraints are worthy of attention, we focus mainly on problems associated with the ratification of the Draft Protocol, the inclusion of unaccustomed crimes in the Court's jurisdiction, the admissibility rules of the Court, the relations of the AU Assembly with the Office of the Prosecutor of the African Court, and the legality of amending a protocol (of the African Court) which is yet to enter into force by another protocol.

2. THE INTERNATIONAL CRIMINAL JURISDICTION OF THE AFRICAN COURT

2.1 **Conferring the African Court with international criminal jurisdiction**

At the time of writing, three regional courts 'exist' in Africa, all of which are at different stages of evolution. The African Court of Human and Peoples' Rights (ACHPR), the first of the three courts, was established by a similarly named protocol adopted by the Organization of African Unity (OAU) in 1998.⁶ The Protocol entered into force on 25 January 2004 and mandated the ACPHR to 'complement the protective mandate'⁷ of the African Commission on Human and Peoples' Rights (AfcemHPR) by issuing binding decisions and ordering specific remedies.⁸ Two things to note about this Court: first, it was established *before* the 2001 adoption of the Constitutive Act that established the AU, and secondly, its jurisdiction was mainly on human rights issues, not on general socio-political matters.

Article 18 of the AU Act, adopted in 2001, envisages a distinct court for the Union – the African Court of Justice (ACJ), which was then established in 2003 by the Protocol of the Court of Justice of the AU.⁹ Two immediate observations are also apt here: first, the AU Act establishes the ACJ without making any reference whatsoever to the ACHPR established by the 1998 Protocol. Secondly, Article 18 makes no reference to human rights; the jurisdiction of the ACJ is

6. 7 *African YIL* (1999) p. 419.

7. Art. 2.

8. See G.M. Wachira, *African Court on Human and Peoples' Rights: Ten Years On and Still No Justice* (Minority Rights Groups International 2008), available at <www.unhcr.org/refworld/pdfid/48e4763c2.pdf>.

9. See <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4937ee0e2&page=search> (visited 11 February 2013).

mainly over such general matters as inter-state disputes. Thus, by the time of the formal inception of the AU in 2002, only two regional courts existed in Africa: one established under a 1998 Protocol with jurisdiction over human rights (ACHPR), the other established under the AU Act with jurisdiction not including human rights (ACJ). Up to this point, however, both courts only existed on paper: neither instrument had been ratified.

The ACHPR Protocol entered into force in 2004 and became functional in 2008 when its judges were finally elected at the Eighth Ordinary Session of the Executive Council of the African Union. The Court's seat was set up in Arusha, Tanzania. The ACHPR delivered its first judgement on 15 December 2009, finding an application against Senegal inadmissible.¹⁰ The ACJ, on the other hand, remains non-existent until this day, although its Protocol entered into force in 2009. This was due to the fact that when the ACHPR Protocol entered into force in 2004, the AU Assembly had already begun discussing a possible merger of the two courts. The 'merger discussions' considerably slowed down the pace of ratifications of the ACJ Protocol.

On 1 July 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights.¹¹ This Protocol effectively merged the ACHPR and ACJ for reasons which we are not here concerned with.¹² The merged court is now known as the African Court of Justice and Human Rights (the African Court). Thus, instead of the pre-existing two courts with two different jurisdictions, the 'Merger Protocol' established a single court with two different jurisdictions organized under the human rights Section and the general affairs Section of that Court (Art. 16 Statute of the African Court). So far, only three States Parties have ratified the Protocol, meaning that the merged court has not entered into force.

Despite the fact that the Protocol establishing the merged court has not entered into force, the AU members proposed granting jurisdiction over international crimes to the merged court. This effectively means that the new court has, by virtue of the Protocol on the Amendments of the Statute of the Court, three jurisdictions, namely human rights, general affairs, and international crimes. Although the merged court will exercise these three jurisdictions through its three chambers, it will, in this incarnation, effectively become a new court (the fourth African experiment) containing three jurisdictions (instead of the two of the original merged court), a fact that is likely to warrant a change in name as well. In reality, however, only one court will exist, the African Court of Justice and Human and Peoples' Rights, which will exercise three types of jurisdiction. This is the court established by the new protocol, amending a protocol that has not entered into force.

10. Afr. C. Hum & Peoples' Rts., *Michelot Yogogombaye v. The Republic of Senegal*, Communication No. 001/2008, Judgment, 30 July 2010.

11. Assembly/AU/Dec.83(V) (2005).

12. See African Court Coalition, 'About the African Court' (2012), available at <www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=16&Itemid=22&lang=en>.

2.2 The International Criminal Law Chamber of the African Court

2.2.1 *General matters*

Article 1 of the Draft Protocol refers to the Court, which is conferred with international criminal jurisdiction, as ‘the African Court of Justice and Human and Peoples’ Rights’.¹³ This clarification is important given that Article 2 of the ‘Merger Protocol’ applied to the Court a nomenclature that dispensed with the word ‘people’, therefore creating the erroneous impression that the merged Court deals *only* with ‘human’ rights. The inclusion of ‘peoples’ rights’ is one of the remarkable features of the African Charter on Human and Peoples’ Rights, which forms the basis of the human rights jurisdiction of the Court.

Despite correcting this inaccuracy, Article 1 of the Draft Protocol contains its own anomaly: in describing the Court as a ‘Court of Justice and Human and Peoples’ Rights’ the provision obviates the international criminal jurisdiction of the Court. Ideally, the Court’s new appellation should be ‘the African Court of Justice, Human and Peoples’ Rights and International Crimes’. Obviously, this will be something of a mouthful, but shortening it as it currently appears in the Statute of the Court does not do justice to the real nature of the Court.

Article 3 of the new Protocol confers the ‘African Court’

‘with original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provision of the Statute annexed hereto’.

Article 16 of the Statute of the Court, which previously referred to the ‘Structure of the Court’, has now been amended to read ‘Sections of the Court’, and provides that

- ‘(1) The Court shall have three (3) Sections: A General Affairs Section, a Human and Peoples’ Rights Section and an International Criminal Law Section;
- (2) The International Criminal Law Section of the Court shall have three (3) Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.
- (3) The allocation of judges to the respective Sections and Chambers shall be determined by the Court in its Rules.’

2.2.2 *The scope of crimes covered: too much too soon?*

Article 17(3) of the Statute invests the international criminal law Section of the African Court with the competence ‘to hear all cases relating to the crimes specified in this Statute’. The crimes covered by the Statute are listed in the new Article 28(a) as: genocide, crimes against humanity, the crime of unconstitutional change of government; piracy, terrorism, mercenarism, corruption, money laun-

13. See also Art. 8 of the Draft Protocol. Emphasis added.

dering, trafficking in persons, trafficking in drugs, illicit exploitation of natural resources, the crime of aggression, and inchoate offences. The international criminal jurisdiction of the African Court covers fourteen discrete crimes and a cohort of inchoate ones subsumed under Article 28(2) of the Statute.

As noted above, several of these crimes are within the purview of international crimes recognized under general international law and treaty law. The inclusion of many unaccustomed crimes, such as money laundering, corruption, mercenarism, the illicit exploitation of natural resources, *inter alia*, in the jurisdiction of the African Court no doubt underscores the weight that many African states attach to these crimes, but it also raises important questions as to the feasibility of the Court ever prosecuting many such crimes. In so far as the Rome Statute makes no provision for such crimes as enumerated above, the ICC cannot prosecute their occurrences in Africa. The acquisition of jurisdiction by the African Court over such unorthodox 'international' crimes, it is submitted, addresses the gap between the jurisdictional reach of the ICC and the occurrence in many African States Parties to the Rome Statute of many admittedly less familiar but ubiquitous and devastating crimes afflicting them.

While there is no questioning that corruption has a debilitating impact on the economies and people of Africa, it is certainly overly ambitious to elevate the vice to the level of an international crime.¹⁴ At the time of writing, the African Union Convention against Corruption has been ratified by only 31 African states, nearly ten years after it was adopted. Even then, only a handful of those states – so far ten, to be more specific – have implemented some of the most basic provisions of the Convention within their domestic laws.¹⁵ We must distinguish corruption from illegal transnational financial flows, such as money laundering, an offence which we may concede is serious enough to merit international criminal jurisdiction.

14. The AU's fight against corruption dates back to the period of the OAU under which numerous declarations and frameworks against corruption were adopted. In addition to legal instruments, the AU established such august bodies as the New Partnership for Africa's Development (NEPAD) principally to ensure good governance in Africa by taking measures towards ending corruption. In the preamble to its Convention on Preventing and Combating Corruption (2003), the AU recalls, among other things, 'resolution AHG-Dec 126(XXXIV) adopted by the Thirty-fourth Ordinary Session of the Assembly of Heads of State and Government in June 1998 in Ouagadougou, Burkina Faso, requesting the Secretary General to convene, in cooperation with the African Commission on Human and Peoples' Rights, a high level meeting of experts to consider ways and means of removing obstacles to the enjoyment of economic, social and cultural rights, including the fight against corruption and impunity and propose appropriate legislative and other measures; [further recalling] the decision of the 37th ordinary session of the Assembly of Heads of State and Government of the OAU held in Lusaka, Zambia, in July 2001 as well as the Declaration adopted by the first session of the Assembly of the Union held in Durban, South Africa in July 2002, relating to the New Partnership for Africa's Development (NEPAD) which calls for the setting up of a coordinated mechanism to combat corruption effectively'. See <www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf> (visited 18 February 2013).

15. See the *Third Report of the African Union Advisory Board on Corruption* (2012), on file with the author.

Mercenarism is a crime on the fringe of domestic and international law. To the extent that mercenaries could originate both from within and outside of the country of their activity, they can be regarded as amorphous entities whose shadowy existence may prove intractable to domestic legislation alone. Nonetheless, it is difficult to see how the activities of people paid to fight in foreign countries engenders international criminal prosecution any more than hiring contract killers to assassinate political opponents abroad. In both cases, unless there is complicity by the national governments of the culprits – in which case the law of state responsibility will apply – prosecution should be undertaken under the national laws of the affected states on the basis of, at least, the territorial principle.¹⁶

The legitimacy of the inclusion of irreverent or unaccustomed crimes in the jurisdiction of the African Court is probably unassailable, especially given their non-coverage by the Rome Statute; this does not imply, invariably, that *all* such crimes are, in fact, ‘international’ and ‘serious’ enough to warrant international prosecution. To qualify as a crime for prosecution by an international tribunal, it is important that the crime concerned is recognized as ‘international’ and ‘serious’ enough by customary international law for the majority of the states designating it as such and/or is a subject of a treaty in force for those states. The twin criteria of ‘international’ and ‘seriousness’ are *sine qua non* to establishing jurisdiction over international crime since, international criminal tribunals are, by very their nature, only reserved for the most serious international crimes.

The ACDEG, which was adopted in 2003 and entered into force in February 2012, is an example of a crime that meets these criteria. The acts constituting unconstitutional changes of government, listed under Article 23 of the ACDEG (military *coup d'états*, the rigging of elections, and so on) have, for a long time, been practices which have been consistently rejected by the majority of African states, as evidenced by myriad treaties and declarations adopted over several decades to outlaw them. The ACDEG is therefore merely a codification of what had become a quintessential custom in Africa: the rejection of UCG.¹⁷

16. See M. Curtis, ‘International Law and the Territories’, 32 *Harv. ILJ* (1991) p. 457; J. Gottmann, ‘The Evolution of the Concept of Territory’, 14 *Social Science Information* (1975) p. 29.

17. There is a long history of the evolution of the AU’s outlawing UCG. The fight against UCG began in the time of the OAU. The OAU adopted several declarations and instruments and set up specific bodies for the purpose of ridding Africa of UCG. The genealogy of UCG is embodied by many paragraphs of the preamble to the ACDEG adopted in 2003 and which entered into force in February 2012. According to the preamble, the Member States of the AU are desirous ‘to enhance the relevant Declarations and Decisions of the OAU/AU (including the 1990 Declaration on the political and socio-economic situation in Africa and the fundamental changes taking place in the world, the 1995 Cairo Agenda for the Re-launch of Africa’s Economic and Social Development, the 1999 Algiers Declaration on Unconstitutional Changes of Government, the 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government, the 2002 OAU/AU Declaration on Principles Governing Democratic Elections in Africa, the 2003 Protocol Relating to the Establishment of the Peace and Security Council of the African Union); [and committed] to implementing Decision EX.CL/Dec.31(III) adopted in Maputo, Mozambique, in July 2003 and Decision EX.CL/124(V) adopted in Addis Ababa, Ethiopia, in May 2004 respectively, by the adoption of an African Charter on Democracy, Elections and Governance; [and committed] to

The African Convention on the Conservation of Nature and Natural Resources, although it was adopted in 2003, has not yet entered into force. Without the entry into force of that Convention there can be only a tenuous basis for regarding the *illicit exploitation of natural resources* as an international crime that the African Court can prosecute. However, where the prosecution of an international crime that has been proscribed by a treaty *that is in force* is left to the conclusion of a specific protocol, the non-conclusion or non-entry into force of the protocol does not undermine the ‘international’ status or the ‘seriousness’ of that crime. Whereas one of the most serious international crimes in Africa today is terrorism, criminalized by the OAU Convention on the Prevention and Combating of Terrorism (which entered into force in 2002, just three years after its adoption), the Protocol to implement that Convention, adopted in 2004, is yet to enter into force.

The determination of whether a crime is ‘serious’ enough for the purpose of international criminal prosecution is a tricky one, and there are no foolproof guidelines for calibrating crimes under international law. For the UN, ‘seriousness’ is often measured by ‘graveness’ but not describing a crime as ‘grave’ is not necessarily fatal. While the 1977 OAU Convention for the Elimination of Mercenarism, which entered into force in 1985, regards mercenarism as a serious crime (especially in the context of the decolonization of Africa), the 1977 Additional Protocol 1 to the Geneva Conventions does not consider the acts of mercenaries as ‘grave breaches’ of international law despite the fact that the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries considers mercenarism as an offence (Art. 2).

The inclusion of aggression in the jurisdiction of the African Court, over which the ICC will now be able to exercise jurisdiction subject to the conditions laid down at the ICC Review Conference in 2010, raises even more pernicious problems.¹⁸ The determination of the crime of aggression is a political act currently exclusively reserved to the UN Security Council given that it is a crime that directly threatens international peace and security.¹⁹ Setting up this crime, therefore, for adjudication by the African Court raises some pertinent questions about the compatibility of that provision with the UN Charter. This issue of compatibility arises because of the obligation incurred by AU member states, like all other UN member states, regarding ‘aggression’, which forms part of the ‘international peace and security’ continuum under the UN Charter. Every State Party to the UN Charter accepts the primary (though not exclusive) responsibility of the Security

implementing Decision EX.CL/Dec.31(III) adopted in Maputo, Mozambique, in July 2003 and Decision EX.CL/124(V) adopted in Addis Ababa, Ethiopia, in May 2004 respectively, by the adoption of an African Charter on Democracy, Elections and Governance ...’. See <www.ipu.org/idd-E/afr_charter.pdf> (visited 18 February 2013).

18. See The Crime of Aggression, Assembly of State Parties to the Rome Statute, Review Conference of the Rome Statute 13th Plenary Meeting, RC/Res.6 (2010); Report of the Working Group on the Crime of Aggression, Assembly of State Parties to the Rome Statute, Review Conference of the Rome Statute Official Records, RC/11 Annex III (2010).

19. UN Charter, Art. 39.

Council for the maintenance of international peace and security.²⁰ Whenever the Council acts in this regard, it does so on behalf of all UN member states, which, under Article 25 of the Charter, undertake to carry out decisions of the Security Council.

While the AU is not precluded from empowering its Court from adjudicating on aggression, the determination of whether that crime has occurred in any given situation rests with the Security Council. While it is still too early to predict how the judicial ascertainment of aggression by the African Court and the ICC will play out *vis-à-vis* the Security Council's political determination of that crime, the Security Council has powers to oust either court in that regard. Concerning an ICC, the Security Council can always suspend the Court's process under Article 16 of the Rome Statute. With regard to the African Court, however, given that the Draft Protocol does not give the Security Council any power whatsoever over the Court's processes, the Security Council can only invoke Chapter VII of the UN Charter to overrule the new African Court. And should an AU member state want to file a complaint against another state alleging aggression before the African Court, there may be a conflict between its rights and obligations under the Protocol and its obligation under the UN Charter, in which case, by virtue of Article 103 of the Charter, the obligation of the Charter prevails.

One remarkable provision in the Draft Protocol encourages the international criminal jurisdiction of the African Court to evolve in *tandem* with developments in international law. Article 28(A)(2) provides that:

'The Assembly may extend upon consensus of the States Parties the jurisdiction of the Court to incorporate additional crimes to reflect the developments of international law.'

This provision is extremely useful, especially in light of the prevalence of certain crimes which affect many African countries but which are not internationally justiciable. But the provision may also serve as an inspiration to the authors of the Rome Statute whose trite jurisdictional scope obdurately sidesteps developments in international law to such a degree that crimes like UCG, affecting the majority of its 33 African States Parties, have not received even the flimsiest attention.²¹

One of the most serious problems that the ICC is likely to confront – and which may eventually undermine adherence to the Rome Statute, especially among the African States Parties – is the disconnect between the crimes over which the Court exercises jurisdiction and those over which it does not but which, in any case, continue to be prevalent among its member states. War crimes, crimes against humanity, genocide and aggression are serious international crimes, but they are classical crimes committed far less frequently than ubiquitous and ongoing crimes like piracy, the trafficking of children and women, internet scams, toxic and haz-

20. UN Charter, Art. 24(1).

21. For a discussion of a more subtle power hijack by failed military coupists, see E. Ghersi, 'South America's New-Style Military Coup', *Christian Science Monitor*, 19 June 2003, available at <www.csmonitor.com/2003/0619/p11s02-coop.html>.

ardous material dumping, to mention but a few transnational crimes affecting many African states and desperately begging for the attention of international criminal jurisdiction.

3. SOME CHALLENGES TO THE PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA

In order for the African Court to exercise international criminal jurisdiction, the new Protocol must first be adopted and ratified by fifteen states²² and, secondly, the many legal hurdles contained in the Protocol must be overcome. We now turn to consider some of these challenges.

3.1 Possible non-adoption or ratification of the Draft Protocol

Prior to the conferral of international criminal jurisdiction on the African Court, only three states had ratified the Merger Protocol. African states are notoriously quick to adopt treaties, but excruciatingly slow to ratify them.²³ International relations and international legal scholars have proffered several theories, such as rationalism,²⁴ constructivism,²⁵ and liberalism,²⁶ to explain why states may or may

22. Art. 11 of the Protocol.

23. For an acknowledgement of this problem by the AU, see the Report of Meeting of Experts on the Review of the Organisation of African Unity/African Union (OAU/AU) Treaties held from 18 to 20 May 2004, in Addis Ababa, Ethiopia, OAU/AU Treaties/Exp-PRC/Rpt(I) Rev. 1.

24. On rationalism generally, see R.O. Keohane, 'Realism, Neorealism, and the Study of World Politics', in R.O. Keohane, ed., *Neorealism and its Critics* (New York, Columbia University Press 1986) p. 1; J. Jupille, J.A. Caporaso and J.T. Checkwel, 'Integrating Institutions: Rationalism, Constructivism, and the Study of the European', 36 *Comparative Political Studies* (2003) p. 7; M. Oakeshott, *Rationalism in Politics and Other Essays*, expanded edn. (Liberty Fund 1991); J. Goldsmith III and E.A. Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective', 31 *J Legal Stud.* (2002) p. 115; R. Goodman and D. Jinks, 'How to Influence States: Socialization and International Human Rights', 54 *Duke LJ* (2004) p. 634; L. Boisson de Chazournes and W.M. Reisman, 'The Costs and Benefits of Economic Sanctions: The Bottom Line', 89 *ASIL* (1995) p. 337.

25. On constructivism, towards which most legal scholars find attraction, see A. Hurrell, 'Norms and Ethics in International Relations', in W. Carlsnaes, et al., eds., *Handbook of International Relations* (London, Sage Publications Ltd. 2002) p. 137 at p. 144; J. Fearon and A. Wendt, 'Rationalism v. Constructivism: A Skeptical View', in *ibid.*, p. 25.

26. See especially M.W. Doyle, 'Liberalism and World Politics', 80 *American Political Science Rev.* (1986) p. 1151; A.-M. Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) p. 503; A.-M. Slaughter, *A New World Order* (Princeton, NJ, Princeton University Press 2004); D. Schleicher, 'Liberal International Law Theory and the United Nations in Kosovo: Ideas and Practice', 14 *Tulane Journal of International and Comparative Law* (2005) p. 179; B.A. Simmons, F. Dobbin and G. Garrett, 'The International Diffusion of Liberalism: Introduction', 60 *International Organization* (2006) p. 781; M.J. Sandel, *Liberalism and the Limits of Justice*, 2nd edn. (Cambridge Cambridge University Press 1998).

not ratify treaties,²⁷ but such generic theories do not explain African states' peculiar behaviour towards treaty ratification. Factors that may influence the rate of the ratification of treaties by African states include the source of a given treaty, the subject-matter of the treaty, and the perception that a treaty threatens sovereignty, a resonant concern for African states.

3.1.1 *Source of a treaty: UN or non-African treaties*

The practice of African states over the past three decades reveals that treaties that emanate from the UN stand a better chance of ratification than those from Africa, even where the treaties address the same issue and even if the African treaty is adopted first. The African Union Convention on Preventing and Combating Corruption (AUCPCC) was adopted in 2003 and entered into force on 5 August 2006.²⁸ So far, the total number of ratifications stands at 33 or roughly 60% of the total AU membership, nine years after the adoption of the Convention.²⁹ In comparison, the United Nations Convention against Corruption (UNCAC) was adopted on 31 October 2003, that is, three months after the adoption of the AUCPCC, and entered into force on 14 December 2005, eight months before the AU Convention entered into force. At the time of writing, 48 AU member states have ratified the UNCAC as opposed to 33 that have ratified the AUCPCC,³⁰ meaning fifteen more AU states have ratified the UN Convention. Even for those states that have ratified both the UN and the AU Conventions, the time lapse between their signing and ratifying the two treaties clearly shows that most African states have ratified the UN Convention more rapidly. Sometimes the difference between the time when an African state ratifies a UN treaty and when it ratifies a similar AU treaty could be as long as four to five years.³¹

The United Nations Convention on the Rights of the Child, adopted on 20 November 1989 and entered into force on 2 September 1990, just ten months after

27. For an application of rationalism, constructivism and liberalism in the context of treaty ratification, see in particular, U. Oberdörster, 'Why Ratify? Lessons from Treaty Ratifications Campaigns', 61 *Vanderbilt L Rev.* (2008) p. 681; E. Hencken, 'Explaining the Adoption of International Human Rights Treaties', paper presented at the annual meeting of the International Studies Association, San Diego, CA, 2008, available at <www.allacademic.com/meta/p99402_index.html>; O.A. Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *Yale LJ* (2002) p. 1935; R.H. McAdams, 'The origin, Development, and Regulation of Norms', 96 *Mich. L Rev.* (1997) p. 338.

28. African Convention Adopted in Maputo, Mozambique on 11 July 2003, available at <www.au.int/en/content/african-union-convention-preventing-and-combating-corruption> (visited on 21 May 2012).

29. Decision on the Draft Convention on the Prevention and Combating of Corruption, Assembly of the African Union, 2nd Ordinary Session, Assembly/AU/Dec. 27(II) (2003). Convention text available at <www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf>.

30. See List of Countries, which have signed, ratified/acceded to the AUCPCC, available at <www.au.int/en/sites/default/files/corruption.pdf>.

31. See the table of analysis on file with the author.

its adoption, is one of the most successful treaties of all time.³² All African states except Somalia and the Sahrawi Arab Republic are parties to the Convention. However, the African Charter on the Rights and Welfare of the Child, adopted on 11 July 1990,³³ entered into force on 29 November 1999, more than nine years after its adoption. While the total time lapse between the adoption and ratification of the UN Child Convention by African states stands at a record 286 days, the figure for the AU Convention stands at a whopping 3,428 days.³⁴

There are a myriad of reasons behind African states' preference for ratifying UN conventions, in comparison with those adopted by African organizations, and it is unnecessary to explore that theme here. But if the discussed pattern of treaty ratification by African states serves as a guide, then it is logical to expect that the fact that the Draft Protocol emanates from the AU may affect the possibility and pace of its ratification by those states.

3.1.2 *Subject-matter of a treaty*

Generally speaking, a state is more likely to quickly ratify a treaty if the treaty embodies a positive norm or represents a value subscribed to by many states.³⁵ One of the main reasons why the UN Convention on the Rights of Child is so widely ratified is because issues concerning children resonate with a vast majority of states.³⁶ Prosecuting international crimes encapsulates the aspiration of many African states and should, *ipso facto*, inspire a quick and wide ratification of the new Protocol if adopted. However, the fact that the Protocol criminalizes corruption and unconstitutional changes of government, offences whose prosecution African leaders are unlikely to enthusiastically embrace, will probably affect their disposition towards the new Protocol.

During its July 2012 summit, the AU Assembly of AU heads of state referred the Draft Protocol to the AU Commission for elaboration on the definition of 'unconstitutional change of government' as well as to advise on the financial implication of the expansion of the Court's jurisdiction. The Commission was to report its findings to the political organ of the AU for consideration at the January 2013 summit. The Commission dealt with the matter at an expert meeting dedicated

32. Convention on the Rights of the Child, New York, 20 November 1989, 1577 *UNTS* p. 3; 28 *ILM* (1989) p. 1448, entered into force 2 September 1990.

33. African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

34. See the table of analysis on file with author.

35. See the 'Constructivism' literature above. On how ideas become norms (through 'socialization') that influence states in their behaviour, see especially H.H. Koh, 'Internalization Through Socialization', 54 *Duke LJ* (2005) p. 975.

36. See in particular, O.A. Hathaway, 'Between Power and Principles: An Integrated Theory of International Law', 72 *University of Chicago L Rev.* (2005) p. 469, arguing that a state ratifies a treaty partly because of its commitment to the norms or ideas that it embodies.

to the issues in December 19-20 in Tanzania.³⁷ The group advised that there was no need to alter the crime of ‘unconstitutional change of government’ as it presently stands in the amended Statute of the Court and the ACDEG.³⁸ While the January 2013 AU Assembly did not explicitly reject this recommendation, it requested the commission to ‘conduct a more thorough reflection, in collaboration with the Peace and Security Council on the issue of popular uprising in all its dimensions, and on the appropriate mechanism capable of deciding the legitimacy of such an uprising’.³⁹

The issue of ‘popular uprising’ it should be recalled, was left unresolved by the May 2012 meeting of the African Ministers of Justice and Attorneys General which endorsed the Draft Protocol.⁴⁰ The particular provision of the Draft Protocol amending the Statute of the Court states that ‘[a]ny act of a sovereign people peacefully exercising their inherent right which results in a change of government shall not constitute an offence under this Article’.⁴¹ The December 2012 AU expert meeting that considered defining ‘the crime of unconstitutional change’, as requested by the July 2012 AU Assembly, proposed replacing this provision with ‘where the Peace and Security Council of the African Union determines that the change of government through popular uprising is not an unconstitutional change of government, the Court shall not be seized of the matter’. Impliedly, whereas military *coup d’états*, the overthrow of governments by rebels, the refusal of incumbent governments to relinquish power after electoral defeats, and the prolongation of incumbent governments’ stay in office through unlawful constitutional amendments constitute unconstitutional changes of governments, and are subject to the Court’s jurisdiction, the overthrow of governments by ‘popular uprisings’ can only be tried by the Court if the Peace and Security Council (PSC) determines that such uprisings are not legitimate.

It may be that in determining whether a particular popular uprising is or is not an UCG the PSC will most likely come down on the side of the beleaguered government, but the AU Assembly is clearly not keen on taking that risk. Certainly, the PSC is an organ of the AU, just as the Assembly of Heads of State is, and it is fair to say that both often speak from the same side of the mouth on most issues. However, expecting that the PSC will always swing in the direction the Assembly wags it, especially in such highly sensitive matters as the legitimacy of a people’s uprising, ignores the independence of that organ as the body responsible for peace

37. See Report on the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implication, AfCHPR/LEGAL/Doc. 3, EX.CL/773(XXII) Annex 1, 19-20 December 2012; Executive Council Twenty-Second Ordinary Session, 21-25 January 2013.

38. *Ibid.*, at p. 4.

39. Decision on the Draft Protocol of the African Court of Justice and Human Rights, Doc. PRC/Rpt(XXV), EX.CL/Dec.766(XXII), p. 1.

40. Executive Council, Twenty-First Ordinary Session, 9-12 July 2012, EX.CL/(731/XXI), Exp/Min/IV/Rev.7, p. 24.

41. Art. 28(e).

and security within the AU system. It is therefore not difficult to see why the AU Assembly feels uncomfortable with excluding ‘popular uprisings’ from the Court’s automatic jurisdiction and subjecting it to the predilections of the PSC, and, why, in the final analysis, this issue adds to the many reasons that may dissuade the Assembly from adopting the Protocol.

None of the AU Assembly summits that have taken place since the endorsement of the Draft Protocol by the African Ministers of Justice and Attorneys General in May 2012 has spoken against the inclusion of the crime of corruption in the Court’s jurisdiction, despite this crime being one that many African governments will most likely run foul of. But this silence should not be taken as signifying approval. It may be that the Assembly is just being careful not to shoot itself in the foot over a crime it is certain may never be prosecuted against any of its members, either because of the impracticality of proving a crime of corruption against a head of state in an African regional court or due to the non-ratification of the AU Corruption Convention or the Draft Protocol criminalizing it. It may very well be that the Assembly is mindful of the terrible publicity an open challenge to the inclusion of corruption in the Court’s international criminal jurisdiction, or its request for the clarification of the definition of the offence adopted by the Protocol, would attract.

3.1.3 *Treaties that ‘threaten’ the sovereignty of African states*

In a sense, every treaty undermines the political sovereignty of a state insofar as every State Party to a treaty relinquishes part of its sovereign authority for the collective good of the treaty. African states have repeatedly claimed that the Rome Statute violates their sovereignty because it authorizes the prosecution of African leaders in The Hague. Yet, the prosecution of international crimes by the ICC, regardless of the culprit’s status, is at the heart of the obligations States Parties assume under the ICC treaty. The African states’ claim that the Rome Statute undermines their sovereignty flies in the face of their voluntary submission to that treaty, and their acceptance of the obligation to yield indicted nationals to the ICC, if they are unable or unwilling to investigate or prosecute such individuals themselves.

Nonetheless, African states will most likely refuse to ratify a protocol that empowers *an African* court to prosecute *African* leaders, notwithstanding that the protocol emanated from their own organization. It would make the AU vulnerable to accusations of hypocrisy if it rejected the Rome Statute on the basis that it violates the sovereignty of its member states and then allows *an African* regional court to prosecute the same leaders. The Protocol establishing the African Court of Human and Peoples’ Rights underwent a long period of gestation precisely because it deals with human rights issues that most African states, at least until relatively recently, considered to be within the exclusive purview of their national sovereignty.

From the perspective of sovereignty, the Draft Protocol has a very low probability of ratification and, if ratified, the Court’s international criminal jurisdiction,

especially as regards prosecuting African heads of state and senior government officials, will most likely be dead on arrival. Despite the undeniable progress made in Africa in the last few years towards increasing the accountability of government officials and the development of a more robust culture of human rights protection, many African states still do not consider it a necessary feature of democracy that presidents and prime ministers be subjected to the *same* courts whose judges are appointed by those heads of state and who, in most cases, are beneficiaries of the state. The networks of paternalism and cronyism run wide and deep in Africa and engulf the majority of African states. It is not uncommon for members of the judiciary, be it at the national or continental level, to regard themselves as mere handmaids of the state or the organization that appoints and funds them.

3.1.4 Raison d'être of a treaty: the case of 'protest treaties'

One class of treaties that always enjoys tremendous support from African states and undergoes a very short gestation period is protest treaties. A protest treaty is a treaty that is adopted as a response to a real or perceived iniquity, unjustness or unfairness, espoused or believed to be espoused by a pre-existing treaty. Protest treaties are mostly statement making and grandstanding. They are treaties fuelled by momentary passion rather than a thorough appreciation and genuine desire for legislation. The Draft Protocol is one such treaty. But here lies the bane of all protest treaties: they wither away as soon as the currency of emotions that fuels them thaws. That is not to say that such a treaty may never be ratified. The ratification of the African Charter on Human and Peoples' Rights, conceived as a response to the International Covenant on Civil and Political Rights, is a perfect example of the occasional success at that stage, but it does take a disproportionately enormous time lapse before they enter into force. The pace of the ratification of protest treaties hardly matches their meteoric drafting and adoption processes.

3.2 The AU Assembly *versus* the Office of the Prosecutor of the African Court

The ability of the international criminal law Section of the African Court to function effectively depends principally on the independence enjoyed by the Office of the Prosecutor in the discharge of its duties. As a matter of law, Article 22(6) of the Draft Protocol guarantees that independence, but the provision governing the appointment of the prosecutor is quite worrisome. According to Article 22(2), '[t]he Prosecutor and Deputy Prosecutors shall be elected by the Assembly from amongst candidates who shall be nationals of States Parties nominated by States Parties'.

Operationalizing this provision implies that, aside from the prosecutor's ability to bring situations to the Court through its *pro prio motu* power (Art. 46(1)), except as may otherwise be impermissible under the Statute, the prosecutor shall be free from political influences of the organs of the AU, the Union's member states, and

any such political entities within or outside of Africa. Guaranteeing the independence of the Office of the Prosecutor is of particular significance in a continent where states are notorious for often holding the judiciary hostage to the executive arm of government.

Unfortunately, the prospect of an independent prosecutor for the African Court is dimmed not only by predicating its appointment on the most political of the AU organs, but also by subjugating the overall functioning of the Office of the Prosecutor to the Assembly: '[t]he remuneration and conditions of service of the Prosecutor and Deputy Prosecutors shall be determined by the Assembly on the recommendation of the Court made through the Executive Council'.⁴² While the caveat that the Assembly seeks the 'recommendation of the Court' in setting the conditions of service of the prosecutor seems reassuring, the mode of composing the Court itself is not free of the Assembly's control. Article 5 of the Statute of the Court invites the Chairperson of the AU Commission to establish three alphabetical lists of potential candidates for the judiciary, denominated into 'A', 'B', 'C' categories by whether the proposed candidates are competent in international law, international human rights law, and international criminal law, respectively.⁴³ After a rather disconcerting exercise in which States Parties to the AU then select the lists on which they wish their candidates to appear, the AU Commission shall pass the three lists to the AU member states, at least within thirty days to the ordinary sessions of the Assembly or the Executive Council of the Union, which shall then elect the judges.

One wonders if the fact that the African Court was created by an already existing organization (the AU) left the Union with no other choice than conferring its Assembly with the responsibility for appointing and servicing the Court's judges and prosecutor, a task that might perhaps have been left to the Assembly of States Parties had the Court been established by a group of states acting individually. While there may be some truth in this assumption, the rather innovative and more assuring approach taken by a similarly set up Caribbean Court of Justice (CCJ)⁴⁴ undermines such a viewpoint.

The CCJ is the only other international tribunal known to combine civil and international criminal jurisdictions, although it needs to be emphasized that the latter is available only at the appellate stage and by special leave of the Court.⁴⁵ Aside from combining civil and criminal jurisdictions, the CCJ can also be compared to the African Court in its having been established by an existing

42. Art. 22(A)(10) of the Draft Protocol.

43. Art. 4(1) Statute of the Court, replacing the previous list in Art. 6.

44. Established by an agreement signed at St. Michael, Barbados on the 14th day of February 2001, available at <www.caribbeancourtsofjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf> (visited 20 January 2013).

45. Art. XXV(4), stating 'Subject to paragraph 2, an appeal shall lie to the Court with the special leave of the Court from any decision of the Court of Appeal of a Contracting Party in any civil or criminal matter.'

organization, the Caribbean Community (CARICOM).⁴⁶ However, unlike as with the African Court, judges of the Caribbean Court are elected by the Regional Judicial and Legal Services Commission (RJLSC) set up under Article V (1) of the CCJ Agreement,⁴⁷ and the Court is composed of members from diverse sectors.⁴⁸ The RJLSC is also responsible for determining the conditions of service of the judges and the remuneration of judges (other than the President of the Court).⁴⁹ More importantly, the RJLSC is tasked with the termination of the judges' appointments.⁵⁰ The provision of Article 5 of the Statute of the African Court is silent on who may terminate the appointments of the prosecutor and the judges, but there can be no doubt that the responsibility for such an august task rests with the AU Assembly.

3.3 The admissibility criteria of the African Court: a court of 'last resort' or a 'court of first recourse'?

Founding treaties of international criminal tribunals often perform a balancing act between such courts and national courts of States Parties by ordering relations in a manner that entitle the latter to exercise jurisdiction over a case before retention by the former. The principle of complementarity, which usually embodies this relationship, is recognized by Article 46(h) of the Draft Protocol of the African Court, just like Article 17 of the Rome Statute of the ICC. The underlining rationale, aside from deferring to the sovereignty of a state, is to ensure that international tribunals remain essentially courts of 'last resort'. Article 17 of the Rome Statute states that a case shall be inadmissible by the ICC except where, *inter alia*, the decision of a state that has jurisdiction is based on a 'unwillingness or inability ... to genuinely prosecute'. Article 46(2)(b) of the Draft Protocol reflects this sentiment by providing for inadmissibility except where – and this is where there is a problem – 'the decision resulted from the unwillingness or inability of the State to (genuinely) prosecute'.⁵¹ The omission of the word 'genuinely' in the Draft Protocol's version has the disastrous implication of lowering the evidential standard of 'inability to prosecute' required before African states can refer a case to the Court. African states could easily exploit this lacuna to turn the Court into a clearinghouse for crimes otherwise prosecutable by their courts. Insofar as only evidence of an 'inability to prosecute', and not evidence of an 'inability to *genuinely* prosecute' is required under Article 46(2)(b), the Court should expect the floodgates to be opened by opportunistic states which will effectively turn the Court into a court of 'first recourse', not of 'last resort'.

46. See the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, 4 July 1973, available at <www.caricom.org/jsp/community/revised_treaty-text.pdf> (visited on 25 January 2013).

47. Art. V(3)(1).

48. Art. V(1)(a-g).

49. Art. V(3)(1)(b and c).

50. Art. V(3)(1)(d).

51. Emphasis added.

Article 46(1) also requires, in addition to the failure of AU member states to investigate or prosecute a crime, that the Court of Regional Economic Communities (RECs) should also have failed to do so: '[t]he 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'. It is only after this double failure that the situation can be referred to the African Court. The problem here is that there is a great overlap in states' membership of RECs in Africa. The majority of the Economic Community of West African States (ECOWAS) states are members of the Libya-based Community of Sahel-Saharan States (CENSAD), while several members of the Common Market for Eastern and Southern Africa (COMESA) are also members of the Southern African Development Community (SADC). In a scenario in which the national state of a criminal holds membership of many RECs, it will be difficult to determine the REC whose court should be considered for the purpose of fulfilling the admissibility criteria of the African Court.

4. CAN AN UNRATIFIED PROTOCOL BE AMENDED?

The Draft Protocol, which is the subject of this commentary, purports to amend the Protocol on the Statute of the African Court of Justice, Human and Peoples' Rights, that is, the 2008 Protocol that merged the African Court of Human and Peoples' Rights (established by a 1998 Protocol), and the ACJ (established by the 2003 Protocol pursuant to Art. 18 of the AU Act) into a single court. As noted above, this 'Merger Protocol' had not entered into force as at the time when the latest Protocol, which amended the Statute of the Court to cover international crimes, was proposed. Even at the time of writing, only three AU states have ratified that protocol.⁵² The question then arises: 'Can a protocol which has not been ratified be amended?'⁵³

Amendments are permissible only to international legal instruments that have already entered into force. This is due to the fact that amendments are warranted by the operationalization of a treaty – and, therefore, are reflections of parties to the instrument – and serve to reduce, increase, expedite or slow down the obligations of those parties therein. It is unnecessary, however, that, for them to be binding, amendments to already ratified treaties must be accepted or ratified by all State Parties to a treaty. Instances abound, for instance, where states accept unratified amendments to treaties. These so-called 'tacit amendments' or 'unrati-

52. Burkina Faso, Libya, and Mali. See <www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87%3Aratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7%3AAfrican-union&Itemid=12&lang=en> (visited 11 February 2013).

53. See C.A Bradley, 'Unratified Treaty Amendments and Constitutional Process', available at <web.law.duke.edu/publiclaw/pdf/workshop06sp/bradley.pdf> (visited 11 February 2013).

fied treaty amendments' differ to 'amending unratified treaties', with which we are concerned, in that whereas the former refers to amendments to already ratified treaties – only that the amendments are not ratified before they enter into force for States Parties,⁵⁴ 'amending unratified treaties' denotes the attempt to amend a treaty which, in itself, has not entered into force.

The problems with the AU proposing amendments to a protocol that has not entered into force are myriad and lie beyond the scope of this endeavour. For one thing, there is the danger of states that have already ratified that treaty reneging. In context, since three AU member states have already ratified the Merger Protocol, amending it before it has entered into force may provide those states with an opportunity to withdraw their consent. This is more so since the AU did not consult its member states before proposing the amendments, and as such, did not gauge their disposition to the attribution of international criminal jurisdiction to the Court. Furthermore, several legal complexities will arise concerning how to deal with the obligations of AU members under the Protocol, which has not entered into force, and how to deal with the purported amending of these obligations by another protocol containing radically disparate ideas.

Thus, even if the AU Assembly adopts the Draft Protocol, it cannot be taken for granted that the Union will have an easy ride in tackling the legal complexities attendant to arguably an unprecedented attempt to amend an unratified treaty.

5. THE ICC AND THE AFRICAN COURT: THE CASE FOR COOPERATION

One question that one cannot fail to ask, notwithstanding the present uncertainty about the fate of the Draft Protocol, is: Should the Protocol amending the Statute of the African Court enter into force, what relationship should this Court have with the ICC? Should both courts establish formal means of institutionally collaborating or should they each carry on their functions relating to each other informally, and/or only whenever opportunities afford? While this is not the place to fully deal with this theme, it is imperative to spare some thoughts on why cooperation between the two courts is not only important, but is also indispensable to the health of international criminal justice.

The level of acrimony that currently exists between the AU and the ICC, following the referral of sitting African heads of state and senior government officials to the ICC is abnormal, and such can only be perpetuated if and when the African

54. See O.A. Hathaway, et al., 'Tacit Amendments', 15 November 2011, available at <www.law.yale.edu/documents/pdf/cgic/TacitAmendments.pdf> (visited 12 February 2013) (stating that '[h]owever, numerous treaties have established procedures for modifications to the regime that do not rise to the level of formal amendments to the treaty. This report focuses on such "unratified treaty amendments" – which include what are called "tacit amendments"', at p. 2.

Court's international criminal prosecution becomes operational, at a serious cost to international criminal justice. The ultimate aim of any international criminal tribunal, wherever it sits, is to dispense international criminal justice. Despite its vociferous campaign against what it rightly or wrongly perceives as the ICC's prejudice against Africa, the AU has consistently claimed that its problem is not with the ICC but with its former prosecutor.⁵⁵ If we accept this claim on its face value – and there are no apparent reasons to believe otherwise – then what is required is a *modus vivendi* that will produce effective international criminal justice.

Yet, it is startling that there is no single reference to the ICC in the Draft Protocol conferring international criminal jurisdiction on the African Court. Doubtless the AU does not have a legal obligation to reference the ICC in its Draft Protocol, nonetheless, such a move would have, at the very least, gone a long way to demonstrate the Union's good faith and acute awareness that most of the states it expects to ratify the Draft Protocol already owe many obligations to the ICC, and that its own court shall be complementary, not antagonistic towards, or purposelessly duplicatory of, the ICC's efforts.

The case for cooperation between the two courts is made more cogent by the symbiotic relationship between the ICC and Africa. While the ICC practically needs Africa to survive – after all, ten years after its Statute entered into force, all its cases originate from Africa⁵⁶ – Africa, in turn, needs the ICC to guarantee its people that they will no longer suffer the dastardly situation of heinous crimes without redress, and that they will be protected from mass murderers and *genocidaires*, whether of the common warlord and other criminal perpetrators, or of the caliber of heads of state entrusted with protecting the security of their people. The AU was the first regional organization to formally include the same heinous

55. F. Chothia, 'Africa's Fatou Bensouda is New ICC Chief Prosecutor', *BBC News Africa*, 12 December 2011, available at <www.bbc.co.uk/news/world-africa-16029121> in which the Chairperson of the AU Commission, Jean Ping, states that: 'Frankly speaking, we are not against the ICC. What we are against is Ocampo's justice.'

56. *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Case No. ICC-02/04-01/05; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06; *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui Germain Katanga, also known as 'Simba'*, Case No. ICC-01/04-01/07; *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10; *The Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Case No. ICC-02/05-01/07; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09; *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09; *The Prosecutor v. Abdel Raheem Muhammad Hussein*, Case No. ICC-02/05-01/12; CAR situation: *The Prosecutor v. Jean-Pierre Bemba Bongo*, Case No. ICC-01/05-01/08; Kenya situation: *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11; Libya Situation: *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11; Cote d'Ivoire: *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11.

crimes prohibited by the Rome Statute⁵⁷ in its constitutive Act.⁵⁸ To date, Africa constitutes the largest regional bloc of ICC membership, supplying 33 State Parties to the Court's overall 121 members,⁵⁹ with at least six of those having already adopted domestic legislation to implement the Rome Statute. An African country, Senegal, was the first state to ratify the Rome Statute.⁶⁰ It was in an African country, Uganda, that the first review conference of the ICC took place, and all the trigger mechanisms for ICC jurisdiction have been fulfilled in Africa. It was in Africa that the first case to launch the ICC on its historical mission, doubling, too, as the first 'self-referral' of a situation by a state to the ICC had originated, even without a determination that Uganda, the state in question, had been 'unwilling' or 'unable' to try the case, as the complementarity principle governing admissibility before the Court requires.

Thus, if an African Court, endowed with international criminal jurisdiction, would not cooperate, or have an amicable relationship with the ICC, the consequences of this for the latter, at least from the perspective of its retaining Africa's interest in its works, will be devastating.

However, in pondering a relationship between the African Court and the ICC, it needs to be emphasized that there is no legal obligation on one court to defer to the other, or that, as between the two courts a case of hierarchy can be made. Let it be noted: the relationship advocated between the ICC and the African Court does not, and cannot arise from any legal obligation imposed on one court to submit to the other, but from the mutuality of the interest of both institutions in dispensing the *ultima ratio* of their existence: international criminal justice. The Rome Statute, which established the ICC, is not binding on the AU as an entity, although it binds its individual member states that are parties to the Statute. As such, the African Court, established by the AU, owes neither its existence nor its validity to the ICC Statute, nor does it owe any obligation to the Court, either under its Statute or general international law. In so far as each court is established by its own constitutive instrument, it is an independent entity and could operate

57. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, 17 July 1998, Vol. I), UN Doc. A/CONF. 183/13 (1998), entered into force 1 July 2002, Arts. 5-8 (prohibiting war crimes, crimes against humanity, and genocide). On African participation and engagement in the process that led to the evolution of the ICC, see generally, P. Mochochoko, 'Africa and the International Criminal Court', in E.A. Ankumah and E.K. Kwakwa, eds., *African Perspectives on International Criminal Justice* (Maastricht, African Legal Aids 2005) p. 246; see also S. Maqungo, 'The Establishment of the International Criminal Court: SADC's Participation in the Negotiations', 9 *African Security Rev.* (2000) p. 42, available at <www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html>.

58. Constitutive Act of the African Union, Lomé, 11 July 2000, 2158 *UNTS* (2000) p. 3, entered into force 26 May 2001, Art. 4(h).

59. Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 *UNTS* p. 3 (1998), entered into force 1 July 2002; for a visual breakdown by regional bloc, see International Criminal Court (ICC), 'Assembly of States Parties: African States', available at <www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> (visited 12 February 2013).

60. Senegal ratified on 2 February 1999. See Rome Statute, *supra* n. 59.

completely independently of any other entity if it so decides. Consequently, assertions that the Rome Statute does not permit the creation of regional courts, such as the African Court, is not only a fundamentally flawed appreciation of international law, but also a fatalistic attempt to create a hierarchy in the ranks of international criminal tribunals.⁶¹

6. CONCLUSION

There is nothing inherently wrong in any region of the world establishing a court with jurisdiction to prosecute international crimes. Arguments that the Rome Statute does not permit the creation of such regional courts, or that such regional courts are illegal under the Rome Statute, as some have contended, are *non sequitur*. The Rome Statute is just another multilateral treaty, even if it admittedly established the most important international criminal court for the world. But that fact, in itself, does not constitute the ICC into a promontory judicial institution outlawing all other similar bodies. The Rome Statute cannot fetter the right of states to establish similar courts in their regions: and that privilege is not owed to the pleasure of the Rome Statute.

The AU is not a party to the Rome Statute and, therefore, does not require the blessing of the ICC in order to confer its own court with similar jurisdiction as the ICC exercises. There is no provision in the Statute that forbids member states from establishing courts of similar jurisdiction in their regions. The fact that the Rome Statute does not cover such crimes as corruption, unconstitutional changes of governments, mercenarism and so on, which affect the majority of African states, is perhaps the strongest case in favour of the prosecution of international crimes by the African Court. The fact also that there is no rule of international law, be it under international treaty law or customary international law, that forbids the existence of multiple institutions concerned with the same purposes and objectives is another. Insofar as no provision of the Draft Protocol of the African Court potentially violates whatever preemptory obligations contained in the Rome Statute, the conclusion of the Draft Protocol by African states that are parties to the Rome Statute does not breach the provision of Article 53 of the Vienna Convention on the Law of Treaties concerning preemptory norms.

That said, the problems contained in the Draft Protocol, and those extraneous to it as discussed above, make it highly unlikely that the African Court will be in a position to effectively prosecute international crimes even if the Protocol is adopted and enters into force. It is also doubtful whether African states *genuinely* desire the African Court to prosecute international crimes. This is not merely because of convincing evidence that Africa's desire to prosecute international crimes in its own Court is more motivated by its opposition to the prosecution of

61. C.B. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *JICJ* (2011) p. 1067 at p. 1073.

its leaders by foreign courts than by any real concern about peace and stability, but also because of the antecedents of the majority of these states. True, there has been a positive shift in African leaders' attitude towards human rights protection and impunity, but translating this into concrete support for a tribunal that might prosecute African leaders will be a mammoth challenge.

The fact that some of the crimes proscribed by the Statute of the African Court meet the criteria of 'international' and 'seriousness' does not mean, *ipso facto*, that the Court will prosecute them. It remains to be seen whether the African Court can prosecute *successful* unconstitutional changes of government in its member states. Doubtless the ACDEG is not retroactive – hence incumbent African heads of states who ascended to power through such proscribed means are currently unaffected – and we would expect some such leaders to run foul of the convention at a later stage. Incidents of the manipulation of constitutions, a refusal to yield political powers to the opposition after losing in elections, and an unconstitutional prolongation of remaining in power, which concerned Zimbabwe, Kenya, and Uganda, peaked before the ACDEG entered into force, and while the Draft Protocol remained unadopted. The Court will have the opportunity to prove itself *only* when such violations arise in the post-ACDEG, post-entry-into-force of the Draft Protocol.

The July 2013 AU Assembly Summit's referral of the Draft Protocol to the AU Commission for an assessment of the financial implications of expanding the Court's jurisdiction, and also for considering 'popular uprising' is a further indication that all may indeed not augur well for the prosecution of some crimes contained in the Statute of the African Court. The fact also that while being still unsure about the fate of the Draft Protocol, the AU Assembly, at its January 2013 summit, sanctioned a preliminary investigation into a possible establishment of an international constitutional court in Africa does not seem to inspire confidence in the seriousness of the Assembly about the matter at hand. With the 'to be, or not to be' question surrounding the African Court's international criminal jurisdiction one would have thought that the Assembly has enough problems in its hands without the complications of yet another court.

Without the specific constraints discussed in this article, it is difficult for one to be persuaded that African leaders will find the necessary political will to empower the African Court and allow its prosecutor a free reign within the ambit of the law. Until that guarantee can be found, it seems that the best assurance for international criminal justice must remain, for now, in the ICC discharging its responsibility as responsibly and impartially as its constitutive instrument requires of it. Striking a balance between the ICC's desire to prosecute offenders regardless of their office or status, and the AU's determination to ensure the decent and respectable treatment of African leaders by the office of the ICC is vital to the future of international criminal justice.⁶²

62. For a comprehensive account of Moreno Ocampo's errant behaviour, see J. Flint and A. de Waal, 'Case Closed: A Prosecutor Without Borders', *World Affairs Journal* (2009), available at <www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders>.