

THE PROPOSED AFRICAN CRIMINAL CHAMBER: AN EFFECTIVE TOOL TO END IMPUNITY ON AFRICAN SOIL? ¹

LA PROPUESTA DE UNA SECCIÓN AFRICANA DE DERECHO INTERNACIONAL PENAL: ¿UNA HERRAMIENTA EFECTIVA PARA ACABAR CON LA IMPUNIDAD EN TERRITORIO AFRICANO?

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Abstract: The African Regional Human Rights System that was established by the 1981 African Charter on Human and Peoples' Rights did not include the creation of a judicial body. It took another seventeen years for the African leaders to agree to establish the African Court on Human and Peoples' Rights. The same year that the Court received its first case the Assembly of the African Union decided to merge the proposed African Court of Justice with the African Court on Human and Peoples' Rights. However, before the Merged Protocol could enter into force, it was amended in order to extend the Court's jurisdiction over serious international crimes. After analysing both the reasons behind the attempt to replace the African Court – largely due to the current hostility between the African Union and the International Criminal Court – and the lights and shadows of the proposed Criminal Chamber of the African Court of Justice and Human and Peoples' Rights, the author maintain that it would be possible to take advantage of all its valuable features and build a 'positive complementarity' between the ICC and the African Criminal Chamber in order to strengthen the legitimacy and effectiveness of both bodies.

Key words: African Criminal Chamber – African Union – ICC - Al Bashir – Malabo Protocol

Resumen: El Sistema Regional Africano de Derechos Humanos, el cual fue establecido bajo la Carta Africana de Derechos Humanos y de los Pueblos (1981), no incluyó la creación de una institución judicial, teniendo que pasar otros diecisiete años para que los líderes africanos acordaran instaurar la Corte Africana de Derechos Humanos y de los Pueblos. El mismo año en el que recibió su primer caso, la Asamblea de la Unión Africana decidió fusionar la Corte de Justicia Africana con la Corte Africana de Derechos Humanos y de los Pueblos. Sin embargo, antes de que el Protocolo refundido entrara en vigor, éste se enmendó para otorgar a la futura Corte competencia sobre crímenes internacionales, dando lugar a una Sección de Derecho Internacional Penal en la misma. Tras analizar los motivos que se esconden detrás de este hecho - en gran parte debido a la existente hostilidad entre la Unión Africana y la Corte Penal Internacional- así como las luces y sombras de la futura Corte Africana, el autor sostiene que sería posible aprovechar sus características innovadoras y construir una 'complementariedad positiva' entre la CPI y la Sección de Derecho Internacional Penal Africana con objeto de fortalecer la legitimidad y eficacia de ambos entes.

Palabras Clave: Cámara Africana de Derecho Internacional Penal- Unión Africana - CPI - Al Bashir - Protocolo de Malabo

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1. Introduction

For centuries, Africa has witnessed egregious and systematic violations of human rights. In an attempt to reverse this unfortunate state of affairs, once the process of decolonization of Africa was completed and following the examples of the European and Inter-American regional human rights system, the Organization for the African Unity (thereafter OAU) adopted in 1981 the African Charter on Human and Peoples' Rights². This treaty institutionalized the regional protection and promotion of human rights in Africa and endeavoured to accommodate universal human rights norms and African cultural values. Moreover, it established the African Commission on Human and Peoples' Rights (thereafter the Commission) in order to oversee its implementation. Since then, other human rights instruments like the 1990 African Charter on the Rights and Welfare of the Child were adopted in order to strengthen the African regional human rights system. However, it was not until after the egregious human rights violations that took place in the African continent in the 1980s and beginning of the 1990s, that African leaders recognized the importance of strengthening the African Human Rights System establishing a judicial body. Having achieved this, things have kept moving slowly. The Protocol of the African Court on Human and Peoples' Rights was adopted in 1998³, entered into force in 2004 and the Court received its first case on August 2008.

The same year that the Court received its first case, the Assembly of the African Union (thereafter AU) decided to merge the proposed African Court of Justice⁴ with the African Court on Human and Peoples' Rights. However, before the Merged Protocol⁵ could enter

² The African Charter on Human and Peoples' Rights (hereafter 'the African Charter') was adopted in 1981 and entered into force in 1986. As of April 2018, 54 countries have ratified the African Charter, available online, <http://www.achpr.org/instruments/achpr/>.

³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, available online, <http://www.achpr.org/instruments/court-establishment/>.

⁴ The Protocol of the Court of Justice of the African Union was adopted on 1 July 2003 and entered into force on 11 February 2009. However, it is not operational and is not expected to ever be due to the 2008 decision of establishing the Merged Court. On this matter see e. g., Konstantinos D. Magliveras and Gino J. Naldi, 'The African Court of Justice' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 66 (2006): 187-213

⁵ The Protocol on the Statute of the African Court of Justice and Human Rights (hereafter Merged Protocol) will enter into force once it has been ratified by fifteen AU Member States. At present only six states, namely Benin, Burkina Faso, Congo, Libya, Liberia and Malawi have taken this step, available online, <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>.

into force, it was amended in order to extend the Court's jurisdiction over serious international crimes⁶.

Below we proceed to analyse the reasons behind the attempt to replace the African Court on Human and Peoples' Rights and the lights and shadows of the proposed Criminal Chamber of the African Court of Justice and Human and Peoples' Rights.

2. Background and jurisdiction of the proposed Criminal Section of the African Court of Justice and Human and Peoples' Rights: Al Bashir and Gaddafi ICC's indictments as the primary motivating force behind its creation.

On February 2009, at the Twelfth Ordinary Session of the Assembly of the African Union, African Heads of State and Government requested the relevant institutions of the African Union to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes⁷. In implementing this mandate, different meetings were held among the AU Commission, the African Court, the Commission, African Ministers of Justice and legal experts. As a result of which, and after four years of preparatory work, in its twenty-fifth ordinary session held on 27 June 2014, the Assembly of the African Union finally adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (thereafter Malabo Protocol)⁸.

⁶ The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereafter Malabo Protocol) will also enter into force once it has been ratified by fifteen AU Member States. However, no Member State has ratified it to date. Available online, https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf.

⁷ Twelfth Ordinary Session of the Assembly of the African Union, Adis Abeba (Ethiopia), Decision on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction doc. Assembly/AU/3(XII), available online, https://au.int/sites/default/files/decisions/9559-assembly_en_13_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf.

⁸ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available online, <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

Therefore, once it becomes operational, the future African Court of Justice and Human and Peoples' Rights will have three sections: 'a General Affairs Section, a Human and Peoples' Rights Section and an International Criminal Law Section'⁹. The Criminal Section, which in turn will be comprised of three chambers (a Pre-Trial, a Trial and an Appellate Chamber¹⁰), would have jurisdiction over fourteen international crimes, including among others, crimes against humanity, genocide, war crimes, crime of aggression, terrorism, mercenarism, corruption, money laundering and trafficking in persons¹¹. Furthermore, its jurisdiction 'would extend to legal persons and natural persons over 18 years, whether African or non-African, but only to crimes committed within the territory of Member States of the AU'¹².

The motivations behind the establishment of an African Criminal Court are quite controversial. According to some authors 'during the drafting of the African Charter on Human and Peoples' Rights in the 1970s, the possibility of including a court with international criminal jurisdiction was already raised'¹³. Likewise, article 4 of the Constitutive Act of the AU, which was adopted back in 2000, refers to the AU obligation of prosecuting international crimes¹⁴. However, the previously mentioned does not refute the fact that, since the indictment of Omar al-Bashir and Muammar Gaddafi by the International Criminal Court¹⁵ (thereafter ICC) and the UNSC's subsequent decline to consider the

⁹ Ibid. Annex, article 16 (1).

¹⁰ Ibid. Annex, article 16 (2). It is also worth mentioning that according to Annex article 4 the African Court of Justice and Human and Peoples' Rights will be composed of 16 judges, while Annex article 16 (3) provides that 'the allocation of Judges to the respective Sections and Chambers shall be determined by the Court in its Rules'.

¹¹ According to Article 28(A) the International Criminal Law Section 'will have power to try persons for the crimes of genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression'.

¹² KPTJ, 'Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court', *Kenya's for Peace With Truth and Justice* 11 (2016): 10

¹³ Ibid. p. 5.

¹⁴ See Gerhard Werle et al., *The African Criminal Court: A Commentary on the Malabo Protocol* (Berlin: Springer, 2016), 16.

¹⁵ The International Criminal Court is defined as 'a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity and war crimes'. Likewise, the Rome Statute, the treaty that established the ICC, was adopted on 17 July 1998 and entered into force on 1 July 2002. See ICC, 'Understanding the International Criminal Court', March 2009, available online, <https://www.icc-cpi.int/NR/rdonlyres/1CFB6062-610E-4430-A5CF-996286BEDE6D/281710/KenyaQAndAWebEng1.pdf>.

African Union's request to defer such proceedings¹⁶, the idea of establishing an African Criminal Court has been embraced more than ever before.

Thus, despite the widespread initial support from African countries and the AU for the establishment of the International Criminal Court, after the ICC issued an arrest warrant against Al Bashir¹⁷ and Gaddafi¹⁸, then sitting Heads of States not parties to the Rome Statute, the situation changed completely. This rift was made worse by the indictment of Uhuru Kenyatta and William Ruto¹⁹ who, in March 2013, respectively became President and Deputy President of Kenya. In fact, it was the Kenyan Government which promoted the strategy recently adopted by the AU calling for mass withdrawal of African states from the ICC²⁰.

According to the current African Union position, the ICC is a 'new mechanism of neo-colonialism' which 'does not apply to the powerful, only the weak – hence the focus on Africa, the new court's "laboratory"²¹. Moreover, it argues that the ICC prioritizes justice

¹⁶ Since the indictment of Omar al-Bashir, the African Union Assembly has been reiterating 'the need to pursue all efforts and explore ways and means of ensuring that the request by the African Union to the United Nations (UN) Security Council to defer the proceedings initiated against African Heads of State and Government, in accordance with Article 16 of the Rome Statute of International Criminal Court (ICC), be acted upon'. See, e. g. Decision on the implementation of the Assembly decisions on the International Criminal Court Doc. ex.cl/670(xix) adopted in Assembly of the African Union Seventeenth Ordinary Session, Malabo (Equatorial Guinea) 30 June-1 July 2011. In this regard, article 16 of the Rome Statute provides that 'no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'.

¹⁷ Two arrest warrants, in 2009 and 2010, have been issued for Al Bashir for war crimes, crimes against humanity and genocide committed in Darfur. See ICC, 'The Prosecutor v. Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09, available online, <https://www.icc-cpi.int/darfur/albashir>.

¹⁸ An arrest warrant was issued on 27 June 2011 for Muammar Gaddafi and his son, Saif Al-Islam Gaddafi, for crimes against humanity committed in 2011 in Libya. Due to Muammar Gaddafi's death, his case was terminated on 22 November 2011, available online, <https://www.icc-cpi.int/libya/gaddafi>. Recently, two more cases have been opened regarding the Libyan situation. See 'Warrant of Arrest for Mahmoud Mustafa Busayf al-Werfalli', Doc. ICC-01/11-01/17, (ICC, 15 August 2017); 'Warrant of Arrest for Al-Tuhamy Mohamed Khaled with under seal and ex parte', Doc. ICC-01/11-01/13-1, (ICC, 18 April 2013).

¹⁹ The charges against Uhuru Kenyatta and William Ruto were withdrawn respectively on 13 March 2015 and 5 April 2016 due to insufficient evidence. ICC, 'Situation in the Republic of Kenya', ICC-01/09, available online, <https://www.icc-cpi.int/kenya>.

²⁰ However, it seems unlikely that such strategy will achieve success. Both South Africa and Gambia revoked their withdrawal at the beginning of 2016. Thus, to date, Burundi is the only and first State to leave the ICC. In this regard, we must not forget that a preliminary investigation was opened in Burundi on 25 April 2016. According to some scholars, the fear of the Burundian Head of State and other state officials of being indicted by the ICC is the main reason behind such withdrawal. On this subject see Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia', *Criminal Law Forum* 6 (2017): 1-57.

²¹ Terence McNamee 'The ICC and Africa: Between Aspiration and Reality: Making International Justice Work Better for Africa', *Brenthurst Foundation Discursion Papers* 2 (2014): 6.

above peace, an argument that could be based on the fact that 'the ICC's indictments have created tensions and aggravated conflicts and humanitarian situations in places such as Uganda and Sudan'²². On the other hand, as far as the issue of immunity is concerned, the AU has expressed that, in order to safeguard the integrity, stability and constitutional order of African countries, heads of state and government should not be prosecuted during their term of office by any International Court or Tribunal²³.

However, as has been noted by a significant number of authors²⁴ these criticisms are to a large extent unfounded. First, it cannot be argued that the ICC imposes a 'white justice', or is a 'neo-colonial institution', since African states have played an important role in the creation of the ICC. For instance, several African delegations participated in the drafting of the Rome Statute²⁵ and Senegal was the first country to ratify it. Likewise, African people hold key positions in the Court. Perhaps the most significant example in this regard is the appointment of the Gambian Fatou Bensouda as ICC's chief prosecutor.

Furthermore, while it is true that before 2016, the year when the ICC decided to open an investigation into the 2008 war in Georgia, all the situations and cases under investigation were in Africa²⁶, the fact remains that five situations – Uganda (2004), Central African Republic (2004 and 2014), Democratic Republic of the Congo (2004) and Mali (2012) – were referred voluntarily to the ICC by the respective Governments²⁷. Moreover, as noted by professor Manisuli Ssenyonjo 'none of the African non-permanent Security Council

²² Lydia A. Nkansah, 'International Criminal Court in the Trenches of Africa', *African Journal of International Criminal Justice* 1 (2017) p. 8-37.

²³ According to the African Union (thereafter AU), 'no international court or tribunal has the capacity to commence or to continue charges against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity'. In the specific case of the ICC, the AU holds that "Article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute, and by referring the situation in Darfur to the ICC, the UN Security Council intended that the Rome Statute would be applicable, including Article 98'. See Assembly of the African Union, Eighteenth Ordinary Session, Addis Ababa (Ethiopia) 29-30 January 2012. Doc. EX.CL/710(XX), available online, https://au.int/sites/default/files/decisions/9649-assembly_au_dec_391_-_415_xviii_e.pdf.

²⁴ See e. g. Jean-Baptiste Jeangène Vilmer 'The African Union and the International Criminal Court: counteracting the crisis' *Journal of International Affairs* 92 no. 6 (2016): 1319–1342.

²⁵ Max Du Plessis, 'The International Criminal Court and its work in Africa', *African Centre for Peace and Security Training* 173 (2008): 4.

²⁶ However, unlike situations under investigation, preliminary investigations were carried out by the Prosecutor before 2016 in non-African States such as Iraq.

²⁷ See, in this regard, article 14 of the Rome Statute.

members voted against the UN Security Council referrals in Darfur and Libya²⁸. In fact, three African countries – South Africa, Nigeria and Gabon – voted in favour of the Libyan referral²⁹.

As regards the issue of immunity, article 27 of the Rome Statute expressly provides that:

(1) This Statute shall apply equally *to all persons without any distinction based on official capacity*. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence³⁰.

(2) *Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person*³¹ (emphasis added).

The crux of the matter concerns the States that have not ratified the Rome Statute and therefore for whom article 27 does not apply. However, in accordance with the existing international law, either on the basis of customary international law³⁰ or on the basis of

²⁸ Charles C. Jalloh et al., *The International Criminal Court and Africa* (Oxford: Oxford University Press, 2017), 223.

²⁹ Although the controversial issue *‘peace v. justice’* lies outside the scope of this report, it would be appropriate to mention Fatou Bensouda’s opinion in this regard, according to whom *‘history has taught us that the peace achieved by ignoring justice has mostly been short-lived, and the cycle of violence has continued unabated [...] justice can have a positive impact on peace and security’* through the *‘shadow of the Court’*. See Philomena Apiko and Faten Aggad, *‘The International Criminal Court, Africa and the African Union: What way forward?’*, *European Centre for Development Policy Management* 201 (2016): 3

³⁰ In this regard, the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Prosecutor v. Anton Furundzija* case held that *‘individuals are personally responsible, whatever their official position, even if they are Heads of State or government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Ruanda [...] are indisputably declaratory of customary international law’*. See *The Prosecutor v. Anton Furundzija*, Case n° IT-95-17/1-T, Judgement, (ICTY, 10 December 1998), para. 140. Likewise, in the well-known *Arrest Warrant* case the ICJ stressed that *‘an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, [...] and the future International Criminal Court’*. See ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, para. 69. Such position have been maintained by the ICC in some of its decisions, arguing that *‘the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court [...] The international community’s commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass and it*

Security Council Resolutions 1593 (2005) and 1970 (2011)³¹³⁰, it is generally recognized by the international law doctrine and jurisprudence that, despite the fact that they were at the time when they were indicted serving Heads of State of non-party States to the Rome Statute, neither Omar al-Bashir nor Muammar Gaddafi enjoyed immunity *ratione materiae* nor *ratione personae* before the ICC.

Notwithstanding the above, it cannot be denied that the power of the UNSC to refer cases to the ICC may compromise -and it is indeed what reflects the Council's current practice- the independence of the International Court, which can be influenced by political considerations. The veto power and the political nature of the Security Council explains why the UNSC decided to refer exclusively the cases of Darfur (Sudan) and Libya and to ignore the crimes committed in similar situations e.g. Afghanistan, Iraq, Palestine or Syria. Furthermore, this political influence is all the more true considering that three of the five permanent members of the Security Council – China, Russia and the USA – have not ratified the Rome Statute. In addition, the ICC Prosecutor tends to focus on the crimes perpetrated by rebels and seems to forget that, in countries such as Uganda, the same crimes have been committed by regime leaders. Finally, it should not be forgotten that there is still room for the ICC, on the basis of the principle of complementarity, to support domestic prosecution encouraging African institutions to solve African problems and therefore

is certainly no longer appropriate to say that customary international law immunity applies in the present context'. See ICC, 'Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir', Doc. ICC-02/05-01/09-139, 12 December 2011, paras. 36 and 42.

³¹ According to a significant number of authors, including D. Akande, P. Gaeta, R. Pedretti and K. Breb, due to the fact that the Court does not have its own police force, it is appropriate to distinguish between two separate but inter-related questions. 'The first question is whether international law immunities of States not party to the Statute of the ICC prevent the latter from exercising its jurisdiction over an incumbent Head of State. Only if this first question is answered in the negative does the second question arise, which is whether such international law of immunities precludes the ICC from requesting a State Party to arrest and surrender a suspect who falls into one the above-listed categories and who is sought by an arrest warrant issued by the Court'. Therefore, the latter would give full meaning to article 98 of the Rome Statute. According to these authors, on the basis of the existing customary international law we can answer affirmatively the first question but no the second one. However, 'the effect of the referral of the situation by the UN Security Council has the consequence that Sudan - or Libya - is bound by the Statute (including by Art. 27). The effect of this would therefore mean that those States are to be regarded as in the same position as a State party to the Rome Statute'. See Claus Kreb, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute' *FICHL Publication Series* no. 15 (2012): 225; Jens Iverson, 'The Continuing Functions of Article 98 of the Rome Statute', *Goettingen Journal of International Law* 4 no. 1 (2012): 131-151; Dapo Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (At long Last) But Gets the Law Wrong', *Ejil Talk*, December 2011. This interpretation has been adopted by the ICC in its recent judgements. See e. g. ICC, 'Prosecution's Notification of Possible Travel in the Case of The Prosecutor v Omar Al Bashir', Doc. ICC-02/05-01/09-185, 25 February 2014, para. 14.

bringing more effective and closer justice to the victims³².

3. Lights and shadows of the Criminal Section of the African Court of Justice and Human and Peoples' Rights

It is indeed in the context of growing hostility toward the ICC described above that the Criminal Chamber of the African Court of Justice and Human and Peoples' Rights has been established. Trying to avoid one-sided and unbalanced views, hereunder we analyse both the lights and shadows of the proposed Court.

Regarding the former, it is noteworthy that the Malabo Protocol foresees the creation of a Victims and Witnesses Unit – which shall form part of the Registry – in order to ensure the respect and protection of victims and witnesses³³ and, thus, avoid what happened for instance in the Kenyatta case before the ICC³⁴. Furthermore, unlike the Rome Statute, the Malabo Protocol provides for the establishment of a Defence Office as an independent organ of the Court which `shall be responsible for protecting the rights of the defence, providing support and assistance to defence counsel and to the persons entitled to legal assistance'³⁵. In this regard, as pointed out by Max Du Plessis:

Defence counsel play a crucial role in all criminal trials to ensure both the fairness of proceedings and the legitimacy of the outcome. [...] For these reasons, the revisions of the ACJHPR that seek to entrench and support the independence and efficacy of defence counsel before that institution are most welcome³⁶.

Another positive aspect of the Malabo Protocol is the fact that, as noted below, the Criminal Chamber will not only have competence over war crimes, crimes against humanity and genocide but also over eleven additional crimes, namely, the crime of unconstitutional

³² Apiko & Aggad, 'The International Criminal Court' (see note 26), 3.

³³ Malabo Protocol (see note 5), Annex, Article 22B (9).

³⁴ See 'The Prosecutor v. Uhuru Muigai Kenyatta', Doc. ICC-01/09-02/11, available online, <https://www.icc-cpi.int/kenya/kenyatta>.

³⁵ Malabo Protocol, (see note 5), Annex, Article 22 C.

³⁶ KPTJ, 'Seeking Justice or Shielding Suspects?' (see note 9), 12.

change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression³⁷. In addition, it is laudable that, taking into account the gross violations of human rights committed by national and international corporations in the African continent, the Court will have jurisdiction over both legal and natural persons³⁸.

As far as the negative aspects are concerned, undoubtedly the most significant criticism of the Malabo Protocol is the content of its article 46Abis, which provides immunity for AU Heads of State and senior state officials³⁹ during their tenure in office. As noted earlier, such provision is contrary to current international law⁴⁰. Furthermore, when it becomes operational, Article 46Abis will trigger a grotesque conflict of obligations for those African States that have already ratified the Rome Statute⁴¹. In the same vein, it is also regrettable that the Malabo Protocol makes no reference to how the relation between the ICC and the African Criminal Court is going to be articulated, and all the more so since both tribunals will have overlapping jurisdictions.

Additionally, as set out above, the Malabo Protocol further increases the existing institutional chaos within the AU. In 2008 the Assembly of the African Union decided to merge the proposed African Court of Justice with the African Court on Human and Peoples'

³⁷ Malabo Protocol (see note 5), Annex, Article 28A.

³⁸ Malabo Protocol (see note 5), Annex, Article 1. Moreover, it is also a positive aspect that trials will take place close to the African people. Thus, as noted by some scholars, 'this has clear benefits for investigations by the prosecution, who will arguably have easier access to evidence and witnesses. [Furthermore] it gives victims and citizens a greater sense of 'ownership' over the trial and would likely facilitate participation and reconciliation'. KPTJ, 'Seeking Justice or Shielding Suspects?', (see note 9), 14.

³⁹ Another additional concern is the vague concept of 'senior state officials' used in article 46Abis.

⁴⁰ It should be noted that even for those authors who defend the existence of two distinct but related conceptual levels – namely, immunity before international criminal courts and immunity before state institutions that arrest a suspect who is sought by an international criminal court – on the basis of current international law, there is a customary international law in regard with the first plane, which excepts the immunity of sitting Heads of State and senior states officials who commit international crimes. *See supra* note 28.

⁴¹ Max Du Plessis, 'Shambolic, Shameful and Symbolic. Implications of the African Union's immunity for African leaders' *Institute for Security Studies* 278 (2014): 13. It should be noted that, taking into account the death of Gaddafi and the withdrawal of charges against Uhuru Kenyatta and William Ruto, the Al Bashir case is the only one on which there are opposing positions between the AU and the ICC. However, in such case it is clear that the ICC position prevails since the referral to the ICC was made by the Security Council under Chapter VII of the UN Charter and thus it is fully applicable article 25 and 103 of the latter instrument. In this regard, see e. g. Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', *Journal of International Criminal Justice* 7 no 2 (2009): 333–352.

Rights, being the latter the only Tribunal which is operational at the moment. However, before the Merged Protocol could enter into force, it was amended by the Malabo Protocol in order to extend the Court's jurisdiction over serious international crimes. In this regard, one of the most problematic issues is what would happen if the Malabo Protocol were to be ratified by 15 AU Member States before the Merged Protocol entered into force.

Furthermore, while it is true that the Court will have jurisdiction over additional crimes, the drafting of the definition of some of them raises serious concerns. Perhaps the most remarkable in this respect is the crime of unconstitutional change of government. As noted by authors such as Gerhard Kemp and Max Du Plessis 'the perverse result of such provisions is that any person peacefully exercising his or her rights, which results in an 'unconstitutional change of government' may be guilty of a crime'⁴². Further, referring to the difficult task to define 'democratically elected government' professor Selemani Kinyunyu questioned the fact that 'in situations such as in current Libya, where the government has repeatedly been accused of being undemocratic, it would be difficult to decide whether or not an overthrow of the government would fit the crime of UCG'⁴³.

The significant additional costs involved is another major concern of establishing a criminal chamber in the African Court of Justice and Human and Peoples' Rights. In this regard, it should be noted that a single international criminal trial would cost an estimated 20 million dollars while in 2016 the total budget for the African Court on Human and Peoples' Rights was 10 million⁴⁴. An insufficient budget not only compromises the court efficiency but also the credibility and fairness of its investigations and the protection of victims and witnesses.

4. Conclusions

⁴² Plessis, "Shambolic, Shameful and Symbolic" (see note 26), 5

⁴³ In this regard, Selemani Kinyunyu pointed out that 'the Protocol stipulates that UCG must be directed against an incumbent elected government. Hence, his view was that a coup against a transitional government would probably not satisfy this element of the crime'. See Selemani H. Adem and Marion Yankson, 'The African Criminal Court: Promoting or Undermining the Prosecution of International Crimes in Africa?' *Symposium at Humboldt-Universität zu Berlin*, June (2015): 569.

⁴⁴ KPTJ, 'Seeking Justice or Shielding Suspects?' (see note 9), 17.

Notwithstanding the aforementioned doubts expressed about the creation of the African Criminal Chamber – particularly with regard to Article 46Abis of the Malabo Protocol which provides immunity for AU Heads of State and senior state officials during their tenure in office –, pursuant to its article 12, the AU Assembly may amend the Malabo Protocol by simple majority upon request by the Court itself or a State Party. Therefore, the criticisms analysed in this article could be solved even before the Protocol enters into force. Thus, it would be possible to take advantage of all its valuable features and build a ‘positive complementarity’ between the ICC and the African Court in order to strengthen the legitimacy and effectiveness of both bodies.

The latter is not as far from being converted into reality as one might think. Recently, during the deliberations within the Working Group on Amendments of the Assembly of States Parties of the Rome Statute (ASP), Kenya – one of the countries that has most sharply criticized the role of the ICC in Africa – announced its intention to ‘propose the amendment of the Rome Statute’s Preamble to ensure that the principle of complementarity sufficiently recognizes regional criminal judicial mechanisms. [Therefore] the ICC would remain a court of last resort allowing judicial proceedings to take place closer to the location where the alleged crimes were committed’⁴⁵⁴⁴.

However, for that to happen the AU must leave behind the current political rhetoric and bear in mind that one of the objectives of the AU as provided in Article 3 of the AU’s Constitutive Act is to promote, protect and guarantee human rights under a just rule of law. This would bring us closer to the aforementioned scenario of ‘positive complementarity’ between the ICC and the AU and, thus, closer to end impunity on African soil.

⁴⁵ See K. Magliveras, “Substituting International Criminal Justice”, *op. cit.*, p. 310.