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Complementarity between the International Criminal Law Section and Human Rights Mechanisms in Africa

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1. INTRODUCTION

Until quite recently, domestic criminal law and institutions were regarded as primary tools for the effective enforcement of the African Charter on Human and Peoples' Rights (African Charter) and other human rights treaties relevant to Africa, as far as criminal justice is concerned.[1] Today, Africa is expanding its frontiers by exploring new paths to enhance protection of human and peoples' rights. In 2014, the African Union (AU) Assembly of Heads of State and Government adopted the *Malabo Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Malabo Protocol)[2] which is posed to be a major contribution to the development of international law. The Protocol sets up a 'megacourt' since, for the first time, an international court will have jurisdiction on both human rights, international/African criminal matters and general affairs of international law. While this is a salutary and innovative initiative, the future court, in this particular format, will certainly face challenges, which could undermine its effectiveness.

However, the major innovation of the *Malabo Protocol* is undoubtedly the institution of the first ever regional criminal court, with jurisdiction on

[1] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, African Commission, 15 May 2006, at 215; *Gabriel Shumba v. Zimbabwe*, *Communication 288/04, African Commission, 2 May 2012, at 194(2); Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt, Communication 323/06, African Commission, 16 December 201,1 at 275(v).*

[2] *Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, adopted at the Twenty-Third Ordinary Session of the African Union Assembly, 26–27 June 2014, Malabo, Equatorial Guinea; see Decision on the Draft Legal Instruments (Doc. Assembly/AU/8(XXIII)).

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international crimes and serious crimes of African international law.[3] This chapter will then focus on the Criminal Section of the future Court in order to explore its relationship with the existing human rights mechanisms in Africa, as well as its potential contribution to the protection of human and peoples' rights on the continent. In fact, the chapter argues that the new African Criminal Court (ACC) should be embedded within the broader system of human rights protection in Africa. Therefore, the chapter sheds some light on legal issues at the intersection of human rights and international criminal law in the African context. Then, Section 2 briefly addresses the general question of the relationship between (international) criminal law and human rights law. Section 3 explores the Criminal Section's interactions with the major African human rights mechanisms. Section 4 concludes by putting forward the theory of mutual reinforcement between different entities for a better strengthening of the African human rights system.

2. A COMPLEX RELATIONSHIP BETWEEN (INTERNATIONAL) CRIMINAL LAW AND HUMAN RIGHTS

Analyzing the relationship between criminal law and human rights is the starting point towards a better understanding of the relationship between the future ACC and other human rights mechanisms on the continent. In fact, (international) criminal law (ICL) and international human rights law (IHRL) have been cohabitating since time immemorial. Their relationship is sometimes harmonious, and other times tense.

A. *A Harmonious Relationship between Criminal and Human Rights Law*

International criminal law and human rights law have both matured and developed in the context of mass atrocities committed during the twentieth century, which have culminated in the perpetration of the Holocaust of Jews by the Nazis during the Second World War, the genocide in Rwanda, the ethnic cleansing in the Balkans and other mass criminality in other parts of the world. Both branches of law make the same call: ending impunity of

[3] On the envisaged Court, see P. Manirakiza, 'The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa', in V. Nhemielle (ed.), *Africa and the Future of International Criminal Justice*, (Den Haag [Pays Bas], Eleven International Publishing, 2012) 375–404; G. Werle and M. Vormbaum (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol* (The Hague, TMC Asser Press, 2017).

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perpetrators of core crimes, which also correspond partly to serious violations of human rights. It is therefore understandable that ICL and IHRL share the same goals and are, to some extent, mutually reinforcing. For instance, in certain areas such as due process, both branches of international law protect the same values. They both enshrine the same fundamental principles that are the tenets for fairness of proceedings. Both ICL and IHRL instruments, for example, provide for the principle of legality, the principle of non-retroactivity, the presumption of innocence, etc.[4] In some circles, it seems like both branches of international law are of the same nature. They are presented as the two sides of the same coin. To that effect, international criminal law is viewed at times as 'an outgrowth of human rights law and celebrated as one of the most significant developments in the struggle to hold human rights violators accountable.'[5]

Similarly, ICL and IHRL reinforce each other; which allow each branch to reach its potential and fulfil its purpose. Before the development of the ICL discipline, most human rights treaties relied on domestic criminal law and institutions to ensure their effective enforcement. This fully explains why most human rights instruments request States parties to criminalize some acts deemed to be human rights violations.[6] Likewise, the former are duty-bound to investigate human rights violations, prosecute and eventually punish persons responsible for rights violations in accordance with their criminal laws.[7]

[4] See, for example, the *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 16 December 1966, Art. 14; *Rome Statute for the International Criminal Court*, Doc. A/CONF.183/9; 17 July 1998, Arts. 66 and 67; *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*; SC Res. 955, 8 November 1994; subsequently amended by SC Res.1165 (1998), SC Res.1329 (2000), SC Res.1411 (2002) and SC Res. 1431 (2002); Art. 20.

[5] A. Clapham, '*Human Rights and International Criminal Law*', in W.A. Schabas (ed), *Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2016), at 5.

[6] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 39/46, 10 December 1984, Art. 4; *Forced Labour Convention*, 1930 (No. 29); Adopted on 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session, Art. 25, etc.

[7] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan* (African Commission on Human and Peoples' Rights), Decision of May 27, 2009, at 147; *Velasquez Rodriguez Case (Velasquez Rodriguez v. Honduras)*, judgment of July 29, 1988 (Inter-American Court of Human Rights), at 166; *Prosecutor v. Anto Furundzija*, (ICTY: Judgment, 10 December 1998), at 145.

The development of ICL has provided a valuable tool to complement human rights law and to reinforce its application. For instance, the creation of international and internationalized criminal courts relevant to Africa[8] have contributed to protect and uphold human rights enshrined in the African Charter on Human and Peoples' Rights (African Charter) and other human rights treaties relevant to Africa. Therefore, ICL has also contributed in supplementing the domestic criminal law and institutions which were regarded as primary tools for the effective enforcement of human rights instruments.

Moreover, the criminalization of systematic and serious human rights violations is a continuation of the human rights struggle by other means. Professor Mégret somewhat emphasizes this by stating that 'the apex of the human rights movement comes in the form of a tribunal that is not a human rights tribunal properly so-called.'[9] This explains the critical role the human rights community plays, both at national or international level,[10] to ensure that perpetrators of human rights violations do not go unpunished. However, it seems peculiar that the African human rights community, especially civil society organizations, did not support nor promote the idea of an African regional criminal court in the beginning![11] In fact they opposed the idea perhaps due to the context in which it has been nurtured, i.e. the tension

[8] International and hybrid courts relevant to Africa are the International Criminal Tribunal for Rwanda; the Special Court for Sierra Leone; The International Criminal Court and the Hissène Habré Special Court.

[9] F. Mégret, 'The Politics of International Criminal Justice', 13–15 *European Journal of International Law* (2002) 1261–84, at 1265.

[10] For instance, Human rights NGOs under the umbrella of the Coalition for an International Criminal Court actively pushed for the creation of the ICC and intensively lobbied governmental representatives during the Rome Conference on the establishment of the ICC; Commissions of Inquiry or fact-finding missions put in place to investigate allegations of human rights violations usually recommend or call upon criminal tribunals to ensure individual accountability; see for example, the Commission of Inquiry in Burundi recommended that Burundian authorities 'Initiate, as soon as possible, an investigation into the crimes committed in Burundi in the light of the conclusions contained in the present report and other information at its disposal.', see *Report of the Commission of Inquiry on Burundi*, A/HRC/36/54 (2017) at 99. Similarly, a fact-finding mission carried out by the African Commission on Human and Peoples' Rights recommended 'the establishment of an independent internationally supported special tribunal in Burundi whose mandates include holding perpetrators of human rights violations and other abuses criminally accountable during the current crisis', see *Report of the Delegation of the African Commission on Human and Peoples' Rights on Its Fact-finding Mission to Burundi*, December 2015, at 172 c).

[11] In a Statement signed up by 30 civil society organizations, the latter stated: 'The African Court is an important continental mechanism to promote the ideals of justice, accountability and human rights. However, we recognise that the Court is currently limited in its mandate (its focus is on human rights violations of the African Charter), its judges are not specialists in international criminal law, and it has no prosecutorial or investigative powers or institutional

between AU and the International Criminal Court (ICC). Consequently, they complained of having been sidelined in the discussion leading to the adoption of the *Malabo Protocol*.

Finally, ICL has strengthened the human rights regime in two ways at least. Firstly, the criminalization and elevation of serious human rights violations, whether committed in peacetime or wartime, to the level of international crimes confirm that they are an affront to the entire humanity, not simply a matter for the individual victims. For example, torture constitutes an international crime punishable either as a crime against humanity,[12], a war crime[13] or even genocide[14] if the legal ingredients are present. Secondly, ICL plays a protective role of human rights. For example, the international criminal law's affirmation of the principle that serious human rights violations amounting to international crimes are not subject to statutory limitations[15]. Thus, it further reinforces the human rights regime and upholds human dignity.

In return, IHRL has contributed to the development and the humanization of ICL. Even if this is not obvious at the first glance, it is important to underline that human rights law provides the parameters within which international criminal law is implemented.[16] For instance, IHRL constrains key players in the area of the international justice to act within its confines. It is not trivial that the Rome Statute prescribes that applicable law before the ICC 'must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'[17] For Professor Mégret, human rights law constitutes the 'constitutional' framework of reference that prevents international criminal law from

capacity to take on the extra burden of bringing to justice perpetrators of international crimes. There is the further danger that loading this responsibility on the African Court will undermine its early progress towards acting as a dedicated regional human rights mechanism.' see *Statement by Representatives of African Civil Society and the Legal Profession on the Implications of the African Union's Recent Decisions on Universal Jurisdiction and the Work of the International Criminal Court in Africa*, Cape Town, 11 May 2009: available online: www.hrw.org/sites/default/files/related_material/2009_CapeTown_%20statement.pdf (visited 10 August 2017)

[12] Judgment, *Akayesu*, (ICTR-96–4-T), Trial Chamber, 2 September 1998, at 593 and 595; Judgment, *Furundžija* (IT-95–17/1-T), Trial Chamber, 10 December 1998, *at. 141*.

[13] Ibid., *at. 162*.

[14] Ibid., *at. 141*.

[15] *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, GA Res. 2391 (XXIII), 26 November 1968; Art. 29 ICC St.

[16] Clapman, supra note 5, at 20.

[17] Art. 21(3) ICC St.

derailing into an illiberal system.[18] Therefore, human rights law has the potential to act as a guideline to teleological interpretations of international criminal law.[19] Additionally, needless to say that due process, which is an important characteristic of a rule of law society, is as much a concern for IHRL as it is for ICL. IHRL fixes the parameters of due process in criminal proceedings. Today, due process standards go beyond respect of the rights of the accused to include those of the victims, which have, quite recently, infiltrated the international criminal proceedings.[20]

B. *A Suspicious Relationship between Criminal and Human Rights Law*

The apparent convergence of the two disciplines is also marred with tensions, at times confrontation. Criminal law is sometimes suspected to be a violator of human rights standards. In fact, criminalizing a certain conduct, either as an act or an omission, entails a restriction of rights, at least the right to liberty, personal autonomy, etc. In this spirit, the primary role of human rights law is to afford protection to human rights holders from criminal law.[21] In order to minimize the negative impact of criminal law on human rights, most international and regional human rights treaties contain protective provisions aimed at securing rights. For instance, there are provisions aimed at ensuring fair trial guarantees to persons suspected or accused of perpetrating crimes.[22] This demonstrates that human rights doctrine entertains a suspicion towards criminal law and it therefore supports a human right law intervention in order to ensure protection and to humanize criminal proceedings.

Similarly, it is to be noted that sometimes there is a normative tension between the two disciplines. For instance, the ICL position on the right to

[18] F. Mégret, 'Prospects for 'Constitutional' Human Rights Scrutiny of Substantive International Criminal Law by the ICC, With Special Emphasis On the General Part', *Roundtable in Public International Law and Theory*, Washington University School of Law, Whitney R. Harris World Law Institute, International Legal Scholars Workshop (Saint Louis, 4–6/2/2010).

[19] P. Soares, 'Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism', 23 *Criminal Law Forum* (2012) 161–91, at 190–1.

[20] Arts. 15(3); 68(3); 75 and 79 ICC St.; Judgment, *Lubanga* (ICC 01/04–01/06), Trial Chamber, 14 March 2012 at 14.

[21] F. Tukens, 'The primary, traditional role of human rights is to afford protection from the criminal law' 9 *Journal of International Criminal Justice* (2011), 577–95, at 579.

[22] ICCPR, Art. 14, Art. 7; African Charter; Malabo Protocol, Art. 46(A).

habeas corpus or provisional release differs from that of IHRL. ICL places a heavy burden of proof on the accused who has to demonstrate exceptional circumstances justifying his/her provisional release.[23] This contradicts the philosophy of human rights according to which detention is an exception and liberty the principle![24]

International criminal norms do also constrain the applicability of human rights law. For example, the principle of non-retroactivity may be a limitation to the enjoyment of human rights, especially the rights of victims. The latter cannot be vindicated for some particular harmful conducts which were not considered criminal at the time they were committed. For instance, discovering new crimes may be in the interests of the rights of victims, while the accused will successfully argue that this violates the right not to be tried for a crime that did not exist at the time the acts were committed. Similarly, when the accused has not been formally charged for such conduct by the prosecution, criminal judges are not allowed to make a determination of culpability for that in the course of a trial on other counts.[25] The rights of the accused will then trump those of the victims in this particular instance.

Despite the paradoxical nature of international criminal law, both as human rights protector and violator,[26] this branch and human rights law reinforce each other and there is a deep interconnection between them. The above overview of the interaction between ICL and IHRL provides the framework that helps to conceptualize and understand the relationship between their distinctive enforcement mechanisms in the African context.

[23] For an overview of how the legal regime changed over the time, see R. Sznajder, 'Provisional Release at the ICTY: Rights of the Accused and the Debate that Amended a Rule' 11 *Nw. J. Int'l Hum. Rts.* (2013) 110; K. Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization* (The Hague: Asser Press, 2016) International Criminal Justice Series 5, at 189–289.

[24] ICCPR, Article 9(3): '(. . .) It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.', see also *General comment No. 35 Article 9 (Liberty and security of person)*, CCPR/C/GC/35, 16 December 2014, at. 37 where the Human Rights Committee holds that 'Extremely prolonged pretrial detention may also jeopardize the presumption of innocence under article 14, paragraph 2'.

[25] Lubanga, supra note 20, at 629–30 (re: sexual violence related crimes which were not part of the indictment).

[26] M. Delmas-Marty, 'Le paradoxe pénal', in M. Delmas-Marty and C. Lucas de Leyssac (eds), *Libertés et droits fondamentaux* (Paris: Seuil, 1996) 368–92, at 368.

3. DEVISING A RELATIONSHIP BETWEEN THE CRIMINAL LAW SECTION AND THE AFRICAN HUMAN RIGHTS MECHANISMS

The core argument of this chapter is that the ACJHR's Criminal Law Section is an addition to the African human rights mechanisms and therefore serves the same cause. Henceforth, entities pursuing the same objective – human rights protection – should not be competing but they should respectfully complement one another. The principle of complementarity, and to a certain extent the principle of comity, can guide the relationship between the ACC and the human rights mechanisms.

A. *Complementarity as a Guiding Principle*

Complementarity as it is used in this chapter should not be taken in its technical sense provided for in ICL, especially the Rome Statute.[27] Here, it is used in its ordinary and plain meaning referring to 'a relationship or situation in which two or more different things improve or emphasize each other's qualities'[28] or 'the state of working usefully together'.[29] In concrete terms, in order for them to achieve their goals or objectives, I suggest that the future ACC and the existing human rights mechanisms will be of assistance to one another, both at the institutional and the jurisprudential level.

1. Complementarity at the Institutional Level

The current African human rights system is conceived in accordance with the Westphalian philosophy. According to the latter, founded in a state-centric law approach, only States are the duty-bearers of international obligations. Only they can be found responsible for human rights violations, including those committed by non-state actors (NSAs) and individuals.[30] So the three main pillars of the African human rights system[31] are competent to only

[27] Art. 1 and preamble, par.10 ICC St.

[28] *Oxford English Dictionary*, available online at: https://en.oxforddictionaries.com/definition/complementarity (visited 15 August 2017).

[29] Cambridge Dictionary, available online at: http://dictionary.cambridge.org/dictionary/english/complementarity (visited 15 August 2017).

[30] Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) v Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights (2001), at 58.

[31] P. Manirakiza, 'Typology and Appraisal of the African Human Rights System', in G. DiGiacomo and S. Lang, *The Human Rights Institutions: Developments and Practices* (Toronto, University of Toronto Press), 2018, 181–201.

determine State responsibility for human rights violations. In traditional IHRL, NSAs and individuals cannot be held accountable for human rights violations, except indirectly in accordance with domestic laws of member State Parties to relevant instruments. However, the new *Malabo Protocol* innovates in that it enshrines the principle of individual and corporate criminal responsibility,[32] making the future mechanism be the first international court equipped with corporate criminal jurisdiction. This is laudable given the fact that NSAs and individuals nowadays are involved in perpetration of human rights violations amounting to international crimes (child soldier recruitment or conscription and use in armed conflicts, child labour, human trafficking, etc.). The fact that the Criminal Section is empowered to prosecute individuals and corporate entities is a major complement to the African human rights mechanisms. It will actually expand the scope and the reach of the latter. Therefore, the Malabo Protocol helps to send the message IHRL is not sending: individuals and corporations, like States, can be held responsible for human rights violations. They can be directly prosecuted and take the blame themselves instead of blaming their national state for their actions.[33]

The fact that the existing human rights mechanisms are not empowered to prosecute persons responsible for human rights violations is a major impediment to their efforts aimed at achieving victims' justice. One has to rely on States' apparatuses to ensure that perpetrators are effectively prosecuted and punished, which is not often the case. The creation of the ACC will strengthen the African system of human rights by enhancing the African capacity to provide remedies for human rights violations.[34] Therefore, the International Criminal Law Section is not a replacement but an important addition to the African human rights architecture. It is a necessary component in the African struggle for the promotion and the protection of human rights; it adds a second layer on the human rights protection shield in Africa.

However, the new criminalization of gross human rights violations on the continent does not necessarily guarantee the improvement of the human rights situation. One has to understand that the ACC is not a panacea. Like any other criminal tribunal, it has its own and inherent limitations in terms of its resources, methods and objectives that will constrain its functioning. For instance, none can expect it to dig into the root-causes of massive and serious human rights violations, i.e. the systemic and structural problems that give rise to them, as this may not be relevant to its final objective, which is to determine

[32] Arts. 46B, 46C Malabo Protocol.
[33] Ibid.
[34] Manirakiza, supra note 3, at 383–6.

guilt or innocence of the accused individual. That is why other less constrained institutions such as the African Commission and the future Court's Human Rights Section will still be relevant and well-positioned to address the root-causes of human rights violations. However, to better address situations of serious human rights violations requires a complementary approach of criminal and human rights justice.

2. The International Criminal Law Section and the African Commission on Human and People' Rights

The African Court, as it stands today, entertains a special and statutory working relationship with its sister institution, the African Commission on Human and Peoples' Rights (ACHPR). In fact, the Court has been created to complement the protective role of the Commission.[35] The modalities of this relationship are provided for in the rules of procedure of both institutions,[36] and they are refined in annual statutory meetings between the Court and the Commission.[37] The Criminal Law Section will certainly capitalize on this existing practice, looking at the Commission as a special partner. The partnership between the Criminal Law Section and the African Commission is founded on necessity and it is justified by mutual reinforcement for better effectiveness.

(a) the african commission complements the criminal law section

Being a trailblazer in the field of human and peoples' rights in Africa, the quasi-judicial African Commission has developed methods to improve the enjoyment of human rights on the continent. It is now equipped with impressive tools and expertise that the Criminal Section can take advantage of, being the newcomer in this domain. In this regard, the Commission can assist the Section in many areas, including evidence gathering and the implementation of its decisions and judgments, contributing therefore to its mission to end impunity and ensure justice for victims of gross human rights violations.

(i) The African Commission as an 'Investigator' for the Criminal Section

The African Commission enjoys investigative powers which are exercised in a variety of ways. The Commission can conduct fact-finding missions, *proprio*

[35] Art. 4 African Court St.

[36] Art. 114 – 23 African Commission Rules of Procedure; Arts. 5, 6(1) & (3), 8 and 33 African Court Protocol.

[37] Art. 115 African Commission Rules of Procedure.

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motu[38] or at the request of AU policy organs.[39] Fact-finding missions are important tools to gather facts and evidence of gross human rights violations. By conducting fact-finding missions, one needs to keep in mind that the objective of the Commission is not for the purpose of criminal prosecutions but rather denunciation, monitoring and advocacy for proper respect and protection of human rights. At the same time, fact-finding missions, most of the time, do reach substantive findings, e.g., the perpetration of international crimes such as crimes against humanity, war crimes and even genocide sometimes.[40] Moreover, material and testimonial evidence is collected, along with a list of potential suspects sometimes.

Similarly, through the protective mandate of the African Commission, the amount of information provided by parties to a communication, along with its own information gathering mechanism make the Commission get a big picture and the full scope of human rights violations in a particular situation.

The question that arises then is to what extent the information gathered and the evidence collected through fact-finding missions and during the examination of communications (cases) can be useful to the Criminal Section? Certainly, they are not irrelevant. First of all, it should be reminded that in virtually every situation, human rights professionals, including those from the Commission, arrive on the field long-time before criminal investigators and other analysts deployed in the name of an international, hybrid or regional court. Being the first ones to show up, most of the time when the situation is still dire, human rights experts experience dramatic situations and can collect valuable information including fresh evidence of potential crimes. Criminal investigators and analysts on their part are deployed years after the perpetration of the crimes. It is then understandable that the first source for their work is to be those reports and other open materials from human rights professionals.[41]

[38] Art. 45(2) and 46 African Charter; Art. 81 African Commission Rules of Procedure. Missions of these nature have been carried out in CAR (September 10– 14th, 2014), Mauritania (June 19–27th, 1996), Zimbabwe (June 24–28th, 2002), etc.

[39] Art. 45(4) African Charter; Missions of these nature have been carried out to Sahraoui Republic (September 24–28th, 2012), see AU Executive Council, Decision EX.CL/Dec. 689 (XX) (2012) and recently to Burundi (December 7–13th, 2015), see Peace and Security Council, *Communiqué PSC/PR/COMM.(DLI)*, para. 12(iv), 17 October 2015.

[40] For instance, the Commission's fact-finding mission in Mali concluded that 'The Aguel'hoc and Diabali attacks may also be classified as crimes against humanity. The rape carried out against women and girls during the crisis are crimes against humanity and should be judged by the International Criminal Court in the absence of action by the Malian Government.'. See *Report of the Fact-Finding Mission to the Republic of Mali*, 3–7 June 2013, at 91.

[41] This was the case for instance for ICTR investigators who relied heavily on reports from human rights community in their early work, such as reports of the Special Rapporteur of the Commission on Human Rights, Mr. René Degni Segui, who concluded that acts of genocide

Similarly, one can anticipate that the Criminal Section will seriously consider and even rely on the work of the African Commission. The latter can share information at its disposal with the former. This is imperative and advisable considering that the Commission uses a flexible methodology, which enables its staff and members to get access to valuable sources of information, in a non-adversarial or suspicious environment. Also, the Commission has a network of informants and collaborators, either within governmental structures or within the civil society community, which are key sources of information. Henceforth, as Bergsmo and Whiley hold, '(. . .) human rights organizations are often well placed to contribute to the analysis and further investigation of the crime base upon which any given inquiry and investigation must in large part rest. Knowledgeable human rights professionals also tend to have a detailed understanding of the conflict in question, its main actors and the chronology of relevant patterns of events which can aid criminal investigation services in their analysis of the allegations of crimes and subsequent prioritization or selection of cases for prosecution.'[42] The information provided by human rights professionals can therefore be useful and/or constitute a starting point for investigations. It can also help in case selection or the establishment of contextual elements of crimes when it is necessary.

The Criminal Section's investigators will however keep in mind that the evidence was not primarily collected for criminal purposes. Therefore, a question arises whether or not the Commission's generated evidence can be used in court as such and/or, related to this, whether a member or staff of the Commission can appear before the Criminal Section as a witness. And if yes, under what conditions this can take place? In the absence of any indication in the Malabo Protocol or other basic legal instruments, one can explore and seek guidance from the international case law and practice. In the *Situation of*

and crimes against humanity were committed in Rwanda; see for instance *Report on the Situation of Human Rights in Rwanda*, UN Doc E/CN.4/S-3/1, 25 May 1994 at 48, 54. For Burundi, there is no doubt that ICC investigations will definitely rely on the substantive reports from the UN Commission of Inquiry on Burundi (*Report of the Commission of Inquiry on Burundi*, A/HRC/36/54 (2017); the United Nations Independent Investigation on Burundi Committee of Independent Experts (*Report of the United Nations Independent Investigation on Burundi (UNIIB) Established Pursuant to Human Rights Council resolution S-24/1*, A/HRC/33/37 (2016).

[42] M. Bergsmo and W. H. Wiley, 'Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes', in S. Skåre, I. Burkey and H. Mørk (eds), *Manual on Human Rights Monitoring, An Introduction for Human Rights Field Officers*, (Oslo: Norwegian Centre for Human Rights, 2008) at 28.

the Democratic Republic of Congo, ICC investigations and prosecutions were made possible because of the information the Prosecutor's Office got from different organizations, mostly from the United Nations. For the most part, documents and other material received from the UN, especially the UN peacekeeping Mission in Congo (MONUC) were handed to the Prosecutor's Office under the condition of confidentiality, pursuant to prior agreements between the UN and ICC.[43] Under the *Relationship Agreement between the International Criminal Court and the United Nations*, 'The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.'[44] It is worth mentioning that confidentiality is not absolute; it can be waived by the UN or the relevant UN programme or agency and disclosure of the evidence is possible upon their consent.[45]

However, in such situation, the Prosecutor finds himself in a dilemma because on one hand he is bound by the confidentiality towards the information provider[46] and, on the other hand, he is under the duty to disclose evidence in his possession or control to the defence, especially exculpatory evidence, in the name of fairness and respect for fair trial rights of the accused persons.[47] Therefore, which duty takes precedence in this kind of situation? This issue was dealt with and settled in *Lubanga* case where the Prosecutor was unable to disclose to the defence more than 200 documents that contain potentially exculpatory information or evidence that is potentially material to the preparation of the defence because the Prosecutor had obtained the

[43] *Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court (with Annexes and Exchange of Letters)*, [hereinafter MONUC MOU], New York, 8 November 2005, Art. 10(6).

[44] *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, [hereinafter ICC-UN Agreement], 4 October 2004, art. 18(3); see also MONUC MOU, Art. 10(6).

[45] ICC-UN Agreement, Art. 18(3) and Art. 20; MONUC MOU, Art. 10(10).

[46] Art. 54(3)(e) of the ICC Statute provides that the prosecutor may agree not to disclose material obtained on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; see also ICC-UN Agreement, Art. 18(3) and Art. 20; MONUC MOU, Art. 10(6).

[47] Art. 67 (2) ICC St.

documents on condition of confidentiality.[48] While the Trial Chamber was of the opinion that the Prosecutor should disclose relevant evidence, the Appeals Chamber took a different approach when it holds that 'If the Prosecutor has obtained potentially exculpatory material on the condition of confidentiality pursuant to article 54 (3) (e) of the Statute, the final assessment as to whether the material in the possession or control of the Prosecutor would have to be disclosed pursuant to article 67 (2) of the Statute, had it not been obtained on the condition of confidentiality, will have to be carried out by the Trial Chamber and therefore the Chamber should receive the material. The Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality agreement and cannot order the disclosure of the material to the defence without the prior consent of the information provider.'[49] Therefore, although confidentiality is a paramount principle, which can assist the Prosecutor discharge its mandate derived from the ICC Statute, at the same time, it should not be to the expense of fairness of the proceedings.

Regarding the possibility of UN staff or officials posed to appear as witnesses before the ICC, it should first be stressed that they enjoy privileges and immunities, including the immunity from legal process in respect of all words spoken or written and all acts performed by them in the performance of their mission for the United Nations.[50] As the privileges and immunities are enjoyed in the interests of the United Nations and continue to exist notwithstanding the fact that the holder is no longer employed on any such mission, then the UN Secretary General has 'the right and the duty to waive those immunities in any case where, in his opinion, they can be waived without prejudice to those interests.'[51] The law and protocols require that their immunity be waived by the employer organization. For instance, in the same *Lubanga* case, the immunity of a former Special Rapporteur for the UN Commission on Human Rights in Congo was waived by the UN in order for him to testify as an expert witness before the ICC, pursuant to a court

[48] Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', *Lubanga* (ICC-01/04–01/06 OA 13), Appeals Chamber, 21 October 2008 at 21.

[49] Ibid., at 3 and 48.

[50] *Convention on the Privileges and Immunities of the United Nations*, 16 UNTS, (1946–1947), 13 February 1946, Art. VI.

[51] *Letter re: The Prosecutor v. Thomas Lubanga Dvilo: Expert Testimony of Mr. Roberto Garreton, from Mr. Peter Taksce-Jensen Assistant Secretary-General in charge of the Office of Legal Affairs to Ms. Silvana Arbia, Registrar International Criminal Court*, 23 January 2009, at 2.

order.[52] Sometimes, the UN can still appoint a representative before the ICC to assist the employee or official during its testimony.[53]

If we apply this to the relationship between the African Commission and the future Criminal Section, the former is undoubtedly a potential information provider to the latter, given its standing as human rights promoter and protector on the continent for the last 30 years.[54] So, to what extent is the Commission prepared to play its role of an indirect investigator for the Criminal Section? Like the UN, it does not need to receive a special mandate as such; the investigative powers of the Commission derive straight from its mandate as defined by the African Charter.[55] However, there will be a need to adjust its *modus operandi* in consideration of its potential indirect investigator status. For instance, the Commission will need to revisit how it carries out its fact-finding missions, for its factual and legal findings to be relevant to the work of the Criminal Section. They are supposed to be conducted in a more rigorous manner than mere promotional field visits. The latter are more or less a diplomatic exercise aimed at sensitizing the visited State Party on the mission and mandate of the Commission; the latter gets also informed on the State's human rights best practices and challenges. Which means, fact-finding missions need to be planned properly so as to distinguish them from promotional missions and to clearly outline the objective of collecting evidence of serious human rights violations amounting to international crimes. For that purpose, fact-finding missions need to be carried out in a relatively reasonable timespan. It is to be noted that whether fact-finding missions are initiated *proprio motu* by the Commission or requested by the AU policy organs, they have been conducted in a few days,[56] casting doubt over the quality and substance of the evidence that can reasonably be collected during that time span. Fact-finding missions should then be taken seriously; time and resources should be devoted to them for better results.[57]

Moreover, the Commission will need to adopt a clear policy guiding its relationship with the future Criminal Section. The policy should explain why

[52] Ibid., at 3.

[53] ICC-UN Agreement, Art. 16(2).

[54] The Commission was operationalized in November 1987, a year after the African Charter on Human and Peoples' Rights became into force, available online: www.achpr.org/files/news/2017/11/d314/30_anniversary_celebrations_bronchure_eng.pdf (visited 6 December 2017).

[55] Art. 45(2) and 46 African Charter; Art. 81 African Commission Rules of Procedure.

[56] Missions in CAR last only 5 days; Burundi: 6 days; Sahraoui Republic: 5 days.

[57] P. Manirakiza, 'The African Human Rights System: A Multi-pillar Legal and Institutional Framework', in G. DiGiacomo and S. Kang (eds), *The Institutions of Human Rights: Developments and Practices*, (Toronto: Toronto University Press, Forthcoming, 2018)

collaboration in a human rights friendly initiative well-warranted; it should also address, inter alia, the issue of its members or staff testifying as expert witnesses, the question around the kind of information that can be shared, when, how and under what conditions (e.g. confidentiality), etc. Later on, building on the UN-ICC relationship agreement as an example, a special agreement should be established between the African Commission and the Criminal Section, which will regulate the complementarity in the particular context of criminal proceedings.

Whether the information or evidence gathered from the ACHPR will actually be used before the Criminal Section, as well as its attached value, will depend on a range of factors. One, the criminal investigators must find it relevant to a potential case; and, due regard must be shown to the accused's fair trial rights. While the information can be used in court provided it is relevant and reliable, the Prosecutor should be conscious that some of its evidence may have been collected by ACHPR in violations of suspects' fundamental rights. Most of the time, suspects may be interviewed by human rights professionals but they have no clue that their testimony will be used against them in court. Similarly, third party witnesses may testify against some individuals without full knowledge that they are collaborating in disguised criminal investigations. The information gathered from third party witnesses will be relayed to criminal investigators without giving suspects an opportunity to say something or to rebut it. Therefore, when adducing that evidence, the Prosecutor should do it in a manner consistent with the rights of the accused. For instance, the disclosure rule should be respected and the accused should get the entire document or conversation for his/her own perusal. Otherwise the proceedings may derail and even collapse, as was the case in *Lubanga* and Gbagbo.

Regarding the value of information and evidence obtained from the ACHPR, the defence can oppose the reliance on materials from external sources. But, as the single judge sitting in the *Gbagbo* case held, 'there does not exist in the applicable law any impediment to the use of such material, or any requirement that it be corroborated.'[58] However, he was of the opinion that those materials from external sources are not of conclusive evidentiary value by themselves. The court must analyse all the material placed before it, in order to determine what weight must be given to each.[59]

[58] Public Redacted Version Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'; Gbagbo (ICC-02/11–01/11), Appeals Chamber, 13 July 2012 at 54.

[59] Ibid.

In brief, although the ACHPR cannot carry out criminal investigations or prosecutions, it can nevertheless gather facts and other material evidencing serious human rights violations.[60] Henceforth, the Criminal Law Section may take over the task and substantially rely on information collected by ACHPR. It is to be reminded that the future Criminal Section Investigation team will not big enough to cover each corner of hot spots, i.e. crisis/conflict zones. The Section will not be therefore benefit from the expertise and the work of the African Commission. Similarly, it can rely on its expertise, experience and network to ensure implementation or follow-up of the Section's orders and judgments.

(ii) The African Commission as an (Enforcement Agent) of the Criminal Section's Decisions and Judgments

The Criminal Section, like any other international criminal court, will rely on State cooperation to enforce its decisions. Since it will not be equipped with a police force or penitentiary facilities for instance, States parties to the *Malabo Protocol* will certainly be called upon to assist the court to enforce its orders and judgments.[61] In the real life, States rarely comply with court orders which risk political implications as exemplified by the arrest warrant issued by the ICC against President Al Bashir of Sudan.[62] Furthermore, they resist and often defy orders or sanctions, which concern them directly or indirectly.[63] The Criminal Section may suffer the same fate as other African institutions in terms of non-compliance with its orders or sanctions. Existing human rights mechanisms, the African Commission in particular, can contribute to ensure follow-up of and compliance with its decisions. This can be done in different

[60] One caution, ACHPR members or staff should not been seen as disguised investigators. This can jeopardize their mission and impede State cooperation, which is critical in order to gather facts and information on human rights violations. States have begun to be suspicious towards human rights officers or experts working on the fields. Burundi for instance has declared persona non grata three experts who were members of the United Nations Independent Investigation on Burundi Committee of Independent Experts, see Letter No 204.01/988/Ref/2016 from the Minister of External Relations and International Cooperation addressed to all ambassadors and representatives, declaring Ms. Maya Sahli Fadel, Mr. Christof Heyns and Mr. Pablo de Greif.

[61] Art. 46L(1)(2) Malabo Protocol.

[62] Many countries, including ICC States Parties, such as Malawi, Chad, Democratic Republic, Kenya, South Africa and Jordan have refused to comply with ICC orders to arrest President Al Bachar while present on their territories for official visits.

[63] See for instance Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', *Kenyatta* (ICC-01/09–02/11–1032), Appeals Chamber, 19 August 2015; Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, *Al-Bashir* (ICC-02/05–01/09), Pre-Trial Chamber II, 6 July 2017.

ways. In the course of the execution of its promotional mandate, Commissioners can raise questions about the visited State Party's level of compliance with decisions of the Criminal Section. The Commission can also use its extensive networks to lobby States institutions and monitor compliance during its promotional visits. Similarly, during the examination of periodic reports, special mechanisms holders or the entire commission can pose questions and push State representatives to respond and make their position known publicly.

(iii) The African Commission as an Agent of the International Criminal Justice System

One of the main objectives of the whole international criminal justice system is to ensure justice for victims. A web of judicial, quasi-judicial and non-judicial institutions concur to the attainment of that objective. The African Commission is part of that community of justice-prone institutions; it contributes to ensure criminal accountability of perpetrators of gross human rights violations. For instance, once a State party is found responsible for Charter violations that amount to international crimes, at the conclusion of its protective proceedings by the way of communications, the African Commission orders investigations and/or prosecutions as a form of remedy.[64] Furthermore, it will ensure that its orders and decisions are complied with. In so doing, the quasi-judicial organ exercises a quasi-criminal jurisdiction[65] and henceforth pursues the objectives of eradicating the impunity of mass atrocities, ensuring justice for victims and preventing further serious violations. By requiring investigations and prosecutions of serious human rights violations amounting to international crimes for instance, ACHPR is immensely contributing to the achievement of the goals of the international criminal justice system, as represented here by the Criminal Law Section. In a sense, ACHPR does also share the same goal with the Criminal Law Section: ending impunity of mass atrocities and ensuring justice for victims.

(b) THE CRIMINAL LAW SECTION COMPLEMENTS ACHPR

The African Commission constantly expresses its concerns regarding the suffering of victims of serious human rights violations as well as the impunity

[64] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02 (African Commission), 15 May 2006 at 215; *Gabriel Shumba v. Zimbabwe, Communication 288/04 (African Commission), 2 May 2012 at 194(2); Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt, Communication 323/06 (African Commission), 16 December 2011 at 275(v).*

[65] A. Huneeus, 'International Criminal Law by Other Means: The Quasi-criminal Jurisdiction of the Human Rights Courts', 107 (1) *American Journal of International Law* (2013) at 1–2.

that the perpetrators of the said abuses continue to enjoy.[66] In order to address this situation, as it has been highlighted above, the Commission, at its level, usually requests States to investigate and prosecute serious human rights violations. Alternatively, it draws the attention of the Assembly of the AU Heads of State and Government, in accordance with art. 58 of the African Charter[67]. However, it is to be noted that this approach is not particularly effective, given the level of impunity of atrocity crimes and also the fact that States rarely conform to the Commission's decisions. Mindful of this, the Commission has been welcoming the creation of international criminal tribunals and calling upon African States to rapidly ratify their respective constitutive instruments.[68] The Commission's vision and expectation of the role of the criminal courts is that they will enhance and immensely contribute to the protection of human and peoples' rights on the continent.[69] It is within this perspective that I submit, as it has been highlighted above, that the Criminal Section contributes to further protection of human rights in Africa. In fact, it complements well the protective work of the Commission by providing an additional layer to current continental criminal apparatus whose pillars are constituted of domestic courts. In this perspective, the Criminal Section can then strengthen the African criminal infrastructure against the impunity of massive or serious human rights violations.

3. The International Criminal Law Section and Other Court's Sections

(a) building a systemic internal harmony

It has been mentioned earlier that the *Malabo Protocol* sets up an impressive judicial structure equipped with three distinct sections: the Human and Peoples' Rights Section; the General Affairs Section and the International

[66] *87: Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court (*African Commission on Human and Peoples' Rights, 38th Ordinary Session, Banjul, The Gambia from 21 November to 5 December 2005 (preamble); *344: Resolution on the fight against impunity in Africa* - ACHPR/Res. 344(LVIII) 2016 (preamble, paras. 8 and 9).

[67] Art. 58 African Charter.

[68] *344: Resolution on the fight against Impunity in Africa* - ACHPR/Res. 344(LVIII) 2016 ('Welcoming the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights granting the court criminal jurisdiction over international crimes affecting Africa' (preamble, para. 7)); *87: Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court*, ACHPR/Res.87(XXXVIII) 05 (preamble).

[69] *59: Resolution on the Ratification of the Statute of the International Criminal Court by OAU Member States*, Pretoria, South Africa; 16th May 2002.

Criminal Law Section.[70] Each section is endowed with a special jurisdiction; each one is reasonably expected to have its special rules of procedure, which will differ from a section to another. For instance, the criminal court does not abide by the exhaustion of local remedies while this is a requirement for the human rights and general sections. Also, the methods and purpose of each section differ substantially. The Criminal Section's purpose, for example, is to determine the individual criminal responsibility while the Human Rights and General Affairs Sections determine state responsibility for the violations of international law. In short, each section of the Malabo 'megacourt' is, in itself, a 'mini-court', with a particular set of international law rules to apply and interpret. This may present, at the face of it, the risk of fragmentation of the applicable law because there is no supremacy or primacy of a section over the others. The lack of a hierarchical relationship raises the question of how to ensure an internal legal harmonization, at least in the areas of convergence. A reading into Article 33(3)(c) of the Vienna Convention on the Law of Treaties, which provides for the method of systemic integration, may offer a way to explore. In accordance with the latter method, 'each instrument of international law must be interpreted and applied in a manner that safeguards harmony within the broader normative environment.' The method is highly regarded by the International Law Commission 'as one of the main tools for counteracting the normative fragmentation of international law. It is widely regarded as one of the main channels that enable the concurrence between special and general international law.'[71] Likewise, the fact that the different sections of the Africa Court are not stand-alone entities is a potential way to avoid fragmentation and instead consolidate the system.

So, although each section of the megacourt will be interpreting and applying different instruments, it is expected that each section will resort to the method of systemic integration to interpret treaties and other instruments relevant to its mission and area of specialization. In order to cement the expected systemic legal coherence at the African court, the next section analyses the intimate and unavoidable relationship between the Criminal Law and the Human Rights Sections.

(b) relationship between the criminal law section and the human rights section of the court

At the outset, it is important to note that the Criminal Law Section and the Human Rights Section are distinct despite the close relationship between

[70] Art. 16(1) Malabo Protocol.

[71] V.P. Tzevelekos, 'The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?', 31 *Mich. J. Int'l L.* (2010) 621, footnote 7.

international criminal law and human rights law as explored in Section 2. If one considers the methods and the objectives of each section, the procedure before the Criminal Section aims at fostering individual responsibility, while the human rights procedure pursues the determination of State responsibility for human rights violations. However, the two procedures can mutually reinforce each other. First of all, the Human Rights Section, like the ACHPR, will be exercising what an author calls 'quasi-criminal jurisdiction'[72] because it can order, as remedies, States parties responsible for violations to investigate and prosecute international crimes. Thereafter, the Section will ensure and monitor States' compliance with its orders. In so doing, the Human Rights Section will be complementing the efforts the Criminal Law Section will be deploying to ensure that the impunity gap is closed and that justice is done for the victims of serious human rights violations amounting to international crimes.

Also, the complementarity of the Human Rights Section can go beyond that and be much more direct. For instance, in the course of its proceedings, if the Human Rights Section gets ample information that can evidence a possible perpetration of international crimes, can it seize the Criminal Law Section? Although it will not technically be called a referral, nothing forbids the HR Section to forward information and documents to the Office of the Prosecutor (OTP) of the Criminal Law Section. While the evidence collected may not necessarily be conclusive, one would expect the Prosecutor to weigh it with other information and documents at his/her disposal in order to reach the conclusion on the possibility of conducting either a preliminary examination or a proper investigation into a situation. Thus, the Human Rights Section is a potential investigator agent for the Criminal Section.

Finally, the last question that warrants some attention is this: should the Human Rights Section play a supervisory role on the Criminal Section's decisions, which are alleged to constitute violations of human rights? As paradoxical as it may sound, it is not impossible for a court to act in violation of fundamental rights of the accused as evidenced in the *Barayagwiza* case.[73] Therefore, the Criminal Law Section can potentially be in the same position as ICTR. However, in general, international criminal courts are not under any external supervision by a constitutional or human rights court, in contrast to national criminal courts and (criminal) authorities, which are generally

[72] Huneeus, supra note 65, at 1–2.

[73] Decision, *Barayagwiza* (ICTR-97–19-AR72), Appeals Chamber, 3 November 1999, at 73, 108; Judgment, *Gatete* (ICTR-00–61-A), Appeals Chamber, at 45 and 286.

supervised by a domestic constitutional court and an international or regional human rights mechanism, either a court or a quasi-judicial entity. However, in IHRL, as well as in modern international criminal law, international criminal courts, like States, have a legal duty to respect and uphold fundamental human rights, especially those of individuals under their effective control. In fact, as international organizations are endowed with an international legal personality,[74] international criminal tribunals are subjects of international law and, therefore, are bound by general rules of international law, including IHRL.[75] For example, according to the Rome Statute regime, the applicable law before the ICC 'must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'[76] Although there is no similar general provision in the *Malabo Protocol*, the Criminal Section will not be excused from the same legal obligation. At a minimum, the Section must uphold and enforce fair trial rights of the accused. Likewise, since the Criminal Section will have people in its detention centre pending trials or resettlement in domestic prisons once a final guilt verdict has been handed down, detainees' rights must be respected. In fact, the then–Second Vice President of the ICC once made a comparison when he stated that, '(. . .) under certain circumstances, the ICC is in a comparable position as States in that it has to respect the human rights of individuals under its effective control.'[77] The same applies for the Criminal Section.

In case of violations of their rights by the Criminal Section, the accused shall be entitled to remedies, including those of a judicial nature. The question that arises then is before which forum this right to remedy can be invoked? Possible venues such as the African Commission or international human rights mechanisms are not in line since the Criminal Section is not a state, albeit being in comparable situation, to some extent. One of the relevant forums to address the situation is the Appeals Chamber of the court.[78] But

[74] See for instance Art. 4(1) ICC St.

[75] Zeegers, supra note 23, at 21.

[76] Art. 21(3) ICC St.

[77] H-Peter Kaul, *Human Rights and the International Criminal Court*, Address delivered at the International Conference on 'The Protection of Human Rights through the International Criminal Court as a Contribution to Constitutionalization and Nation – Building', German – Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG), Thammasat University – Faculty of Law, in cooperation with the German Embassy Bangkok, Bangkok, Thailand, 21 January 2011 at 12–13.

[78] For instance, ICTR Appeals Chamber addressed and remedied numerous allegations of violations of the rights of the accused, see *Gatete* case, supra note 73, at 287.

what is interesting from an academic perspective is whether or not the Human Rights Section of the court could constitute such a venue for remedying human rights violations perpetrated by the Criminal Section. First of all, referring or reviewing the conduct of a court before another court, as far as human rights are concerned, is not a new phenomenon. The European Court on Human Rights has regularly been seized of cases alleging violation of human rights.[79] In our case study, the *Malabo Protocol* seems to support such a possibility when it provides that 'the Human Rights Section shall be competent to hear all cases relating to human and peoples' rights.'[80] However, a closer reading of the Protocol may suggest otherwise. For instance, decisions of the Criminal Section are deemed to be decisions of the Court in accordance with the spirit of Article 9(2) of the Protocol which provides that 'a judgment given by any chamber shall be considered as rendered by the Court'. Likewise, as far as criminal jurisdiction is concerned, the decisions of the appellate chamber shall be final.[81]

The matter will further be complicated by the fact that the Criminal Section is not a State; only States are justiciable before human rights bodies, including the Human Rights Section. Even before the European Court of Human Rights, all successful cases were directed against States. Cases against international organizations have been declared inadmissible sometimes because the functional immunity regime comes into play in the proceedings.[82] In our case study, the Criminal Section is an organ of an international organization (AU)[83] and as such it is not linked to a particular State to which its conduct violating human rights can be attributed. So, if the Criminal Section were to find itself a respondent party before the Human Rights Section, it is possible that it can also invoke the immunity regime that applies to international organizations against all forms of prosecutions, either criminal or civil.

In conclusion, Articles 7 and 17(3) should be read with due regard to the *ratione personae* jurisdiction of the Human Rights Section which extends only to States. One can then assume the above-mentioned provisions are finally conceived that way only for purposes of division of labour between the Court's sections. So, if the accused has been able to complain of his or her human

[79] *Milosevic v. The Netherlands*, 77631/01, Council of Europe: European Court of Human Rights, 19 March 2002.
[80] Arts 7 and 17(3) Malabo Protocol, emphasis added.
[81] Art. 8(4) Malabo Protocol.
[82] *Stichting Mothers of Srebrenica and Others v. The Netherlands*, European Court of Human Rights (3rd Section), Application no. 65542/12, 11 June 2013.
[83] By virtue of Art.5 (1)(d) of the African Union Constitutive Act.

rights situation up to the appellate chamber, then the latter's decisions should not be subjected to review by the Human Rights Section. It is to be presumed that the entire Court would have already exhausted its jurisdiction in this regard. However, it is important for the Criminal Law Section to build bridges with other human rights mechanisms in order to ensure legal harmony and prevent fragmentation of applicable rules.

4. TOWARDS A THEORY OF JUDICIAL DIALOGUE BETWEEN HUMAN RIGHTS MECHANISMS AND THE CRIMINAL SECTION

A. *Plural Entities and the Risk of Legal Fragmentation*

The expansion of the African judicial and quasi-judicial infrastructure for the promotion and protection of human rights poses a particular challenge for the entire system: how can we ensure that this proliferation is not detrimental to the cause it is supposed to serve and that all those institutions are mutually reinforcing in order to maintain some degree of legal coherence instead of competing for hegemonic power? In this last section, I argue that the new Criminal Section and existing human rights mechanisms should engage in a judicial dialogue posed to avoid fragmentation of applicable law and to enhance the coherence and legitimacy of the system. In the absence of clear 'rules of relationship',[84] i.e. rules of international law that clarify the interrelationship between different mechanisms, and in the absence of any form of hierarchical order, the judicial dialogue may prove difficult to achieve and sustain. Pessimistic voices claim that international courts are in a competitive battle. Koskenniemi and Leino posit that international tribunals are 'involved in a hegemonic struggle in which each hopes to have its special interests identified with the general interest.'[85] For Justice Guillaume, the former President of the International Court of Justice, each court 'has a tendency to go its own separate way'[86] to the point that even the interjudicial dialogue is insufficient to resolve potential inconsistencies. The ICTY in the *Tadić* jurisdiction decision went further and set the alarm: 'International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a

[84] U. Linderfalk, 'Cross-fertilisation in International Law', 84 *Nordic Journal of International Law* (2015) 428–55, p. 435.

[85] M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 553–79 at 562.

[86] G. Guillaume, *The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order*, Speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000.

number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).'[87]

However, there are optimistic voices who claim that the mere increase of tribunals and other adjudicatory mechanisms does not necessarily lead to fragmentation. As alluded to earlier, if different judicial and quasi-judicial entities resort to the method of systemic integration while interpreting and applying their founding instruments, they can easily counter the normative fragmentation risk.[88] In practice, international criminal courts and human rights judicial or quasi-judicial institutions are in constant dialogue despite the *Tadić* holding which provoked fragmentation anxiety. In fact, it is not unusual for a criminal court to face a human rights issue;[89] similarly, human rights mechanisms do also face international criminal law related issues.[90] It is therefore conceivable and highly probable that each entity will resort to the work and jurisprudence of the other. I anticipate that the Criminal Section will not deviate from this practice. However, in the absence of hierarchy among institutions, the question that arises relates to the value and weight of the case law of each one vis-à-vis the others. I will briefly examine the existing practice and determine how the Criminal Section will use the jurisprudence of other human rights mechanisms and vice-versa.

B. *Judicial Dialogue in Practice among International Legal Entities*

The necessity for judicial dialogue at the international level derived out of necessity due to the lack of rules of relationships between international tribunals and human rights courts and supervisory bodies. The *Tadić* holding emphasizes on the 'the separateness and equality of diverse international tribunals'.[91] The fact that each tribunal is a self-contained system[92] is much telling about the horizontality of international judicial and quasi-judicial

[87] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Dusko Tadić a/k/a 'DULE'* (ICTY Appeals), 2 October 1995, at 11.

[88] *Tzevelekos*, supra note 71, at 665, 688

[89] See *Barayagwiza* case and *Gatete* cases, supra note 73

[90] See Judgment, *Hadijatou Mani Koraou v. Niger*, (ECW/CCJ/APP/0808) ECOWAS, October 27, 2008, at 72–89 (considering whether slavery is a crime against humanity in accordance to relevant international criminal law norms).

[91] R. Teitel and R. Howse, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order', 41 *N.Y.U. J. Int'l L. & Pol.* (2008–2009) 959, at 967.

[92] *Tadić*, supra note 87, at 11.

institutions. However, horizontality does not preclude any cross-reference or judicial dialogue between them. In fact, as Teitel and Howse argue,

> what the Tadić court was resisting in its reference to 'self-contained systems' was the hegemony or binding authority of an external tribunal. It could not accept the notion that the material of that tribunal be treated as *stare decisis* rather than as part of the normative material to be considered in solving the legal problem at hand within the parameters of the regime to which the tribunal solving the problem was charged in its mandate.'[93]

Henceforth, decisions of an international judicial institution are not binding upon other international tribunals or quasi-judicial mechanisms such as the human rights supervisory bodies. However, they don't lack authority. Regarding decisions and jurisprudence from human rights treaty bodies, the ICTR held that they 'are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.'[94]

The concept 'persuasive authority' may look ambiguous. Schauer thinks that the term 'optional authority' would fit better than 'persuasive authority'.[95] Thus, for him, 'persuasive authority' seems to be interchangeable with the terms 'inspiration', 'basis for discussion', 'assistance', 'orientation', or 'interpretive guidance'.[96] In the literature and in the understanding of the international courts, it means that judges and other decision-makers are not required to follow the result or reasoning of other judges' decisions, but have a choice whether to use the authority or not.[97] A judge or court will make a reference to a decision or judgment only if he finds its reasoning persuasive.[98] For international criminal courts, Geneus argue that whenever faced with a human rights issue, they are obligated to consult the jurisprudence of the European Court of Human Rights, and, after a thorough review, they can decide whether they are persuaded by its reasoning or whether they want to deviate from it and re-interpret the human rights standard.[99] If a court is persuaded by the decision, it will decide how to translate a particular norm in the context of

[93] Teitel and Howse, supra note 91, at 976.
[94] Barayagwiza case, supra note 73, at 40.
[95] F. Schauer, 'Authority and Authorities', 94 *Virginia Law Review* (2008) at 1946.
[96] Ibid.
[97] J. Geneuss, 'Obstacles to Cross-fertilisation: The International Criminal Tribunals' "Unique Context" and the Flexibility of the European Court of Human Rights' Case Law', 84 *Nordic Journal of International Law* (2015) 404–27, at 424.
[98] Ibid., at 424–5.
[99] Ibid., at 425.

criminal proceedings, keeping in mind the delicate balance between accused's fair trial rights and public interest. This was for example the case in *Furundžija* where the ICTY relied on the definition of torture as provided for in the Convention against torture, considering it as reflecting customary international law.[100]

Many authors warn against a direct transplantation of norms or concepts originating from another branch of international law. For instance, the legal norm or concept must be translated from the language of the original legal system into the language of the receiving one.[101] Contextualization becomes relevant because 'judges would have to apply their own founding statutes and there may be limits to how far decisions originating from different statutes may be transposable'.[102] Thus,

> importing a human rights norm into international criminal law requires an assessment of whether such norm shares the same concerns, serves the same aims and is grounded on legal principles which are corner-stones of international criminal law. Because human rights instruments ultimately aim at protecting the individual against the abuse of state power, the definition of crimes under human rights law cannot be automatically transposed on international criminal law where the relationship is private in the sense that the individual is opposed to other individuals.[103]

If a court decides to depart from interpretations of human rights norms, it should carefully explain and provide a sound justification of the deviation, given the fact that those interpretations from human rights bodies prove to be authoritative. For instance, the high degree of persuasiveness attached to the case law of the European Court of Human Rights, which, according to Geneuss, 'carries the weight of "directory authority"[104] any "re-interpretation" of a straightforward (autonomous) interpretation of specific terms that determine the scope of applicability of a human rights norm by the ECtHR, like criminal charge, witness or penalty, seems to be possible only in very exceptional circumstances'.[105] For example, 'in regard to a re-interpretation of a generalizable juridical test, on the other hand, ICTs [International criminal tribunals] must identify the factors used by the ECtHR. Then ICTs can add

[100] *Furundžija*, supra note 12, at 159 and 160; *Furundžija* Appeals Judgment at 111.
[101] Geneuss, supra note 97, at 406.
[102] A.Z. Borda, 'How Do International Judges Approach Competing Precedent? An Analysis of the Practice of International Criminal Courts and Tribunals in Relation to Substantive Law,' 15 *International Criminal Law Review* (2015) 124–46 at 136.
[103] Soares, supra note 19, at 183.
[104] Geneus, supra note 97, at 426.
[105] Ibid.

additional factors that reflect the unique context in which they operate and might omit those factors that are not relevant because they only matter in the domestic context.[106]

Borda distinguishes situations where departure is warranted: when an international criminal court considers that a human rights body has erred on a legal point in its decision[107] or in the interests of justice when a particular norm needs to be adapted to the contextual background of the case.[108] In any case, the principle of judicial comity among institutions is usually respected to the point that it is rare to notice a 'frontal' collision of courts in their decisions, at the exception of the *Tadić* (ICTY) and *Nicaragua* (ICJ) cases which articulate different tests of attribution of State responsibility for acts committed by non-states actors acting under their control.[109] Therefore, for Miller, a court will respect the jurisdiction of others and will be 'reluctant to show its disrespect for another by distinguishing or explicitly disagreeing with its decisions.'[110] Romano reinforces this point by arguing that

> if judges of one court feel differently from those of another court on a given point of law, out of judicial comity they will often simply omit to take cognizance of judgments that do not support the reasoning chosen. Citing to say 'they got it wrong' will generally be avoided, and probably even severely frowned upon … Likewise, whenever judges of one court feel the need to depart from established case law or practices propound followed by other courts, they will usually try to avoid arguments on the merits of the other court's decision-making. Rather, they will stress differences in the respective constitutive instruments and missions.[111]

However, under the disguise of 'uniqueness', 'specificity' or 'distinctiveness' of international criminal courts, comity does not forbid a reinterpretation of human rights norms developed by human rights courts and supervisory bodies to the point that they develop their own human rights

[106] Ibid.
[107] Borda, supra note 102, at 139.
[108] Ibid., at 138.
[109] While the ICJ ruled in favor of an 'effective control' test (see Judgment, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)*, ICJ, 27 June 1986, at 105–115), the ICTY propounded the 'overall control' test (see, *Tadić*, ICTY, Appeals Chamber (IT-94–1-A) 15 July 1999, at 145 and 162. See also A Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18–4 *European Journal of International Law* (2007) 649–68.
[110] N. Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', 15 *Leiden Journal of International Law* (2002) at 499.
[111] C.P.R. Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue', 41 *Journal of International Law and Politics* (2009) 766–7.

standards.[112] This hard deviation is a double-edge sword. It can enhance or undermine legal protections of the accused.[113] For instance, international tribunals' stance on the right to *habeas corpus* or provisional release is particularly instructive. While human rights bodies emphasize on the right to liberty to be upheld, even in criminal proceedings unless special circumstances justify detention,[114] international criminal courts reverse the burden of proof by requiring the accused to demonstrate exceptional circumstances justifying provisional release,[115] making 'detention appears to be the rule and provisional release the exception'.[116] The justification for this departure lies in the particularly odious and complex nature of the crimes prosecuted before international criminal tribunals and the special circumstances under which they function, particularly their reliance to state cooperation.[117] Similarly, in the *Kunarac* case, ICTY departed from the torture rule provided for in human rights law by holding that a person acting in his private interests can be held accountable.[118]

In case of departure, 'an earlier interpretation by a sister court would not, generally, be formally overruled and, in principle, both would therefore remain valid.'[119] Therefore, two decisions of equal legal force but containing different interpretation of the same standard may co-exist, given the fact that each court is a self-contained institution, which precludes any kind of

[112] E. Møse, 'Impact of Human Rights Conventions on the Two Ad hoc Tribunals', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Leiden: Martinus Nijhoff, 2003) 185–204 at 189.

[113] M. Fedorova and G. Sluiter, 'Human Rights as Minimum Standards in International Criminal Proceedings', 3 *Human Rights & International Legal Discourse* (2009) at 18 et seq. But see, S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford, Oxford University Press, 2003) at p. 7 (who argues that the adherence of ICTs to international human rights is a policy issue, not a legal question).

[114] Human Rights Committee, *Cagas v. Philippines* (Comm No 788/1997), CCPR/C/73/D/288/1997, 23 October 2001 at 7.4.

[115] Sznajder and Zeegers, supra, note 23; ICCPR, supra, 24. Amendments Adopted at the Thirteenth Plenary (26–27 May 2003), 10. The requirement of exceptional circumstances was removed from the Rules of Procedure and Evidence of ad hoc tribunals, respectively at the twenty-first plenary session of the judges (ICTY) in November 1999 and, more than three years later, at the Thirteenth Plenary (26–27 May 2003) for ICTR.

[116] Decision on Jadranko Prlic˝'s Motion for Provisional Release, *Prosecutor v. Prlic´ et al* (IT-04–74-T), ICTY, 21 April 2011, at 28.

[117] Decision on Motion for Provisional Release filed by the Accused Zejnil Delalic´, *Delalic´ et al* (IT-96–21-T), Trial Chamber, 25 September 1996, at 19.

[118] Judgment, *Kunarac, Kovac and Vukovic*, (IT-96–23& IT-96–23/1-A), Appeals Chamber, 12 June 2002 at 148.

[119] Borda, supra note 102, at 136–7.

precedence of any on the other. This can give rise to fragmentation and potential conflict and insecurity to accused persons and practitioners.

It has been highlighted earlier that human rights norms and case law developed by human rights bodies are not binding on international criminal courts. They are of persuasive authority and international courts can take them as a starting point[120] in order to justify their specific interpretations of human rights norms, based on the nature and content of the human right in question placed within the context in which international criminal courts operate.[121] I submit that a justice and fairness-oriented approach would prevent a demarcation very detrimental to the human rights of the accused persons. In fact, in order to put it into practice, it is now well settled that international courts founding legal instruments include an explicit and unequivocal obligation to interpret and apply their applicable law in a manner consistent with 'internationally recognized human rights',[122] contrary to the ad hoc tribunals, which do not have an explicit statutory obligation to adhere to IHRL.

C. *Whither Judicial Dialogue between the Criminal Law Section and Human Rights Mechanisms?*

Finally, how can we translate the above principles around the judicial dialogue among international judicial and quasi-judicial human rights and criminal institutions, in the African context? Concretely, being the last born, will the Criminal Section simply transplant norms and principles adopted by pre-existing African human rights mechanisms throughout their work? In the alternative, to what extent the Criminal Section may depart from interpretations made by human rights mechanisms? This section addresses these questions.

The relationship between the Criminal Section and existing African human rights mechanisms should rest on the same principles developed above which guide the relationship between international criminal courts and human rights courts and supervisory bodies. In a nutshell, one can expect the Section to take into account the case law developed by the current African Court on Human and Peoples' Rights, the RECs courts and the ACHPR as well. While the case law should not be binding on the Section, it nevertheless carries with it an important persuasive value. The Section cannot afford to ignore the existing norms and principles set up by authoritative institutions on

[120] Geneuss, supra note 97, at 384.
[121] Ibid.
[122] Art. 21(3) ICC St.

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the continent. However, none can expect a direct transplant of the said human rights principles and norms in the criminal proceedings. At a minimum, their application and interpretation should be contextualized in view of the specificity of the methods and purposes of the Criminal Section.

A problem may arise with the African Commission's decisions. What is the value of the latter in the eyes of the Criminal Section? Should this entity also consider them as persuasive or simply depart from them, the reason being that they have been engineered by a non-judicial body? In my view, it is not advisable for the Section to go this road. Instead, it should follow the footsteps of the current continental human rights court which considers the Commission's decisions as persuasive. In practice, the current Human Rights Court regularly cites the Commission's decisions on different issues such as exhaustion of local remedies, fair trial rights, etc. Therefore, the Criminal Section should not easily dismiss the persuasiveness of African Commission's decisions, arguing the quasi-judicial nature of the institution. But for the sake of contextualization, no rule forbids the Criminal Section to adopt a different interpretation of human rights issues.

On the other hand, we expect human rights mechanisms to also reference or draw inspiration from the case law of the Criminal Section when they will be dealing with human rights violations amounting to international crimes. This is not new on the continent. For instance, the ECOWAS Court exercising its human rights jurisdiction in the *Hadijatou Mani* slavery case did refer to ICTY jurisprudence in *Kunarac* case and endorsed the tribunal's 'indicators' of modern day slavery essentially involving the nature and degree of control, physical and psychological, over the individual.[123]

In conclusion, the Criminal Section and other African human rights mechanisms should engage in a judicial dialogue instead of each one stubbornly acting as a self-contained entity without any regard to other institutions with similar goals. Actually, the *Human Rights Strategy for Africa* makes the same call for collaboration.[124] This is a win-win deal, which is posed to strengthen each entity and assist it in reaching its potentials. Therefore, cross-fertilization and cross-referencing between the Criminal Section and Human Rights Mechanisms 'either at the standard-setting level or at the interpretation stage' will avert fragmentation but also will meet the challenges posed to the African law where judicial and quasi-judicial entities interact. It will maintain its normative unity.

[123] *Koraou* case, supra note 90, at 77.
[124] *Human Rights Strategy for Africa*, (Addis-Ababa: African Union Commission, Department of Political Affairs) 2011, at 23, 24 & 41.

5. CONCLUSION

The creation of an ACC is undoubtedly a major breakthrough in the fight against impunity of serious violations of human rights on the African continent. The Criminal Section of the ACJHR is an important and indispensable addition to the existing human rights institutions operating at the continental, sub-regional or national level. In fact, it was the missing link towards strengthening of the African human rights architecture. Contrary to other continental human rights mechanisms, it is tasked with the determination of the individual and corporate criminal responsibility. This ever-lacking pillar at regional level will undoubtedly complement the actual system entrusted with the power to only determine states' responsibility for human rights violations. This will contribute towards the convergence between state and the individual responsibility for human rights violations. However, it is important to conceive the Criminal Law Section in more functional and utilitarian terms, as a preventive tool instead of being merely reactive to serious human rights violations.

However, the new criminalization of gross human rights violations on the continent does not necessarily guarantee the improvement of the human rights situation; but at the same time, this chapter contends that the new criminal law section will enhance the capacity of the human rights system to ensure protection of human rights. The Section is therefore an integral part of the struggle against human rights violations. It is part and parcel of the human rights architecture. Although proliferation of mechanisms can spread some fears of fragmenting African human rights standards and law, this chapter has showed that the risk can be mitigated or avoided through cross-referencing between relevant institutions, guided/informed by the principles of complementarity and comity. In this regard, the African criminal Section should apply and interpret its relevant instruments in a way compatible with the existing human rights case law. This will be a major contribution to the normative unity and harmony of African human rights law instead of promoting its disintegration.