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NAVIGATING GLOBAL FRAGILITY: THE ICC AS A PILLAR OF INTERNATIONAL CRIMINAL JUSTICE

Deo John Nangela *

Abstract

Global peace and stability are increasingly becoming fragile amid internal state fissures, contested sovereignty, and weakened multilateralism. At the same time, the legitimacy and deterrent capacity of the International Criminal Court (ICC) are sharply contested, particularly in Africa. The African Union has criticized the ICC for selective justice, neo-colonial bias, and structural power asymmetry. This paper examines these critiques alongside the Malabo Protocol, which seeks to Africanize international criminal justice but is constrained by immunity for sitting leaders and weak enforcement. Despite these tensions, the paper argues that the ICC retains essential normative value by stigmatizing atrocity crimes, affirming victims' dignity, and sustaining global accountability norms.

Key Words: *ICC, Global Fragility, International Criminal Legal Order, Deterrence, Crimes Against Humanity, AU, Impunity, Multilateralism, Sovereignty, Malabo Protocol*

1. INTRODUCTION

As the twentieth century gave way to the twenty-first, few anticipated the turbulence that now defines the international rule-based order. At the turn of the century, multilateralism was the prevailing norm, and collective efforts to secure peace and

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stability — including the prevention and punishment of the gravest crimes against humanity — enjoyed significant momentum.[1] Yet, the twenty-first century has unfolded against a markedly different backdrop: renewed great-power rivalry, fragmented multilateralism, regional contestations, and entrenched non-state violence increasingly dominate the global agenda.[2]

Today, the fragility of peace and stability is starkly evident, and the international community appears to be operating on precarious ground. Internally, many states are fractured by political, social, and economic tensions; externally, longstanding borders and norms of sovereignty are increasingly under strain, as seen in contexts ranging from the China's tensions over Taiwan and Inner Mongolia, the India – Pakistan hostility and Cambodia and Thailand's border instability, to the on-going Russo-Ukraine war. A recent European Union (EU) report warns that the post–World War II rules-based order is "dying,." Highlighting persistent geopolitical and geoeconomic upheavals, security threats, and environmental and technological pressures that necessitate strengthened resilience across international

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1 See Ruggie, J. G. "Multilateralism: The Anatomy of an Institution," (1992) 46 *International Organization* 561–598. See, generally, Roberts, A. & Kingsbury, B., (eds.), *United Nations, Divided World: The UN's Roles in International Relations* (2nd ed. 1993.

2 See Goddard, S. E., MacDonald, P.K & Nexon, D.H., The Return of Power Politics? (Available from *https://ondisc.nd.edu/assets/560655/goddard_macdonald_nexon_introduction_power_politics.pdf?utm_campaign=redirect&utm_medium=web&utm_source=ndisc.nd.edu* (accessed on 15/12/2025). See also Ikenberry, G.J., "The End of Liberal International Order?" (2018) 94 *International Affairs* 7–23. See also Mead, R.W. "*The Return of Geopolitics: The Revenge of the Revisionist Powers*, (2014) 93 *Foreign Affairs,* pp. 69-74, 75–79. Koskenniemi, M. *International Law and the Far Right: Reflections on Law and Cynicism*, T.M.C. Asser Press, (2019).

governance frameworks,[3] the Report concludes that "the world today is more unpredictable than ever before."[4] Additionally, even developments such as the United States' recent recharacterization of its Department of Defence as a "*Department of War*" appear to confirm this trajectory, amplifying concerns about future instability.[5]

Within the African context, ongoing wars in the Sahel and Great Lakes regions have coincided with persistent African Union (AU) criticisms of the International Criminal Court (ICC).[6] The AU has promoted the Malabo Protocol as a framework for African-centered international criminal justice, raising questions about whether this initiative complements the ICC by strengthening regional ownership of justice or risks entrenching impunity through immunity provisions and weak enforcement mechanisms.[7]

Against this backdrop, several pressing questions emerge. Can the ICC, despite its institutional and enforcement limitations, continue to function as a central pillar of international criminal

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3 See European Commission, *Resilience 2.0: Empowering the EU to thrive amid turbulence and uncertainty*, 2025 Strategic Foresight Report, Strasbourg, 9.9.2025 COM (2025) 484 final, at page 1. (Available from *2e1f1de3-dff6-44f7-b2a3-1dd8eee396bb_en* (as accessed on 9/9/2025)).

4 See above note 3.

5 See the White House, Presidential Acts, *Restoring the United States Department of War*, Executive Orders, 5 September 2025. Available from *https://www.whitehouse.gov/presidential-actions/2025/09/restoring-the-united-states-department-of-war/* (as accessed on 10/09/2025).

6 See Clarke, K.M. *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*. Duke University Press, 2019.

7 See Omorogbe, E.Y. "The Crisis of International Criminal Law in Africa: A Regional Regime in Response? (2019) 66 *Netherlands International Law Review*, pp. 287-311.

justice? How valid are the AU's criticisms, particularly when they reflect political self-preservation and sovereignty-driven resistance to external accountability? Moreover, given the adoption of the Malabo Protocol, which seeks to Africanize international criminal justice, does the Protocol genuinely complement the ICC and strengthen regional ownership of justice, or does it risk entrenching impunity through immunity provisions and weak enforcement mechanisms?

This paper examines the current state of the global order and assesses the ICC's continuing relevance as a cornerstone institution for promoting justice and stability. It explores the concepts of global fragility, stability, and the international criminal legal order;[8] analyses the erosion of stability and the need for restorative measures; and emphasises the role of international legal enforcement in deterring atrocity crimes and reinforcing peaceful coexistence. Moreover, it evaluates the ICC's perception from an African perspective and critically examines the validity of these regional critiques.

Structurally, the article is divided into five parts. Part One introduces the study and clarifies the concepts of global fragility and stability. Part Two considers the ICC and its role in upholding the international criminal legal order. Part Three examines the issue of Africa's fragility and evaluates criticisms of the Court, with particular emphasis on the African Union's perspective. Part Four analyses the Malabo Protocol and considers the manner in which it may be harmonised with the ICC regime. Finally, Part

8 These concepts are discussed in parts 1.1 and 2.0 of this paper.

Five draws conclusions from the discussion, setting out some recommendations.

1.1 Conceptualising Fragility and Global Stability

In defining what fragility means, the Organization for Economic Co-operation and Development (OECD) defines it as a "*combination of exposure to risk and insufficient coping capacity of the state, system and/or communities to manage, absorb or mitigate those risks*."[9] Conceptually, however, fragility is better understood contextually, given its association with a wide range of disciplines—from development economics and political science to public health, international relations, and global justice.[10] Owing to its ubiquity, fragility is widely regarded as a global phenomenon, indeed the norm rather than the exception, affecting states to varying degrees.[11]

1.2 Global Stability *vs* the State of Global Fragility

Global stability stands in dichotomy to fragility. It denotes a state of harmony, resilience, and institutional capacity to absorb and

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9 See OECD (2022), States of Fragility 2022, OECD Publishing, Paris, *https://doi.org/10.1787/c7fedf5e-en (as* accessed on 28/8/2025), at p.11. See also Dupuy, K., Gates, S., and Nygård, H.M. "State Fragility and Armed Conflict" *Conflict Trends, 07/ 2016* (available from *https://cdn.cloud.prio.org/files/2723b83a-1eca-4f68-b8fd-ac928a41a8e2/Dupuy%20Gates%20Nyg%C3%A5rd%20-%20State%20Fragility%20and%20Armed%20Conflict%20Conflict%20Trends%207-2016.pdf?inline=true* (as accessed on 28/8/2025). See also Gates, S., Graham, B.A., Lupu, Y., Strand, H. and Strøm, K.W. "Power Sharing, Protection, and Peace". (2016) *The Journal of Politics,* 78(2) pp. 512-526.

10 See Saeed, R. "The Ubiquity of State Fragility: Fault Lines in the Categorisation and Conceptualisation of Failed and Fragile States" (2020) 29 (6) *Journal of Social and Legal Studies*, pp.767-789. See, for instance the applicability of this concept in the global health in Diaconu, K., *et al.*, "Understanding Fragility: Implications for Global Health Research and Practice" (2020) 35 (2) *Health Policy and Planning*, pp. 235-243.

11 See Saeed, above note 10.

manage socio-political and economic shocks. Fragility, by contrast, reflects the vulnerability of states whose institutions lack the strength or infrastructure to withstand internal or external pressures. As noted earlier, presently, the international order is at a critical juncture: peace and stability have rarely been so precarious, undermined by complex and shifting forces. As one commentator notes, "the world has seen mounting pressures on states and the international system generally."[12] Many nations are both internally and externally experiencing a surge of risks associated with internal violence as well as an atmosphere of belligerent behaviours, never experienced hitherto since the end of the Cold War Era.[13]

The last two decades offer stark illustrations. The food riots of 2007–2008 exposed vulnerabilities in global supply chains.[14] Subsequently, the financial crisis of 2009 shook economies and deepened inequalities. In the decade that followed, the number of global refugees doubled.[15] The COVID-19 pandemic (2019–2023) laid bare structural weaknesses in governance and health systems,[16] while climate change has continued to exacerbate fragility by fuelling migration and resource conflicts.[17] Even long-established democracies have not been immune: the

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12 See, "*A World Adrift: The Failures of the Global Order and What Comes Next*" (available from *https://fragilestatesindex.org/2025/02/18/a-world-adrift-the-failures-of-the-global-order-and-what-comes-next/* (as accessed on 2/9/2025).

13 See Rustad, S.A., (2025) *Conflict Trends: A Global Overview*, 1946–2024. *PRIO Paper*. Oslo: PRIO. (Available online from *https://cdn.cloud.prio.org/files/31b69202-0728-4852-94e9-a08bdf662fe9/Rustad%20-%20Conflict%20Trends%201946-2024%20-%20PRIO%20Paper.pdf?inline=true* (as accessed on 24/8/2025).

14 See, "A World Adrift", above, note 12.

15 See, "A World Adrift", above, note 12.

16 See, "A World Adrift", above, note 12.

17 See, "A World Adrift", above, note 12.

unprecedented attack on the U.S. Capitol on 6 January 2021 revealed cracks in democratic resilience.[18] More recently, the year 2024 was marked as "the fourth most violent year since 1989… with 61 active conflicts across 36 countries — the highest number recorded since 1946." [19] That such belligerence now extends to Europe — a region long considered secure in the post–World War II order — is particularly striking.[20] Coles and Rellstab note that, beyond undermining stability in Europe, the Russo-Ukraine war has had far-reaching consequences for global food and energy security, particularly in the Middle East and Africa, sending shockwaves through an international system still recovering from the COVID-19 pandemic.[21] These developments collectively underscore the urgency of assessing the state of global stability versus fragility, and their implications for the institutions designed to maintain peace and justice.

1.3 The Rationale

The foregoing analysis raises a critical question: what lessons can be drawn from the current state of fragility for understanding the ICC's relevance? Fundamentally, the present global context highlights the indispensable role of the ICC as a guardian of justice, stability, and peace. It underscores the necessity of forging broader multilateral consensus to strengthen the Court's authority

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18 See, "A World Adrift", above, note 12.

19 See Rustad, above note 13, at p. 7.

20 See for instance, Genini, D. "How the war in Ukraine has transformed the EU's Common Foreign and Security Policy" (2025) *Yearbook of European Law,* pp.1-43. See further, Falkner R. "Weaponised Energy and Climate Change: Assessing Europe's Response to the Ukraine War" (2023) 3(1):10 *LSE Public Policy Review*, pp. 1–8. DOI: *https://doi.org/10.31389/ lseppr.78* (as accessed on 2/9/2025).

21 See Coles, S. and Rellstab, L. "Seven Ways Russian's War on Ukraine has Changed the World' (available *from https://www.chathamhouse.org/2023/02/seven-ways-russias-war-ukraine-has-changed-world* (as accessed on 2/9/2025)).

and align its mission with the 193 sovereign states recognized under the UN Charter. While numerous lessons emerge from the fragility scenarios discussed above, this paper emphasizes four overarching themes, each of which helps explain why the ICC remains central to today's fragile international order.

Firstly, although the nature of challenges faced by states and regions is not homogeneous, a closer assessment reveals that each bears its own internal and external fissures, often stemming from domestic political tensions or external pressures. From a regional standpoint, the African continent, for instance, continues to grapple with overt fractures manifesting in tribal, ethnic, religious, and political conflicts — many of which are increasingly multi-layered and resistant to resolution.[22] In Europe, the Russo-Ukraine war has starkly exposed both the fragility of the region's much-assumed perpetual peace and the limitations of the European Union's *Common Foreign and Security Policy (CFSP)*, which was conceived in the relative stability of the post–Cold War era.[23] Elsewhere, in Asia, Middle-East, the Caribbean and Indo-Pacific, tensions and conflicts remain active and volatile.[24] Collectively, these crises create fertile ground for international crimes, underscoring the continuing relevance of the ICC.

Secondly, at a broader global level, the present moment reflects a weakening of the post–World War II rules-based international order. This unsettling of the *status quo* is being fuelled not only by the negative effects of globalisation and large-scale migrations

22 See Rustad, above note 13, at p. 7.

23 See Genini, above note 20, at p.1).

24 Consider, for instance, the on-going Myanmar crisis, the Syrian crisis or the Unresolved Haiti sufferings.

— caused by war, poverty, and climate change — but also by the weaponisation of technology to incite hatred, the resurgence of populist rhetoric, belligerent expansionist policies, and the rising threat of xenophobia. [25] The growing xenophobic and ultra-nationalistic tendencies, particularly in the form of hostility toward immigrants perceived as threats to employment, cultural identity, or national security, are increasingly taking root as state policies in some countries. This is fostering dangerous "us *versus* them" fault lines that strain inter-state relations and risk escalating into open conflict.[26]

Undoubtedly, all indicators are now on the wall, that the cherished ideals of internationalism — which once fostered respect for state sovereignty and territorial boundaries — are gradually eroding, replaced by xenophobic postures and expansionist ambitions that threaten the stability of the existing international legal order.[27] This reality calls for a renewed global

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25 See, Ibrahim, Y. K., Ahmad, A. A., Duguri, U.S., "The Complexities of South African Xenophobia on Nigerian Nationals" (2020) 4(2*) Liberal Arts and Social Sciences International Journal (LASSIJ), 71.10.47264/idea.lassij/4.2.7* (as accessed on 28/9/2025). See also Nnaemeka, A.K. 'Xenophobia and National Identity: A Study and Moral Evaluation of Contemporary South African Nigerian Conflicts on Digital Platforms' (2024) 4 (3) *Aquino Journal of Philosophy*, pp.141-150; Castles S., Haas, H. de, & Miller, M. J. *The Age of Migration: International Population Movements in the Modern World*, 6ed. Red Globe Press (2019).

26 See Lesetedi, G.N., & Modie-Moroka, T., "Reverse Xenophobia: Immigrants Attitudes Towards Citizens in Botswana". A Paper presented at the African Migrations Workshop: Understanding Migration Dynamics in the Continent at the Centre for Migration Studies, University of Ghana, Legon-Accra, Ghana, September 18th – 21st 2007. (Available from *https://www.migrationinstitute.org/files/events/lesetedi.pdf* (as accessed on 31/8/2025.) See also Tan, S. "The Onset of Ethnic War: A General Theory" (2015) 33 (3) *Sociological Theory,* pp. 256-279.

27 See Leonitiev, L., "On the Rise of Universal Criminal Justice" (2025) *Policy Brief Series No.167*, pp.1-4, available from *https://www.toaep.org/pbs-pdf/167-leontiev/* (as accessed on 28/8/2025).

consensus aimed at strengthening multilateral conflict-resolution mechanisms alongside coercive criminal enforcement institutions such as the ICC. In this respect, all 193 UN member states ought, as a matter of necessity, to accede to the Rome Statute and support the Court, whose role in preserving international peace and stability remains indispensable. It is particularly paradoxical that the United States, while positioning itself as a promoter of global peace through instruments such as the 2019 *Global Fragility Act* (GFA)[28] —intended to prevent conflict and foster stability in fragile states — has simultaneously imposed sanctions on the ICC, an institution whose very purpose is to advance these objectives. Such a posture risks being seen as counterproductive, if not outright contradictory.

Thirdly, the global fragility outlined above reflects a deeper erosion of globalism and respect for cultural diversity (*multiculturalism*), both of which were once celebrated as core principles enshrined in post–World War II human rights instruments.[29] These are slowly being side-lined even if they were hitherto regarded highly as jewels that help to decorate the post-World War II geo-political landscape. In their place, we now witness the rise of eccentric and neo-chauvinistic tendencies,

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28 See *the Global Fragility Act of 2019* (Title V of Div. J, P.L. 116-94) (GFA).

29 See for instance *General Assembly Resolution 67/185* on "Promoting efforts to eliminate violence against migrants, migrant workers and their families." See also Articles 1 and 55 of the Charter of the United Nations (1945) and the preamble to the Universal Declaration of Human Rights (UDHR, 1948). See further: Jokhio, Z., 'Cultural Diversity in a Globalized World: Navigating Interconnected Realities' (available from *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4589308* (as accessed on 31/8/2025); Sotshangane, N., "What Impact Globalization has on Cultural Diversity?" (2002) (4)(1) *Alternatives: Turkish Journal of International Relations*, pp. 214-231; Yang, M. "Why are Some People More Hostile to Immigrants than Others?"(2018) 26 (1) *The Park Place Economist*, pp. 116-122.

driven by internal contradictions, widening inequalities, and the consolidation of wealth and power through technology. This dynamic is fuelling a resurgence of populist nationalism, protectionism, and xenophobia worldwide, contributing to the emergence of a volatile and chaotic global landscape.[30]

It is indeed ironic that the rules-based international and domestic legal orders — carefully constructed in the aftermath of the Second World War — are today being undermined by some of the very states that helped establish them. The United States again provides a striking example: it is affirmed, in its National Security Strategy (NSS) that it will:

> "Work to strengthen fragile states 'where state weakness or failure would magnify threats to the American homeland" and "empower reform-minded governments, people, and civil society" in these places."[31]

With such an affirmation under its NSS, which has been backed by a legal framework such as the GFA, one would scarcely expect the US, which is a democracy of its own stature, to simultaneously oppose the ICC through punitive sanctions. Such a contradiction, however, exposes the fragility of the current global legal order and raises critical questions about the credibility of international commitments to peace, justice, and collective security.

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30 See *A World Adrift*, above note 12.

31 See the 2020 US Strategy to Prevent Conflict and Promote Stability. The Strategy was submitted to Congress in line with Section 504(a) of the *Global Fragility Act of 2019*, which requires development of a ten-year Global Fragility Strategy. The same is available from *https://www.state.gov/wp-content/uploads/2021/01/2020-US-Strategy-to-Prevent-Conflict-and-Promote-Stabilit-508c-508.pdf* (as accessed on 2/9/2025).

Finally, considering these developments, a "re-examination of the trends and contexts in which conflict occurs"[32]—as well as the appropriate means of exerting deterrent pressure on those responsible for such insidious schemes — is both necessary and warranted. Traditionally, strategies such as diplomatic pressure, economic sanctions, multilateral military interventions, international campaigns, mediation and arbitration, and legal enforcement measures against perpetrators of mass atrocities have all been employed, in varying forms, to achieve deterrent goals. Today, however, the challenge lies in the declining emphasis on such collective approaches — approaches once characterised by multilateralism, the reinforcement of international norms, and a focus on collective security. This shift demands urgent redress, with renewed commitment to a revitalised and firmly upheld multilateral spirit as the only viable solution to the fragility of the present global order.[33]

The establishment of the ICC in 1998 marked a decisive step in this direction. It signified two fundamental commitments. *First,* building on the lessons of the post–World War II Nuremberg and Tokyo International Military Tribunals, [34] and later the *ad hoc* tribunals for the former Yugoslavia (ICTY)[35] and Rwanda (ICTR),[36] the international community demonstrated its readiness to create a permanent, multilateral forum vested with jurisdiction

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32 See Leonitiev, above note 27.

33 See *A World Adrift*, note 12 above.

34 The Nuremberg IMT was established on the 8th of August 1945, and The Tokyo IMT was set up in January 1946.

35 For the ICTY see Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), S.C. Res.827, art. 3, U.N. Doc. S/RES/827 (May 25, 1993).

36 See Statute of the International Tribunal for Rwanda (ICTR), S.C. Res. 955, art. 5, U.N. Doc. S/RES/955 (Nov. 8, 1994).

over perpetrators of the most serious international crimes. *Second*, the creation of the ICC embodied the international community's resolve to end impunity by constructing a robust system of international criminal enforcement capable of addressing grave crimes and deterring those who might otherwise plunge their societies, states, regions, and indeed the wider international community into conflict, instability and mass suffering.

That said, the pressing concern now is how the ICC has been perceived since its inception, and whether, nearly three decades later, the states that championed its creation continue to view its founding mission as relevant in addressing today's challenges. This issue of relevance will be examined in the discussion that follows.

2. STRENGTHENING A FRAGILE INTERNATIONAL CRIMINAL LEGAL ORDER (ICLO): THE ICC AND ITS ROLE

International criminal legal order (ICLO) refers to the framework of legal rules designed to bring to justice perpetrators of the most egregious crimes, namely genocide, crimes against humanity, war crimes, and the crime of aggression.[37] Emerging from the post–World War II determination to end impunity for such atrocities, this legal order gained momentum in the post-1990s

[37] See Robinson, D., et al., *An Introduction to International Criminal Law and Procedure*, 5ed, Cambridge University Press, (2024), at pp. 1–27. See also Shaffer, G., and Aaronson, E. "Transnational Legal Ordering of Criminal Justice" in Shaffer, G., (ed) *Transnational Legal Ordering of Criminal Justice*, Cambridge University Press, (2020), at pp.205-233.

with the creation of *ad hoc* tribunals.[38] However, the *ad hoc* tribunals' approach was fragile in nature on the account that it was temporary and reactive.[39] The temporary nature of the *ad hoc* tribunals underscored the need for a permanent court, culminating in the 1998 Rome Statute[40] and the subsequent establishment of the ICC to enforce its provisions globally.

The establishment of the ICC under the Rome Statute marked a watershed moment in the ICLO, combining the entrenchment of global norms with the capacity to address legal fragility and preserve systemic coherence.[41] The jurisprudence it has so far developed through its decisions such as the *Lumbanga's case*,[42] *Katanga's case*[43] and other subsequent decisions — on modes of liability and levels of victims' participation and reparations — has helped to provide a practical clarification regarding the elements of international crimes, thus contributing to the development of prosecutorial and evidentiary practice relating to the prosecution of such crimes. Its high-profile investigations, which have included indictment of senior political figures, demonstrate that

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38 The International Criminal Tribunal for the former Yugoslavia (ICTY) and its sister International Criminal Tribunal for Rwanda (ICTR), were both created by the UN Security Council.

39 See Ford, S. "The Impact of the Ad Hoc Tribunals on the International Criminal Court," in *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and ICTR's Most Significant Legal Accomplishments,* Milena Sterio & Michael Scharf (eds.), Cambridge University Press, (2019).

40 Rome Statute of the International Criminal Court, 2187 UNTS 90 (entered into force 1 July 2002).

41 See Chao. Y., "The Role of International Criminal Law in the Global Legal Order", (2015) No. 46 *FICHL Policy Brief Series* (available from *https://www.toaep.org/pbs-pdf/46-chao?utm_source=chatgpt.com* (accessed on 11/12/2025).

42 See, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 (Trial Judgment, 14 Mar 2012).

43 See, *Prosecutor v Germain Katanga,* ICC-01/04-01/07 (Trial Judgment, 7 Mar 2014).

holding high office does not confer immunity from accountability.[44]

As noted earlier, the rationale for these developments is anchored not only in the need to end impunity for international crimes by ensuring that post-conflict trials are steered against all accused perpetrators, but also in the aim of creating a deterrent effect for potential future offenders and guaranteeing justice for victims and their communities. These objectives are integral to societal reconstruction and the promotion of peaceful coexistence. In addressing impunity, states are bound by obligations under both conventional treaty law and customary international law. These include the duty to investigate alleged violations constituting international crimes, to prosecute perpetrators, and to cooperate in investigations and prosecutions, thereby facilitating the effective enforcement of the international legal order.[45] With the adoption of the Rome Statute in 1998 and the subsequent establishment of the ICC in 2002, member states of the Rome

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44 See, e.g., the ICC, 'Situation in Ukraine' and arrest warrants issued 17 March 2014 (detailing warrants against senior officials). See also Jackson, M. "The ICC Arrest Warrants against Vladimir Putin and Maria Lvova-Belova – An Outline of Issues", 21 March 2023, Blog of the *European Journal of International Law*, (available from *https://www.ejiltalk.org/the-icc-arrest-warrants-against-vladimir-putin-and-maria-lvova-belova-an-outline-of-issues/*(as accessed on 10/9/2025)).

45 See The International Commission of Jurists, *International Law and the Fight Against Impunity*, 2015. See also Art. 1 of the *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by the UN General Assembly on 9 December 1948, UNTS No. 1021, Vol. 78 at 277 (entered into force 12 January 1951, and Rome Statute of the International Criminal Court, 2187 UNTS 90 (entered into force 1 July 2002). See, Johnson, D., and Schmitt, M.N., "The Duty to Investigate War Crimes" Lieber Institute, Articles of War, Dec 22, 2020 (available from *https://lieber.westpoint.edu/duty-investigate-war-crimes/?utm_source=chatgpt.com* (as accessed on 11/12/2025).

Statute became legally obliged to fully discharge their responsibilities under the treaty.

However, shortly after the ICC began implementing its mandate, it encountered significant criticisms, including being accused of practicing selective prosecution. Unfortunately, such criticisms came from some of its own member states, particularly through the African Union (AU), despite African countries having been strong supporters of the Statute. Considering the continent's own fragility, however, the validity of such criticism merits, albeit briefly, a careful examination.

3. AFRICA'S FRAGILITY AND ITS VIEWPOINT AGAINST THE ICC

Critical scholarship on international criminal justice interventions against impunity — the central mandate of the ICC — often emphasizes that such interventions are not purely legal endeavours, but may also act as potential "disruptors of fragile political equilibria."[46] Debates within the politics of international justice highlight that international criminal law functions within complex political contexts rather than in isolation.[47] Both empirical and theoretical studies indicate that ICC interventions can transform local and transnational political dynamics,

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[46] See Rodman, K. A. *The "Peace versus Justice" Debate at the International Criminal Court*, (unpublished manuscript/working paper, presented at the "Political Violence, Self-Determination and Global Law" Workshop at the 23rd IVR World Congress of Philosophy of Law and Social Philosophy, Jagiellonian University, Krakow, Poland, 1-6 August 2007, available from *https://web.colby.edu/karodman/files/2017/04/IVR_Rodman_ICCPaper.pdf?utm_source=chatgpt.com* (as accessed on 23/11/2025).

[47] See Cryer, R. *An Introduction to International Criminal Law and Procedure, 4th* ed., Cambridge University Press (2019); See also Schabas, W. A. *An Introduction to the International Criminal Court* 5th ed., Cambridge University Press (2017).

reinforcing accountability norms while simultaneously complicating peace negotiations, challenging state sovereignty, and influencing pre-existing political settlements.[48] From the perspective of African states, such scholarly insights appear to inform the continent's critical stance toward the ICC; however, the legitimacy of this position remains contested, given that Africa's scepticism toward the Court is closely intertwined with enduring political and institutional fragility rooted in post-colonial governance challenges.[49]

Although African states initially championed the Rome Statute, their relationship with the ICC soon became strained after the Court's establishment, evolving into one of the most contentious geopolitical and normative debates of the twenty-first century.[50] Its work in relation to Africa has been criticised on the ground that it has turned out to be an institution that serves as a tool of neo-colonialism, practices selective justice, infringes on African

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48 See generally, Roadman, above note 46.

49 See, generally, Mutua, M. 'Politics and Human Rights: An Essential Symbiosis' in Byers, M., (ed) *The Role of Law in International Politics: Essays in International Relations and International Law*; Oxford University Press, (2001), pp.149-176. See also: Mutua, M. 'Africans and the ICC: Hypocrisy, Impunity, and Perversion' in Clarke, K.M., Knottnerus, A.S. & de Volder, E. (eds), *Africa and the ICC: Perceptions of Justice,* Cambridge University Press (2016), pp. 47–60; Mamdani, M. *Saviors and Survivors: Darfur, Politics, and the War on Terror.* Pantheon (2009). See also Nouwen, S.M.H & Werner, W.G., 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 (4) *European Journal of International Law*, pp. 941–965.

50 See Murithi, T., "The African Union and the International Criminal Court: The Politics of Impunity and Sovereignty," (2010), 54(1), *Journal of African Law*, pp. 1–26. See also Gissel, L.E. "A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003", (2018) 29 (3) *European Journal of International Law*, p. 725-748; Naldi, G. & Magliveras, K.D., "The International Criminal Court and the African Union: A Problematic Relationship*,"* in Jalloh, C.C., & Bantekas, I., (eds) *Africa and the International Criminal Court,* Oxford University Press (2017), pp. 111-137.

sovereignty, or disproportionately targets African leaders.[51] However, much of this negative perception appears to have been reinforced by the AU's stance, which "opposed the prosecution of international crimes under universal jurisdiction by non-African states."[52]

Observably, records of the ICC do show that, during its early operations, most individuals brought before the Court for international crimes were from Africa, including former and incumbent heads of state such as former Sudanese President Omar Al-Bashir. Within AU circles, this reality gave rise to a mistaken perception that the ICC's investigations and enforcement actions were selective or biased.[53] Consequently, the AU member states adopted *The Sirte Decision* that members states should refrain from cooperating with the ICC in the execution of its arrest warrants [54] This was followed by six successive decisions reaffirming the AU's non-cooperation stance.[55] To date, the AU has not annulled this position.

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51 See, for instance: deGuzman, M.M., "Is the ICC Targeting Africa Inappropriately? A Moral, Legal, and Sociological Assessment", in Stemberg, R.H., (ed) *Contemporary Issues Facing the International Criminal Court,* Koninklijke Bill NV, Leiden/Boston (2016), pp. 334-337. See also: Benyera, E. 'Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States' (2018) 37 (1) *Politeia* pp.1-30; Chenwi, L. & Sucker, F. 'South Africa's Competing Obligations in Relation to International Crimes' (available from *https://www.saflii.org/za/journals/CCR/2018/9.pdf* (as accessed on 29/8/2025)).

52 See Chenwi & Sucker, note 51 above at p. 200.

53 See Chenwi & Sucker, note 51 above at p. 200.

54 See Assembly of the African Union, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, AU Doc. Assembly/AU/Dec.245(XIII) (3 July 2009), Sirte, Libya.

55 The subsequent AU Decisions were: (1) The AU's decisions adopted during Kampala Summit (2010). These were *AU Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the ICC* and t*he AU*

Even so, the AU's non-cooperation stance is itself ironical. As noted earlier, most African states were ardent supporters of the Rome Statute, fully involved in the negotiation process, championed the establishment of the ICC and even embarked on a swift ratification of the treaty.[56] In fact, as of January 2025, 34 of the 54 AU member states are parties to the Rome Statute, constituting the largest regional group of member states. This raises a critical question: why were African states initially so invested in adopting the Rome Statute, only to later criticise the ICC's operations through the AU?

In my view, the reasons for Africa's initial enthusiasm are clear. *First,* having emerged from colonial domination, many African states faced persistent neo-colonial interventions, often orchestrated through coup *d'états* targeting democratically elected governments.[57] *Second*, the continent has been plagued by war-mongering actors, some pursuing secessionist or destabilizing

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Assembly/AU/Dec.296(XV) (27 July 2010, Kampala, Uganda. (2) The AU's Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.334(XVI) (30 June–1 July 2011, Malabo, Equatorial Guinea). (3) The AU *Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.397(XVIII) (30 January 2012, Addis Ababa, Ethiopia*). (4) The AU *Decision on International Jurisdiction, Justice and the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1(Oct.2013) (12 October 2013, Addis Ababa, Ethiopia – Extraordinary Session).* (5) The AU Decision on Africa's Relationship with the International Criminal Court (ICC), Assembly/AU/Dec.493(XXII) (31 January 2014, Addis Ababa, Ethiopia).

56 See Tessema, M.T., and Vesper-Gräske, M. 'Africa, the African Union and the International Criminal Court: Irreparable Fissures?' (2016) *FICHL Policy Brief Series,* No. 56. (Accessed from *https://www.toaep.org/pbs-pdf/56-tadesse-graeske* on 26/12/2025).

57 See Rodney, W., *How Europe Underdeveloped Africa.* London: Bogle-L'Ouverture Publications, (1972). See also Akinola, A., (ed.) *The Resurgence of Military Coups and Democratic Relapse in Africa.* Cham: Palgrave Macmillan, (2024); Engels, B., "Coups and neo-colonialism", (2023) 50 (176). Review of Political Economy, pp. 147–153.

agendas.[58] *Third*, Africa has endured — and continues to face — instances of poor governance, corruption, and dictatorial regimes that shield elites from accountability while much of the population suffers.[59] Against this backdrop, the Rome Statute and the establishment of the ICC represented a new hope promising that impunity, maladministration, and flagrant human rights abuses could be effectively challenged.

However, this initial optimism was soon undermined by efforts to dissuade African countries from supporting the ICC, particularly following the issuance of arrest warrants against sitting and former presidents such as Omar Al-Bashir of Sudan, and the summonses issued to former Kenyan President Uhuru Muigai Kenyatta and his Deputy (now President) William Samoei Ruto, though these Kenyan cases have since lapsed.[60] The ICC's assertive actions struck a sensitive nerve. In response, the AU Assembly convened an extraordinary summit on 12 October 2013, during which a resolution was passed reflecting the continent's growing uneasiness.

In that resolution, adopted in Sharm El Sheikh in July 2008, while it reaffirmed its previous Decisions adopted in January and July 2009, January and July 2010, January and July 2011, January and

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58 See Varin, C., & Abubakar, D. (eds.) *Violent non-state actors in Africa: Terrorists, rebels and warlords*. Palgrave Macmillan (2017). See also De Vries, L & Schomerus, M (Eds.) *Secessionism in African Politics*, Palgrave Series in African Borderlands Studies. Palgrave Macmillan, (2019).

59 See, Ganahl, J. P. *Corruption, good governance, and the African state: A critical analysis of the political-economic foundations of corruption in Sub-Saharan Africa*. Universität Potsdam, (2013)..

60 See the Trial Chambers Decision in *Prosecutor v. Ruto and Sang, Case No. ICC-01/09-01/11, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016 (http://www.legal-tools.org/doc/41dc5f/) (as accessed on 29/8/2025).*

July 2012, and May 2013, maintained the AU's stance against activities of the ICC in Africa, alleging the abuse of the principles of Universal Jurisdiction.[61] It also expressed the AU's strong conviction that the search for justice should be pursued in a way that does not impede or jeopardise efforts aimed at promoting lasting peace in conflict affected areas in the continent. In its 2013 Decision, the AU Assembly of Heads of State and Government affirmed that no proceedings shall be initiated or continued before any international court or tribunal against a serving AU Head of State or Government, or anyone exercising such authority, during their term in office.[62]

At its core, however, the AU's stance was legally and factually flawed. *First*, it overlooked key dynamics of the ICC's mandate and foundational principles under the Rome Statute, particularly the principle of complementarity. Those who persuaded African countries to consider withdrawing from the Rome Statute seem to have failed to critically and adequately examine the source of African situations referred to the ICC. In fact, most ICC cases in Africa were self-referred by the states themselves.[63] Uganda, for instance, referred its Situation to the ICC on 16 December 2004,[64] having ratified the Rome Statute on 14 June 2002. Similarly, the Democratic Republic of Congo (DRC) (2005),

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61 See Assembly of the African Union. (2013, October 12). Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1(Oct. 2013). African Union.

62 See AU, Decision on the African's relationship with the ICC, Ext/ Assembly/AU/Dec.1 (Oct. 2013) (http://www.legal-tools.org/doc/ edad86/) (as accessed on 29/8/2025).

63 See Gissel, above note 50 at p. 727.

64 See the Situation in Ugandan (ICC-02/04) (involving the cases of *Prosecutor vs. Joseph Kony and Vincent Otti* (ICC-02/04-01/05) as well as *Prosecutor vs. Dominic Ongwen,* ICC-02/04-01/15.

Central Africa Republic (2005), and Mali (2012) situations were all referred to the ICC voluntarily. Given these facts, the argument of unilateral targeting of Africa is untenable.

Second, a closer look at other situations, further reinforces the conclusion that criticisms against the ICC were unfounded. The situations in Darfur (Sudan, 2005) and Libya (2011) were referred to the ICC by the United Nations Security Council (UNSC), with full support from AU member states present during the adoption of the relevant resolutions.[65] The Kenyan Situation was initiated by the ICC under the *prorio motu* context in terms of Article 15 of the Rome Statute.[66] Even so, it could not have justified a sweeping conclusion that the ICC was biased.

Third, the AU's resolution may be understood as grounded in unfounded fears, since the ICC's exercise of authority over individuals most responsible for Rome Statute crimes did not amount to a departure from the principle of complementarity.[67] As a matter of settled principle, the ICC's authority is engaged

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65 See UN Security Council, Resolution 1593 (2005), UN Doc. S/RES/1593 (31 March 2005)) in respect of the Situation in Darfur (Sudan) and UN Security Council, Resolution 1970 (2011), UN Doc. S/RES/1970 (26 February 2011 in respect of Situation in Libya. All these were Chapter VII resolutions, hence binding under international law.

66 See Gissel, above note 50, citing Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Situation in the Republic of Kenya (ICC-01/09), Pre-Trial Chamber II, 31 March 2010.

67 See Ssenyonjo, M. "The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders", (2013) 13 (2) *International Criminal Law Review*, pp. 385–428. See also Gaeta P. & Labuda, P. I. "Trying Sitting Heads of State: The African Union versus the ICC in the Al-Bashir and Kenyatta Cases," in Jalloh, C.C., & Bantekas, I., (eds.), *The International Criminal Court and Africa,* Oxford University Press, (2017), pp.138-162.

only where the rule of law has been violated, not where it has been upheld. Rather than directing criticism at the Court, the AU ought to have compelled African leaders to strengthen democratic institutions, entrench respect for the rule of law and human rights, and prioritise the peaceful resolution of internal conflicts across the continent—measures that would have both insulated individuals from ICC jurisdiction and reinforced the Court's mandate. Instead, the AU elected to pursue the Malabo Protocol as a nascent and conceptually innovative effort to assert regional ownership over international criminal accountability; however, as examined below, its articulation within a fragile political context and the inclusion of provisions such as Article 46A, which grants immunity to sitting leaders, reveal significant normative deficiencies that risk shielding political elites from accountability.[68]

The *fourth* reason relates to the complementarity principle. Article 17 of the Rome Statute espouses this principle. It establishes that the Court intervenes only when a state party is unwilling or unable to prosecute alleged crimes fairly. Since many African judicial institutions lacked either the capacity or the political will to prosecute perpetrators of serious international crimes, ICC involvement was legally justified. However, as earlier noted here above, despite the evident challenges within domestic judicial systems in the continent, the African heads of state and governments opted to advocate for a non-cooperation with the

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[68] See Gissel, above note 50. See further Amnesty International, "Africa's Malabo Protocol: Protecting Leaders from Justice?" (2017) (available from *https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0130632016ENGLISH.pdf* (as accessed on 04/01/2026).

ICC, a stance that was and remains to be counterproductive and regressive. Conversely, instead of strengthening cooperation with the ICC, which would have not only provided a window for mutual capacity building and skill sharing, including provision of technical support for reforming domestic judicial mechanisms in line with the principle of complementarity, the continent leaders resorted to the adoption of The Malabo Protocol.

In essence, the Protocol runs counter the complementarity principle espoused under Article 17 of the ICC in three ways: **one**, it has institutionalised shielding of specific class of individuals named under Article 46A *bis*. A fact that triggers the very condition of "unwillingness" envisaged under Article 17(2)(a) of the Rome Statute;[69] **two**, it undermines genuine proceedings because, any regional court that will accept a shielding of those most responsible for atrocity crimes from being prosecuted cannot be said to offer a "genuine" alternative to ICC jurisdiction but contradict its normative architecture.[70] Any reasonable person would argue, therefore, that such an approach as envisaged in the Malabo regime risks being treated not as a complementary mechanism, but as evidence justifying ICC intervention; and, **three**, it leads to normative fragmentation thereby marking a normative regressive trend in the existing

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69 See Egyir, D.K., "Heads of State Immunity under the Malabo Protocol: Triumph of Impunity over Accountability?" (LLD Thesis submitted at the University of Pretoria) (available *https://repository.up.ac.za/bitstreams/c7e3f6f8-6760-437c-955d-25e883051d30/download* (as accessed on 20/1/2026).

70 See Triffterer, O., & Burchard, C., "Article 27," in Triffterer, O., & Ambos, K. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd edn, Oxford University Press (2016), pp. 1085–1112.

ICLO.[71] This is because, whereas the Rome Statute decisively rejects official capacity as a bar to criminal responsibility (Article 27), the Malabo Protocol reintroduces a concept long regarded as incompatible with modern international criminal law.[72]

But one question that needs to be considered here is whether, when the African leaders opted for the adoption of The Malabo Protocol, they were mindful of what Article 17 of the ICC is all about and, if so, whether they seriously considered the repercussions that may ensue in the aftermath. Principally, evidence suggests that the African Union (AU) was aware of the potential conflict between the Malabo Protocol — particularly Article 46A *bis* — and the ICC's complementarity regime under Article 17 of the Rome Statute, but did not subject that conflict to serious, good-faith legal reconciliation.[73]

According to the Amnesty International, the AU was repeatedly warned that Article 46A *bis* would undermine complementarity and violate established international criminal law norms but no amendments or clarifications were introduced, a fact that reinforces the inference of political prioritisation over legal harmonisation.[74]

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71 See Tladi, D. "The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff," (2015) 13 (1) *Journal of International Criminal Justice*, 3–17.

72 See Cassese, A., Antonio Cassese, *International Criminal Law,* 2nd edn, Oxford University Press (2008). See also Epik, A., "No Functional Immunity for Crimes under International Law before Foreign Domestic Courts" (2021) 19 *Journal of International Criminal Justice*, pp. 1263-1281.

73 See Kreß, C., "On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement," (2010) 23 (4) *Leiden Journal of International Law*, pp. 855-873.

74 See the Amnesty International, above note 68.

An akin observation was made by Gissel, who, in reconstructing the drafting process of the Malabo Protocol reveals that, though the AU debates were saturated with ICC-related concerns, yet, no explicit attempt was made to reconcile Article 46A*bis* with Article 17, no complementarity clause was included, and no doctrinal justification was advanced.[75] In essence, Article 46A*bis* of the Malabo Protocol reflects a political calculus aimed at shielding incumbent elites and reasserting control over accountability, rather than a principled effort to advance international criminal justice through regional mechanisms.[76] Although this critique does not deny the legitimacy of African regional justice, it underscores that regional ownership lacks normative credibility where it is secured by diluting the existing fundamental principle that no individual is above the law.[77]

Finally, it is important to note that, although the ICC's initial investigations and prosecutions primarily involved perpetrators from Africa, the Court's mandate extends globally and continues as well to be exercised in relation to violations committed on other continents. For example, *the Georgia Situation (2008)*— the first ICC case outside Africa— was initiated *proprio motu* by the ICC Prosecutor under Article 15 of the Rome Statute.

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75 See Egyir, above note 69.

76 See Egyir, above note 69.

77 See, generally, Rittaberger, b., and Schroeder, P., The Legitimacy of Regional Institutions" (available from *https://phischroeder.github.io/assets/OUP_Rittberger-Schroeder.pdf?utm_source=chatgpt.com* (as accesed on 12/11/2025)). Gumede, W. "The International Criminal Court and Accountability in Africa" (31 January 2018) (available from *https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html#:~:text=Most%20importantly%2C%20every%20African%20citizen,governments%20and%20non%2Dgovernmental%20strongmen.(as* accessed on 12/11/2025).

Investigations into alleged crimes committed in and around South Ossetia during the 2008-armed conflict were authorised by Pre-Trial Chamber I on 27 January 2016. In June 2022, the ICC issued arrest warrants against three *de facto* South Ossetian officials—*Mikhail Mindzaev, Hamlet Guchmazov*, and *David Sanakoev*—for alleged crimes against ethnic Georgians.[78] Investigations remain ongoing, with the challenge that the accused reside in areas controlled by Russia, which does not recognize ICC jurisdiction and has refused to cooperate.

Other notable non-African cases include *the Myanmar Situation*, which also involved the ICC Prosecutor exercising *proprio motu* powers under Article 15.[79] This followed the violent August 2017 military crackdown on Rohingya Muslims in Rakhine State, resulting in killings, sexual violence, and the forced displacement of over 700,000 Rohingya into Bangladesh.[80] Although Myanmar is not a state party to the Rome Statute, Bangladesh has been a state party since 2010. Given that Bangladesh was directly affected by the mass deportations, on 6 September 2018, the ICC's Pre-Trial Chamber held that the Court had jurisdiction and should exercise it over the alleged acts of deportation and related crimes.[81]

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78 See No. ICC-01/15-41-Red 30-06-2022 1/24 EK PT (available from *https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_05215.PDF* (as accessed on 10/09/2025)).

79 See Bangladesh/Myanmar: *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar,* ICC-01/19 (Investigation) (available from *https://www.icc-cpi.int/bangladesh-myanmar* (as accessed on 10/09/2025)).

80 See Kul, M.C and Bülbül, H.B. 'The Jurisdiction of the International Criminal Court: Examining the Legal Landscape Post-Bangladesh/Myanmar Decision' (2024) 44(2) *Public and Private Law Bulletin*, pp.487-515.

81 See Kul and Bülbül, above note 80. See also Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the

Consequently, on 14 November 2019, the Pre-Trial Chamber authorised the opening of a full *proprio motu* investigation and on 27 November 2024, the ICC Prosecutor filed an application for warrant of arrest for Senior General and Acting President Min Aung Hlang.[82]

Beyond Myanmar, the ICC Prosecutor is also actively investigating the Afghanistan, Palestine, Ukraine, and Philippines Situations. These non-African cases provide compelling evidence that the ICC's architecture is not biased against Africa, a perception that the AU Assembly should now formally address and annul, correcting a narrative previously endorsed through its own prior decisions.

In light of the foregoing developments, it is apparent that the AU's criticisms levelled against the ICC were largely unfounded. Conversely, the adoption of the Malabo Protocol, seemingly undertaken without sufficient consideration of the manner in which the two regimes might coherently and effectively complement one another, now presents significant concerns and warrants urgent reconsideration, including possible amendment and realignment with the ICC framework. Against this backdrop, a critical question arises: how may the two regimes be reconciled? This article proceeds to examine that question.

People's Republic of Bangladesh/ Republic of the Union of Myanmar ICC-01/19-27, 14 November 2019 | Pre-Trial Chamber III | Decision (available from *https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06955.PDF* (as accessed on 9/9/2025)).

82 See Statement of ICC Prosecutor Karim A. A. Khan (KC) *Application for an Arrest Warrant in the Situation in Bangladesh/Myanmar* (available from *https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-application-arrest-warrant-situation-bangladesh* (accessed on 10/09/2025)).

4. RECONCILING THE MALABO PROTOCOL WITH THE ICC FRAMEWORK

4.1 Framing the Problem: Africa's Systemic Fragility

The necessity to reconcile the Malabo Protocol and the ICC is an issue better explained by the African continent's historical, socio-economic, political, and institutional context.[83] At present, while several African states enjoy relative political stability and sustained peace, a number of countries, viewed in aggregate, continue to confront significant socio-economic and governance-related challenges.[84] Those challenges, while neither uniform nor endemic to all states, range from persistent structural economic fragility, deepened by high debt burdens, commodity dependence, social inequality and widespread youth unemployment;[85] to institutional fragility characterised by democratic backsliding, weak or uneven state institutions, governance and rule of law deficit.[86] Key challenges do also include security concerns evidenced by

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83 See Mutua, M. "What Is TWAIL?" (2000) 94 *American Society of International Law Proceedings,* pp. 31-38. See also Chimni, B.S., "Third World Approaches to International Law: A Manifesto" (2006) 8 *International Community Law Review* 3. See further, Mutua, M., 'Africa and the Legitimacy of International Criminal Justice' (2009) 11 *African Journal of International and Comparative Law* 177.

84 See UNDP, *Human Development Report 2023: Fighting Inequalities in the Age of Digitalisation* (UNDP, New York 2023); See also UNDP, et al. (2023) *Africa Sustainable Development Report 2023* (United Nations Development Programme, New York (2023) 1–20; and AfDB Group, *Africa's Development Context* in *Annual Report 2023* (African Development Bank) 3–8.

85 See World Bank, *Africa's Pulse, October 2023: An Analysis of Issues Shaping Africa's Economic Future,* World Bank, Washington, DC, (2023). See also UN Conference on Trade and Development (UNCTAD), *Economic Development in Africa Report 2024* (UNCTAD 2024). See also UNDP,et al above note 84; and see: Cilliers, J and Sisk, T.D., *Assessing long-term state fragility in Africa: Prospects for 26 'more fragile' countries*. ISS Monorgraph, Number 188 (available from *https://www.files.ethz.ch/isn/174496/Monograph188.pdf* (as accessed on 2/1/2026).

86 See Mo Ibrahim Foundation *Ibrahim Index of African Governance 2024* (Mo Ibrahim Foundation, London) (2024). See also Freedom House (2023) *Freedom in the World 2023: Democracy and Governance Trends in Africa* (Freedom House, Washington, DC).

intrastate and transnational conflicts— especially in the Sahel, Great Lakes, and Horn of Africa regions— suggesting existence of limited state capacity to monopolise the legitimate use of force.[87]

Based on recent empirical evaluations by multilateral institutions, the above noted analysis highlight a bifurcated continental landscape: while several African states exhibit measurable gains in governance and development, persistent socio-economic and institutional vulnerabilities continue to afflict other regions.[88] It is within this complex and heterogeneous continental context — shaped by historical, socio-economic, and institutional factors — that regional legal initiatives, such as the Malabo Protocol, should be assessed for potential reform, especially as they seek to respond to perceived gaps in global governance while coexisting with established international legal regimes like the ICC.[89]

According to Abass, although many commentators argue that the African Union's adoption of the Malabo Protocol in 2014 was politically motivated, the aspiration of African states to prosecute atrocity crimes predates this development. [90] As early as the 1970s, many African countries viewed the systematic practice of apartheid in South Africa as tantamount to a crime against

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87 See Williams, P.D., *War and Conflict in Africa,* 2nd ed., Wiley & Sons Ltd (2016) ch. 1–2 (pp. 1–60).

88 See the World Bank (2023) above note 85.

89 See Tladi, D., 'The African Union and the International Criminal Court: The Battle for the Soul of International Law' (2009) 34 *South African Yearbook of International Law* 57.

90 See Abass, A., "Historical and Political Background to the Malabo Protocol" in Werle, G., et al., *The African Criminal Court: Commentary on the Malabo Protocol*, Asser Press, (2017), p. 15.

humanity and therefore deserving of international criminal accountability.[91] However, that idea was reinvigorated in 2009 during the AU's Assembly, in its Twelfth Ordinary Session held in Addis Ababa, Ethiopia, requested the Commission of the African Union to consult with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, and "examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes."[92]

In June, 2014, therefore, The Malabo Protocol — formally the Protocol on *Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* — was adopted by the African Union Assembly of Heads of State and Government on 27 June 2014, during their 24th Ordinary Summit held in Malabo, Equatorial Guinea.[93] On its face, the Malabo Protocol resembles the Rome Statute, suggesting that its drafters drew inspiration from it.[94] However, as noted earlier and as will be discussed further below, the Malabo regime "differs radically" when assessed against the international criminal law norms embodied in

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91 See Abass, above note 90.

92 See Werle, G. and Vormbaum, M., "Creating an African Criminal Court", in Werle, G., et al., *The African Criminal Court: Commentary on the Malabo Protocol*, Asser Press, (2017), p.3.

93 See African Union. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). 24th Ordinary Session of the Assembly of Heads of State and Government, 27 June 2014, Malabo, Equatorial Guinea. African Union, *https://au.int/en/newsevents/20240625/african-union-celebrates-10th-anniversary-adoption-malabo-protocol* (as accessed on 11/11/2025).

94 Van Doorne, J., *The Rome Statute and Malabo Protocol: Complementarity's Creation of a Fragmented World* (LLM Thesis, 2019) (available from *https://arno.uvt.nl/show.cgi?fid=148714* (as accessed on 15/12/2025).

the ICC framework.[95] This divergence underscores the urgent need to harmonise the Malabo Protocol with the ICC regime. The manner in which the two regimes should be reconciled, and the issues requiring attention in that regard, will be discussed below.

4.2 Reconciling the Two Regimes: What and How?

As noted above, the African continental environment exhibits considerable political, institutional, and socio-economic fragility. When unmitigated, this fragility can precipitate internal tensions and abuses, sometimes escalating into armed conflicts and atrocities that constitute crimes against humanity.[96] This fact, viewed from the context of both the Malabo Protocol and the ICC framework indicate that the two regimes share a common objective: they seek not only to provide frameworks for the mitigation and prevention of atrocities arising from armed hostilities but also to serve as forums for holding perpetrators of such crimes accountable.[97] While this shared purpose represents a normative strength of both regimes, they diverge structurally, with the Malabo Protocol being a regionally conceived regime and the ICC a global one. This divergence underscores the need for a complementary design in which the regional framework supports and reinforces the global system.[98]

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95 See Van Doorne, above note 94.

96 See Williams, above note 87.

97 See, generally, Articles 3, 4, 5, 6, 46, 28-36 and 45 of the African Union, *Protocol on the Statute of the African Court of Justice and Human Rights on the Establishment of an African Criminal Court* (Malabo Protocol) OAU Doc. CAB/LEG/24.9/3/10 (adopted 27 June 2014, entered into force 5 July 2016). See Articles 5, 6, 8, 25, 28, 17 and 53 of the *Rome Statute of the International Criminal Court*, 17 July 1998, UNTS Vol. 2187, p. 90, entered into force 1 July 2002.

98 See Tladi, above note 89. See also Clarke, above note 6; Van Doorne, above note 94.

Although Article 46 of the Malabo Protocol, like Article 17 of the Rome Statute, addresses complementarity by assigning primary responsibility for prosecuting international crimes to national jurisdictions, several observations can be made. First, under Article 46, African states and the African Court may exercise jurisdiction over international crimes without automatically deferring to the ICC. In contrast, Article 17 requires the ICC to act only when national or regional authorities are unwilling or unable to prosecute.[99] This structural divergence illustrates the Malabo Protocol's emphasis on regional autonomy, while also highlighting areas where the regional and global regimes may overlap or conflict. This gap underscores the need for harmonization, as the Protocol does not explicitly address what occurs if the African Court fails, is unwilling, or is subject to political limitations.

In such circumstances, it remains unclear whether the ICC retains the authority to intervene *proprio motu*.[100] This creates a juridical and political uncertainty which may be cleared by having in place a "failure clause" stating that "*if the African Court or member state demonstrates unwillingness or inability to prosecute genuinely, the ICC may exercise jurisdiction*". The importance of having such a *proprio motu* language within the Protocol is that, while it preserves the African Court's primacy, it as well maintains the ICC's global oversight as a safeguard against impunity, clarifies jurisdictional stances and enhances legitimacy of both regimes. That approach will satisfy the notion that the regional institutions should complement the global institution which is the ICC.

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99 See Tladi, above note 89. See also Mutua (2009) above note 83.

100 See Tladi, above note 89. See also Clarke, above note 6.

The second and pertinent concern calling for specific reform considerations, is Article 46A *bis*. As discussed earlier, this Article seeks to provide immunity to the very same perpetrators who the Protocol seeks to hold accountable. Article 46A *bis* has been widely criticised for functioning as a claw-back provision that undermines the Court's criminal jurisdiction.[101] Characteristically, a claw-back provision appears to recognise jurisdiction, rights, or obligations, but subjects that recognition to vague, broad, or discretionary limitations. Such limitations permit states or institutions to avoid compliance, thereby undermining the practical effectiveness of the instrument and rendering it inconsistent with prevailing international norms.[102] In principle, Article 46A *bis* satisfies these features. Although it operates alongside provisions conferring jurisdiction over genocide, crimes against humanity, war crimes, and other serious international crimes, it effectively withdraws that jurisdiction in respect of the individuals most likely to bear responsibility for such crimes, namely serving heads of state and senior officials. Murungu and Tladi observe that Article 46A *bis* hollows out the Protocol's accountability regime and reintroduces immunities that have been rejected under contemporary international criminal law.[103]

Reform is therefore necessary, either through repeal of the provision or by expressly subjecting Article 46A *bis* to the

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101 See Murungu CB, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067. Akande D, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law,* 407-433.

102 On claw-back clause see: *Media Rights Agenda and Constitutional Rights Project v Nigeria* (2000) AHRLR 200 (ACHPR). See generally, Viljoen, F., *International Human Rights Law in Africa,* 2nd edn, Oxford University Press (2012).

103 See Murungu, above note 101.

complementarity framework under Article 17 of the Rome Statute.

5. CONCLUSION AND WAY FORWARD

5.1 Conclusion

In this paper an attempt was made to examine the phenomenon of global fragility and to assess the role of the International Criminal Court (ICC) within an increasingly strained international legal order. It has demonstrated that fragility can no longer be understood as a condition confined to particular regions or states; rather, it has become a pervasive global reality. Manifested in weakened institutions, erosion of the multilateral, rules-based system and the persistence of protracted conflicts driven by bellicose and xenophobic attitudes, political repression, systemic corruption, widespread human rights violations, fragility continues to undermine international peace and security. Historically and contemporaneously, such conditions have consistently provided fertile ground for the commission of atrocity crimes, thereby engaging the core concerns of international criminal law. Within this context, the ICC remains a central pillar of international criminal justice.

As a permanent judicial institution mandated to prosecute crimes that shock the conscience of humanity, the ICC plays a crucial role in restoring respect for the rule of law, affirming human dignity, and contributing — albeit indirectly — to peace and stability in fragile societies. Contrary to persistent criticisms, particularly from sections of the African Union, this article has shown that the ICC's engagement with African situations has been legally grounded in state referrals, Security Council

mandates, and the proper exercise of its *proprio motu* powers. Africa's prominence in early cases reflects these jurisdictional realities rather than institutional bias, a conclusion reinforced by the Court's expanding engagement beyond the continent.

This article has further demonstrated that, while the Malabo Protocol represents an important assertion of African ownership over international criminal justice, it is undermined by significant structural weaknesses. Key ambiguities, particularly in Article 46, leave unresolved whether the ICC can intervene if the African Court is unwilling, unable, or politically constrained to prosecute, creating juridical and political uncertainty. Moreover, the inclusion of Article 46A *bis,* which grants immunity to sitting heads of state and senior officials, further weakens accountability. By excluding those most responsible for atrocity crimes, the Protocol risks entrenching impunity and generating normative tension with the Rome Statute, limiting effective complementarity with the ICC.

5.2 Way Forward

Given the fragility of the contemporary rules-based international order, a central priority must be its strategic revitalisation through concerted efforts to build political consensus among all 193 UN member states around the core principles that have underpinned global stability since World War II. Equally imperative is the strengthening and harmonisation of global and regional justice institutions, in order to synergise their efforts and consolidate the norms of international criminal law. In this regard, the relationship between the ICC and regional initiatives such as the Malabo Protocol assumes particular significance. While the

Malabo Protocol represents an important assertion of regional ownership over accountability for international crimes, its current design, especially the inclusion of immunity provisions under Article 46A *bis*, undermines its effectiveness and risks entrenching impunity. Reform is therefore imperative.

A credible way forward lies not in positioning the Malabo Protocol as an alternative to the ICC, but in recalibrating it as a genuinely complementary regional mechanism. This requires removing or reforming claw-back provisions that dilute accountability and explicitly aligning the Protocol with the complementarity framework of Article 17 of the Rome Statute. Harmonisation would preserve regional autonomy while preventing accountability gaps where regional mechanisms fail. More broadly, effective international criminal justice demands enhanced cooperation among the ICC, regional courts, and national jurisdictions, alongside coordinated action by States Parties, regional organisations, civil society, and international institutions, ensuring atrocity crimes are deterred and justice reinforced.