

# Seeking Justice or Shielding Suspects?

**An analysis of the Malabo Protocol on the African Court**

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# Abbreviations and acronyms

AfriCOG	Africa Centre for Open Governance
AU	African Union
ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Commission on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
ACJHPR	African Court of Justice on Human and People's Rights
ACJ	African Court of Justice
AfCHPR	African Court of Human and Peoples' Rights
AGA	African Governance Architecture
CSOs	Civil Society Organisations
EACJ	East African Court of Justice
EACT	East African Community Treaty
EU	European Union
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHRL	International Human Rights Law
IL	International Law
PALU	Pan African Lawyers Association
RECs	Regional Economic Communities
SADC	South African Development Community
UN	United Nations

# Executive summary

In 2014, member states of the African Union adopted a protocol in Malabo, Equatorial Guinea, known as the Malabo Protocol. The Malabo Protocol is an agreement which, when ratified by 15 member states, would grant criminal jurisdiction to the existing African Court of Human Rights, which is proposed to be merged with the African Court of Justice to create an African Court of Justice and Human Rights (ACJHR). This new court will have jurisdiction to adjudicate interstate disputes and human rights violations, as well as prosecute serious crimes committed by individuals and corporations on the African continent.

Although the discourse for the establishment of an African criminal court has its origins in the 1970s, it has recently gained renewed momentum due to the perception at the AU of international meddling in the affairs of African states. As a corollary, a need was expressed for a court that can prosecute crimes that are particularly prevalent in Africa, but are of apparently little prosecutorial interest to much of the rest of the world.

This report gives a compelling history of the proposed African court, to provide insight and guidance to enhancing its efficacy. The report also aims to address structural weaknesses of this court, but also to highlight the potential benefits of the Protocol. This balanced and constructive assessment can be utilised by state actors and members of the public to rally behind an acceptable version of the Protocol and the potential ACJHR, which it seeks to establish.

The intent of the African states to create a court with criminal jurisdiction is noble, and given strong operational and constitutional backing, such a court has the potential to provide a strong African option to achieving justice for the victims of international and other serious crimes. However, as proposed, the ACJHR has a number of serious weaknesses that risk making it stillborn. The most serious of these is the provision in Article 46A *bis*, which grants immunity from prosecution to sitting heads of state and other senior officials. Given that the type of crimes to be prosecuted by the Court are those that tend to be committed by powerful individuals in and out of government, the granting of immunity to them would seem to undermine the *raison d'être* of the Court.

But the ACJHR might yet prove to be a step towards greater accountability and justice in Africa. In addition to removing the immunity provision, this can be achieved by strengthening a unit to protect and care for victims and witnesses; increasing the proposed number of judges to better handle the caseload; clarifying better the crimes to be pursued; expressing commitment to work in tandem with CSOs; and committing to better funding sources and communication to the public. The Protocol should also provide for a framework for cooperation between the Court and regional and international courts, notably the ICC, in order to provide for a holistic and universal approach to fighting impunity on the continent that complements rather than undermines global efforts.

The Protocol has advantages that are not found in other courts. These include provision for an office of defence counsels established on an equal footing to the office of the prosecutor; the addition of specific crimes of particular concern to the continent; the promise to pursue corporate entities which bring harm to civilians, and the desire to try alleged perpetrators in close proximity to their victims.

Should the Protocol be ratified and the Court created, the will of the public must flow through it. The current disconnect between state actors and everyday civilians must be bridged to develop a Court that reflects the justice, truth and peace all African people desire and deserve.

## Recommendations

### Victims, witnesses, and the general public

- In its efforts to create an African Court with criminal jurisdiction, the AU must place a genuine commitment to place the protection and empowerment of victims and witnesses at the heart of its considerations.
  - The proposed ACJHR must strive to ensure that its victims and witness organisations are well staffed and well-funded, and that victims are properly represented throughout the various cases.
  - Witness intimidation and bribery that has blighted previous attempts to hold individuals to account must be stamped out through rigorous prosecution of individuals engaging in such crimes.
- Citizens across Africa should make clear to the AU what they expect from the ACJHR, and what they think needs to change.

### Amendments to the Protocol

- The Protocol includes a provision for amendments to be adopted by simple majority of the Assembly, upon recommendation by a State Party or the Court (Art. 12). States Parties should introduce amendments to the Protocol before it enters into force, to strengthen its effectiveness and legitimacy. For example:
  - Article 46A *bis* should be removed entirely. No immunity should be provided to any individual, regardless of their official position.
  - To allow the Protocol to operate within the AU's policy of sequencing peace and justice, a provision can be added that allows the Peace and Security Council of the African Union to request the Court to defer a trial for a year if it is in the interest of peace and stability - the final decision must lie with the Court.
  - The number of judges should be expanded to at least 27 to enable the Court to handle cases in a more efficient and effective manner.
  - The definition of the crime of unconstitutional change of government (Art. 28E) should be amended to restore a proviso that 'any act of a sovereign people peacefully exercising their inherent right shall not constitute an offence under this article'.

- Article 46H on 'complementary jurisdiction' should be amended to cement the Court's commitment to work with the ICC and make it clear that African states are not proposing that there is an exclusive relationship between membership of the ACJHR and fulfilment of their obligations under the Rome Statute.
- The AU must find new and inventive ways to increase dramatically its budget, and the budgets of its various institutions.
- The ACJHR is, ultimately, for the benefit of the public and, in particular, the victims of crimes on the continent. The AU should therefore undertake extensive public education around the proposed court.

## The AU

- The Assembly should adopt a resolution affirming that the ACJHR would be complementary to the work of the ICC and is not intended to shield those in power from prosecutions in other national, regional, or international courts.
- The AU should engage in dialogue with the ICC in a constructive and open spirit, which does not ignore shortcomings, but also avoids manipulating or hiding behind the justified sentiments of Africans who reject the negative legacies and on-going damage of the history of racism, colonialism, and imperialism, to justify impunity.
- In future meetings or summits held to discuss, or make amendments to the Malabo Protocol, CSOs, legal experts, and members of the public should be invited and engaged on a more substantial level than has been the case so far.

## The ICC

- In the spirit of positive complementarity, the ICC should allow regional courts – such as the ACJHR – a place in the framework of institutions that are complementary to the ICC.
- Should the Malabo Protocol come into force, the ICC should work closely with the ACJHR and embrace a close partnership with it.

## Civil Society

- CSOs should robustly engage in all conversations leading to setting up of the ACJHR or amendments to the Protocol.
- CSOs should undertake thorough reviews and provide constructive criticism of the Protocol and not reject it outright.
- CSOs also have a role in ensuring that the general public and, most importantly, victims, are made aware of the movement to create an African court and that they are provided with the necessary forums and platforms to contribute to the discussion.

# Introduction

Following the indictment and trials of heads of state and senior government officials, by both European courts and the International Criminal Court (ICC), the legitimacy of international criminal justice mechanisms has been questioned by some on the African continent. The AU has viciously attacked the actions of the ICC and European courts and the rhetoric of ‘imperialism’, ‘bias’ and ‘neocolonialism’ has trickled down to everyday African citizens who do not always have sufficient information to separate fact from political rhetoric.

It is against this backdrop that efforts to establish an African alternative to international criminal courts have been reignited, with the AU adopting a Protocol at the Malabo Summit in 2014 (the ‘Malabo Protocol’) that would vest in a proposed ‘African Court of Justice and Human Rights’ (ACJHR) the jurisdiction to try individuals and corporations for serious crimes. The Protocol has yet to come into force, but some have already hailed the move as a trailblazing opportunity to address international crimes in the region, while others have expressed concern about numerous weaknesses in the proposed structure and jurisdiction of the court.

This report seeks to provide a balanced and constructive critique of the Malabo Protocol and the movement for an African criminal court as a whole. By examining the underlying motives of the Protocol, its legal

and structural weaknesses – as well as wider concerns of accountability and justice – can be addressed in a more effective and practical manner. Most importantly, the report seeks to bring the issues to the public’s attention, to enable them to contribute to a debate that has so far been dominated by politicians, lawyers and civil society organisations.

This report begins by outlining the existing legal mechanisms to try serious crimes in Africa. In Part II, the historical origins of an African penal court are explored, identifying the key triggers that initiated the debate and the complex politics unavoidably intertwined with it. Part III then seeks to identify both the potential benefits and problems of the Malabo Protocol. Lastly, Part IV provides actionable recommendations for addressing not only the weaknesses of the Malabo Protocol, but also the crumbling relationship between the African Union and the ICC, with the ultimate aim of ensuring victims finally obtain the justice they so deserve.

## Background

The African continent has faced some of the worst atrocities of the past century. Many were committed by former colonial powers, leaving deep scars across the continent, but several were perpetrated post-independence by African presidents, leaders, rebels and citizens. Numerous perpetrators not only avoided any sort of criminal prosecution, but

some remain seated firmly in their positions of power while the victims of these atrocities receive little or no justice. Moreover, the continent has had to grapple with certain evils that are particularly pervasive, and whose seriousness the international community has, at times, under-appreciated. Some notable examples include apartheid, unconstitutional changes of government through fraudulent elections, coups and civil war, the illicit exploitation of and illicit misappropriation of proceeds from natural resources, the use of mercenaries and other unlawful forces, and corruption. In many of these instances the offences go unpunished, allowing impunity to flourish and leaving many victims without justice.

The desire to confront such impunity has become intertwined with the continent's desire to assert its sovereignty and independence. This has resulted in a growing

movement for an 'African Court' that could simultaneously hold 'the worst of the worst' to account whilst allowing Africa to assert its autonomy through its own court – one that could also address crimes that are particularly prevalent on the continent.

The movement to establish such a court has been long and complex, involving a multitude of actors that include governments, lawyers, civil society organizations (CSOs), and academics. Equally complex have been the motivations behind the desire for a continental court. The most consistently used reasoning has been the need to tackle impunity and prevent conflict, both within and between African states, as well as to encourage effective pan-African cooperation on such issues. However, the recent vigour and enthusiasm with which the African Union has embraced the idea is undoubtedly influenced by other political considerations, particularly its disillusionment with the ICC.

# Part I Existing court structures

Before asking whether Africa needs an African criminal court, it is first necessary to examine what mechanisms already exist to address international crimes on the continent.

## 1. National courts

A number of African states have passed legislation to include various international crimes – particularly genocide, crimes against humanity, and war crimes – in their criminal and penal laws. This allows national courts to try and punish citizens of that country for such crimes, without the need to resort to international or regional courts. Some states, such as Uganda, have gone as far as to create a specific division of its High Court to handle international crimes. However, the capacity of national courts to try international crimes is often severely limited due to lack of funding and personnel, or an unwillingness to try senior state officials.

## 2. Courts of the Regional Economic Communities (RECs)

The RECs have established regional courts, some of which have the ability to try human rights cases – such as the Economic Community of West African States Court of

Justice and the East African Court of Justice (EACJ). As yet, none have the ability to hold individuals criminally responsible for international crimes, and instead handle disputes between states or between citizens and the state.

One of the courts – the South African Development Community (SADC) Tribunal – was scuttled by Southern African leaders following a 2008 decision in favour of the applicant against Zimbabwe in the dispute involving expropriation of private land without compensation.<sup>1</sup> Rather than implementing the decision, the SADC Summit adopted a new Protocol stripping the Tribunal of the competence to adjudicate on matters brought by individuals and legal persons. The Summit also did not renew the terms of the serving judges and did not appoint new judges – effectively suspending the Tribunal. The EACJ has faced similar (although not as severe) political backlash, particularly following a 2006 ruling that the National Assembly of Kenya did not undertake or carry out an election within the meaning of the East African Community Treaty.<sup>2</sup> Both instances demonstrate that the survival of many accountability mechanisms in Africa depends on not upsetting those at the top.

1 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008), available at <<http://www.saflii.org/sa/cases/SADCT/2008/2.html>>

2 Wandia M, 'Stop manipulating and bullying the EA court to serve interests of regional elites' <<http://www.theeastafrican.co.ke/OpEd/comment/Stop+manipulating+and+bullying+the+EA+court+/-/434750/1404590/-/hvapauz/-/index.html>>

### **3. African Commission on Human and Peoples' Rights (ACHPR)**

The ACHPR is a quasi-judicial body that was created by the African Charter on Human and Peoples' Rights in 1986. It consists of 11 experts 'of the highest reputation' in human and peoples' rights from across the continent, elected by the AU Assembly (Arts 31-33, African Charter). The Charter establishes three core functions of the ACHPR: promoting human and peoples' rights; protecting human and peoples' rights; and interpreting the Charter. In furtherance of this, the Commission may make non-binding recommendations to governments (Art. 45).

### **4. African Court of Human and Peoples' Rights (AfCHPR)**

The AfCHPR was established in 1998 by a Protocol to the African Charter<sup>3</sup> to preside over cases concerning AU states' compliance with the African Charter on Human and Peoples' Rights. Its jurisdiction, therefore, covers human rights violations by states, but not individual crimes. It came into being in 2004 and remains the only functioning court of the AU, having delivered three judgments so far.

The Protocol also emphasises in its Preamble that the Court is to work in tandem with the Commission, and under Article 5(1)(a) endow the ACHPR with the ability to submit cases to the Court. The Commission did this for the first time in 2011, bringing a case

against Libya for widespread human rights violations, which resulted in the first binding ruling against a state by the AfCHPR.<sup>4</sup>

### **5. African Court of Justice (ACJ)**

In 2002, the Organization of African Unity was disbanded and replaced by the AU under the Constitutive Act of the AU. The Constitutive Act included the creation of an ACJ to handle interstate disputes and the interpretation of AU treaties, but it does not have the jurisdiction to hold individuals criminally responsible. In 2003, the Protocol of the Court of Justice of the African Union was adopted to set-up the ACJ as the 'principle judicial organ of the Union'. However, due to moves to merge the ACJ with the AfCHPR (discussed below), the setting up of the ACJ has been put on hold.

### **6. African Court of Justice and Human Rights**

At the Sharm El-Sheikh Summit in 2008, a Protocol on the Statute of the African Court of Justice and Human Rights (the 'Merger Protocol') was adopted. In order to, in the words of its preamble, 'take all necessary measures to strengthen [the AU's] common institutions and to endow them with the necessary powers and resources to carry out their missions effectively', it merges the ACJ with the AfCHPR, resulting in an African Court of Justice and Human Rights (ACJHR) that would have two chambers: one to deal with interstate disputes and 'general affairs', and

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3 Protocol To The African Charter On Human And Peoples' Rights On The Establishment Of An African Court On Human And Peoples' Rights <http://www.achpr.org/instruments/court-establishment/>

4 *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Application No. 00412011, Order for Provisional Measures, 30 March 2011, available at <[http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya\\_35\\_AComHPR\\_v\\_Libya\\_Order\\_Provisional\\_Measures.pdf](http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya_35_AComHPR_v_Libya_Order_Provisional_Measures.pdf)>

the other to handle human rights disputes (Arts. 16-17, Merger Protocol). Neither of these chambers, however, would have jurisdiction over crimes committed by individuals.

Like so many AU treaties, there has not been the required number of ratifications (15) to operationalise the African Court of Justice and Human Rights. Therefore, at the time of writing, the only AU court functioning is the AfCHPR, with both the ACJ and merged court lying dormant.

## 7. International courts

### (i) The ICC

Of all international courts, arguably the most well known and influential in Africa is the ICC. It was created, with the participation of a large number of African states, at the Rome Conference in 1998. Under its founding document – the Rome Statute – it is mandated with investigating and prosecuting genocide, crimes against humanity, war crimes, and, upon the ratification of an amendment by 30 State Parties, the crime of aggression.<sup>5</sup> The court has jurisdiction over situations in, or citizens of, states that are a party to the Rome Statute, or if the Security Council refers a situation to the court. Although not all African states are party to the Rome Statute, African states make up the largest bloc of signatories, with Senegal being the first state to sign the treaty.

While the relationship between the AU and the ICC has soured significantly, three important points must be made: Firstly,

while the anti-ICC faction has been more vociferous, not all AU member states are opposed to the Court. Many are supportive, a few more openly so than others. Secondly, not all members of the AU are members of the ICC, and therefore the actions of one are not necessarily representative of the other. Thirdly, even if those states that are signatories are unhappy with the ICC, this does not automatically absolve them of their obligations under the Rome Statute, nor does it remove the ICC's jurisdiction. Thus, until individual states formally withdraw from the Rome Statute (at the time of writing no African state has actually done this), then international crimes perpetrated in their territory or by their citizens may be tried by the ICC.

### (ii) *Ad Hoc* Tribunals

In exceptional circumstances, the Security Council can set up an *ad hoc* international tribunal to deal specifically with a situation. This is what happened after the Rwandan Genocide, whereby the International Criminal Tribunal for Rwanda (ICTR) was created specifically to try the key perpetrators. This is, however, a rare occurrence due to the need for consensus among the Security Council and the huge costs associated with setting up such tribunals.

### (iii) Hybrid tribunals

A third type of international tribunal is the 'hybrid' tribunal, which incorporates both international and national features. In some cases they work alongside the domestic

<sup>5</sup> Rome Statute of the International Criminal Court, available at < [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) >

judiciary, while in others they have been attached to, or incorporated into, the local judicial system. They will be composed of both international and local staff and apply a mixture of international and national law.

In Africa, the two most prominent examples of hybrid tribunals are the Special Court for Sierra Leone, set up to try perpetrators of international crimes in the Sierra Leone civil war, and the Extraordinary African Chambers in Senegal. The latter was created to try Hissène Habré, the former president of Chad and other individuals alleged to have committed torture and other international crimes in Chad. The successful trial of Habre is of particular significance as it was the first time a former African head of state was being prosecuted in another African country. This is possible due to 'universal jurisdiction' for international crimes – the principle that states or international institutions can claim jurisdiction over an individual accused of international crimes, regardless of where the crime was committed or the nationality of the accused.

## The African Governance Architecture

As well as national, regional and international courts, there are additional accountability mechanisms that would complement and influence the functioning of any AU court with criminal jurisdiction.

The African Governance Architecture (AGA), formed under the African Charter on Democracy, Elections and Governance (ACDEG), provides the framework for actions of the AU on constitutionalism, democracy, good governance, rule of law, human and peoples' rights and the fight against impunity. It also seeks to encourage cooperation and synergy among the various AU and REC organs and institutions.

This is complemented by a broader African transitional justice policy framework, which encapsulates the measures open to the AU, RECs and Member States in pursuing the twin objectives of justice and peace in a more comprehensive and sustainable manner.

## Part II **Origins of the idea of an “African Criminal Court”**

Although the discourse relating to an ‘African Court’ is often associated with the AU’s disillusionment with the ICC, discussions regarding an African court with criminal jurisdiction trace much further back and the motivations are far more complex. In essence, four key stepping-stones can be identified:

### **1. Drafting of the African Charter on Human and People’s Rights**

During the drafting of the African Charter on Human and Peoples’ Rights in the 1970s, the possibility of including a court with international criminal jurisdiction was raised, primarily as a mechanism by which to combat the apartheid regime of South Africa. Relying on the seemingly likely creation of an international penal court by the UN (which failed to materialise at the time), and conscious of the jealousy with which African states were guarding their newfound sovereignty, the author of the Charter, Keba M’Baye, eventually dismissed the idea.<sup>6</sup>

Despite no court emerging from these discussions, it nonetheless highlights two important points. Firstly, that it is misleading to claim that the idea of trying international

crimes on the continent was never seriously considered until the indictment by the ICC of al-Bashir in 2009; and secondly, the eagerness with which African states wanted to address apartheid is but one example of the historical need for a court that can prosecute crimes particularly prevalent in Africa, but of less prosecutorial interest to most of the rest of the world.<sup>7</sup>

### **2. Treaty obligations**

Contained in the treaties of the African Union are various obligations that support or require the creation of an African penal court.

Article 4(h) of the Constitutive Act of the AU provides for ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’. Article 4(o) calls for, among other things, the ‘rejection of impunity’. While these articles may not impose a strict legal obligation to establish a court, they demonstrate an acceptance by the AU that it has an obligation to prevent and punish international crimes. It is arguable that an effective judicial institution would be a viable way in which to address these concerns.

<sup>6</sup> Abass A, ‘Prosecuting international crimes in Africa: rationale, prospects and challenges’ [2013] *EJIL* Vol. 24, No 3 933, 937.

<sup>7</sup> *Ibid.*

A more concrete basis, however, is found in the ACDEG. Due to its prevalence on the continent, 'Unconstitutional Change of Government' is codified as an international crime by the ACDEG. Article 25(5) holds that perpetrators 'of unconstitutional change of government may ... be tried before the competent court of the Union'. Logically, therefore, the ACJ or ACJHR would require the necessary criminal jurisdiction to try this, and perhaps other, international crimes.

### 3. The 'abuse' of universal jurisdiction

A more short-term factor in the move to create an African penal court is the perceived abuse of universal jurisdiction by judges in European courts. While the principle that there is universal jurisdiction to try perpetrators of international crimes is well founded, and has been accepted by the AU,<sup>8</sup> a string of indictments of African officials by low-level judges in various European countries has sparked tensions and allegations of misuse of the principle of universal jurisdiction.

In essence, African states have alleged that the indictments are motivated by political influence. Thus, the creation of an African court with criminal jurisdiction was considered as a way to prevent foreign courts from unfairly trying Africans under the principle of universal jurisdiction. Two cases in particular had a significant effect on the AU's move to create an African court with criminal jurisdiction, as detailed below.

#### a. The Hissène Habré trial

In September 2005, a Belgian court indicted the former president of Chad, Hissène Habré, for crimes against humanity, torture, war crimes and other human rights violations. The European Parliament demanded that Senegal, where Habré had been in exile for 17 years, extradite him to Belgium for trial. Senegal refused, claiming it had no jurisdiction to try him for crimes committed in Chad. In 2006, the AU responded by a Decision to appoint a Committee of Eminent African Jurists to 'consider all aspects and implications of the Hissène Habré case as well as the options available for his trial'.<sup>9</sup>

The report of the Committee recommended, among other things, that Senegal exercise jurisdiction, which it eventually did. However, in the event of similar future circumstances, the Committee recommended that the 'African Court should be granted jurisdiction to try criminal cases' and that 'there is room in the Rome Statute for such a development and that it would not be a duplication of the work of the International Criminal Court'.<sup>10</sup>

This report, therefore, gave the proponents of an African court a valuable legal opinion on both the benefits of conferring criminal jurisdiction on the court and its compatibility with the ICC.

#### b. Indictment of Rwandese officials

In 2008, the indictment of 40 senior Rwandese officials by a Spanish judge proved

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8 See, generally, <<https://www.amnesty.org/download/Documents/32000/ior530042011en.pdf>>

9 Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, para 1, available at: [http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA\\_Repor0506.pdf](http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf)

10 *Ibid*, paras 34 & 35.

to be a turning point: the Rwandese Justice Minister and Attorney General, Tharcisse Karugarama, alleged that the indictments were a form of 'neo-colonial judicial *coup d'état*'.<sup>11</sup> The AU joined in the condemnation and consequently initiated a dialogue with its partner, the European Union, on the misuse of universal jurisdiction. From this came the AU-EU Expert Panel on the Principle of Universal Jurisdiction. One of its recommendations was a return to the idea of empowering African States to try international crimes in Africa – an idea that had so far received a lukewarm reception from AU state parties.

This time, however, the AU embraced the idea and in February 2009, adopted Decision 213, which requested 'the (African Union) Commission, in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010.'<sup>12</sup>

Pursuant to this, the Commission contracted the Pan African Lawyers Association (PALU) in 2010 to produce recommendations and a draft legal instrument to amend the statute of the ACJHR so as to confer criminal jurisdiction on it. It was this draft legal instrument that, after numerous meetings, consultations, and alterations, was eventually adopted as a Protocol by the AU at its summit in Malabo, Equatorial Guinea, in 2014.

It should be noted that, while it is possible for weak cases to be brought before the court for political reasons, no concrete evidence has ever been provided to show that European courts were motivated by racism or neo-imperialism when exercising universal jurisdiction. In fact, as Human Rights Watch points out, the most frequently cited cases of abuse are not cases of universal jurisdiction but rather cases initiated on the basis that some of the victims were, for example, French nationals.<sup>13</sup> Nevertheless, the issues surrounding universal jurisdiction represent significant concerns about sovereignty and independence that became the turning point for the AU in its pursuance of an African criminal court.

#### 4. Conflict with the ICC

While the discussions surrounding universal jurisdiction may have been the principal trigger of the process to vest an African court with criminal jurisdiction, the indictment of Omar al-Bashir, and the Security Council's subsequent refusal to consider the AU's request to defer the proceedings, undoubtedly resulted in a monumental shift in the attitude of African states.

Following a Security Council referral, the ICC opened an investigation into the situation in Darfur. In July 2008, the Prosecutor applied for an arrest warrant for the President of Sudan – Omar al-Bashir – and several high-ranking officials, on the grounds of war crimes and crimes against humanity. The AU quickly submitted a request to the Security Council,

11 Abraham G, 'Africa's Evolving Continental Court Structures: At the Crossroads?' [2015] (Occasional Paper No 209) SAIIA, page 8 <<http://www.saiia.org.za/occasional-papers/africas-evolving-continental-court-structures-at-the-crossroads>>

12 Decision Assembly/AU/Dec.213(XII), adopted by the Assembly at its 12th Ordinary Session, in Addis Ababa, Ethiopia, in February 2009.

13 Human Rights Watch, 'Basic Facts on Universal Jurisdiction' (2009) <<https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>>

asking them to use their powers under Article 16 of the Rome Statute to defer the trial, to prevent a collapse in the on-going peace negotiations.<sup>14</sup> The Security Council virtually ignored the request – a move that was seen by the AU as disrespectful. Allegations of bias and Western hypocrisy streamed in, and the AU adopted resolutions in both 2009 and 2010 criticising the Security Council, urging member states to stop cooperating with the ICC, and requesting the AU Commission to hasten the implementation of Decision 213.<sup>15</sup>

This rift was made worse by the election of Uhuru Kenyatta and William Ruto – both ICC indictees – to president and deputy president of Kenya, respectively, in March 2013. Once elected, the contention that heads of state should enjoy immunity was reinvigorated and the allegations of bias against the ICC were stepped up a gear. The cases quickly became politicised and portrayed as a battle for both Kenya's and Africa's sovereignty against 'declining imperial powers' that are 'race-hunting'.<sup>16</sup> In October 2013, the AU adopted resolutions to ask the Security Council to defer the case and stated that no sitting head of state should appear before an international court.<sup>17</sup>

It is important to take a step back and examine these accusations objectively. It has been pointed out again and again that the majority of cases before the ICC were self-referrals (such as the DRC, Uganda, the Central African Republic and Mali) or welcomed at the time the prosecutor initiated his/her investigations (such as in Kenya and Cote

d'Ivoire), and therefore the idea that the ICC 'targeted' Africa is simply untrue. Moreover, it is in the interest of African leaders to discredit a court that poses a threat to their power, and thus not surprising that those who have already been charged by the ICC are among its loudest critics. It is also informative that the AU had no complaints against the ICC when all its investigations targeted rebel leaders.

Nevertheless, it remains hard to justify why, until the exception of the recent opening of an investigation into the situation in Georgia, no charges had been brought outside of Africa, despite there having been international crimes committed in numerous other regions. This has enabled the narrative of bias to resonate across the continent and trickle down to ordinary citizens, many of whom have joined in the denunciation of the ICC and the supposed hypocrisy of the West. The failure to effectively counter this narrative of bias has allowed the ICC to be portrayed as the enemy, rather than an ally, in the struggle for an African court.

Moreover, to suggest that the current lack of support for the ICC is solely because of its prosecution of African leaders may be an oversimplification. Prof. Kamari Clarke has argued that a critical issue lies in the drafting of the Rome Statute: many crimes that were of central concern to the global South – such as mercenaries, drug trafficking, and environmental damage – were left out, and the statute eventually adopted was 'deeply shaped by international power relations.'

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14 AU Peace and Security Council Decision (PSC/MIN/Comm CXLII) 21 July 2008 paras 3, 5, 9 and 11(i).

15 Decision Assembly/AU/Dec.270 (XIV); Assembly/AU/10 (XV); Assembly /AU/Dec.296 (XV).

16 Capital News, 'ICC toy of declining imperial powers – Uhuru' (2013) <<http://www.capitalfm.co.ke/news/2013/10/icc-toy-of-declining-imperial-powers-uhuru/>>

17 Decisions and Declarations of the Extraordinary Session of the Assembly of the African Union, 12 October 2013 <[http://www.iccnw.org/documents/Ext\\_Assembly\\_AU\\_Dec\\_Decl\\_12Oct2013.pdf](http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf)>

Prof. Clarke contends that 'in many of the African post-war regions with decimated judiciaries and infrastructures, the political crimes of the *Rome Statute* are really not able to address the root causes of economic plunder that are key to the emergence of violence in the first place.'<sup>18</sup>

It is precisely this argument that has been used by the drafters of the Malabo Protocol to justify the creation of an African court with jurisdiction over additional crimes that are more relevant to Africa's political and economic context than those of the Rome Statute.

In light of this, the proposals for an ACJHR with criminal jurisdiction were embraced with renewed enthusiasm and championed as 'an African solution for an African problem'. Although the AU's decision to explore criminal jurisdiction for the ACJHR started prior to the fall out with the ICC, the disintegrating relations meant that the AU hastened the process and the two issues of universal jurisdiction and ICC bias became conflated. Thus, by the time the Protocol was adopted in Malabo, Equatorial Guinea in 2014, it appeared to many as retaliation by the AU against the ICC.

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18 Clarke K, 'Is the International Criminal Court (ICC) targeting Africa inappropriately?' (2013) <<http://iccforum.com/africa#Clarke>>

## Part III **The Malabo Protocol**

As explained above, the Merger Protocol that consolidates the AfCHPR and the ACJ into one court was adopted in 2008, but has yet to be ratified. The Protocol adopted at the Malabo Summit in 2014 – officially titled the ‘Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights’ – is a set of amendments to the Merger Protocol.

These amendments would vest in the merged court a third chamber that would have criminal jurisdiction over 14 crimes. The jurisdiction would extend to legal persons and natural persons over 18 years, whether African or non-African, but only to crimes committed within the territory of Member States of the AU. In line with the principle of non-retroactivity, the court would only be able to try crimes that were committed after it came into force.

Like the Merger Protocol, however, the Malabo Protocol has yet to receive the 15 ratifications it needs to come into force. This results in a rather confusing situation whereby there are a number of possible AU options for courts, depending on which protocols do or do not get ratified:

- a. Neither the Merger Protocol nor the Malabo Protocol get the required number of ratifications and the ACJ remains dormant, in which case the AfCHPR remains the only functioning court of the AU.
- b. Neither the Merger Protocol nor the Malabo Protocol gets the required number of ratifications but the ACJ is

operationalised and functions parallel to the AfCHPR.

- c. The Merger Protocol receives 15 ratifications, but the Malabo Protocol does not, in which case the AfCHPR and ACJ are merged into a single court with two chambers – one for interstate disputes and one for human rights – but *without* jurisdiction to try international crimes.
- d. The Malabo Protocol receives the required 15 ratifications, but the Merger Protocol does not, resulting in the third chamber existing without the requisite legal and institutional framework of the Merger Protocol. This would raise a number of complex issues under international law, such as whether crimes within the subject matter jurisdiction of the third chamber occurring after the ratification of the Malabo Protocol, but before the ratification of the Merger Protocol, could still be adjudicated. It is therefore questionable if the Malabo Protocol could in fact enter into force before the Merger Protocol.
- e. Both the Merger Protocol and Malabo Protocol receive the required ratifications, creating a merged court with a third chamber that has jurisdiction over international crimes.

The ultimate question, then, remains: would the coming into force of the Merger Protocol and/or the Malabo Protocol be a blessing or a curse?

## 1. Should the ACJ and the AfCHPR be merged?

One potential difficulty in merging the two courts is that they deal with different jurisdictions: one is a human rights court and the other has a broad jurisdiction over international law and interstate disputes. The expertise of a judge sitting in the human rights court may be different to that of a judge in the ACJ, with the latter requiring a more general qualification in international law rather than human rights specifically. This could prove to be problematic when the courts are merged and the various judges have to hear cases from both the human rights chamber and the ACJ chamber.<sup>19</sup> However, it should be noted that the judges of the International Court of Justice are required to be well versed in international law generally, and there is no reason why this model could not work within the merged court. In essence, such concerns are, in reality, operational decisions about staffing, rather than inherent weaknesses in the concept of a merged court.

Moreover, two key benefits of merging the courts can also be identified:

- a. A merged court would avoid splitting of both human and financial resources, and therefore counter the problem of underfunding and understaffing that hampers numerous AU institutions, particularly the African Commission. This would also make for a simpler judicial system without an unnecessary number of different courts and tribunals.
- b. Although the various judges may come from different backgrounds, a single court allows for international law to develop more coherently on the continent, rather than multiple courts providing varying interpretations of similar issues. This would, in turn, contribute to 'a unified, integrated, cohesive, and, hopefully, indigenous jurisprudence for Africa.'<sup>20</sup>

Therefore, while challenges will undoubtedly arise and will need to be addressed swiftly, these can be overcome and are outweighed by the benefits of synchronising the AU's judicial system. A single court would cut back on the need for already scarce funds and personnel, and allow for the coherent development of African jurisprudence.

## 2. Strengths of the Malabo Protocol

### a. Defence

Of all the international and hybrid tribunals for the prosecution of international crimes, only one – the Special Tribunal for Lebanon – has a Defence Office as an independent organ of the court. The ICC, for example, has an Office of Public Counsel for the Defence that is part of the Registry, whereas the Office of the Prosecutor is an independent organ of the court. For some critics, therefore, one of the greatest weaknesses of international criminal tribunals in general is that the defence counsels often have poor capacity and little institutional support.<sup>21</sup> This risks exposing defendants to unfair trials that are tilted in favour of a stronger and more independent prosecution.

<sup>19</sup> Kindiki K, 'The proposed integration of the African Court of Justice and the African Court of Human and Peoples' Rights: legal difficulties and merits' [2007] *AJICL* 138.

<sup>20</sup> *ibid.*

<sup>21</sup> Tuinstra J, 'Defending the defenders: The role of defence counsel in international criminal trials' [2010] *JICL* 8, 463–486.

Perhaps the most positive aspect of the Malabo Protocol, therefore, is the creation of a Defence Office as a separate and independent organ of the court, alongside the Presidency, Office of the Prosecutor, and Registry (Art. 2(4)). The Protocol goes even further, adding provisions under Article 22C that: entrench the Defence Office's duty to protect the rights of the accused; require 'adequate facilities [for] defence counsel and persons entitled to legal assistance'; and creates a Principal Defender who will enjoy 'equal status with the Prosecutor in respect of rights of audience and negotiations'.

A provision requiring there to be 'adequate facilities' is significant; it specifically addresses the problem of inadequate funding that has afflicted international criminal tribunals, particularly the ICTR.<sup>22</sup> Furthermore, placing the Principal Defender on equal footing with the Prosecutor is an important innovation of the Protocol that would help ensure the principle of 'equality of arms' and provide a more effective channel through which concerns about defence can be raised and addressed.

As Max Du Plessis notes: 'Defence counsel play a crucial role in all criminal trials to ensure both the fairness of proceedings and the legitimacy of the outcome. International criminal trials are no different... For these reasons, the revisions of the ACJHPR that seek to entrench and support the independence and efficacy of defence counsel before that institution are most welcome.'<sup>23</sup>

## **b. Victims office**

Due to international criminal trials often involving powerful individuals, sometimes with access to state machinery, witnesses and victims are extremely vulnerable to intimidation, harassment, bribery, and even assassination. Indeed, of all the lessons to be learned from the Kenyan cases before the ICC, the most significant is the crucial need for protection of victims and witnesses. Adequate protection is not only necessary for the sake of the individuals, but also essential for maintaining a strong and credible case.

In light of this, it is laudable that the Malabo Protocol creates a Victims and Witnesses Unit within the Registry to provide, among other things, 'protective measures and security arrangements, counselling and other appropriate assistance' (Art. 22B). In addition, Article 46M establishes a Trust Fund 'for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families.' This emulates the ICC, which also has a 'Victims and Witnesses Unit', as well as a Trust Fund.

It is hoped that the protection of, and respect for victims and witnesses would be taken seriously not only by the ACJHR but also by states themselves. The experience of the ICC indicates that no matter what protections are created by the Protocol, if states became complicit in intimidation, bribery and assassination of witnesses or victims, the court would quickly lose both its credibility and ability to build strong cases.

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22 Kerr K, 'Fair trials at international criminal tribunals: Examining the parameters of the international right to counsel' [2005] *GJIL* 36, 1227.

23 du Plessis M, 'Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders' [2014] *ISS Paper* 278, 4.

### c. Additional crimes

As explained in Part II, Africa has grappled with certain crimes that are unique, if not in nature, then in their pervasiveness on the continent and the damage they cause. One motivation behind creating an African court, therefore, is to find a way to address serious crimes that are too complex or politically charged for national courts, yet not 'serious' enough for the ICC.

The Malabo Protocol would not only vest jurisdiction over the 'core' international crimes of genocide, crimes against humanity, war crimes, and aggression, but adds an additional ten crimes (Art. 28A):

- Unconstitutional Change of Government
- Piracy
- Terrorism
- Mercenarism
- Corruption
- Money Laundering
- Trafficking in Persons
- Trafficking in Drugs
- Trafficking in Hazardous Wastes
- Illicit Exploitation of Natural Resources.

Even if such a large list of crimes raises concerns (addressed in section 3), it provides an exciting opportunity to address crimes that are well known to the continent, yet the subject of relatively few trials and convictions.

An important rationale for placing these crimes on the same level as the so-called 'core' international crimes is that many of them are capable of destabilising a state, which in turn leads to the proliferation of core international crimes. For example, several of the civil wars in Africa were preceded by an unconstitutional change of government that threw the state into chaos in which core crimes were committed. Thus, it is arguably more sensible and forward-looking to address the crimes that may *lead* to serious conflict or civil war, rather than waiting for violence to happen. In addition, there is often a mutually causative and reinforcing relationship between these crimes and core international crimes.

The Protocol also explicitly includes rape as a method of genocide, and refines the definition of war crimes to include additional elements of international humanitarian law. Both are welcome changes to the definitions of crimes that are in line with increasing recognition of sexual and gender-based violence as a weapon in conflict.

### d. Corporate liability

Africa has not only suffered at the hands of individuals, but also corporations – the human rights violations of mining companies in the Congo are but one example. Foreign and multinational companies can be particularly damaging to African economies: a recent study showed that Africa loses billions of US dollars every year to tax dodging and illicit financial outflows.<sup>24</sup> The Malabo Protocol, in recognition of this, provides that 'the Court shall have jurisdiction over legal persons, with the exception of States' (Art. 46C).

24 Health Poverty Action, 'Honest Accounts? The true story of Africa's billion dollar losses' (PDF 2014) <[http://www.francophonie.org/IMG/pdf/honest-accounts\\_final-version.pdf](http://www.francophonie.org/IMG/pdf/honest-accounts_final-version.pdf)>

There are a number of challenges related to corporate liability that the ACJHR will have to overcome. Firstly, the court will have to be careful to separate instances of individual actions and corporate policy. Secondly, proving the mental element (or *mens rea*) of a crime is much harder to do with a corporation made up of numerous individuals, each with different motivations and states of mind, than it is for one individual.

Nevertheless, there are serious merits in extending liability to corporations, particularly in the African context. Firstly, many corporations operating on the continent are foreign/multinational and have tended to avoid prosecutions by arguing that an African state has no jurisdiction to try them, irrespective of the harm they have caused. The Malabo Protocol would nullify this argument with regards to serious crimes. Secondly, many of the crimes in the Protocol would undoubtedly have significant institutional and corporate elements to them, particularly corruption, trafficking in hazardous waste, illicit exploitation of natural resources and money laundering. Lastly, it would send an important message that corporations are held to the same moral standards as individuals, and are deserving of the same stigma and retribution should they pursue criminal policies.

#### **e. Proximity**

As well as the positive aspects of the Malabo Protocol, there is a more general advantage to having international crimes tried by an African court, in that it allows trials to be conducted where possible in, or at least

closer to, the region in which the atrocities were committed. This has clear benefits for investigations by the prosecution, who will arguably have easier access to evidence and witnesses. More importantly, however, it gives victims and citizens a greater sense of 'ownership' over the trial and would likely facilitate greater interest, participation and reconciliation. This is combined with a sense of empowerment that African institutions are capable of handling trials, rather than relying on international tribunals, and hopefully eliminates the toxic debates around neo-imperialism and bias that have plagued the ICC trials.

Indeed, it is because of these advantages that one of the founding principles of the ICC is 'complementarity' – the principle that the ICC should be a court of last resort, and should prioritise facilitating and encouraging trials at the national level (Art. 1, Rome Statute).

### **3. Weaknesses of the Malabo Protocol**

#### **a. Immunity**

In almost every critique of the Malabo Protocol,<sup>25</sup> there is one controversial provision that remains the focal point and raises the most questions about the efficacy and legitimacy of the court. It is Article 46A *bis*, which states:

*'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such a capacity, or other senior state officials based on their functions, during their tenure in office.'*

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<sup>25</sup> See, for example, du Plessis (n. 16), Abraham (n. 5), Abass (n. 1).

In summary, Article 46A *bis* provides immunity for sitting heads of state and 'senior state officials' (an undefined term) of the AU. It should be noted that this immunity is not absolute: it is only for the duration of their tenure in office, after which they could be tried, and it does not prevent them from being investigated or called as a witness.

The article was inserted due to a directive by the AU Assembly, on the basis that it is consistent with the AU's policy on sequencing peace and justice.<sup>26</sup> In essence, the AU argues that the removal of a sitting head of state is a recipe for destabilising a state even further and causing chaos at a time when peace negotiations should be prioritised. Libya and Somalia are often cited as examples of a failure to sequence peace and justice, while the trials of former presidents Laurent Gbagbo of Côte d'Ivoire, Hissène Habré of Chad and Charles Taylor of Liberia are cited as good examples of a head of state being removed first and tried once the country had returned to relative peace and stability.

However, it is unlikely this was the sole motivation behind the article. The granting of immunity could be seen as African states cementing their position that sitting heads of state should enjoy immunity, even for international crimes – a position that has been the centre of many of the AU's quarrels with the ICC. It is also plausible that leaders would support the addition of the article simply out of self-interest and a desire to avoid being held accountable for their actions, particularly if they see the court as a replacement, rather than an ally, of the ICC.

Whatever the motivations, the justifications provided by the AU are weak in the extreme, for several reasons:

- One of the most significant threats to sustainable peace and security on the continent, and one of the greatest betrayals of the rights of victims, is impunity, particularly amongst the political elite. It is the ability of those in power to act, knowing there will likely be no serious consequences, which so often enables individuals to commit atrocities, leaving helpless victims in their wake. Indeed, the AU Constitutive Act recognises this under Article 4(o), which specifically calls for the 'rejection of impunity'. It sends a conflicting message that a court is set up to address impunity and hold individuals to account, yet provides immunity for individuals occupying precisely the type of position that would allow them to commit mass, organised crimes. As a letter by a group of CSOs to the AU pointed out: the 'irrelevance of official capacity is at the core of making accountability for the gravest crimes meaningful. The alternative would carve out a sphere of impunity for high-level perpetrators'.<sup>27</sup>
- Although perpetrators may still be tried at a later date, this provides a perverse incentive for a head of state or senior state official to cling onto power for as long as they can. While the African Governance Architecture (AGA) has provisions that are supposed to ensure leaders only stay in power constitutionally, there have undoubtedly been extensions of power by heads of state

26 PALU, 'A Brief on the Malabo Protocol Granting International Criminal Jurisdiction to the African Court of Justice & Human Rights' (2015) <<http://county-yangu.com/default/details.php?number=1373>>

27 'Joint Civil Society Letter on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights' (2014) <<http://www.hrw.org/node/253666>>

since the establishment of the AGA that are, at the very least, questionable, yet have resulted in little or no action from the AU.

- Many of the crimes in the Protocol are likely to be committed by, or at the very least involve, heads of state or senior state officials. For example, the crime of aggression commonly involves invasions, bombardments or other violations of a state's sovereignty by 'a person in a position effectively to exercise control over or to direct the political or military action of a state or organization' (Art. 28M of Malabo Protocol). It is extremely unlikely that decisions to carry out such acts of aggression do not involve the head of state or senior state officials in charge of the military. Similarly, it would seem rather absurd that, if a person comes to power through an unconstitutional change of government (such as a coup) and then claims immunity as a sitting head of state, he or she cannot be tried for the crime of 'Unconstitutional Change of Government' until they step down.
- By joining the ICC and introducing implementing legislation of the Rome Statute domestically, many AU states accepted that official capacity is irrelevant with regards to international crimes. South Africa's International Crimes Act, which implements the Rome Statute, for example, provides that 'the fact that a person ... is or was a head of State or government ... is neither... a defence to a crime; nor... a ground for any possible reduction of sentence' (Section 4(2)(a)).
- The illogicality of the AU's position is further betrayed by the fact that the immunity provision only applies to an AU head of state. If the AU genuinely believes sitting heads of state should enjoy immunity under international law, why not extend the immunity provision to *any* head of state?

The AU's policy of sequencing peace and justice has proven to be flexible. In South Sudan, for example, the AU decided to investigate human rights violations parallel to peace negotiations – and this should be encouraged. A rigid policy, whereby peace and justice are treated as mutually exclusive, is neither logical nor constructive. The immunity provision provides an unwelcome and unnecessary suggestion that it would never be in the best interests of an AU state to try a sitting head of state or senior state official. A possible alternative would be to remove the immunity article and instead have a provision that allows the Peace and Security Council of the African Union to submit a request to a separate chamber of the Court to defer a trial for a year, if it was in the interest of peace and stability. This would be much like the relationship between the Security Council and the ICC, with the difference being that in the case of the African Court, it would be the judges who would have the final say as to whether a deferral should be granted.

Of course, the relationship between the ICC and the Security Council is not without its critics. For many, the idea that a political body can subvert the mission of a judicial entity is unpalatable. For example, the former Chief

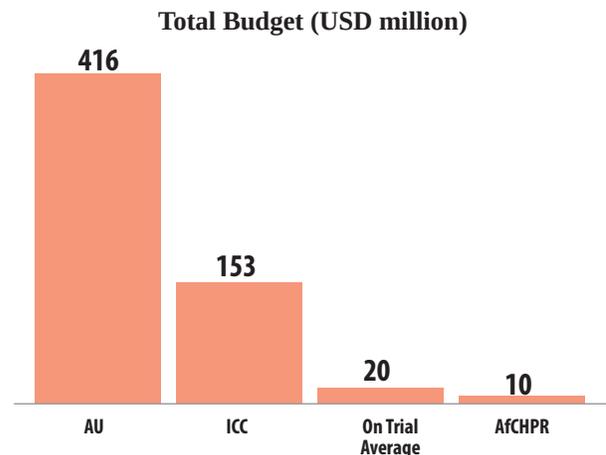
Prosecutor for the ICTY and ICTR, Louise Arbour, has long advocated for ‘a separation of the justice and political agendas.’<sup>28</sup> This is the reason why it would be preferable to have the AU Peace and Security Council mandated to make a request for consideration and determination by the Court.

## b. Finance

Another major concern of adding a third chamber to the ACJHR is the additional costs that will come with it. The AU and its institutions are chronically underfunded and heavily reliant on international donors – who provide 72 per cent of the AU’s budget – which was the main reason why it was suggested that the ACJ and AfCHPR be merged. Moreover, international criminal trials have proven to be incredibly costly; it has been estimated that a single international criminal trial costs US\$20 million.<sup>29</sup>

To put it into perspective: the AU’s total budget for 2016 is roughly US\$416 million, with US\$10 million going to the AfCHPR;<sup>30</sup> by comparison, the total budget of the ICC for 2016 is €139 million, or approximately US\$153 million at the time of writing.<sup>31</sup>

Lack of adequate funds not only risks impacting on the efficiency of the court, but has a direct impact on the fairness and credibility of trials. Adequate funds are needed to allow for thorough investigations,



adequate defence of the accused, and robust protection of witnesses and victims. The ICC, for example, strives to place victims’ interests at the heart of its operations, yet its Trust Fund for Victims remains ‘scandalously underfunded’<sup>32</sup> and therefore often unable to provide any, let alone sufficient, victim support.<sup>33</sup>

The AU will have to come up with an answer as to how it will raise significantly more money in order to fund the court. If it cannot, then the court is unlikely to ever get off the ground, let alone conduct high profile cases.

Nevertheless, there are promising signs that the AU is looking into creative ways of increasing its budget and reducing its dependence on donors. At an AU summit in 2015, heads of state reconsidered proposals originally put forward in 2012 by a panel chaired by former president of Nigeria,

28 Kersten M, ‘The UN Security Council and the ICC: Between a Rock and a Hard Place’, <<http://justiceinconflict.org/2011/05/06/the-un-security-council-and-the-icc-between-a-rock-and-a-hard-place/>>

29 du Plessis M, ‘Implications of the AU decision to give the African Court jurisdiction over international crimes’ [2012] ISS Paper 235, 9

30 Decision No: Assembly/AU/Dec. 577(XXV), available at <<http://www.saflii.org/au/AUDECISIONS/2015/19.html>>

31 Resolution ICC-ASP/14/Res.1, available at <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-10-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf)>

32 Support and Funding for Victims Is Crucial for the I.C.C., New York Times, <<http://www.nytimes.com/roomfordebate/2014/12/11/do-we-need-the-international-criminal-court/support-and-funding-for-victims-is-crucial-for-the-icc>>

33 Goetz AM, ‘Support and Funding for Victims Is Crucial for the I.C.C.’, <<http://www.nytimes.com/roomfordebate/2014/12/11/do-we-need-the-international-criminal-court/support-and-funding-for-victims-is-crucial-for-the-icc>>

Olusegun Obasanjo that new taxes on airline tickets, hotel stays and text messages could bring in up to US\$2.3 billion per year.<sup>34</sup> Although those particular proposals have faced resistance from AU states reliant on tourism, it is at least an encouraging indication that the AU is aware of the need to drastically increase its budget.

### c. Judges

Merging jurisdiction over international law (IL), international human rights law (IHRL) and international criminal law (ICL) into one, means that the 'scope of the court's jurisdictional reach is breathtaking.'<sup>35</sup> Not only does this make the court's work incredibly complex, but also it raises questions as to the capacity of judges to handle the array of possible cases.

Article 4 of the Protocol stipulates that five judges shall be elected with experience and competence in IL, five judges shall be elected with experience and competence in IHRL, and six will be elected with experience and competence in ICL – making a total of 16 judges. The ICC experience has shown that even the 18 judges they have dedicated to criminal trials have been insufficient to ensure speedy judicial process, and therefore the 16 judges of the ACJHR would be spread far too thin to allow for swift trials.

Furthermore, neither five nor six judges would be capable of stretching themselves over the three chambers (pre-trial, trial, and appeals) so as to ensure that, for example, only ICL judges heard ICL trials. Alternatively,

if the Protocol was intended to allow any of the judges to try any case, regardless of whether they have sufficient expertise in that particular area of law or not, then this risks unfair trials and inconsistent jurisprudence. Quite clearly, the court needs a larger roster of judges if it is to carry out its work efficiently and effectively.

### d. Additional crimes

Although there are positive elements to including additional crimes, there are also potential problems as outlined below.

Firstly, to pick apart the definitions of each of the new crimes is outside the scope of this discussion, but one definition that is in particular need of attention is that of Unconstitutional Change of Government (Art. 28E). It is an extremely broad definition that was somewhat tempered by the inclusion of an exception for 'any act of a sovereign people peacefully exercising their inherent right', but this exception was unfortunately removed during the drafting process. In comparison, the definition of terrorism (Art. 28G) has an exception for 'struggle waged by peoples according to the principles of international law for their liberation or self-determination', which was not removed. As Du Plessis points out:

*'The perverse result of these two provisions, when read together, is that any person peacefully exercising his or her rights, which results in an 'unconstitutional change of government' may be guilty of a crime, but a person who commits violent acts – including those that cause 'death*

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34 Progress Report Of The High Level Panel On Alternative Sources Of Financing The African Union, available at <[http://ccpau.org/wp-content/uploads/2014/03/Obasanjo-Panel-Progress-Report-Assembly-AU-18-XIX-2012-\\_E.pdf](http://ccpau.org/wp-content/uploads/2014/03/Obasanjo-Panel-Progress-Report-Assembly-AU-18-XIX-2012-_E.pdf)>

35 *Ibid*, page 6.

*to ... any number of persons' – and does so with the purpose of causing 'general insurrection' in a state, may be excused from criminal liability.<sup>36</sup>*

Secondly, the addition of so many crimes injects a level of complexity that will make the judges' work difficult, at least to begin with. An enormous number of interpretational questions will have to be answered before the definitions will be of sufficient clarity to be applied, which will slow the progress of cases significantly.

Thirdly, although the Protocol requires crimes to be 'of sufficient gravity' before the court can exercise jurisdiction (Art. 46H), there is the potential for the court to be flooded with cases that allow it to avoid tackling sensitive cases. For example, individual terrorists and pirates could be continually hauled before the inadequately staffed ACJHR so as to distract the court from, say, high-level politicians orchestrating major corruption or violent conflict. This, of course, is not certain and would be avoided by (1) judges interpreting the threshold of 'sufficient gravity' strictly and (2) ensuring the prosecutor appointed has the necessary integrity and independence to pursue sensitive cases.

#### **e. Political will**

A lack of political will is not a problem with the Malabo Protocol itself, but rather the climate in which the ACJHR would operate. No matter how robust the provisions and how qualified the staff, the court will fall at the first hurdle if there is not genuine commitment by states and politicians. Sincere cooperation

with the court by governments will be crucial to ensure that witnesses and victims are protected, suspects are surrendered, evidence is collected, and sentences are properly enforced.

There are already worrying indications of a lack of commitment to holding individuals to account for international crimes, particularly if that individual is a high-ranking state official. Firstly, the injection of the immunity provision demonstrates an unwillingness of the political elite to hold themselves to the same standards as others; secondly, the AU's calls for non-cooperation with the ICC, and the subsequent finding of the ICC that Kenya was refusing to cooperate, sets a dangerous precedent that a state only has to cooperate with the court if they 'agree' with the cases before it – this is also evident in the suspension of the SADC Tribunal for its ruling against Mugabe's policies; lastly, the slow rate of ratifications of the Protocol (only four so far) indicate most African states are reluctant to usher in the new court, perhaps due to doubts about funding or fear of accepting its jurisdiction.

## **4. Relationship with national courts/RECs**

Emulating the ICC's principle of complementarity, the Malabo Protocol includes a provision detailing the ACJHR's relationship with both national courts and RECs. Under Article 46H, the ACJHR would only accept a case if a State is 'unwilling or unable to carry out the investigation or prosecution'. This has the dual benefit of

<sup>36</sup> du Plessis, M, Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders, page 5 < <https://issafrica.s3.amazonaws.com/site/uploads/Paper278.pdf>>

ensuring that the ACJHR is not flooded with cases, and encouraging national and regional courts to develop their ability to try serious crimes.

## 5. Relationship with the ICC/ complementarity

A glaring omission in the Protocol, which has received strong criticism, is that nowhere in the complementarity provisions is the ICC or Rome Statute mentioned. As Du Plessis observes:

*'It is unfathomable that the draft protocol nowhere mentions the ICC ... . Either this is a sign that the AU hopes its members will sidestep the ICC, or it is a case of irresponsible treaty making – forcing signatories to become party to an instrument that willfully or negligently ignores the complicated relationship that will exist for states parties to the Rome Statute.'*<sup>37</sup>

Garth Abraham goes further, arguing that the 'only reasonable interpretation of this exclusion can be that it is a conscious snub to the ICC by the AU'.<sup>38</sup>

However, Don Deya, director of PALU, the organisation that was tasked with drafting the Protocol, is adamant that it is not a deliberate snub, and that throughout the process it has been clear that the ACJHR intends to cooperate with, and complement the ICC.<sup>39</sup> He points to Article 46L, which allows the court to 'seek the co-operation or assistance of ... international courts ... and

may conclude Agreements for that purpose', and therefore suggests that the ACJHR could sign a Memorandum of Understanding with the ICC at the earliest opportunity that would set out how the two institutions will work together.

Critics have also questioned whether complementarity under the Rome Statute extends to regional courts, such as the ACJHR, or is intended to only apply to national courts.<sup>40</sup> If the latter were true, it would create serious tension between the two institutions, as the ICC could refuse to accept that an individual they wished to try could be tried by the ACJHR instead. It would also mean that any state that is a party to the founding treaties of both the AU and the ICC could find itself in a position where it risks breaching obligations under one treaty by complying with the other treaty. However, it seems likely that in the spirit of 'positive' complementarity the ICC would allow, even encourage, an added layer of regional courts, even if this required the Assembly of State Parties to the Rome Statute to amend the wording of the Rome Statute accordingly. This would of course be subject to the condition that the purpose of the said regional court was not simply to shield certain individuals from prosecution – an accusation that the ACJHR may face due to the addition of the immunity provision.

Cooperation would benefit both institutions greatly. It would allow the caseload to be shared, with the ICC focusing on the highest-

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37 du Plessis, M. Implications of the AU decision to give the African Court jurisdiction over international crimes page 10. < <https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf> >

38 Abraham G, 'Africa's Evolving Continental Court Structures: At the Crossroads?', page. 12 <<http://www.saiia.org.za/occasional-papers/669-africa-s-evolving-continental-court-structures-at-the-crossroads/file>>

39 Deya D (personal communication, August 26, 2015).

40 Murungu C, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' [2011] JICL 9 1067, 1081; Abraham (n. 5), page 12.

level perpetrators of core international crimes, while the ACJHR concentrated on perpetrators of crimes not under the jurisdiction of the ICC, or mid-level perpetrators of the core crimes. A good working relationship with the ACJHR could also be an opportunity for the ICC to re-legitimise its image in Africa and re-establish the strong relationship it once had with the AU. More importantly, it is essential that the ACJHR does not hinder the work of the ICC and in so doing prioritise political grandstanding over securing justice for victims. If this were to happen, the court would instantly lose its credibility among both the international community and a significant portion of Africans.

## Conclusion

Reactions to the Malabo Protocol have been mixed. Although there is nothing inherently wrong with an African court with jurisdiction over international crimes, critics have expressed serious doubts about the validity, efficacy, and purpose of the proposed ACJHR, particularly with regards to the immunity provision and the question of finance.

By contrast, proponents of the court see an opportunity to add a layer of accountability that has so far been lacking on the African continent. They argue that, while there will undoubtedly be obstacles, these can be overcome, and that to simply condemn the court before it has been created is unhelpful. The ACJHR has the potential to shift Africa's focus from constantly fighting the ICC to working towards an innovative, empowering,

and credible court that confronts crimes that are particularly damaging to the continent and, crucially, offers an avenue of justice for victims.

A key reason for such a significant split in opinion is that, throughout the process, there has been a serious disconnect between civil society, the general public, and the African Union. The drafting of the Malabo Protocol would have benefited significantly from greater involvement of both civil society and the general public. The result has been suspicion and confusion as to the purpose and effect of the Malabo Protocol. This lack of engagement, however, is not solely the fault of the AU; CSOs have shown an unwillingness to engage in the process so far and have been criticised by the drafters as being unnecessarily dismissive.

One thing is clear: the wheels are rolling, and the possibility of a regional court being established is real. The rate of ratifications may be slow, but it must be remembered that even the most enthusiastic proponents of the Rome Statute thought it would take at least a decade to come into force, if at all – it took only four years. Therefore, neither a wholly confident nor wholly dismissive attitude will be constructive. If Africa is to end up with the credible, independent and effective court it so deserves, then all stakeholders – particularly CSOs and the general public – must engage in the process in a pragmatic and realistic manner, and work together to address the significant weaknesses and challenges before the court is born.

## Part IV Recommendations

### Victims, witnesses, and the general public

- Of all the stakeholders, the most important, yet often the most ignored, are victims. In the midst of academic and political debates surrounding the ICC and the ACJHR, the interests of the thousands of victims across Africa must remain paramount, and their opinions must be sincerely taken into account. Whichever route the AU ultimately takes, it must do so with a genuine commitment to place the protection and empowerment of victims and witnesses at the heart of its considerations.
- Should the ACJHR come into being, important lessons can be learned from the ICC's experiences with victims and witnesses, particularly the weaknesses of their Victims and Witness Unit and the consequences of an underfunded Victims' Trust Fund. The ACJHR must strive to do better by ensuring that its equivalent bodies are better staffed and better funded, and that victims are properly represented throughout the various cases.
- Equally important, the witness intimidation and bribery that has blighted previous attempts to hold individuals to account, particularly for the 2008 post-election violence in Kenya, would need to be stamped out through rigorous prosecution – by either the ACJHR, or the domestic courts of individual states – of individuals engaging in such crimes.

- As well as victims, the general public has a vested interest in the ACJHR and individuals should contribute as much as they can – through debates, forums, media pieces, etc – to the debate. Citizens across Africa should make clear to the AU what they expect from the ACJHR, and what they think needs to change.

### Amendments to the Protocol

The Protocol includes a provision for amendments to be adopted by simple majority of the Assembly, upon recommendation by a State Party or The Court (Art. 12). All State Parties would do well to use this provision to introduce amendments to the Protocol before it enters into force, so as to strengthen its effectiveness, efficacy, and legitimacy. The following amendments are recommended:

- Article 46A *bis* should be removed entirely. No immunity should be provided to any individual, regardless of their official position. This would place the Protocol more in line with both the AU Constitutive Act's rejection of impunity and the policy of international criminal tribunals around the world.
- To allow the Protocol to operate within the AU's policy of sequencing peace and justice, a provision can be added to the Protocol that allows the Peace and Security Council of the African Union to request the Court to defer a trial for a year if it was in the interest of

peace and stability. The final determination as to whether to grant the request for deferral must however lie with the judges, to avoid the situation that currently occurs at the ICC where the UN Security Council's power to defer judicial proceedings amounts to a potential interference with the independence of the Court.

- The number of judges should be expanded to at least 27; i.e. 9 judges with experience in each of the Court's three jurisdictional bases. This would enable the Court to handle cases in a more efficient and effective manner.
- The definition of the crime of unconstitutional change of government (Art. 28E) should be amended to reintroduce a proviso that 'any act of a sovereign people peacefully exercising their inherent right shall not constitute an offence under this article'. This is a necessary limitation for an otherwise extremely broad definition that criminalises the democratic right of a people to initiate a peaceful uprising.
- Article 46H on 'complementary jurisdiction' should be amended to cement the Court's commitment to work with the ICC and make clear to African states that being a member of the ACJHR does not mean abandoning their obligations under the Rome Statute. This could simply entail amending section 1 of the Article to state: 'The jurisdiction of the Court shall be complementary to that of the National Courts, the Courts of the Regional Economic Communities where specifically provided for by the Communities, and to the International Criminal Court.'

## The AU

- The Assembly should adopt a resolution affirming that the ACJHR would be complementary to the work of the ICC and is not intended to shield those in power from prosecutions in other national, regional, or international courts. The ACJHR's reputation and legitimacy will be doomed if it is perceived as nothing more than a 'conscious snub' to the ICC or a tool of AU leaders to avoid prosecution. It is in the AU's best interest to ensure the Court is not perceived as such, or African states that are signatories to the Rome Statute will be reluctant to ratify the Malabo Protocol for fear that it will conflict with their obligations to the ICC.
- The AU should engage in dialogue in good faith with the ICC and avoid the constant and manipulative use of inflammatory narratives of racism, colonialism, and imperialism. This is not to deny the existence of these ills, but to caution against the often essentially dishonest deployment of these narratives in the context of debates on the actions of the Court. The ICC may not be a perfect institution, but it is essential in the fight against impunity and for holding perpetrators of grievous crimes to account – something clearly recognised by the numerous African states that have referred situations to the court. The experiences, expertise, and resources of the ICC will be invaluable to the ACJHR, which would benefit hugely from a close partnership with the ICC and, equally, suffer greatly from an antagonistic relationship.

- In future meetings or summits held to discuss, or make amendments to, the Malabo Protocol, CSOs, legal experts, and members of the public should be invited and engaged on a more substantial level than has been the case so far. The support of CSOs and the general public will be essential for the credibility of the Court.
  - The AU must find new and inventive ways to dramatically increase its budget, and the budgets of its various institutions. Taxes on mobile phone use, for example, could represent a promising source of funding. If the ACJHR is to function effectively and efficiently, its budget must be drastically larger than that of the current AfCHPR.
  - The ACJHR is, ultimately, for the benefit of the general public and, in particular, the victims of crimes on the continent. Unfortunately, public awareness about the various courts and resolutions of the AU is pitifully low. The AU should undertake extensive public education around the proposed ACJHR and provide appropriate platforms and forums for victims and members of the general public to contribute to the discussions.
- Should the Malabo Protocol come into force, the ICC should work closely with the ACJHR and embrace a close partnership with it. This would have the dual benefit of potentially reducing the ICC's caseload and countering the inaccurate narrative that the ICC is an enemy of Africa. Rejecting the court outright would only further alienate the ICC from the continent.

## Civil Society

## The ICC

- CSOs have so far been conspicuously absent in the drafting of the Malabo Protocol. This can partly be attributed to the AU's failure to reach out and include other stakeholders, but also due to the fact that CSOs across the continent have generally been dismissive of the movement to expand the jurisdiction of the ACJHR. This must change. Representatives of civil society should request to be invited to all meetings of the AU regarding the setting up of the ACJHR or amendments to the Protocol.
- CSOs should undertake thorough reviews and provide constructive criticism of the Protocol. There may be extensive vulnerabilities in the ACJHR as currently conceptualised, but this can only be changed through actionable recommendations and pragmatic advocacy, rather than outright rejection.
- CSOs also have a role in ensuring that the general public and, most importantly, victims, are made aware of the movement to create an African court and that they are provided with the necessary forums and platforms to contribute to the discussion.