



Implications of the AU decision to give the African Court jurisdiction over international crimes

INTRODUCTION

In February 2010, pursuant to a decision taken by the African Union (AU) Assembly a year earlier,¹ the AU Commission appointed consultants to work on drafting an amended protocol on the Statute of the African Court of Justice and Human Rights (hereafter 'African Court'). The draft amended protocol, amongst other key issues, provides for the expansion of the jurisdiction of the African Court to deal with specific criminal matters. In June 2010, only four months after receiving their brief, the consultants completed a first draft protocol, which has since been considered at two validation workshops coordinated by the AU Pan-African Parliament in late 2010 and at three meetings of government experts convened by the AU Commission during 2011. The draft protocol adds criminal jurisdiction over the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes such as trafficking in persons and drugs, terrorism, piracy, and unconstitutional changes of government and corruption.

A November 2011 draft was prepared for review at the AU Government Legal Experts meeting, held from 7–11 May 2012 in Addis Ababa, Ethiopia. The draft was reviewed including changes up until 15 May 2012. Ministers of Justice and/or Attorneys General met from 14–15 May 2012 to, among other things, consider adopting the report of Government Legal Experts on amendments to the African Court's Protocol.² The meeting considered and adopted the draft protocol except article 28E relating to the crime of unconstitutional change of government (which is to be given more thought because of its definitional problems). We are now at a stage where the

ministerial meeting approved the draft protocol as amended and recommended it to the AU Assembly for adoption.³

The time frame which the AU has provided for the complex task of drafting, reviewing and finalising the amendments has been relatively short. The process occurs against the backdrop of the AU's open hostility to the International Criminal Court's (ICC) focus on African situations. It is also unfortunate that the process to expand the African Court's jurisdiction has not been particularly transparent,⁴ with limited consultation among legal experts in AU member countries, officials of relevant institutions, or civil society. In light of their key role in the establishment and implementation of African regional human rights mechanisms and the ICC, civil society organisations have critical expertise to offer, as do other relevant stakeholders. Questions around jurisdiction, the definition of crimes, immunities, institutional design and the practicality of administration and enforcement of an expanded jurisdiction, among others, require careful examination. In this regard, and in the spirit of transparency and good regional governance, the process would have benefited from a genuine process of consultation.

As this paper will show, the process of expanding the African Court's jurisdiction is fraught with many legal and practical complexities. The expansion has implications on an international, regional and domestic level. All these implications need to be considered, particularly the impact on domestic laws and obligations, and the relationship between African states parties to the Rome Statute of the ICC, the ICC itself and the African Court.

BRIEF RETROSPECTIVE ON THE AFRICAN COURT

Where we are – the African Court on Human and Peoples' Rights

In June 1998 the Organisation of African Unity (OAU) adopted the Protocol on the African Court on Human and Peoples' Rights (AfCHPR),⁵ which entered into force on 25 January 2004.⁶ The AfCHPR 'complements the protective mandate' of the African Commission on Human and Peoples' Rights,⁷ which until that point in time was the principal supervisory organ of the African Charter, situated in Banjul in The Gambia – and which currently, because of various problems in fomenting the work of the AfCHPR, remains the principal supervisory organ of the African Charter.

Be that as it may, the AfCHPR was expected to complement the protective mandate of the African Commission. The court is staffed by 11 judges, elected in an individual capacity and by secret ballot, who hold office for a six-year term. The first group of judges of the AfCHPR was elected on 22 January 2006. Despite the requirement of gender balance, only two female judges were elected.⁸ The court has its seat in Arusha, Tanzania.

The AfCHPR has competence to decide 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned'⁹ and to provide an opinion on any legal matter relating to the charter or any other relevant human rights instrument.¹⁰

Cases may be submitted to the court by: the African Commission; a state party which has lodged a complaint with the commission; a state party against whom a complaint has been lodged; a state party whose citizen is a victim of human rights violations; and African inter-governmental organisations.¹¹ In exceptional cases the AfCHPR may allow individuals or NGOs to bring cases before the court without first having to refer the matter to the commission.¹² In terms of article 5 of the protocol: '[t]he Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with art 34(6) of this Protocol.' Article 34(6) of the protocol provides as follows:

At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under art 5(3) of this Protocol. The Court shall not receive any petition under art 5(3) involving a State Party which has not made such a declaration.

Articles 5 and 34(6) thus create two conditions for individuals to have direct access to the AfCHPR. The first is that the state party concerned must have made a declaration pursuant to art 34(6) of the protocol. The second is that the court itself must choose to exercise its discretion to hear the case. Normally, it may only consider such cases once the commission has considered the matter and has prepared a report or taken a decision.¹³ The declaration required from a state under article 34(6) – allowing an individual or NGO to bring a complaint against it to the AfCHPR – is an unfortunate condition imposed under the protocol. Certainly, it has done little to help build the reputation of the court in the eyes of the countless African victims of human rights violations who, in the absence of an article 34(6) declaration by their state, will be unable to access the AfCHPR.¹⁴ As one commentator has rightly noted: 'One need not be extensively versed in African politics to gauge the likelihood of African states making an extra effort to provide their citizens and civil society groups with avenues through which to hold them accountable'.¹⁵

The proceedings of the AfCHPR will usually be in public and oral hearings are envisaged.¹⁶ Where the interests of justice require it, those appearing before the court may be entitled to free legal representation.¹⁷ If the court finds a violation of a protected right, it shall order an appropriate measure to remedy the violation.¹⁸ This may include compensation,¹⁹ and provisional measures may also be adopted.²⁰ The judgment of the court is final and without appeal.²¹ In a significant improvement on the African Commission's procedures, states parties undertake to comply with the judgment of the AfCHPR in any case to which they are parties.²² Of special significance – and mirroring the European system in this respect – is that implementation of the court's decisions will be monitored by the political bodies of the AU. Article 29(2) of the AfCHPR's protocol provides in this regard that the Council of Ministers shall be notified of the judgment and shall monitor its execution on behalf of the Assembly of the AU. Article 30 of the court's statute further states: 'The States parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.²³

The AfCHPR to date has handed down two decisions: *Yogogombaye v The Republic of Senegal*, delivered on 15 December 2009 and *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, delivered on 25 March 2011. The decision of *Yogogombaye v The Republic of Senegal*²⁴ concerned an application by a Chadian national residing in Switzerland brought against the Republic of Senegal, with a view to

obtaining suspension of the on-going proceedings against Hissen Habre, former head of state of Chad, and now a political refugee with asylum status in Dakar, Senegal. The AfCHPR found that in order for it to hear a case brought by an individual against a state party, there must be compliance with, inter alia, articles 5(3) and 34(6), requiring that the state deposit a special declaration authorising such a case to be brought against it. Senegal had not made a declaration pursuant to article 34(6) and accordingly the AfCHPR concluded that it did not have jurisdiction to hear the matter.

The second case heard by the AfCHPR, *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, concerned an Order for Provisional Measures in respect of the violence that shook Libya in early 2011.²⁵ Libya was ordered by the court to 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons' and to report to the AfCHPR within 15 days on 'measures taken to implement the Order'. The application was brought by the African Commission on Human and Peoples' Rights. The court made this order *proprio motu* (of its own accord) in the course of its considerations.

Where we once were going – the African Court of Justice and Human Rights

In June 2008 the AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights to merge the African Court on Human and Peoples' Rights with the African Court of Justice of the African Union.²⁶ The protocol will enter into force 30 days after the deposit of the instrument of ratification by 15 member states of the AU. The African Court of Justice and Human Rights will be the main judicial organ of the AU.²⁷ It shall have jurisdiction over all cases and legal disputes which relate to 'the interpretation and application of the Constitutive Act, Union treaties and all subsidiary legal instruments, the African Charter and any question of international law'.²⁸ The protocol establishing the African Court will replace the existing protocols establishing, on the one hand, the African Court of Justice, and on the other hand, the African Court on Human and Peoples' Rights.

All that said, the merged African Court has yet to come into being. To date, of the 15 ratifications required before the protocol can enter into force, only two have been lodged – that of Libya and Malawi.²⁹ On paper Africa's principal judicial organ is the African Court of Justice and Human Rights. In practice, however, this task remains the responsibility of the African Court on Human and Peoples' Rights.

Where we are headed – an African Court with a criminal reach

While the not-yet-moribund African Court on Human and Peoples' Rights ticks along, its not-yet-birthing replacement (the merged African Court of Justice and Human Rights) now faces a proposed *in utero* adjustment. As we have seen, the AU at its Ministers of Justice and/or Attorneys General meeting from 14–15 May 2012 has adopted the report of Government Legal Experts on amendments to the African Court's protocol, and the meeting approved the draft protocol as amended and recommended it to the AU Assembly for adoption. While those involved in its drafting explain that the protocol has been motivated by reasons other than anti-ICC sentiment,³⁰ this explanation rings hollow when considering the recent tension between African states, the UN Security Council and the ICC;³¹ and when (as will be discussed below) the protocol is studiously silent on any relationship between the African Court with its expanded criminal jurisdiction, and the ICC.

Staying with the ICC-AU relationship for now, it might be recalled that on 31 March 2005 the UN Security Council for the first time used its discretion under article 13 of the Rome Statute to refer a matter to the newly created ICC for investigation and possible prosecution. It did so by adopting Resolution 1593 (2005) in which it referred the situation in Darfur, Sudan to the ICC.³² The ICC pre-trial chamber thereafter issued arrest warrants for four Sudanese officials, including Sudan's President Al-Bashir – who was indicted for war crimes, crimes against humanity and genocide.

The Government of Sudan has objected to the indictment, arguing that Sudanese sovereignty is being violated. Further, the AU has called on the UN Security Council to invoke article 16 of the Rome Statute to

Those involved in drafting the protocol argue that the process has been motivated by reasons other than anti-ICC sentiment

suspend the processes initiated by the ICC against Al-Bashir. The UN Security Council has failed to act on the request. In 2009 the AU Assembly expressed deep concern at the indictment, stating that 'in view of the delicate peace process underway in The Sudan, the application could seriously undermine peace efforts'.³³ It further directed all AU member states to withhold cooperation from the ICC in respect of the arrest and

surrender of Al-Bashir.³⁴ In November 2009 the AU presented a proposal for an amendment to article 16 giving the UN General Assembly the authority to defer an investigation should the UN Security Council ‘fail to act’ on such a request within six months.³⁵ In July 2010, AU heads of state reiterated this decision, and further suggested that the indictment displays selectivity and double standards in respect of the prosecution of war crimes, especially in Africa.³⁶ At its 18th Summit in January 2012, the AU Assembly repeated its concerns; including a request that the AU consider asking the International Court of Justice (ICJ) to rule on the question of immunities of heads of state.

While undoubtedly the AU’s position is strengthened by the persistent refusal of the UN Security Council to act even-handedly as regards international criminal justice (willing to send African situations to the ICC for the court’s attention; unwilling to send similarly deserving cases in respect of Israel or Syria to The Hague), the saga nevertheless suggests that in some quarters the belief is that African leaders should not be held to account by a

There are legitimate questions not only about the African Court’s capacity to fulfill its newfound ICL obligations, but also its general and human rights obligations

non-African court.³⁷ This view no doubt had some influence on the AU Assembly’s decision that the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights should examine the implications of the African Court being empowered to try international crimes.³⁸ This call was probably also bolstered by frustrations resulting from the simmering tensions between the ICC and the AU in Africa.³⁹ The Kenyan situation has further strained relations: in 2010 the ICC prosecutor asked the court’s pre-trial chamber to issue summons for six people on the grounds that they have committed crimes against humanity in the post-election violence in Kenya in 2007 and 2008. The backlash has been considerable – with Kenya’s parliament passing a resolution calling for Kenya’s withdrawal from the Rome Statute and the AU agreeing to transmit a request to the UN Security Council asking it to defer the ICC’s investigation into the Kenyan violence.⁴⁰ Notwithstanding

these difficulties, in January 2011 the UN Security Council referred the violence in Libya to the ICC.⁴¹

Having noted the factors that likely motivated the decision to expand the jurisdiction of the African Court, it is necessary to also cover the process followed thus far by the AU Commission in carrying out the AU Assembly’s decision. The process of preparing a ‘Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights’ (‘the draft protocol’)⁴² included the following milestones in summary format:

- February 2009: The AU summit requested the AU Commission in consultation with the African Court on Human and Peoples’ Rights to examine the implications of empowering the African Court to try international crimes such as genocide, crimes against humanity and war crimes and report to the Assembly in 2010.
- January 2010: The AU Commission reported to the AU summit and contracted the Pan African Lawyers Union (PALU) to produce a detailed study with comprehensive recommendations and a draft legal instrument amending the Protocol on the Statute of the African Court of Justice and Human Rights. PALU was given a narrow mandate to specifically draft an amended protocol rather than a new legal instrument.
- June 2010: PALU submitted its first draft report and draft amended legal instrument to the Office of the Legal Counsel (OLC) of the AU Commission. The OLC and the AU Commission provided comments and input on the first draft.
- August 2010: PALU submitted a second draft report and draft legal instrument, incorporating the directives and suggestions of the OLC.
- August and October/November 2010: Two validation workshops coordinated by the AU Pan-African Parliament (PAP) were held in South Africa to consider the draft report and draft legal instrument. The workshops were attended by the AU Commission and legal counsel of relevant AU organs and institutions as well as the legal counsel of the Regional Economic Communities.⁴³ Subsequently, both the draft report and draft legal instrument were amended, incorporating directives and suggestions from the workshops.
- March, May and October/November 2011: Three meetings of government experts took place in Addis Ababa, Ethiopia to formally consider the draft report and draft legal instrument. Both the draft report and draft legal instrument were amended at each stage based on directives and suggestions from the meetings.

While this process on paper appears stretched over three years, African governments (for whom the implications are the greatest) have only had little more than a year to review the actual text of the draft protocol. A roundtable report prepared by the Institute for Security Studies confirms that legal advisors and senior representatives from southern African countries believed the process to be rushed and very complex,⁴⁴ and that enough time for proper consideration had not been provided. As the process of drafting the protocol – as set out by the AU above – suggests, NGOs and other external legal experts were also not asked for input and nor was the draft protocol made available for public comment.

Prior to the AU meeting of 14–15 May 2012, the November 2011 draft was the last version of the protocol publicly available. However, the latest version on its header says that it includes ‘Revisions up to Tuesday 15th May 2012’, the final day on which the ministerial meeting approved the draft protocol as amended and recommended it to the AU Assembly for adoption – confirming the rushed nature of the process. However, in substance the provisions of the draft protocol are little changed from the November 2011 version. The first noticeable change introduced by the draft protocol is one of nomenclature: the original African Court on Human and Peoples’ Rights, which was to become the merged African Court of Justice and Human Rights, is now destined to be the African Court of Justice and Human and Peoples’ Rights.⁴⁵ The nomenclature change prefigures far greater proposed amendments, the most far-reaching of which are considered next.

STRETCHED TOO FAR? THE COURT’S EXPANDED JURISDICTION

Under the draft protocol the court is ‘vested with an original and appellate jurisdiction, including international criminal jurisdiction’.⁴⁶ The draft protocol opens the court’s doors wider still:

The Court has jurisdiction to hear such other matters or appeals as may be referred to it in any other agreements that the Member States or the Regional Economic Communities or other international organizations recognized by the African Union may conclude among themselves, or with the Union.⁴⁷

A number of concerns arise in this regard. They relate to structure, manpower, budget, and relationship.

The first concern is with the court’s ambitious jurisdictional reach. To understand the proposed jurisdiction one must start with article 28 of the protocol, styled: ‘Jurisdiction of the Court’. Article 28 is itself a barn

door in respect of jurisdictional issues. Through it, the court shall determine legal disputes which relate to:

- a) the interpretation and application of the Constitutive Act;
- b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;
- c) the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; or any other legal instrument relating to human rights, ratified by the States Parties concerned;
- d) any question on international law;
- e) all acts, decisions, regulations and directives of the organs of the Union;
- f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;
- g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
- h) the nature or extent of the reparation to be made for the breach of an international obligation.

Against that background, the draft protocol provides that the court will have three sections: a General Affairs Section, a Human and Peoples’ Rights Section, and an International Criminal Law Section.⁴⁸ The Human and Peoples’ Rights Section ‘shall be competent to hear all cases relating to human and peoples’ rights’. Those cases are described very broadly in article 28 as relating to ‘the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; or any other legal instrument relating to human rights, ratified by the States Parties concerned’.

The General Affairs Section will hear all manner of cases submitted to it under article 28 of the protocol, except those cases assigned to the Human and Peoples’ Rights Section and the International Criminal Law Section as specified. In other words, with the exception of ‘the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; or any other legal instrument relating to human rights, ratified by the States Parties concerned’, the General Affairs Section will, if the

court becomes fully operational, be a very busy section indeed.

The newcomer – the International Criminal Law Section – ‘shall be competent to hear all cases relating to the crimes specified in this statute’.

The scope of the court’s jurisdictional reach is breathtaking. Even before the International Criminal Law (ICL) Section was introduced, the court would have had its hands full. With the ICL section added, there must be legitimate questions about the capacity of the court to fulfil not only its newfound ICL obligations, but also about the effect that such stretching will have on the court’s ability to deal with its general and human rights obligations.

The legitimacy of such questions is reinforced by the following considerations. In the first place, the subject-matter of the court’s ICL jurisdiction is itself anything but modest. The ICL section ‘shall have the power to try persons’ for a long list of the worst crimes known to humanity, including: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government; piracy; terrorism; mercenarism; corruption; money laundering; trafficking in persons; trafficking in drugs; trafficking in hazardous wastes; illicit exploitation of natural resources; the crime of aggression; and inchoate offences.⁴⁹ Each of these crimes is separately defined as an offence under the draft protocol.⁵⁰ The problems with some of these definitions will be discussed in due course. For now it is enough to note that the court is expected not only to try the established international crimes, but also to tackle a raft of other social ills that plague the continent. While in principle this is laudable, it is sobering to recall that it took almost a decade for the ICC – a court dedicated to the prosecution of international crimes, with a far more limited jurisdictional focus on just three of the crimes that the African Court will be expected to tackle – to complete its first trial in the Lubanga matter. While there may be legitimate criticisms of the ICC for how that trial progressed, the fact remains that international criminal trials are a slow and laborious process at the best of times, particularly if proper fair trial guarantees are to be respected. The process of doing justice to these prosecutions runs the risk of being severely compromised when a court is expected to do too much by way of the crimes on its docket.

That is particularly the case when the court is given too little by way of resources. If the African Court’s ICL section is meaningfully to do justice to the subject-matter of this vast list of crimes, it will not only have to have a dedicated team of prosecutors and investigators to perform the task of getting the cases to court, but will also require many highly experienced judges who can preside over the trials and adjudicate the appeals. In this respect, the draft protocol creates ‘The Office of the Prosecutor’ and

indicates that the prosecutor ‘shall be responsible for the investigation and prosecution of the crimes specified in this Statute’.⁵¹ The draft protocol does not spell out what such investigations might entail, or how the prosecutor’s office might be structured to perform such a task.

In this regard, some insight into the complexities at hand might be gleaned from the manner in which the Office of the Prosecutor (OTP) in the ICC operates.⁵² The OTP is an independent organ of the ICC headed by the prosecutor, who is assisted by one or more deputy prosecutors. The OTP’s mandate is also to prosecute and investigate, but is limited to war crimes, crimes against humanity and genocide. To this end, the OTP receives referrals and information pertaining to the alleged commission of crimes within the jurisdiction of the ICC, examines the information available and conducts investigations and prosecutions in accordance with the Rome Statute. The functions of the OTP are carried out by the immediate office of the prosecutor and three divisions, with help from a number of support service units. The Investigations Division is responsible for collecting and examining evidence while

The draft protocol attempts to create jurisdiction over a number of crimes that are not yet fixed in the international criminal law firmament

the Prosecutions Division guides the Investigation Division in accordance with the prosecutorial strategy determined by the prosecutor, and litigates on his or her behalf. The Jurisdiction, Complementarity and Cooperation Division (JCCD) gathers additional information and analyses situations referred to the prosecutor or in which the OTP has otherwise taken an interest. The result of this analysis informs the decision as to whether there is a reasonable basis to proceed with an investigation. JCCD is also responsible, once an investigation is underway, for assessing the admissibility of cases, and this process continues throughout the investigation.

What is clear is that at the ICC, there are a number of divisions and supporting staff units which are all necessary to properly perform the complex task of investigating and prosecuting just three of the 15 crimes the African Court will be expected to try.

Even assuming that there will be sufficient manpower to perform such investigations and prosecutions, another key question is whether there will be judicial capacity to deal with the range of issues that arise in a criminal prosecution

(or prosecutions) involving such crimes. The African Court protocol currently stipulates that the court shall consist of 16 judges.⁵³ It must be assumed that not all of those 16 will have the expertise to try international criminal law matters; indeed, the amendment protocol rather vaguely says that the court shall be composed *inter alia* of judges who possess the qualifications in ‘international humanitarian law or international criminal law’.⁵⁴ It is not at all clear how many of these judges will be dedicated to the ICL section. For instance, are judges who are experienced in international humanitarian law only permitted to sit in the ICL section, which is, after all, empowered to try cases like drug trafficking and corruption, which have nothing to do with international humanitarian law? It is assumed not. If indeed the draft protocol means to say that only those with international criminal law experience are destined for the ICL section, then the most the protocol tells us by way of numbers of judges in the ICL section is that ‘[a]t the first election [of judges], six (6) judges shall be elected from amongst the candidates of list C [containing the names of candidates having recognised competence and experience in international criminal law]’.⁵⁵ Those six judges will be in charge of the ICL section.

According to the draft protocol the ICL section of the court ‘shall have three (3) Chambers: a Pre-Trial Chamber, a Trial Chamber, and an Appellate Chamber’;⁵⁶ and the six ICL judges will obviously have to be allocated to these three chambers.⁵⁷ But whatever their allocation, the draft protocol already stipulates the quorum for the various chambers of the ICL section: the pre-trial chamber shall be duly constituted by one judge;⁵⁸ the trial chamber shall be constituted by three judges⁵⁹ and the appellate chamber by five judges.⁶⁰

It is clear that the six ICL judges will find themselves spread so thinly over these three chambers as to jeopardise any thought of speedy justice. More problematic is a question of mathematics. Assuming for present purposes that the court only has one criminal trial ongoing at any given time, that would more than wrap up the entire complement of ICL judges. One judge would preside in the pre-trial chamber, and she could not then preside in the other two chambers in respect of the same case;⁶¹ another three would then preside in the trial-chamber; and a further (and different) five would have to be available to sit in any appeal. A full criminal trial and appeal, involving each of the designated chambers, would accordingly require nine judges, three more than the total allotment of ICL judges appointed to the court’s ICL section.

In short, there are not enough judges necessary to do anything close to the justice that this expansive criminal jurisdiction presages. It is notable that the ICC is staffed with 18 judges; with the Appeals Chamber composed of the president plus four judges, while the Trial and Pre-Trial

Divisions have no fewer than six judges each.⁶² As the ICC’s experience shows, even this large contingent of judges – all dedicated exclusively to the task of meting out international criminal justice – has not been sufficient to ensure speedy trials.

AN EXPANSIVE EXERCISE – THE COURT’S SUBSTANTIVE JURISDICTION

Assuming that the court will have the budget and the staff to do its criminal law work properly, there is the question of the draft protocol’s ambitious jurisdictional reach. As introduced previously, the subject-matter of the court’s ICL jurisdiction is expansive. The ICL section shall have the power to try persons for genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government; piracy; terrorism; mercenarism; corruption; money laundering; trafficking in persons; trafficking in drugs; trafficking in hazardous wastes; illicit exploitation of natural resources; the crime of aggression; and inchoate offences.⁶³ Each of these crimes is separately defined in the draft protocol.

In its current form the draft protocol gives rise to a number of problems purely at the level of definition – the definitions of certain of these crimes is worthy of a separate paper in respect of each.

A further difficulty is that the draft protocol attempts to create, seemingly overnight, jurisdiction over a number of crimes that are not yet fixed in the international criminal law firmament. Take corruption for instance, or the illicit exploitation of natural resources, or the most obvious – unconstitutional change of government. The predicate for according an international court criminal jurisdiction in respect of crimes is that the substantive elements of the crimes are generally agreed upon – at the very least, that there is consensus amongst African states regarding these crimes and their elements.

Thus, it might be noted that when the international community decided to accord the International Criminal Tribunal for the former Yugoslavia (ICTY) jurisdiction over international crimes, there was concern to do so only in respect of crimes that were universally accepted as international. Thus, in his report pursuant to the UN Security Council Resolution establishing the ICTY, the UN Secretary-General stated that ‘the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise’.⁶⁴ In doing so, the ICTY in the leading case of *Tadic*, subsequently confirmed the customary nature of the grave breaches regime.⁶⁵ So too, when the drafters of the Rome

Statute of the ICC were deciding on which crimes to place under the ICC's jurisdiction, there was a 'general agreement that the definitions of crimes in the ICC statute were to reflect existing customary international law, and not to create new law'.⁶⁶

One might therefore ask on what legal basis the drafters of the protocol have attempted to vest the African Court with this extraordinary jurisdiction? It seems that the only basis by which this might plausibly be done is through reliance on the AU Constitutive Act – the Act which empowers the AU to do that which it does. The AU is an international organisation of limited membership, with a regional scope.⁶⁷ It was inaugurated in 2002 to replace the Organisation of African Unity whose function and structure has been rendered largely obsolete by the attainment of independence of all African states.⁶⁸ It is accordingly governed by the 'common law of international organisations' which has developed largely through the practice of the UN and its organs but has not been unaffected by the rise to prominence of regional bodies in recent times.⁶⁹ All such inter-governmental bodies are subject to the same legal regime – or the 'common law of international organisations'⁷⁰ – save that the nature of a particular such organisation may inform the interpretation of its internal acts and functions.⁷¹

Because almost all such organisations are established by treaties, they are therefore subject to the general rules of interpretation set out in the 1969 Vienna Convention on the Law of Treaties (VCLT).⁷² According to article 31(1) of the VCLT, the general rule of interpretation is that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Thus, in its *Nuclear Weapons Advisory Opinion* the ICJ stated:

[T]he constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.⁷³

Importantly, in its *Reparations for Injuries Suffered Opinion* the ICJ explained:

Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.⁷⁴

In this regard, it is not insignificant that the AU Constitutive Act most relevantly in article 4(h) sets out '[t]he 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'. According to article 31(2) of the VCLT, 'context for the purpose of the interpretation of a treaty' includes not only the text, preamble and annexes, but also 'any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. In the organisation's preamble it records its determination 'to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively'.

Furthermore, the Preamble of the Protocol Establishing the AU Peace and Security Council (PSC) notes the AU's desire to establish 'an operational structure for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction, in accordance with the authority conferred in that regard by Article 5(2) of the Constitutive Act of the African Union'. Further, article 7(e) of that protocol gives the PSC the power to 'recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments'.

Where does that leave us? It suggests that if the AU's power to imbue the African Court with international criminal jurisdiction lies anywhere – it is in article 4(h) of the AU's Constitutive Act. Yet that article limits the AU to take power in respect of only three categories of crimes: war crimes, genocide, and crimes against humanity.

There is a further important reason of principle why it is laudable to limit jurisdiction to crimes that are accepted under customary international law, or at least amongst African states. That is because under international criminal law jurisdiction over international crimes is twinned with the notion of immunity for such crimes.

As noted earlier, under the draft protocol officials who commit the crimes listed in the protocol have been stripped of the immunity that is traditionally accorded to them under

customary international law. Article 46B(2) says that the official position of any accused person, whether as head of state or government, minister or as a responsible government official, shall not relieve such person of criminal responsibility. But under international law, that immunity is accorded to such officials for all official functions and is only stripped from them in cases where they have committed international crimes recognised under customary international law. Immunities have long been considered a legitimate and necessary feature of international law. As Cryer et al note:

The law of immunities as ancient roots in international law, extending back not hundreds, but thousands, of years. In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys could have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide both inviolability for the person and premises of a foreign State's representatives and immunities from the exercise of jurisdiction over those representatives.⁷⁵

That said, the utility of such immunities has decreased over time with modern communication technology and a professional diplomatic corps. What is more, the rise of international criminal law has produced a sometimes competing good: prosecuting those most responsible for international crimes. As a result, there is often an inevitable tension between these two imperatives and, although there is some movement towards resolving this tension in favour of combating impunity, immunities continue to be an absolute (if temporary) bar to prosecution in certain instances.

The point is that even under the existing state of international law, and even for the crimes most obviously established under international law (genocide, crimes against humanity and war crimes) there remains a duty on states to respect the rules of immunity in certain circumstances. In stripping immunity for all crimes, including those which are clearly not yet part of customary international law's corpus, the draft protocol perhaps unwittingly forces states to make a choice between respecting their own and others' immunities under international law by refusing to become a party to the protocol, or becoming a party to the protocol with the risk of violating that immunity. It is of little assistance to states to add the rider (as has been done in the latest revision of the protocol on 15 May 2012) that such stripping is '[w]ithout prejudice to the immunities provided for under international law'. Such a rider merely confirms that the

difficulty has now been recognised. This is poor drafting and leaves the problem to states (and in due course the African Court) to resolve which immunities are stripped for which of the 15 crimes – an unsatisfactory result which creates the potential for deep diplomatic controversies over recognition or non-recognition of established international law immunities.

INTERNATIONAL JUSTICE – AN EXPENSIVE EXERCISE

Obviously, given the court's expansive jurisdiction, and the consequent necessity for a full complement of staff and institutional resources to ensure that justice can be done to that jurisdiction, there will be a vast amount of money required to ensure that the court is properly staffed and capacitated to run international criminal trials.

Indeed, the fiscal implications of vesting the court with criminal jurisdiction raise serious questions about the effectiveness, independence and impartiality of such a court. To put it in blunt financial terms, the unit cost of a single trial for an international crime in 2009 was estimated to be US\$ 20 million.⁷⁶ This is nearly double the approved 2009 budgets for the African Court and the African Commission standing at US\$ 7 642 269 and US\$ 3 671 766, respectively; and represents 14 per cent of the AU's total annual budget of US\$ 140 037 880 for 2008.⁷⁷

Viewed from another perspective and in more recent terms, in 2011 the AU's budget for the 2011 financial year amounted to US\$ 256 754 447.⁷⁸ Included in that amount was a total allocation for the African Court on Human and

The fiscal implications raise serious questions about the effectiveness, independence and impartiality of such a court

Peoples' Rights of US\$ 9 389 615. Compare that with the ICC. In the same year the ICC had a budget of US\$ 134 million, which was US\$ 26 million short of what it said it needed for 2012.⁷⁹ The point is that the ICC budget – currently for investigating just three crimes, and not the raft of offences the African Court is expected to tackle – is more than 14 times that of the African Court without a criminal component; and is just about double the entire budget of the AU. The fact is that international experience shows that proceedings are slow and expensive. For

example, by the time the ICTY wraps up its work (projected date 2013), it will have taken almost two decades and cost US\$ 2 billion to complete its work.

The questions in this regard are manifold. Where will the money come from? Will international partners (who currently contribute a significant percentage of the AU's budget) be willing to contribute towards the court's expansion? Has any costing exercise been done by the drafters of the protocol? How will such costing impact on other priorities within the AU? What will the impact of such costing be on the existing work of the African Court?

These questions are situated alongside others that go to the institutional nature of the court. So, for example, a mechanism of regional co-operation for the court will need to be established and implemented as well as arrangements for holding detainees and prisoners. An enhanced African Court will have to be provided with these facilities. If these are unaffordable, then agreements will have to be reached with African states for them to take responsibility for the detention of accused persons undergoing trial before the court and the imprisonment of individuals convicted after such trials.

In addition, a re-configured African Court with criminal jurisdiction will need the capacity to undertake outreach, protect victims and witnesses, and collect and preserve evidence. That is besides – if the ICC's experience is anything to go by – the need for a defence or legal aid fund to be allocated (to ensure that impecunious accused are able to receive proper representation when faced with international criminal charges); and for a victims unit to be

It is unfathomable that the draft protocol nowhere mentions the ICC

established (if victims are to be a party to the proceedings, then not only will they need safe facilities for attendance at trials; but will also need legal representation and reparations – a fact apparently recognised under the protocol, which speaks about the need for a 'Trust Fund' to be established 'for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims'⁸⁰).

As various African NGOs have already highlighted, the capacity of African states to muster the resources and will to guarantee these facilities – even as many of them struggle to guarantee the independence of their own domestic judicial institutions – is open to serious question.⁸¹

THE PROTOCOL'S DISQUIETING SILENCE ON THE ICC

Given that the African Court will be occupying the same legal universe as the ICC, it is necessary to consider the relationship (if any) between these two courts. This is no small matter. Recall that 33 African states are now party to the ICC, with at least six of those states having adopted implementing legislation to give effect to their obligations to the ICC. It thus seems imperative that the relationship between the ICC and the African Court be addressed.

The challenges are multiform. In the first place, which court will have primacy? While the AU might wish for its member states to incline towards the African Court for the prosecution of regional crimes, more than 60 per cent (33 of 54) of those member states are already treaty members of the ICC. This means that there will be potentially overlapping spheres of jurisdiction; and the prospects of conflicting obligations – not to mention a doubling up for some states on contributing financially to two courts.

What is more, careful thought would obviously have to be given to the question of domestic legislation to enable a relationship with the expanded African Court (especially given problems with mutual legal assistance and extradition). Here there is a minefield of difficulties, including that: elements of crimes in the protocol may be different from the elements of crimes in domestic law (thus requiring a major re-write of many of the domestic laws of African states), or that a number of the crimes listed in the protocol are not crimes in the domestic law of African states, thus requiring careful introduction of these crimes to ensure cooperation; that domestic law may already require an obligation to cooperate with the ICC in the investigation of certain crimes; and that surrender of suspects to the African Court and extradition between states parties will require regulation.

These are complex questions; and the interrelationship between domestic and international legal sources is complicated. That is evidenced by the fact that just six of the 33 African states parties have been able to work their way through these complexities to adopt domestic legislation in respect of the ICC. It is not a task that will be made any easier in respect of the African Court's expanded criminal jurisdiction – if anything, it will be a complicating factor for the 33 African states parties to the ICC.

Given these difficulties, it is unfathomable that the draft protocol nowhere mentions the ICC, let alone attempts to set a path for African states that must navigate the relationship between these two institutions. 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 wilfully or negligently ignores the complicated relationship that will

exist for states parties to the Rome Statute. Perhaps, more generously, it will be heralded in due course by the AU as an African Court that will complement the ICC, but with a regional focus – although presently there is nothing in the draft protocol to speak of such a complementary working relationship.

Whatever the position, consider by comparison the careful thinking that has gone into the drafting of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, which similarly would envisage a new system for the prosecution of such crimes as a complement to the ICC's Rome Statute. Leading international law experts from around the world have been involved in drafting the Crimes against Humanity Treaty, and this is what the organisers had to say about their concern not to undermine the ICC:

Much of the conference time was devoted to thinking about the relationship between the International Criminal Court and a new treaty condemning crimes against humanity. Virtually unanimous support was expressed for the idea that the treaty should in no way hamper, but should instead support the ICC and build upon the ICC Statute. Many experts referred to the long and arduous process of negotiating the Rome Statute, the fragile compromises achieved, and the current difficulties of the Court, particularly in regard to political support from African States, as reasons to rely heavily upon the ICC Statute for definitional purposes and to ensure that a new treaty with provisions on interstate enforcement and State responsibility would complement the ICC regime.⁸²

Unfortunately, the same cannot be said for the draft protocol. There is no guidance given to states parties who are already legally committed to the ICC as to how, if, or when they should balance those obligations in relation to the proposed criminal jurisdiction to be exercised by the African Court.⁸³

CONCLUSION: WHAT TO MAKE OF THESE DEVELOPMENTS?

Given these interrelated, compounding and material difficulties with the creation of an international criminal chamber at the African Court, what is to be made of these latest developments?

The draft protocol may be simply a first stab at enhancing the African Court's profile and jurisdiction, and the intention may be to improve and refine it before formal adoption, or indeed, if necessary, to jettison the project because of difficulties that further research confirms cannot be overcome (as just one example, the funding question). However, the indications are that the AU intends

to adopt the draft protocol this year. That much is clear from the outcome of the May 2012 AU meeting, where Ministers of Justice and Attorneys General decided that the protocol will be tabled for adoption. This will probably occur at the June/July 2012 AU Assembly summit. If that is indeed so, then the process and the substance can be questioned.

As to process, there has been hardly any meaningful debate on this protocol outside the legal consultants to the AU and the AU's substructures. There is little evidence that the draft protocol has been opened to critical input from independent legal experts, academics or the NGO community. As to substance, the draft protocol, with the various problems attendant thereto, will be difficult to implement.

The result is that it would seem that the AU's decision to embark upon the expansion of the African Court's jurisdiction is a reaction to the ICC's currently directed investigations on the continent. It must be said in closing that even that would be an oddity. The African Court will not have retrospective jurisdiction, so it cannot solve the existing frustration that the AU palpably feels in respect of the ICC's current cases. The draft protocol specifies that: 'The Court has jurisdiction only with respect to crimes committed after the entry into force of this Protocol and Statute'.⁸⁴ Nor would the prosecution of a case by the African Court bar the ICC from prosecuting the very same case under the principle of complementarity, as article 17 of the Rome Statute refers to 'states' and not to other courts.

All things considered, the draft protocol appears to have been rushed into existence, and the result is a legal instrument that raises more questions than it provides answers to Africa's vast human rights needs. A positive outcome would be for the AU to set up a court that complements the work of the ICC, and is comprehensively funded, legally sound and politically capacitated to fearlessly pursue justice for the worst crimes affecting the continent.

NOTES

1. Assembly/AU/Dec.213 (XII) of February 2009.
2. See <http://www1.dailymaverick.co.za/article/2012-05-11-day-for-the-icc-in-africa#.T6zBVeUdtmA.email>.
3. See African Union Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, 14 and 15 May 2012, Addis Ababa, Ethiopia.
4. Drafts of the protocol have not been made available for public consultation and comment. At the time of writing, to this author's knowledge, neither the latest iteration of the protocol or its predecessors is available on the Web.
5. See generally, the *African Human Rights Law Journal*, 2 (2002), which contains articles dedicated to a discussion of the court. See, too, GJ Naldi and K Magliveras, Reinforcing

- the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights, *Netherlands Quarterly of Human Rights*, 16 (1998), 431; JC Mubangizi & A O'Shea, An African Court of Human and Peoples' Rights, *SAYIL*, 24 (1999), 257; M Matua, The African Human Rights Court: A Two-Legged Stool?, *Human Rights Quarterly*, 21 (1999), 342; N Pityana, Reflections on the African Court on Human and Peoples' Rights, *African Human Rights Law Journal*, 4 (2004), 121.
6. This happened after 26 December 2003 when the court's protocol achieved the required 15th ratification for the protocol to become operative.
 7. Article 2 of the AfCHPR protocol.
 8. Article 14(3) of the AfCHPR protocol.
 9. Article 3 of the AfCHPR protocol.
 10. *Ibid*, art 4.
 11. *Ibid*, art 5(1).
 12. *Ibid*, art 5(3) read with article 34(6).
 13. *Ibid*, art 8.
 14. See further, M Matua, The African Human Rights Court, (*supra*) at 355.
 15. J Harrington, The African Court on Human and Peoples' Rights, in Evans and Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*, 2002, 305 at 319.
 16. Article 10.
 17. Article 10(2) - but the article does not say who must bear the burden of providing this representation.
 18. Article 27.
 19. Article 27(1).
 20. Article 27(2).
 21. Article 28.
 22. Article 30. The enforcement of the AfCHPR's order was discussed by Abebe A. Mulugeta in the case of *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya* (discussed further below) in which he states that although the order is binding, it 'can only be implemented through diplomatic pressure'.
 23. However, see R Cole, The African Court on Human and Peoples' Rights: will political stereotypes form an obstacle to the enforcement of its decisions, *Comparative and International Law Journal of Southern Africa*, XLIII (2010).
 24. Application No. 001/2008. For further discussion see J Biegon and M Killander, Human rights development in the African Union since 2008, *AHRLJ*, 9 (2009), 300, 228.
 25. The violations complained of related to, inter alia, the detention of an opposition lawyer in Benghazi; random shooting of demonstrators by security forces; and 'excessive use of heavy weapons and machine guns against the population'. See further M du Plessis and C Gevers, Human rights court provides some light in African tunnel, *Business Day*, 15 April 2011.
 26. The arguments for the merged court were both financial and organisational. The expense associated with funding two courts made it impractical. Further, African leaders wanted to avoid the overlap that exists in the European system between the European Court of Human Rights and the European Court of Justice. This is in contrast to an earlier decision taken, after much debate, by a meeting of African Ministers of Justice, which had been convened to finalise the Protocol on the Court of Justice of the African Union (see AU Doc Assembly/AU/Dec 45 (III)). For criticism of the AU Assembly's decision see the African Commission on Human and Peoples' Rights Resolution on the Establishment of an Effective African Court on Human and Peoples' Rights adopted at the 37th Session of the ACHPR, held from 27 April to 11 May 2005 in Banjul, The Gambia (for text, see http://www.achpr.org/english/resolutions/resolution81_en.html) and Amnesty International, Open Letter to the Chairman of the African Union (AU) seeking clarifications and assurances that the Establishment of an effective African Court on Human and Peoples' Rights will not be delayed or undermined, IOR 63/008/2004, 5 August 2004.
 27. Article 2 of the Statute of the African Court of Justice and Human Rights.
 28. *Ibid*, article 28.
 29. However, there is conflicting information on this. On the Coalition for the African Court website, one page says there are three ratifications (Burkina Faso, Libya, Malawi) (see <http://bit.ly/lk0o0h>), while another page says only Libya and Malawi (see <http://bit.ly/IAPJ3X>). The AU has removed the status of ratification list from its website.
 30. Alternative explanations include that the current process stems from three issues: i) the AU's work on the misuse of the principle of universal jurisdiction, ii) the challenges brought about by the process of Senegal prosecuting the former President of Chad, Hissen Habre, and iii) the need to give effect to article 25(5) of the African Charter on Democracy, Elections and Governance which requires that the AU formulate a new international crime to deal with unconstitutional changes of government. See D Deya, Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crimes, *International Criminal Justice*, *Openspace* Issue 2, February 2012.
 31. For a thorough discussion of the issue see Dapo Akande, Max du Plessis and Charles Jalloh, *An African Expert Study on the African Union concerns about article 16 of the Rome Statute of the ICC*, Pretoria: Institute for Security Studies, 2010.
 32. Article 13(b) of the Rome Statute.
 33. Decision on the application by the ICC prosecutor for the indictment of the President of the Republic of the Sudan Assembly/AU/Dec.221(XII). For further discussion see Dire Tladi, The African Union and the International Criminal Court: The battle for the soul of international law, *SAYIL*, 34 (2009).
 34. Article 16 grants the UN Security Council the power to defer an ongoing investigation or prosecution for one year if the Security Council determines it is necessary for the maintenance of international peace and security under chapter VII of the UN Charter. It would be necessary to show that the continued involvement of the ICC is a greater threat to international peace and security than suspending the ICC's work. It has been argued that the request for the Article 16 deferral is baseless in law and motivated by a desire to further alienate the ICC from Africa. Both the United States and the United Kingdom have publicly stated that they will veto such a request.

35. Article 16, in its current formulation, gives the UN Security Council the exclusive power to request deferral of ICC investigations and prosecutions. Africa's proposed article 16 amendment faces the political obstacle of garnering support for a provision which implicates the relationship between the UN General Assembly and the Security Council regarding the maintenance of international peace and security. For more on this see Max du Plessis and Chris Gevers, Making amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010, *SAYIL*, 34 (2009).
36. Assembly/AU/Dec.296(XV). This decision clearly creates a *prima facie* obligation on African states not to do so. With respect to member states of the AU that are also states parties to the Rome Statute, this would appear to create a conflict between the obligations imposed by the Rome Statute and those imposed by the decisions of the AU.
37. In July 2008 the AU stated that 'abuse of the principle of universal jurisdiction is a clear violation of sovereignty' and 'indictments against African leaders have had a negative impact on international relations'. Al Bashir's subsequent visits to Kenya, Chad and Malawi, all states parties to the Rome Statute, in defiance of an ICC arrest warrant has further strained the relationship between Africa and the ICC.
38. Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/Dec.213 (XII) as well as Assembly/AU/Dec.271 (XIV).
39. See generally Max du Plessis, *The International Criminal Court and its work in Africa: Confronting the myths*, Pretoria: Institute for Security Studies Paper 173, November 2008.
40. AU Assembly held in Addis Ababa from 30-31 January 2011.
41. UN Security Council Resolution 1970 (2011).
42. See Legal/ACJHR-PAP/4(II) Rev. 4, adopted at the 5th Meeting of Government Experts on the Legal Instruments on the transformation of the African Union Commission into the African Union Authority, 9 to 19 May 2011, Addis Ababa, on file with author.
43. D Deya, Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crimes, *International Criminal Justice, Openspace Issue 2*, February 2012, 24. It is interesting to note that it would appear that government legal advisors from AU member states were not part of these validation workshops.
44. *Understanding the opportunities and challenges of expanding the jurisdiction of the African Court of Justice and Human Rights*, Report from a roundtable for southern African government officials, International Crime in Africa Programme, Institute for Security Studies, Pretoria, 3 April 2012.
45. See Article 1: Definitions – 'Court means the African Court of Justice and Human and Peoples' Rights'; and article 8: Nomenclature changes – In the Protocol and the Statute wherever it occurs 'African Court of Justice and Human Rights' is deleted and replaced with 'African Court of Justice and Human and Peoples' Rights'.
46. See article 3(1).
47. Article 3(2).
48. Article 16.
49. Article 28A(1): International Criminal Jurisdiction of the Court.
50. Article 28B through 28N.
51. Article 22A(6).
52. The detail of what follows is taken from Lynn Gentile, Understanding the International Criminal Court, in Max du Plessis (ed), *African Guide to International Criminal Justice*, Pretoria: Institute for Security Studies, 2008, 104 -105.
53. Article 3(1).
54. Article 3.
55. Article 4(3).
56. Article 16(2).
57. Article 16(3) says that this allocation will be 'determined by the Court in its Rules' – those Rules are still to be drafted.
58. Article 10(4).
59. Article 10(4).
60. Article 10(5).
61. As the Rome Statute indicates in respect of its own pre-trial chamber judges in article 39 (4), 'under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case'. This flows from the 'generally established and acknowledged principle according to which a judge who has already expressed his opinion in a phase of the proceedings, cannot participate in a subsequent phase, this being a basic condition for a fair trial' – see Cassese et al, *The Rome Statute of the International Criminal Court*, Vol II, 2002, 1237.
62. See Gentile (supra) at 106.
63. Article 28A(1): International Criminal Jurisdiction of the Court.
64. UN Secretary-General, Report submitted pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, at 34.
65. Decision on the Defence Motion on Jurisdiction - Tadic (IT-94-1-T), Trial Chamber, 10 August 1995, at 52 ('In the case of what are commonly referred to as "grave breaches", this conventional law has become customary law').
66. Kirsch, Foreword, in K Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, 2003; see also Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol I, Proceedings of the Preparatory Committee during March, April and August 1996, UN General Assembly Official Records, UN Doc. A/51/22, 13 September 1996 at 54.
67. Although more commonly referred to as a regional organisation. Under international law there is no reason to distinguish between general international organisations and ones with a regional focus insofar as the binding nature of their acts on member states are concerned. Reference to international organisations herein refers to inter-governmental organisations and not other nongovernmental organisations.
68. See generally Max du Plessis, The African Union, in J Dugard, *International Law: A South African Perspective*, 4th Ed, 2012.

69. D Akande, International Organizations, in M Evans, *International Law*, 271.
70. Ibid.
71. D Akande notes: 'It is true that these 'constitutions' regulate manner matters such as membership, competences, and financing, in disparate ways. However, it is equally true that customary international law and, to a much lesser degree, treaties have generated principles of general application. These common principles concern matters such as the legal personality of international organizations, implied competences, interpretations of constituent instruments, employment relations, immunities and privileges, and the liability and responsibility of the organisation and its member States.' Ibid.
72. See *Nuclear Weapons Advisory Opinion* where the ICJ stated, at para 19: 'From a formal standpoint, the constituent instruments of international organisations are multilateral treaties, to which the well-established rules of treaty interpretation apply'.
73. At para 19.
74. ICJ, *Reparation for Injuries Suffered*, Advisory Opinion, ICJ Reports 1949, 174 at 180.
75. Cryer, *An introduction to international criminal law and procedure*, Cambridge University Press, 2007, 422.
76. See Implications of the African Court of Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity, and war crimes, Opinion by various African NGOs, 16. (Undated)
77. Ibid, 16-17.
78. See Executive Council Eighteenth Ordinary Session, DECISIONS, EX.CL/Dec.600-643(XVIII), Addis Ababa, Ethiopia, 24-28 January 2011.
79. And importantly, already there has been a fight amongst member states about funding of the ICC. See further http://newsandinsight.thomsonreuters.com/Legal/News/2011/12_December/Member_countries_fight_over_international_court_s_budget/.
80. See article 46M.
81. See Implications of the African Court of Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity, and war crimes, Opinion by various African NGOs, 16 (Undated)
82. See Leila Sadat, A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, 9, available at <http://law.wustl.edu/harris/CAH/docs/CompHistoryFinal01-06-11.pdf>.
83. Again, by contrast, consider the careful wording of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity in its various provisions recognising the existence of State's complementary duties towards the ICC, available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>.
84. Article 46E.

ABOUT THIS PAPER

This paper considers the decision by the African Union (AU) to expand the jurisdiction of the African Court of Justice and Human Rights to act as an international criminal court with jurisdiction over the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes. At an AU meeting from 14–15 May 2012 a draft protocol to effect that expansion was approved and has been recommended to the AU Assembly for adoption.

The short time frame which the AU has provided for the complex task of drafting the protocol occurs against the backdrop of the fractured relationship between the AU and the International Criminal Court (ICC). The process of expanding the African Court's jurisdiction is fraught with complexities and has implications on an international, regional and domestic level. All these implications need to be considered, particularly the impact on domestic laws and obligations, and the relationship between African states parties to the Rome Statute of the ICC, the ICC itself and the African Court.

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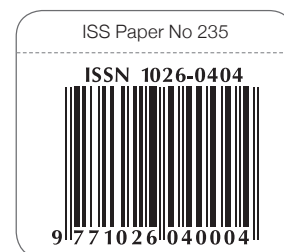
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