

# **The proposed International Criminal Chamber section of the African Court of Justice and Human Rights: A legal analysis**

## **1 Introduction**

The continued tension between the African Union (AU) and the International Criminal Court (ICC) has reached its climax with the African regional body deciding to expand the jurisdiction of the African Court of Justice and Human Rights (ACJHR). The expanded jurisdiction will see the addition of a third tier section with competency to try international crimes. This development appears to have been occasioned by a number of issues that have emerged in Africa relating to international criminal justice in Africa.

The tension between the AU and the ICC seems first to have arisen sometime in 2005. This is the period when the United Nations Security Council (UNSC), acting under article 13 of the Rome Statute, referred the case of Sudan (the situation in Darfur) to the ICC for possible investigation and prosecution. This happened when the UNSC adopted resolution 1593 (2005) in which it referred the situation in Darfur, Sudan to the ICC.

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<sup>74</sup>Jenks *The common law of mankind* (1958) 1.

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The ICC pre-trial chamber thereafter issued arrest warrants for four Sudanese officials, including Al Bashir, the president of Sudan. The AU has on numerous occasions called on the UNSC to suspend these investigations citing article 16 of the Rome Statute. The AU Assembly expressed deep concern at the indictment, stating that ‘in view of the delicate process underway in Sudan, the application could undermine peace efforts’.<sup>1</sup> The issuing of the warrant of arrest against Al Bashir intensified the hostility of the African Union towards the ICC.<sup>2</sup> The hostility and tension were also manifested when the AU rebuffed the ICC’s request to open a liaison office in Addis Ababa, the AU base.<sup>3</sup>

This hostile attitude has not gone unnoticed in The Hague and some African capitals. The recently elected prosecutor of the ICC, Fatou Bensouda, refers to ‘rumours’ about ‘African disengagement’<sup>4</sup> and warns that the relationship between the ICC and the AU should not deteriorate further.<sup>5</sup> This tension has further been demonstrated by some African countries defying their obligations under the Rome Statute.<sup>6</sup>

## 2 Background

The international community adopted the Rome Statute of the ICC to establish the first permanent international tribunal to try perpetrators of the most heinous crimes.<sup>7</sup> The ICC has a mandate to investigate and prosecute individuals for war crimes, crimes against humanity, and genocide.<sup>8</sup> The Rome Statute came into force in July 2002.<sup>9</sup> The ICC has jurisdiction when the abovementioned crimes are committed either in the territory of a member state, by nationals of a member state, or if the United Nations, acting pursuant to chapter VII of the United Nations Charter, refers a specific situation to the ICC.<sup>10</sup>

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<sup>1</sup>Decision on the application by the ICC prosecutor for the indictment of the President of the Republic of Sudan Assembly/AU/Dec 221 (XII).

<sup>2</sup>Mills “‘Bashir is dividing us’: Africa and the International Criminal Court’ (2012) 34/2 *Human Rights Quarterly* at 404.

<sup>3</sup>Ossom ‘An African solution to an African problem? How an African prosecutor could strengthen the ICC’ (2011) 52 *Virginia Journal of International Law Digest* at 68.

<sup>4</sup>Ankumah ‘Is Africa a participant or target of international justice – an interview with Fatou Bensouda, deputy Prosecutor of the International Criminal Court’ (2010) 1 *African Legal Aid Quarterly* at 3.

<sup>5</sup>Statement by Fatou Bensouda, ICC OTP roundtable, 19–20 October 2010.

<sup>6</sup>Kenya and Chad refused to arrest Al Bashir when he visited these countries.

<sup>7</sup>Rome Statute of the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc A/CONF 183/9 (‘Rome Statute’) <http://untreaty.un.org/cod/icc/statute/rome.htm> (accessed 3 August 2012). See art 1 of the Rome Statute.

<sup>8</sup>See arts 5–9 of the Rome Statute.

<sup>9</sup>After the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary General of the United Nations. See art 126 of the Rome Statute.

<sup>10</sup>Article 13 of the Rome Statute.

The ICC has traditionally had strong support in Africa,<sup>11</sup> of the 121 countries that have become parties to the Rome Statute, thirty-three from Africa have ratified the Rome Statute.<sup>12</sup> Africa, therefore, played a significant and constructive role in the negotiations which ultimately led to the establishment of the ICC.<sup>13</sup> Nonetheless, the strong support that the ICC enjoyed during its inception is less evident today.<sup>14</sup> This strong support is, however, waning for a number of reasons. One of these involves article 13(b) – how ICC acquires jurisdiction. The article reads:

A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council (hereinafter UNSC) acting under Chapter VII of the Charter of the United Nations.

Some scholars have observed that this amounts to an intrusion into and violation of the global constitution.<sup>15</sup> However, the provision empowers the UNSC, consistent with its chapter VII power under the Charter of the United Nations, to ensure the maintenance of international peace and security, and to refer non-parties to the ICC for investigation and possible prosecution.<sup>16</sup>

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<sup>11</sup>Schabas *African Union defying International Criminal Court* <http://humanrightsdoctorate.blogspot.com.au/2009/07/african-union-defying-international.html>.

<sup>12</sup>The African Countries that have since ratified the Rome Statute are: Senegal 2 February 1999; Ghana 20 December 1999; Mali, 16 August 2000; Lesotho 6 September 2000; Botswana 8 September 2000; Sierra Leone 15 September 2000; Gabon 20 September 2000; South Africa 27 November 2000; Nigeria 27 September 2001; Central African Republic 3 October 2001; Benin 22 January 2002; Mauritius 5 March 2002; Democratic Republic of Congo (DRC) 11 April 2002; Niger 11 April 2002; Uganda 14 June 2002; Namibia 25 June 2002; Gambia 28 June 2002; United Republic of Tanzania 20 August 2002; Malawi 19 September [2002]; Djibouti 5 November 2002; Zambia 13 November 2002; Guinea 14 July 2003; Burkina Faso 16 April 2004; Congo 3 May 2004; Burundi 21 September 2004; Liberia 22 September 2004; Kenya 15 March 2005; Comoros 18 August 2006; Chad 1 November 2006; Madagascar 14 March 2008; Seychelles 10 August 2010; Tunisia 24 June 2011; Cape Verde 10 October 2011.

<sup>13</sup>Jallow and Bensouda 'International Criminal Law in an African context' in Du Plessis (ed) *African guide to international criminal justice* (2008) at 15; see also Maqungo 'The establishment of the International Criminal Court: SADC's participation in the negotiations' (2000) 9/1 *African Security Review* at 42-53.

<sup>14</sup>Odero 'Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo colonial conspirator thesis' in Chacha and Biegon (eds) *Prosecuting international crimes for Africa* (2011) at 145. See also Murithi 'Africa's relations with the ICC; A need for reorientation' (2012) *Perspectives: Political analysis and commentary from Africa* at 4.

<sup>15</sup>The global constitution in this instance is the Vienna Convention on the Law of Treaties (1969) widely held as a basic norm of customary international law. Section 4 (art 34-36) provides that as a general rule, a treaty does not create either obligations or rights for a third state without its consent. See also Scheffer and Cox 'The constitutionality of the Rome Statute of the International Criminal Court' (2008) 98/3 *The Journal of Criminal Law and Criminology* at 983; for a comprehensive analysis of art 13(b) see Casey and Rivkin Jr 'Limits of legitimacy: The Rome Statute's unlawful application to non state parties' (2003) 44 *Virginia JIL* at 63.

<sup>16</sup>Sudan signed the Rome Statute on 8 September 2000 but is yet to ratify it. While unlikely to ratify, it is still bound to avoid conduct that would defeat the object and purpose of the treaty.

The UNSC, for instance, acting under chapter VII and pursuant to article 13(b) of the Rome Statute, referred the case of Sudan (the situation in Darfur) to the ICC's prosecutor to open investigations for alleged crimes against humanity, genocide, and war crimes.<sup>17</sup> Subsequent to the investigations, the ICC issued arrest warrants for Ahmad Harun, Sudan's Minister of State for the Interior, and Ali Kushayab, a Janjaweed militia leader.<sup>18</sup> Then, in July 2008, in light of the involvement of the president of Sudan (Omar Al-Bashir) in the conflict in Darfur and his continued interference and obstruction of the prosecution of the Sudan's officials by the ICC, the prosecutor applied for his arrest warrant.<sup>19</sup>

The arrest warrant by the ICC for the Sudanese president was the genesis of the feeling of discomfort towards the ICC within the AU. The AU strongly opposed the arrest warrant.<sup>20</sup> The argument raised by the AU was head of state immunity.<sup>21</sup> Head of state immunity, a traditional rule of international law, may prevent the ICC from prosecuting the dictator. While serving heads of state do not enjoy functional (*rationae materiae*) immunity for their actions because international crimes cannot be official acts, they may enjoy personal (*rationae personae*) immunity, which covers all acts performed by the head of state, during or prior to his assumption of office.<sup>22</sup> However, treaty arrangements providing for jurisdiction over crimes of international concern do not nullify personal immunities recognised by traditional international customary law.<sup>23</sup> These immunities must be excluded by express agreement or by waiver.<sup>24</sup> The Rome Statute includes such a waiver under article 27. On the basis of to the waiver embodied in article 27, the AU asked for clarification on the immunities of officials whose states are not party to the Rome Statute.<sup>25</sup>

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<sup>17</sup>For a comprehensive overview of the situation in Darfur, see the 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General' prepared pursuant to Security Council resolution 1564 of 18 September 2004, available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf), paras 40-72.

<sup>18</sup>*Prosecutor v Harun and Al Abd Al Rahman* Case ICC 02/05 0107. The decision was premised on the prosecution's application pursuant to art 58(7) of the Rome Statute.

<sup>19</sup>*Prosecutor v Omar Al Bashir* Case ICC 02/05 01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir; see also Gosnell 'The request for an arrest warrant in Al Bahir' (2008) 6/5 *Journal of International Criminal Justice* at 841.

<sup>20</sup>For a more comprehensive discussion on the case of Al Bashir and the AU response, see Weldehaimanot 'Arresting Al Bashir: The African Union's opposition and the legalities' (2011) 19/2 *African Journal of International and Comparative Law* at 208.

<sup>21</sup>*Ibid.*

<sup>22</sup>Functional immunity is also referred to as substantive immunity, personal immunity has been referred to as temporal immunity and the Latin terms for both are frequently employed. I will use the more common English terms personal and functional immunity throughout. While functional immunities would otherwise persist indefinitely, personal immunities are forfeited once the official leaves office.

<sup>23</sup>Danilenko 'The Statute of the International Criminal Court and third states' (1999-2000) 21/3 *Michigan JIL* 445 at 469-470.

<sup>24</sup>*Ibid.*

<sup>25</sup>AU Assembly's Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/13(XIII) 13th Ordinary Session 1-3 July

Similarly, in the ICCs' case docket Bikundo observed that there is always something new from Africa.<sup>26</sup> The ICC has cases from Uganda,<sup>27</sup> Sudan, the Democratic Republic of the Congo,<sup>28</sup> The Central African Republic,<sup>29</sup> Kenya, Libya, and Ivory Coast.<sup>30</sup> Bikundo notes thus:

This is the point made again and again that a court that is yet to gain credibility and respect begins with going after the weakest and not necessarily the most criminal. Therefore it targets Africans not because they are the worst but because they are the weakest.

Bikundo further observes that Africa has the most limited infrastructure when it comes to dealing with international crimes, and that this gives rise to the connotation of weakness.<sup>31</sup> He further notes that while the inability to prosecute implies weakness, an unwillingness to do so constitutes culpability.<sup>32</sup>

First, the AU feels that ICC is an institution which is targeting, or discriminating against, Africa.<sup>33</sup> Secondly, the AU feels that ICC is a colonial tool for western powers;<sup>34</sup> thirdly, the court's exclusive focus on Africa, is

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2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya par 8.

<sup>26</sup>Bikundo 'The International Criminal Court and Africa: Exemplary justice' (2012) 23 *Law Critique* at 21.

<sup>27</sup>Referral submitted in December 2003. Decision to open investigation followed on 29 July 2004.

<sup>28</sup>Referral submitted in March 2004. Decision to open investigation followed on 5 July 2004.

<sup>29</sup>Referral submitted on 7 January 2005. Decision to open investigation followed on 27 May 2007.

<sup>30</sup>Note 26 above at 22.

<sup>31</sup>*Id* at 28.

<sup>32</sup>*Ibid*.

<sup>33</sup>The former Chairperson of the African Union Commission Jean Ping once observed thus: 'We are not against international justice. It just (seems) that Africa has become a laboratory to test the new international law' available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm> (accessed 4 August 2012). The President of Rwanda also observed thus: 'Rwanda cannot be party to ICC for one simple reason ... with ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. ICC is made for Africans and poor countries.' Kezio Musoke 'Kagame tells why he is against ICC charging Bashir' (3 August 2008) *Daily Nation* available online at <http://allafrica.com/stories/200808120157.html> (accessed 4 August 2012) See also President Mugabe of Zimbabwe while addressing the UN General Assembly noted that the ICC has no credibility in Africa. He said: 'The Court seems to exist only for alleged offenders of the developing world, the majority of them Africans. The leaders of the powerful Western States guilty of international crimes, like Bush and Blair, are routinely given the blind eye. Such selective justice has eroded the credibility of ICC on the African continent.' See 'Mugabe slams "blind" International Criminal Court' (2011) *Zimbabwe Mail* (Harare) available [http://www.thezimbabwemail.com/zimbabwe/9132\\_mugabe\\_slams\\_blind\\_international\\_criminal0court.html](http://www.thezimbabwemail.com/zimbabwe/9132_mugabe_slams_blind_international_criminal0court.html) (accessed 4 August 2012).

<sup>34</sup>'AU Justice Ministers protest abuse of Universal Jurisdiction' available at <http://allafrica.com/stories/2008/11050742.html>.

undermining African efforts to solve its own problems.<sup>35</sup> The AU has called on the UNSC under article 16 of the Rome Statute, to defer the Sudanese case involving president Al-Bashir, but the UNSC has to date chosen not to accede to this request for a deferral.<sup>36</sup>

Against this backdrop, the AU resolved not to cooperate with the ICC regarding the arrest warrant of the president of Sudan.<sup>37</sup> Many African states have declared their intention not to cooperate in arresting the Sudanese president, citing among other reasons, presidential immunity enjoyed by a serving head of state.<sup>38</sup> However, as noted above, this assertion is excluded by article 27 of the Rome Statute which removes immunity for any person. Article 27 provides:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Although article 27 suggests that all immunities are lifted, article 98 indicates that officials of states not party to the statute, can rely on personal immunity. Perhaps African countries have been relying on article 98 as basis for their argument of lack of cooperation with ICC. Article 98 reads:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that

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<sup>35</sup>Du Plessis *The International Criminal Court that Africa wants* (2010) at 19 45.

<sup>36</sup>*Ibid*, see also Ciampi 'The proceedings against President Al Bahir and the prospects of their suspension under article 16 of the ICC Statute' (2008) 6/5 *Journal of International Criminal Justice* at 885.

<sup>37</sup>Decision reached during the Assembly of the African Union, 13th Ordinary Session 1 3 July 2009 Sirte, Great Socialist People's Libyan Arab Jamahiriya, Assembly/AU/Dec 243 267 (XIII) Rev 1.

<sup>38</sup>Note 35 above at 50 74; see also Chacha 'Immunity of state officials and the prosecution of international crimes' in Chacha and Biegon (eds) *Prosecuting international crimes in Africa* (2011) at 33; Toner 'Competing concepts of immunity: The (r)evolution of the head of state immunity defense' (2004) 108/3 *Penn State LR* at 899.

State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

While article 27 represents the move away from traditional state sovereignty and head of state immunity, article 98 is evidence of the Statute's drafters' necessary concessions to power politics and a state-centric international system. The tension manifested by the two articles is beyond the scope of this work.

### **3 The new chamber as an African filter – subsidiarity at work**

Parallel with its move to attack the ICC, the AU has also been seeking an 'African solution to African problems'. To this end, during its 12th and 13th ordinary sessions the AU Assembly requested the AU Commission, in consultation with the African Commission on Human and Peoples' Rights (ACHPR), to ensure the early implementation of an earlier mandate to examine the implications of empowering the African Court on Human and Peoples' Rights to try serious crimes of international concern such as genocide, crimes against humanity, and war crimes, which would be complementary to national jurisdiction.<sup>39</sup>

Following this, the AU Government Experts and Ministers of Justice/Attorneys General on Legal Matters, adopted the AU-Final Court Protocol.<sup>40</sup> This Protocol seeks to confer upon the yet to be established African Court of Justice and Human Rights (ACJHR) (also referred to as the court) the jurisdiction to convict and sentence individuals for international crimes.

However, during the presentation of the Protocol to the Assembly of the AU, the Assembly noted the intended amendments and requested the AU Commission to work in collaboration with the African Court to prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the ACJHR.<sup>41</sup>

This paper, therefore, aims to discuss the new Protocol, highlight some pertinent issues it raises, address the relationship of the yet to be established international criminal chamber and the ICC, and discuss the way forward.

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<sup>39</sup>AU Assembly's decision on the Meeting of African States Parties n 23 above par 5.

<sup>40</sup>As adopted by the ministers on 17 May 2012 (Amending Merged Court Protocol Exp/Min/IV Rev 7, 15 May 2012).

<sup>41</sup>Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights during the Assembly of the Union, 19 th Ordinary Session 15 16 July 2012, Addis Ababa Ethiopia, Doc Assembly/AU/13(XIX)A.

## **4 Analysis of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights**

### *4.1 Structure of the Draft Protocol and Statute of the African Court of Justice and Human Rights*

The Draft Protocol (DP) is divided into three chapters. The first deals with general provisions. Organs of the ACJHR are provided for in article 2 and include, the Presidency, the Office of the Prosecutor, and the Registry. Article 3 sets out the jurisdiction of the ACJHR,<sup>42</sup> and article 4 stipulates that the ACJHR shall complement the protective mandate of the ACHPR. Chapter II relates to transitional provisions, while chapter III deals with final provisions including when the Protocol shall come into force.

### *4.2 Amended Draft Statute of the African Court of Justice and Human and Peoples' Rights*

Article 6 of the amended Statute of the ACJHR provides for a three tier court made up of:

- (a) a General Affairs Section, and
- (b) a Human Rights Section
- (c) the International Criminal Law Section which shall have three (3) chambers<sup>43</sup> – a pre-trial chamber,<sup>44</sup> a trial chamber,<sup>45</sup> and an appellate chamber.<sup>46</sup>

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<sup>42</sup>Article 3 reads: 'The Court is vested with an original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the Statute annexed hereto. 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.'

<sup>43</sup>See also art 39 of the Rome Statute.

<sup>44</sup>As per art 46F of the Amended Draft Statute, the court may exercise jurisdiction with respect to a crime referred to in art 28A (these crimes are genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, etc) in accordance with the provisions of the Amended Draft Statute if:

A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party;

A situation in which one or more of such crimes appears to have been committed is referred to Prosecutor by the Assembly of Heads of State and Government of the African Union or the Peace and Security Council of the African Union.

The Prosecutor has initiated an investigation in respect of such a crime in accordance article 46G.

The Pre-Trial Chamber may also issue such order as may be required to provide for the protection and privacy of witnesses and victims, the presentation of evidence and the protection of arrested persons.

See article 9(3)*bis*.

<sup>45</sup>Article 19(5)*bis* provides that the Trial Chamber shall receive and conduct appeals from the Pre trial Chamber in accordance with Article 18 of this Statute.

<sup>46</sup>The Appeals Chamber shall receive and conduct appeals from the Trial Chamber in accordance with Article 18 of this Statute.



The International Criminal Section (part c) is relevant for present purposes. Article 7 relates to the assignment of matters to sections of the court. The General Affairs Section has competency to hear all cases submitted pursuant to article 28<sup>47</sup> of the Statute. The Human Rights Section has competency to hear all cases relating to human and peoples' rights,<sup>48</sup> while the International Criminal Law Section has competency to hear all cases relating to crimes specified in the Statute.<sup>49</sup>

Article 8 of the amended statute deals with revision and appeals. In this instance appeals are allowed under the International Criminal Law Section, ie, appeals may lie from a decision of the Pre-Trial Chamber or the Trial Chamber. The grounds for appeal are: a procedural error, an error of law, and an error of fact. These are the elements provided for under section 81 of the Rome Statute save that the section goes on to include any other ground that affects the fairness or reliability of the proceedings or decision.

An appeal may also be made against a decision on jurisdiction or admissibility of a case, an acquittal, or a conviction.<sup>50</sup> The Appellate Chamber may affirm, reverse, or revise the decision appealed against. The decision of the Appellate Chamber shall be final.

## **5 What crimes will the international criminal law chamber be seized of?**

The expansion of the court's criminal jurisdiction is impressive given that it will try a cross-section of crimes and exceeds the current jurisdiction of the ICC.<sup>51</sup>

The International Criminal Chamber shall have the power to try persons for the crimes provided hereunder:<sup>52</sup> genocide,<sup>53</sup> crimes against humanity,<sup>54</sup> war

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<sup>47</sup>These cases include the interpretation and application of the Constitutive Act, the interpretation, application or validity of other Union treaties, and all subsidiary legal instruments of the Union or the Organisation of African Unity, any question of international law, and the nature or extent of the reparation to be made for the breach of an international obligation.

<sup>48</sup>These cases include the interpretation and 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 state parties concerned.

<sup>49</sup>See arts 14 and 28A of the Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights (the Amended Statute).

<sup>50</sup>*Id* at art 8(3).

<sup>51</sup>Pursuant to art 5 of the Rome Statute, the ICC shall have jurisdiction with respect to the following crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

<sup>52</sup>*Id* at art 28A.

<sup>53</sup>*Id* at art 28B, genocide is defined so as include acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such, by: killing members of the group;

crimes,<sup>55</sup> the crime of unconstitutional change of government,<sup>56</sup> piracy,<sup>57</sup> terrorism,<sup>58</sup> mercenarism,<sup>59</sup> corruption,<sup>60</sup> money laundering,<sup>61</sup> trafficking in persons,<sup>62</sup> trafficking in drugs,<sup>63</sup> trafficking in hazardous wastes,<sup>64</sup> illicit exploitation of natural resources,<sup>65</sup> and the crime of aggression.<sup>66</sup>

Through the above list, the draft amended statute attempts to create, jurisdiction over a number of crimes that are not yet fixed in the international criminal law firmament.<sup>67</sup> 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, and there should be consensus amongst African states regarding these crimes and their elements.<sup>68</sup>

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causing serious bodily or mental harm to the members of the group; deliberately inflicting on the group conditions calculated to bring about its physical destruction in whole or in part; measures imposed to prevent births within the group; forcibly transferring children of the group to another group; and acts of rape that is intended to change the identity of a particular group.

<sup>54</sup>*Id* at art 28C defines crimes against humanity to include, but not limited to, the following acts if when committed as part of a widespread or systematic attack or enterprise directed against any civilian population, with knowledge of the attack or enterprise: murder; extermination; enslavement; forcible transfer of population; torture; and the crime of apartheid, to name a few.

<sup>55</sup>*Id* at art 28D defines ‘war crimes’ to mean any offence when committed as part of a plan or policy or as part of a large scale commission of such crimes. Such crimes include grave breaches of the Geneva Conventions of 12 August 1949, grave breaches of the First Additional Protocol of the Geneva Conventions of 8 June 1977, and many more.

<sup>56</sup>*Id* at art 28E. The crime of unconstitutional change of government is defined as committing or ordering to be committed acts with the aim of illegally accessing or maintaining power. See n 27 above.

<sup>57</sup>*Id* at art 28F defines piracy.

<sup>58</sup>*Id* at 28G defines terrorism to include but not limited to any act which is a violation of the criminal laws of a state party, the laws of the African Union calculated or intended to intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles.

<sup>59</sup>*Id* at art 28H defines what constitutes mercenarism and who a mercenary is.

<sup>60</sup>*Id* at art 28I.

<sup>61</sup>*Id* at art 28Ibis.

<sup>62</sup>*Id* at art 28J.

<sup>63</sup>*Id* at art 28K.

<sup>64</sup>*Id* at art 28L.

<sup>65</sup>*Id* at art 28Lbis defines illicit exploitation of natural resources to include acts if they are of a serious nature affecting the stability of a state, region or the Union.

<sup>66</sup>*Id* at art 28M; ‘Aggression’ means the use, intentionally and knowingly, of armed force or any other hostile act by a state, a group of states, an organisation of states or non state actor(s), or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a state party, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union.

<sup>67</sup>Du Plessis *The implications of the AU decision to give the African Court jurisdiction over international crimes* June 2012, Institute for Security Studies (ISS).

<sup>68</sup>*Id* at 7.

There is concern regarding the prosecution of the crime of unconstitutional change of government. This provision is subject to be misused to abuse the democratic right of rights agitating for constitutional reforms or regime change. The investigations by the ICC, for example in Libya and the Ivory Coast, arose from acts of grave human rights violation by leaders of the countries when the citizens attempted to push for regime change as well as political reforms.<sup>69</sup>

Article 28N defines modes of responsibility to include inciting, instigating, organising, directing, facilitating, financing, counselling or participating as a principal, co-principal, agent, or accomplice in any of the offences stipulated above. Article 15 relates to entities eligible to submit cases to the court. This article seeks to amend article 29 of the Statute of the African Court of Justice and Human Rights to include the Peace and Security Council and the Office of the Prosecutor.<sup>70</sup> Article 16 of the draft amended statute relates to other entities eligible to submit cases to the court and limits African individuals and African non-governmental organizations, to the extent that only those with observer status at the AU or its organs and institutions, but only with regard to a state that has made a declaration accepting the competence of the court. While this article is progressive by giving NGO'S an opportunity to submit cases to the court, the provision does not factor in circumstances under which an NGO may wish to forward a case in a country that has not accepted the jurisdiction of the court.

Article 34A and B deals with instituting proceedings before the International Criminal Law Section and posits that cases shall be brought by or in the name of the prosecutor. The registrar shall then give notice of the case to all parties concerned, including the chairperson of the AU Commission.

Article 19 and new section 43A, relate to sentences and penalties. Penalties imposed by the court shall be limited to prison sentences and/or pecuniary fines.<sup>71</sup>

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<sup>69</sup>Nakandha 'Africa and the International Criminal Court: Mending fences'(12 July 2012) *Avocats Sans Frontieres* at 13 15.

<sup>70</sup>Article 29 of the Protocol on the Statute of the African Court of Justice and Human Rights provides as follows:

The following entities shall be entitled to submit cases to the Court on any issue or dispute provided for in article 28 :

State Parties to the Protocol;

The Assembly, Parliament and other organs of the Union authorized by the Assembly;

A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.

Further, the Court shall not be open to States, which are not members of the Union. The Court shall also have no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol.

<sup>71</sup>Article 43A of the amended Statute.

Chapter 1VA deals with provisions specific to the international criminal jurisdiction of the court. These cover the rights of the accused, individual criminal responsibility, corporate criminal liability, exclusion of jurisdiction over persons under the age of eighteen, temporal jurisdiction, preconditions for the exercise of jurisdiction, exercise of jurisdiction, the prosecutor, complementary jurisdiction, *non bis in idem*, enforcement of sentences, as well as enforcement of fines and forfeiture measures.<sup>72</sup>

## **6 Implications of the proposed amendments**

### *6.1 Obstacles and difficulties*

The prospect of extending the jurisdiction of the ACJHR holds certain implications. For instance, the addition of a criminal jurisdiction to the ACJHR may be a disincentive for some states joining the merged African Court. This is so because states who have had an unfavourable experience with the African Human Rights Court, may have second thoughts about the expanded jurisdiction of the court and so not ratify the Protocol.<sup>73</sup> The consequence of the need for a new political decision to ratify, is that states would be faced with an all-or-nothing option. An all-or-nothing requirement may be a disincentive for some states ratifying the Protocol creating a section with jurisdiction over serious crimes. A state faced with an all-or-nothing option would be attuned to the protection of human rights or its obligations under the ICC Statute, may decide not to ratify the merged Court Protocol at all, due to its reticence to accept a court that deals with international crimes.<sup>74</sup> However, article 6 of the amending Protocol counters this foreseeable resistance.<sup>75</sup> The disincentive resulting from the extension of the jurisdiction means that once the merged court comes into effect, if states have not joined the African Court, they may remain not only outside the African Court's criminal jurisdiction, but also its human rights mandate.

This resistance can be overcome by use of reservations when signing the amending Protocol. Reservations, understandings, and declarations (RUDS) allow a country to become a state party to an international treaty in a qualified and contingent manner, exempting itself from certain obligations with which

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<sup>72</sup>*Id* arts 46A 46M.

<sup>73</sup>Viljoen *AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol* <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>.

<sup>74</sup>*Ibid*.

<sup>75</sup>Article 6*bis* provides as follows: 'At the entry into force of this Protocol, until a Member State ratifies it, any jurisdiction which has hitherto been accepted by such Member State with respect to either the African Court on Human and Peoples' Rights or the African Court of Justice and Human Rights shall be exercisable by this Court.'

state parties are normally expected to comply.<sup>76</sup> Reservations, understandings, and declarations to international human rights treaties are more common than in any other area of international treaty making.<sup>77</sup> For this reason, African countries can postpone their obligations regarding the international criminal chamber but still observe their obligations regarding the General Affairs and Human Rights sections of the expanded court.

The other aspect relates to access to the court. Article 16(f) of the amending Protocol limits access to the court by only allowing African individuals or African non-governmental organizations (NGOs) with observer status at the African Union or its organs or institutions, but only with regard to a state that has made a declaration accepting the competence of the court to receive cases or applications submitted to it directly.<sup>78</sup> The duration of the declaration is unclear, and such declarations may be valid for an indefinite time or specified period. Further, state parties to the amending Protocol may make declarations with impermissible limitations, or where the declarations are time specific, may fail or neglect to renew their declarations.<sup>79</sup> This restrictive approach is a necessary incentive for the adoption or ratification of the amending Protocol.<sup>80</sup>

The restrictive access of individuals and NGOs to the African Court, in contrast to the unfettered access of state parties, and the granting of optional jurisdiction to the African Court in cases lodged by individuals and NGOs, is paradoxical and a fundamental flaw. Primacy of access to the African Court for state parties defies the conventional understanding of international human rights law.<sup>81</sup> The *leitmotif* of human rights is to insulate the individual from the ‘predatory state’;<sup>82</sup> a scheme which necessitates platforms accessible to the individual to complain in cases of violations.<sup>83</sup> This view is based on the liberal theory of human rights in terms of which individuals are the foremost consumers of the human rights protection systems like the African Court.

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<sup>76</sup>Neumayer ‘Qualified ratification: Explaining reservations to International Human Rights Treaties’ (2007) 36/2 *Journal of Legal Studies* at 397.

<sup>77</sup>*Ibid.*

<sup>78</sup>This article seems to limit access only to Africans and African NGOs therefore effectively shutting the door to international NGOs that have a bearing to human rights, eg, Human Rights Watch and Amnesty International, among others.

<sup>79</sup>Juma ‘Lost, or accrued in transition? The anatomy of the new African Court of Justice and Human Rights’ (2009) 13 *Max Planck Yearbook of United Nations Law* 267 at 288.

<sup>80</sup>Elsheikh ‘Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights: Introductory note’ (1997) 9/4 *African Journal of International and Comparative Law* 943 at 947.

<sup>81</sup>Juma ‘Access to the African Court on Human and Peoples’ Rights: A case of the poacher turned gamekeeper’ (2007) 4/2 *Essex Human Rights Review* 1 at 3 7.

<sup>82</sup>*Ibid.*, see also Mutua ‘Savages, victims and saviours: The metaphor of Human Rights’ (2000) 42 *Harvard ILJ* at 201.

<sup>83</sup>Juma n 79 above.

African states have no incentive to refer cases, be they violations of human rights and/or international crimes, to tribunals. The African state presented in the image of a poacher,<sup>84</sup> cannot be granted the primary remit to seek redress on behalf of individuals whose rights it has violated through its acts or omissions. Put more bluntly, to rely on the 'predatory' state to institute cases before the African Court may well be a case of poacher turned gatekeeper.<sup>85</sup>

The next negative element arising from the draft Protocol, relates to article 18 and deals with revision and appeals. This provision suggests that decisions of the Human Rights Section may be overturned on appeal by the Appellate Chamber not well versed in human rights matters.<sup>86</sup>

The amending Protocol brings with it a cost implication.<sup>87</sup> It should be recalled that the AU merged the African Court on Human and Peoples' Rights with the African Court of Justice as a cost saving measure. The task of establishing a three-tier court, and in particular the proposed addition of an international crimes chamber, is complex, time consuming, and expensive. Prosecutions of international crimes have entirely different requirements than the adjudication, for example, of human rights violations committed by states or during intra-state disputes. These requirements include the obtaining and retention of evidence; protection and support for victims and witnesses; pre-trial detention; protection of defence rights; investigations and prosecutions; trials and imprisonment and state cooperation. That being the case, resource constraints affecting regional human rights organs, is a major impediment which is likely to hamper the viability and operations of the African Court exercising international criminal jurisdiction.<sup>88</sup>

Merging an international criminal chamber with the human rights and general affairs divisions of the ACJHR is unprecedented in international law. The main problem is that these various divisions have incompatible functions and

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<sup>84</sup>Note 81 above.

<sup>85</sup>*Ibid.*

<sup>86</sup>Article 18(4) provides that the Appellate Chamber may affirm or revise the decision appealed against and that decision is final.

<sup>87</sup>See, for instance, Silverman 'Ten years, \$900m, one verdict: Does the ICC cost too much?' BBC 13 March 2012 available at [http://m.bbc.co.uk/news/magazine\\_17351946](http://m.bbc.co.uk/news/magazine_17351946). The International Criminal Court (ICC) currently has an annual budget of over \$140m (£90m) and 766 staff. Since its inception, its estimated expenditure has been around \$900m (£600m). See also Burke White 'Regionalization of international criminal law: A preliminary exploration' (2003) 38/4 *Texas ILJ* 729 at 739 where the author estimated appropriation for the ICTY for 2002 2003 to be just over US\$256 million and in the UNSC has over the last eight years paid more than US\$1.6 billion to operate the ICTR and ICTY. For a comprehensive analysis regarding cost implications, see Wippman 'The costs of international justice' (2006) 100/4 *AJIL* at 861.

<sup>88</sup>The African Court as currently established has no investigators, holding detention facilities, witness protection programmes as well as prosecution and defence teams.

mandates. While the general and human rights sections deal with state responsibility and accountability in respect of inter-state disputes and human rights violations, the international criminal law section deals with individual responsibility.<sup>89</sup> Such distinct functions have never before been merged into a single judicial entity or organ at the international level. The general affairs and human rights sections primarily deal with state responsibility, while a court dealing with criminal justice makes a finding about individual guilt.<sup>90</sup> Secondly, the evidentiary standards at each tier of the court are different. While state responsibility is determined with reference to the standard of balance of probabilities, in an international criminal tribunal the standard is 'beyond reasonable doubt'.<sup>91</sup>

## 6.2 *Innovative aspects of the new section*

Article 4(h) of the Constitutive Act of the AU mandates African states to take measures to prevent the commission of international crimes, especially in situations of grave concern such as the commission of genocide, war crimes, and crimes against humanity, as these crimes pose a threat to international peace and security. Article 4(h) may, therefore, be said to be the basis for the establishment of the international criminal law section within the ACJHR to try international crimes committed in Africa.

By introducing an international criminal law regime for the African continent, the AU now seems to act upon its own words.<sup>92</sup> The draft amending Protocol provides for an independent African prosecutor,<sup>93</sup> a court that has jurisdiction over crimes of particular significance for Africa,<sup>94</sup> and does not recognise immunities – not even for heads of state.<sup>95</sup>

A further positive aspect relates to the application of the complementary jurisdiction.<sup>96</sup> The amending Protocol has raised the issue of complementarity,

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<sup>89</sup>Note 60 above.

<sup>90</sup>*Ibid.*

<sup>91</sup>*Ibid.*

<sup>92</sup> See art 3(e, f, g, h and i) of the Constitutive Act of the AU

<sup>93</sup> See art 22A of the amended draft.

<sup>94</sup> Such crimes include the crime of aggression, election rigging, unconstitutional change of governments, human trafficking, acts of terrorism, piracy, drug trafficking slave practices and slavery. See arts 28E–28M. See also Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9/5 *Journal of International Criminal Justice* at 1067.

<sup>95</sup> Article 28N referring to modes of responsibility, states that an offence is committed by *any* person. See also art 46B which refers to individual criminal responsibility. Sub article 2 provides that without prejudice to the immunities provided for under international law, 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 nor mitigate punishment.

<sup>96</sup> Article 46H of the amended draft recognises complementary jurisdiction.

and to that end provides that the jurisdiction of the court shall be complementary to that of national courts, and of the regional economic communities where specifically provided for by the communities. The principle of complementarity is based not only on respect for the primary jurisdiction of states, but also on practical considerations of efficiency and effectiveness, since states will generally have the best access to evidence, witnesses, and resources to carry out proceedings.<sup>97</sup>

The extension of international criminal jurisdiction to the African Court must be a genuine framework for addressing impunity, fostering political accountability, and providing a different layer of a regional complement to the international criminal justice system rather than a route for shielding perpetrators of grave crimes against international criminal justice.<sup>98</sup> However, it appears from the provisions discussed above, that these are technical manoeuvres to oust the jurisdiction of the ICC.

## **7 Relationship between the expanded African Court and the ICC**

The ICC has jurisdiction over persons most responsible for international crimes: genocide, war crimes, crimes against humanity, and the crime of aggression.<sup>99</sup> The expanded African Court has a wider jurisdiction. The fact that the ICC exists does not rule out the possibility that independent and sovereign African states acting collectively may establish an International Criminal Chamber based on international treaties allowing states to prosecute and punish international crimes,<sup>100</sup> the Constitutive Act of the AU,<sup>101</sup> and customary international law.<sup>102</sup>

The amending draft Protocol deliberately makes no reference to the ICC leaving one to conclude that the AU's only intention with the establishment of

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<sup>97</sup>Olugbuo 'Positive complementarity and the fight against impunity in Africa' in Chacha and Biegon (eds) *Prosecuting international crimes in Africa* (2011) at 249.

<sup>98</sup>Nyanduga 'Perspectives on the African Commission on Human and People's Rights on the occasion of the 20th anniversary of the entry into force of the African Charter on Human and People's Rights Focus: Twenty years after the entry into force of the African Charter on Human and People's Rights' (2006) 6/2 *African Human Rights LJ* at 255.

<sup>99</sup>See arts 5-8 of the Rome Statute. The Review Conference of the Rome Statute held in Kampala, Uganda from 31 May-11 June 2010 adopted a definition of the crime of aggression. However, the ICC will have jurisdiction over the crime subject to a decision to be taken after 1 January 2017 by the same majority of states parties as is required for the adoption of an amendment to the Statute. See Assembly of States Parties (ASP) resolution RC/Res 6 adopted at the 13th plenary meeting 11 June 2010, [http://www.icc.cpi.int/iccdocs/asp\\_docs/Resolutions/RC\\_Res6\\_ENG.pdf](http://www.icc.cpi.int/iccdocs/asp_docs/Resolutions/RC_Res6_ENG.pdf) (accessed 8 August 2012).

<sup>100</sup>Murungu n 94 above at 1085; see also The Convention Against Torture arts 5(2) and (7) as well as the Genocide Convention art VI 100 art 4(h).

<sup>101</sup>Article 4(h).

<sup>102</sup>See art 95 of the United Nations Charter.



the international criminal law section of the African Human Rights Court, is competition. It should be noted, however, that international courts are not founded on an hierarchical level like national courts.<sup>103</sup>

The ICC operates on the principle of complementarity which makes it the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.<sup>104</sup> It has, however, not been established whether this complementarity principle can be extended to regional courts like the expanded African Court. The closest that the text of the Rome Statute comes to addressing regional issues is in its requirement that the judiciary manifest '[e]quitable geographical representation'.<sup>105</sup> One could also argue that creating regional courts simply means inserting an additional layer of jurisdiction into the complementarity scheme of the Rome Statute.<sup>106</sup> The exception to this complementarity principle can be seen in the practices of the *ad hoc* Tribunals, the International Tribunal for the former Yugoslavia, and the International Tribunal for Rwanda.<sup>107</sup> While it is novel idea for the AU to establish an international criminal chamber, it must ensure the court follows the standards and/or model of the ICC but with territorial jurisdiction limited to Africa.<sup>108</sup>

A problem raised by the amending draft Protocol is that it will require its member states to abdicate their obligations under the Rome Statute.<sup>109</sup> The process of establishing the International Criminal Law section is, therefore, contrary to the provisions of the Rome Statute which require that member states cooperate fully with the ICC. This applies equally to the AU as an intergovernmental organisation.<sup>110</sup> However, pursuant to the principle of *pacta sunt servanda*, African states must fulfil their obligations as provided for in the Rome Statute. Like all other rules of international law, the principle of good faith fulfilment of obligations derives from, and is maintained in force by, the general consent of states. Consent is the only way to establish rules that legally bind sovereign states.<sup>111</sup> Withdrawal from the Rome Statute can offer no

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<sup>103</sup>See generally Yuval *The competing jurisdictions of international courts and tribunals* (2005) International Courts and Tribunal Series.

<sup>104</sup>Articles 1 and 17 Rome Statute; see also Benzing 'The complementarity regime of the International Criminal Court: International criminal justice between states sovereignty and the fight against impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* at 591, 592.

<sup>105</sup>See art 36(8)(a)(ii).

<sup>106</sup>Rauxloh 'Regionalisation of the International Criminal Court' (2007) 4 *New Zealand YIL* at 67.

<sup>107</sup>See for further discussion on the principle of complementarity, El Zeidy 'The principle of complementarity: A new machinery to implement international criminal law' (2001 2002) 23/4 *Michigan JIL* at 869.

<sup>108</sup>Burke White n 87 above; see also chapter VIII of the United Nations Charter.

<sup>109</sup>Murungu n 94 above

<sup>110</sup>See art 87(6) of the Rome Statute.

<sup>111</sup>Lukashuk 'The principle of *pacta sunt servanda* and the nature of obligation under international law' (1989) 83/3 *AJIL* at 513.

solution for African leaders while the ICC can reach non-member states through the UNSC.<sup>112</sup>

## 8 Relationship between ICC and other regional bodies

Outside of the arena of international criminal law, regional mechanisms have become the enforcement means of choice for many international legal regimes. Under the emerging system of international criminal justice, enforcement of international law has two primary focal points. These revolve around the states delegating authority through the United Nations to international tribunals such as the ICC to prosecute international crimes, and the international community delegating authority to national courts to enforce international criminal law directly.<sup>113</sup>

The ICC's success as the principal adjudicative body at the international level lies not only on its efficient operation, but also on its successful interaction with national and supranational legal orders. International criminal courts are dependent on other organisations to give them things. These things include money, evidence, access to evidence, defendants, witnesses, witness protection, court personnel, prison facilities, and the enforcement of orders and judgments.<sup>114</sup> Without these elements, the ICC cannot operate.

The European Union (EU) continues to play an important role in positively encouraging its constituting members to be 'good international citizens', as well as supporting the development of the ICC as an independent Union.<sup>115</sup> The relationship between the ICC and the EU has so far been *ad hoc*. Besides the functional aspects of the EU-ICC Cooperation Agreement,<sup>116</sup> the rest of the EU initiatives have been undertaken without any formal coordination between the EU and the ICC.<sup>117</sup> This interaction aims at promoting the ICC's cause within the remit of the EU which is fully compatible with the EU's agenda of human rights and democratic governance.<sup>118</sup>

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<sup>112</sup>See art 13(b) of the Rome Statute.

<sup>113</sup>Note 87 above; see also Burke White 'A community of courts: Toward a system of international criminal justice' (2002) 24/1 *Michigan JIL* at 1.

<sup>114</sup>Cogan 'International criminal courts and fair trials: Difficulties and prospects' (2002) 27 *Yale JIL* at 111.

<sup>115</sup>Antoniadis and Bekou 'The European Union and the International Criminal Court: An awkward symbiosis in interesting times' (2007) 7 *International Criminal LR* at 621.

<sup>116</sup>This agreement places a general obligation of cooperation and assistance between the EU and the ICC and foresees, *inter alia*, the regular exchange of information and documentation of mutual interest. The agreement does not apply to ICC requests for information from individual member states, which are governed by bilateral arrangements, nor does it affect the competence of the European Community to achieve the objectives of the agreement through separate measures. For a better analysis see, generally, General Secretariat of the Council 'The European Union and the International Criminal Court' (European Union, 2010). See also The EU Common Position on the International Criminal Court Council Common Position 2003/444/CFSP.

<sup>117</sup>Note 113 above.

<sup>118</sup>*Id* at 650 655.

The EU, therefore, has been a staunch supporter of the ICC since its inception.<sup>119</sup> While the Rome Statute does not have a Regional Economic Integration Organization-clause, the EU nevertheless holds a special position in the ICC'S overarching system of international cooperation.<sup>120</sup> This shows that the EU and the ICC enjoy a cordial relationship; however some commentators have described the ICC as an EU court.<sup>121</sup> This perception arises from the EU'S strong support for the ICC,<sup>122</sup> which is further evidenced by EU declarations on concrete decisions of the ICC or its prosecutor.<sup>123</sup>

The Organization of American States (OAS) too, cooperates with the court.<sup>124</sup> The former prosecutor of the ICC observed that his office regularly cooperates with regional organisations such as the League of Arab States.<sup>125</sup> The ICC, therefore, depends absolutely on external cooperation in order to comply with its mandate and can only effectively and efficiently carry out its judicial activities if has sufficient cooperation from the international community.

## 9 Conclusion

The ICC has a mandate to prosecute, as a tribunal of last resort, international crimes committed within national jurisdictions that are themselves unwilling or incapable of prosecuting. In the absence of guidance from the amending draft Protocol, African ICC states are placed in a situation which may frustrate efforts of accountability with the ICC and other institutions.

Africa has a history of adopting impressive legal texts for supranational institutions, but practice demonstrates that words on paper do not always translate into effective institutions. The creation of an international criminal law section of the African Court of Justice and Human and Peoples Rights is a good idea in that justice done closer to home has a better chance of

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<sup>119</sup>Ryngaert 'Universal jurisdiction in an ICC era: A role to play for EU member states with the support of the European Union' (2006) 14/1 *European Journal of Crime, Criminal Law and Criminal Justice* at 46.

<sup>120</sup>Article 87(6) of the Rome Statute stipulates the role for intergovernmental organisation as follows 'The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate'.

<sup>121</sup>Groenleer and Rijks 'The European Union and the International Criminal Court: The politics of international justice' in Jorgensen (ed) *The European Union and international organizations* (2009) at 206.

<sup>122</sup>Mertens 'The International Criminal Court: A European success story?' (2011) 1 *EU Diplomacy Papers* at 1.

<sup>123</sup>*Id* at 16.

<sup>124</sup>Kirsch 'The role of the International Criminal Court in enforcing international criminal law' (2007) 22/4 *American University ILR* at 539.

<sup>125</sup>Moreno Ocampo 'The International Criminal Court some reflections' (2009) 12 *Yearbook of International Humanitarian Law* at 3.

legitimacy. The only problem is that very few African states, if any, would be prepared to engage in ‘throwing stones from a glass house’.<sup>126</sup> Which African state would be prepared to support the indictment of an African leader in an African court while similar situations might occur in their backyards? It is unlikely that an African state would enforce an arrest warrant against a serving head of state.<sup>127</sup>

African states’ commitment to fight impunity must be seen to be a reality and not merely rhetoric. In order for the extension of the international criminal jurisdiction to succeed, the prevalence of a culture of disrespecting human rights, intolerance and bad governance must stop. Democratic institutions and their decisions must be respected.

The AU’s decision to expand the jurisdiction of the ACJHR stems from the tension created by the ICC and its investigations on the continent. An African Court with international criminal jurisdiction is a long term project. It cannot, and will not, offer relief to any of the people currently indicted or under investigation by the ICC. The African Court with an expanded criminal jurisdiction will not have retrospective jurisdiction. 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.<sup>128</sup>

The notion of regionalising international criminal law, however, brings with it some potential benefits. As contrasted with supranational enforcement mechanisms, regional enforcement may have greater legitimacy with affected communities and contribute towards a forum for restorative justice. Regionalisation of international criminal law facilitates deeper commitment by states that face lower sovereignty costs of membership. The proponents of regional criminalisation of international have argued that permanent regional criminal courts might narrow the impunity gap between national and international investigations and prosecutions.<sup>129</sup> Regionalisation, it is argued, does not represent a retreat from the minimal global norms of criminality established in the Rome Statute.<sup>130</sup> These proponents also observe, however, that the establishment of regional criminal courts would undermine the development of a fully-fledged body of international criminal law by diverting

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<sup>126</sup>Nyandunga Bahame ‘Reflections and perspectives of the African Commission on Human and Peoples’ Rights’ Paper presented at the Consultative Conference on International Criminal Justice, United Nations Headquarters 9 11 September 2009.

<sup>127</sup>Murungu n 94 above.

<sup>128</sup>See art 46E of the Draft Protocol.

<sup>129</sup>Rauxloh n 105 above.

<sup>130</sup>*Ibid.* See generally Schabas ‘Regions, regionalism and international criminal law’ (2007) 4 *New Zealand YIL* at 3.

cases from the ICC, developing different families of multinational law, and further fragmenting case development in this area of law.<sup>131</sup>

The African-ICC relationship faces major challenges. However, given the dynamism of international relations, the Africa-ICC relation will continue to evolve. African leaders should choose to register their dissatisfaction with the current approach adopted by ICC from within rather than externally. They should make the new criminal chamber a partner to the ICC in its quest to fight impunity on the African continent. There remains a real possibility of the ICC being an institution that will help Africa. However, the legitimate concerns of African countries as to undue emphasis at the ICC on African countries must be taken seriously.

*Matasi W Martin\** and *Bröhmer Jürgen\*\**

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<sup>131</sup>*Ibid.* See also Hopkins 'What's wrong with regionalising international criminal law?' (2007) 4 *New Zealand YIL* at 85.

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