



OCCASIONAL PAPER 209

Governance and APRM Programme

January 2015

Africa's Evolving Continental Court Structures: At the Crossroads?

Garth Abraham

South African Institute of International Affairs

African perspectives. Global insights.

ABOUT SAIIA

The South African Institute of International Affairs (SAIIA) has a long and proud record as South Africa's premier research institute on international issues. It is an independent, non-government think tank whose key strategic objectives are to make effective input into public policy, and to encourage wider and more informed debate on international affairs, with particular emphasis on African issues and concerns. It is both a centre for research excellence and a home for stimulating public engagement. SAIIA's occasional papers present topical, incisive analyses, offering a variety of perspectives on key policy issues in Africa and beyond. Core public policy research themes covered by SAIIA include good governance and democracy; economic policymaking; international security and peace; and new global challenges such as food security, global governance reform and the environment. Please consult our website www.saiia.org.za for further information about SAIIA's work.

ABOUT THE GOVERNANCE AND APRM PROGRAMME

SAIIA's Governance and African Peer Review Mechanism (APRM) programme aims to place governance and African development at the centre of local and global discussions about the continent's future. Its overall goal is to improve the ability of the APRM to contribute to governance reforms, institutions and processes. The programme focuses on: Enhancing meaningful and authentic participation of non-state actors in Country Self-Assessment Review (CSAR) and National Programme of Action (NPOA) processes; increasing knowledge among key decision-makers of the need for Country Level Institutions to be functional, have political support and enjoy legitimacy; increasing the capacity and functionality of official APRM institutions; and contributing to the identification of critical issues for governance reform in Africa through the APRM.

SAIIA gratefully acknowledges the Swiss Agency for Development and Cooperation (SDC), which generously supports the Governance and APRM Programme.

Programme head: Steven Gruzd, steven.gruzd@wits.ac.za

© SAIIA January 2015

All rights are reserved. No part of this publication may be reproduced or utilised in any form by any means, electronic or mechanical, including photocopying and recording, or by any information or storage and retrieval system, without permission in writing from the publisher. Opinions expressed are the responsibility of the individual authors and not of SAIIA.

Please note that all currencies are in US\$ unless otherwise indicated.

ABSTRACT

Heads of state and government (HOSG) in Africa, through the African Union (AU), have for some time expressed particular concern about two developments in current international criminal justice – the exercise of universal jurisdiction and the work of the International Criminal Court (ICC). Concern about the former relates to the indictment of senior government officials – including HOSG – from a number of African states by certain European states for international crimes allegedly committed. With regard to the ICC, following the indictment of three African HOSG, the charge being levelled is that Africa specifically is being targeted by that court. Protestations and appeals having failed to halt these developments, African HOSG, through the AU, have resolved to address international crimes at the continental level. To date, African court structures have not had the necessary jurisdiction to do so. As a consequence, in June 2014 at a HOSG Summit the AU amended the Protocol of the African Court of Justice and Human Rights to give it jurisdiction over the three recognised international crimes – genocide, crimes against humanity and war crimes – and over 14 additional crimes. The amendment is problematic for a variety of reasons. Of primary concern, however, is that it fails to address the relationship between the proposed Expanded Court and the ICC; and, while coaching the move as reflective of Africa's commitment to end a culture of impunity for those guilty of gross human rights violations, the amendment specifically accords immunity from the jurisdiction of the Expanded Court to African HOSG and senior government officials. The only viable conclusion to be drawn is that the amendment is a conscious snub to the ICC and aims specifically to protect African HOSG and senior government officials from prosecution. In the light of current trends in international law, which value human rights over sovereignty, this move is lamentable and must be resisted.

ABOUT THE AUTHOR

Garth Abraham is currently an Associate Professor in the School of Law at the University of the Witwatersrand, Johannesburg. He holds an MA in History (University of Natal), an LLB (University of Cape Town) and an LLM (University of the Witwatersrand, Johannesburg) and is currently reading for a PhD through the Katholieke Universiteit Leuven in Belgium. Between 2003 and 2013, he was a legal advisor to the International Committee of the Red Cross. He has published widely. His current areas of research interest are the historical development and application of international law and of international humanitarian law within an African context.

ABBREVIATIONS AND ACRONYMS

ACDEG	African Charter on Democracy Elections and Governance
ACHPR	African Court of Human and Peoples' Rights
ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
AU	African Union
HOSG	heads of state and government
ICC	International Criminal Court
NGO	non-governmental organisation
PALU	Pan African Lawyers Union
REC	regional economic community

INTRODUCTION

Through the African Union (AU), African heads of state and government (HOSG) for some time have been voicing disquiet about the direction taken by developments in international criminal justice. Of particular concern is the extent to which European states have resorted to the principle of universal jurisdiction for international crimes – including those committed in Africa, even when the alleged offenders are senior state officials – and the indictment by the International Criminal Court (ICC) of African HOSG for international crimes. This has happened in the face of protestations and appeals from the AU. The trend suggests that impunity for the commission of international crimes no longer applies internationally, and that human rights considerations trump appeals to sovereignty. The issue that appears especially troubling to African HOSG is the dispensation of international criminal justice on Africans by states and institutions outside the continent.

One possible counter-strategy is for African states themselves to assume responsibility for the prosecution of international crimes. Until recently, however, the continent's court structures lacked the jurisdiction necessary to do so. In June 2014 at its summit meeting in Malabo, Equatorial Guinea, the HOSG Assembly of the AU adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the 'Malabo Protocol'). This protocol potentially adds a third section (the 'Expanded Court') to the proposed African Court of Justice and Human Rights (ACJHR), which section will have jurisdiction over 14 designated 'international' crimes. Problematically, however, the Malabo Protocol provides that African HOSG and senior state officials will not be subject to the jurisdiction of the Expanded Court, a situation that poses two major challenges for the international community: the first concerns Africa's relations with, and the mandate of, the ICC; the second relates to the possible impact of the Malabo Protocol on the struggle to put an end to impunity for persons who commit international crimes.

This paper deals with these two issues against a background discussion of Africa's continental court structures (both actual and envisaged), the justifications advanced for adoption of the Malabo Protocol, and the extent to which the content of that protocol is aligned with those justifications.

AFRICAN COURT STRUCTURES

The Malabo Protocol is the culmination of a process that began in 1981 with the adoption by the AU's predecessor, the Organization of African Unity, of the African Charter on Human and Peoples' Rights.¹ This charter, which entered into force in 1986 and has since been ratified by 53 of the 54 members of the AU,² enabled the 1987 establishment in Banjul of the African Commission on Human and People's Rights. As its supervisory organ the commission is tasked with oversight and interpretation of the charter. The commission is quasi-judicial in character and although it is able to hear complaints of violations of the charter its decisions are not binding.

In 1998 a protocol to the charter was adopted that created the African Court of Human and Peoples' Rights (ACHPR).³ That protocol entered into force on 25 January 2005; out

of the possible 54, currently 27 states are parties to it. The ACHPR, which sits in Arusha, may hear applications relating to human rights violations brought before it by the AU Commission, African inter-governmental organisations and member states. By exception, individual citizens and non-governmental organisations (NGOs) of those states that have so agreed may also make applications to the ACHPR.⁴ Although 23 applications have been brought before the ACHPR since 2008, the wheels of continental justice move slowly – to date, only two judgements have been handed down.⁵

A second, inter-state, court structure was included in the AU's Constitutive Act of 2001;⁶ the structure was further developed in the 2003 Protocol of the Court of Justice of the AU.⁷ The African Court of Justice (ACJ), as the institution was to be known, was intended as the principal judicial organ of the AU, with authority to rule on disputes over the interpretation of AU treaties. Although this protocol entered into force in 2010, in effect the ACJ was stillborn and has been superseded by the Protocol on the Statute of the African Court of Justice and Human Rights (the Merger Protocol).⁸

In 2007 a group of African legal experts was commissioned by the AU to advise on a possible conjunction of the ACHPR and the ACJ. Although not initially receptive to the idea, the AU at its summit meeting in Sharm El-Sheikh in 2008 adopted the Merger Protocol, thus confirming the joining of the two into a 'Merged Court'. This court was to have two jurisdictional chambers: the first, a general chamber to consider inter-state issues and labour matters affecting employees of the AU (which was the original jurisdiction of the ACJ); and the second, a human and peoples' rights chamber with the same powers as the ACHPR. The Merger Protocol is to enter into force after 15 ratifications, but to date only five states have ratified.⁹

Finally, in February 2009 at an AU HOSG Assembly, Decision 213 was adopted,¹⁰ requesting

... the [AU] Commission, in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010.

The AU Commission then requested the Pan African Lawyers Union (PALU) to prepare recommendations and a draft amendment to the Merger Protocol. The PALU draft was considered at validation workshops attended by legal counsel attached to AU organs and institutions, and representatives from some regional economic communities (RECs). The input of government delegations was then incorporated into the document. After further discussions, delays and amendments, in May 2014 a draft was put before a ministerial session of a meeting of the Specialised Technical Committee on Justice and Legal Affairs in Addis Ababa. At this meeting, attended by representatives of 38 member states, two AU organs and one REC, the draft was adopted and submitted for consideration and adoption to the AU Assembly, through its executive council. It was this draft that was formally adopted as the Malabo Protocol at Malabo in June 2014.

Clearly, the Expanded Court contemplated under the Malabo Protocol, if it is indeed established, might only start operations at some stage in the distant future – the protocol itself will only come into force 30 days after the deposit of instruments of ratification by 15 member states.¹¹ At present the only functioning tribunal on the continent is the

ACHPR; enough ratifications have not yet come about to establish either the ACJ or the Merged Court.

The relationship between the various options is therefore complicated. It is possible that the ACJ and the Merged Court might never be established and that the Expanded Court might simply replace the ACHPR. Alternatively, the Merged Court and the Expanded Court might themselves never be established: the ACHPR would merely continue under its current jurisdiction and the ACJ might then begin operations. Finally, perhaps the Merged Court might become the single continental court, the Expanded Court not having secured enough support.

JUSTIFICATION FOR THE EXPANDED COURT

The justification for creating a chamber endowed with jurisdiction to consider international crimes at the continental level, although having much to do with current African disenchantment with the ICC (because of a perception that the ICC is deliberately targeting Africa), is both older and more complex than the ICC controversy. The motivation was initially threefold: firstly, a perceived abuse of the principle of universal jurisdiction; secondly, a challenge posed by the proposed prosecution of Hissène Habré, former president of Chad; and thirdly, Article 25(5) of the African Charter on Democracy, Elections and Governance (ACDEG), which requires that those perpetrating 'unconstitutional change of government' be tried by a 'competent court of the Union'.

For some time there has been concern among Africa's leaders over how the doctrine of universal jurisdiction was being used by certain European states. Universal jurisdiction is defined as the assertion of jurisdiction by the domestic courts of one state in respect of crimes committed in the territory of another state by a national of another state, against victims who are also nationals of another state.¹² In other words, the traditional links recognised by international law for the exercise of jurisdiction by states – territoriality,¹³ nationality,¹⁴ passive personality¹⁵ and the protective¹⁶ principle – are absent. Generally, the grounds for assertion of jurisdiction are for determination by the domestic legal order of the individual state.

The assertion of universal jurisdiction for international crimes effectively began in 1961 with the Eichmann case in Israel,¹⁷ followed in 1982 by the Demjanjuk trial.¹⁸ It was, however, the establishment by the UN Security Council of ad hoc tribunals for Yugoslavia and Rwanda, respectively in 1993 and 1994, that saw a number of states enacting legislation to allow them to exercise universal jurisdiction over crimes committed in both those countries. After 1993, legislation introduced in several European countries resulted in the filing of charges against foreign officials from many parts of the world – some of them from Africa.¹⁹

For Africa, matters came to a head in 2008. At an AU meeting of ministers of justice and attorneys general on 18 April, the Rwandese Justice Minister and Attorney General, Tharcisse Karugarama, raised the issue of abuse of universal jurisdiction following the indictment of 40 senior Rwandese officials by Andreu Merelles, an investigative judge of the Spanish National Court (*Audiencia Nacional*).²⁰ Charged with genocide, crimes against humanity and terrorism committed in Rwanda between 1990 and 2002, the accused were members of the Rwanda Defence Force. For some, the move on the part of the

Spanish judge was an affront to all of Africa – Karugarama alleged that it was an attempt to re-colonise Africa ‘through a form of “neo-colonial judicial coup d’état” under the guise of judicial independence and universal jurisdiction’.²¹ The meeting roundly condemned the arrest warrants as an abuse of the doctrine of universal jurisdiction and recommended an AU study to consider the abuse further. A commission was constituted and a report prepared.

Immediately afterwards came the Pan-African Parliament’s Johannesburg Declaration of 15 May 2008, followed exactly a week later by the Brazzaville Statement of the Inter-Ministerial Committee of the International Conference of the Great Lakes Region. Both pronouncements condemned the abuse of universal jurisdiction and decreed that warrants should not be issued against acting African heads of state.²²

The AU then attempted to negotiate a moratorium on the execution of warrants through the UN Security Council and the EU.²³ These negotiations failed. In consequence, the next AU HOSG Assembly meeting in February 2009 adopted Decision 213, which proposed the creation of the Expanded Court and expressed regret at a warrant of arrest being executed against Rose Kabuye, Chief of Protocol to the president of Rwanda.²⁴ Subsequent ordinary sessions of the Assembly reiterated the call for the immediate termination of all pending indictments and called upon all ‘concerned States to respect International Law and particularly the immunity of state officials when applying the Principle of Universal Jurisdiction’.²⁵

The second motivation for creating an African court or chamber to consider international crimes at the continental level relates to the challenge posed by Habré, the former ruler of Chad.²⁶ In September 2005 Habré was indicted by a Belgian court for crimes against humanity, torture, war crimes and other human rights violations. On 17 March of the following year, the European Parliament demanded that Senegal – where Habré had been in exile for 17 years – extradite him to Belgium for trial. Senegal refused. In the meantime, at a HOSG Summit in Khartoum in January 2006 a committee of eminent African jurists was constituted to ‘consider all aspects and implications of the Hissène Habré Case [sic] as well as the options available for his trial’.²⁷ The report of the committee recommended inter alia that Senegal exercise jurisdiction; alternatively, that all African countries party to the UN Convention Against Torture were also eligible to exercise jurisdiction; or that an ad hoc tribunal be established. In the event of similar circumstances prevailing in the future, the committee²⁸

... observed that there is urgency in sending strong signals throughout Africa that impunity is no longer an option. In this regard the Committee considered various measures and different mechanisms available, including the possibility of conferring criminal jurisdiction on the African Court of Justice [to confer criminal competence that can be adopted by States within a reasonable time-frame], to make the respect for human rights at national, regional and continental levels a fundamental tenet of African governance. The Committee discussed the prospects for the creation of the African Court of Justice and Human Rights based on the project to merge the African Court of Human and Peoples’ Rights and The African Court of Justice. The Committee proposes that this new body be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of Convention Against Torture. The Committee also noted that there is room in the Rome

Statute for such a development and that it would not be a duplication of the work of the International Criminal Court.

Finally, Article 23 of the ACDEG is germane to the issue.²⁹ It declares that certain means of accessing or maintaining power are illegal and amount to 'an unconstitutional change of government'. Article 25(5) of ACDEG holds that '[p]erpetrators of unconstitutional change of government may ... be tried before the competent court of the Union'. There being no existing court with appropriate jurisdiction, the ultimate aim is that the Expanded Court will enjoy such competence.

AFRICA AND THE ICC

The AU's souring relationship with the ICC must be seen against this background. At its inception the ICC was positively embraced by Africa's leadership; not only was Senegal the first state to deposit its instrument of ratification but to date 34 of the 122 states parties to the Rome Statute of the ICC are African and a further eight have signed but not yet ratified. In terms of numbers, Africa represents the largest continental support bloc.³⁰ Furthermore, of the eight cases currently under consideration by the ICC, five have been referred to the ICC by African states parties themselves.

The tide turned, however, when on 4 March 2009 arrest warrants were issued against the incumbent President of Sudan, Omar Hassan Al Bashir, and other members of the Khartoum regime for international crimes allegedly committed in Darfur. At its next Assembly meeting in Sirte on 3 July 2009, the AU expressed 'deep concern' at the indictment of Al Bashir and the 'unfortunate consequences that the indictment has had on the delicate peace process underway in the Sudan'.³¹ The relevant decision further 'requested the Commission to ensure the early implementation' of Decision 213 relating to the establishment of the Expanded Court. The AU's attitude toward the ICC became even more confrontational at its February 2010 HOSG Summit in Addis Ababa, which took a decision that underscored 'the need for African States Parties [to the Rome Statute] to speak with one voice to ensure that the interests of Africa are safeguarded'.³² The decision further encouraged African states parties to raise the issue of immunity for officials of states not party to the Rome Statute.³³ Five months later at its Kampala summit the Assembly called on AU member states not to co-operate with the ICC over the arrest of Al Bashir; ominously, it requested member states to 'balance, where applicable, their obligations to the AU with their obligations to the ICC'.³⁴ A further indication of the AU's animosity toward the ICC is reflected in the rejection of the ICC's request to open a liaison office in Addis Ababa.³⁵

Shortly thereafter, because of their alleged complicity in the violence that followed Kenya's 2007 elections, in December 2010 Kenya's President Uhuru Kenyatta and Deputy President William Ruto were named with four others by the prosecutor of the ICC, Luis Moreno Ocampo, as suspects in crimes against humanity. At the time Kenyatta and Ruto were in opposition. In response, Kenya formally requested that the ICC defer investigations and prosecutions; at its January 2011 Summit the AU Assembly endorsed this request 'to allow for a National mechanism to investigate and prosecute the cases

under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity'.³⁶

Despite this request, Kenyatta and Ruto were indicted in March 2011 and summoned to appear before the ICC's Pre-Trial Chamber. In September 2011 charges against Kenyatta and Ruto (as well as Joshua arap Sang) were confirmed. The matter was further complicated when in March 2013 presidential elections in Kenya resulted in victory for a Kenyatta–Ruto alliance, the two being declared president and deputy president respectively. Despite this turn of events, the trial of Ruto began on 10 September 2013; Kenyatta became the first serving head of state to appear before the ICC (declaring that it was in his personal capacity) at The Hague on 8 October 2014, when the hearing was adjourned.

The third incident to anger the AU involved the late Colonel Muammar Gaddafi, former president of Libya. Action taken by Libyan state forces against the civilian population in Tripoli, Benghazi and Misrata during the first two weeks of the Libyan civil war (15–28 February 2011) provoked the UN Security Council by way of Resolution 1970³⁷ to refer the situation in Libya to the ICC. In June 2011 the ICC issued arrest warrants for Gaddafi, his son Saif al-Islam Gaddafi and his brother-in-law Abdullah al-Sanussi, for the commission of crimes against humanity. At its July 2011 Summit, the AU Assembly criticised the issuing of the arrest warrant on the grounds that it 'seriously complicates ... efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually-reinforcing way, issues relating to impunity and reconciliation'. The Assembly therefore decided 'that Member States shall not cooperate in the execution of the arrest warrant' against Gaddafi.³⁸ The matter became academic after Gaddafi was murdered in October 2011.

At subsequent HOSG summits Assembly decisions continued to call for solidarity among AU member states in their opposition to the proceedings launched against Al Bashir and to call on the UN Security Council to act in terms of Article 16 of the Rome Statute³⁹ and defer the ICC's prosecution of Al Bashir, Kenyatta and Ruto.⁴⁰ Matters came to a head at the October 2013 Summit in Addis Ababa when some member states called on all signatory African states to withdraw their membership of the Rome Statute, arguing that 'the court had fallen short of its goals to deliver justice fairly'.⁴¹ Although the move was unsuccessful, it was decided⁴²

to fast track the process of expanding the mandate of the African Court on Human and Peoples' Rights (ACHPR) to try international crimes [and] that the Commission expedites the process of expansion of the ACHPR to deal with international crimes in accordance with the relevant decision of the Policy organs and INVITES Member States to support this process.

The consequence was the adoption of the Malabo Protocol at the Malabo summit in June 2014.

THE MALABO PROTOCOL AND THE EXPANDED COURT

Since its first draft was published in 2011, various iterations of the Malabo Protocol have received considerable attention and have been widely debated.⁴³ An immediate concern

relates to the speed with which the original draft – a version the Malabo Protocol strongly resembles – was prepared and the consequences of such haste (PALU completed the first draft a mere four months after having been briefed on the matter). While government representatives were given the opportunity to debate the issue seriously there was no similar opportunity for civil society by way of interested NGOs and non-governmental experts.

Had civil society been given the opportunity to make a contribution it might, for example, have pointed to the challenge posed by the creation of three chambers, essentially staffed by the same judges but dealing with very different legal issues. The 'general' and 'human rights' chambers are to deal with issues of state responsibility and accountability in respect of inter-state disputes and human rights violations, while the 'criminal' chamber will be concerned with individual criminal responsibility. According to one expert 'such an amalgamation of functions and mandates is unprecedented under international law'.⁴⁴ Apart from having to establish fundamentally different findings – state responsibility versus individual guilt – the chambers will be employing very different evidentiary standards: the 'general' and 'human rights' chambers a 'balance of probabilities', the 'criminal' chamber 'beyond reasonable doubt'.

Civil organisations might also have questioned the feasibility of according the criminal chamber jurisdiction over 14 international crimes. While three of these are uncontroversial – they are the core international crimes of genocide,⁴⁵ crimes against humanity⁴⁶ and war crimes⁴⁷ – the remainder are contentious. The definitions of the core crimes in the Malabo Protocol are widely agreed and are identical to those found in the Rome Statute. The Malabo Protocol, however, also includes a slew of other crimes addressed in AU treaties and protocols, or in instruments generated by certain RECs. These crimes are: unconstitutional change of government;⁴⁸ piracy;⁴⁹ terrorism;⁵⁰ mercenarism [sic];⁵¹ corruption;⁵² money-laundering;⁵³ trafficking in persons;⁵⁴ trafficking in drugs;⁵⁵ trafficking in hazardous wastes;⁵⁶ illicit exploitation of natural resources;⁵⁷ and crimes of aggression.⁵⁸ So ambitious a jurisdictional spread poses many problems. The immediate challenge for states ratifying the Malabo Protocol will be so-called 'domestication', which will require that the elements of the 14 crimes accord with the elements of crimes within their national law. Ensuring such congruity might well require a major rewrite of aspects of domestic criminal law.

Perhaps an insurmountable hurdle will prove to be financial. In 2011 the ACHPR had a budget of \$9 million with a staff complement of 47; this may be compared with the ICC, which with a jurisdiction effectively limited to the three core international crimes cited above has an annual budget of \$134 million.⁵⁹ Whence the expanded court will derive the necessary additional financing is uncertain. Included within the financial costs will be the need for additional personnel – in the form of qualified judges, dedicated prosecutors and investigators – and facilities for holding detainees and prisoners.

Despite these challenges, however, in and of itself there is nothing wrong with creating a continental court with jurisdiction over international crimes. Indeed, some have argued that such a court will advance the cause of international criminal justice in Africa. In March 2014 the then deputy president of South Africa, Kgalema Motlanthe, in an address at the University of Pretoria suggested that the court is necessary 'to respond adequately to the yearnings of ordinary Africans for justice whilst being sensitive to the unique nature of the Africa context'.⁶⁰ Besides, argued Motlanthe, the creation of an 'African Court' would

go some way to address general frustration with current global geopolitical arrangements and more particularly, resentment of the ICC and its relationship with Africa.

Motlanthe contended that the global system as it stood was unfair insofar as it was conceived within a matrix that reflected Western norms and values. Evidence of its unfairness, he held, was reflected in the composition of the UN Security Council and the world trade system, in both of which the interests and priorities of the wealthy 'West' prevail. The focus of his attack, however, was the ICC; he dismissed that institution as a modern form of colonialism ('a transnational legitimation [sic] of hegemony') and pointed to instances that in his view reflected a bias against Africa. For example, the UN Security Council referred the cases of the Sudan and Libya, but not abuses in other countries; it indicted Al Bashir while the AU was attempting to resolve the Sudan conflict peacefully; and it proceeded with the trials of Kenyatta and Ruto even when asked by the AU not to do so. Further, for Motlanthe the stance of the ICC vis-à-vis Africa reflected the double standards that plague any discussion on matters of justice between Africa and the West. Thus while Charles Taylor was charged for his involvement in the conflict in Sierra Leone, Western business interests that allegedly fuelled the conflict for financial gain went unhindered.

Selective accountability is also reflected in the refusal by the US to entertain ICC scrutiny of the actions of its own citizens, while prescribing such scrutiny for others. Further, when considering violations in Africa the West fails to recognise the context within which the African state functions: because of its colonial past, it is a fragile entity in which conflict is pandemic, often necessitating harsh action.

Despite this animus, however, Motlanthe saw the 'ICC as an indispensable international judicial organ'; an 'African Court' would contribute to, rather than detract from, the current dispensation. That its progenitors intended the Expanded Court to serve such a role, however, is doubtful for two reasons: first, the manner in which the Malabo Protocol addresses – or fails to address – the relationship with the Expanded Court; and secondly, the ICC's attitude to Article 46 A *bis* of the draft protocol dealing with immunities.

THE EXPANDED COURT AND THE ICC

Had Africa's commitment to international criminal justice been genuine, presumably the Malabo Protocol would have addressed itself to the ICC. Despite his criticism of the Court, Motlanthe, for example, suggested that the ICC remained the pinnacle court for the continent – matters should be referred to it when the African Court experiences limitations and/or when victims appeal directly to it. (Clearly, the additional layer of complementarity added by the African Court would necessitate an amendment to the Rome Statute, which currently only contemplates complementarity with national mechanisms; such an amendment is not inconceivable.)

This, however, is not the thinking behind the Malabo Protocol. Article 46 H, which addresses 'complementary jurisdiction', deals only with complementarity vis-à-vis national courts and the courts of the RECs 'where specifically provided for by the Communities'; the instrument fails to make any reference whatsoever to the ICC. The only reasonable interpretation of this exclusion can be that it is a conscious snub to the ICC by the AU,

an explanation borne out when considering the manner in which the Amending Statute deals with immunities.

IMMUNITY FOR HOSG AND SENIOR STATE OFFICIALS

One of the founding principles on which the AU, through its Constitutive Act, is apparently based is 'condemnation and rejection of impunity'.⁶¹ Indeed, each of the decisions of the AU Assembly dealing with the ICC has contained a clause reaffirming a commitment to fight impunity. That of July 2012 is typical:⁶²

The Assembly ... reiterates [the AU's] commitment to fight impunity in conformity with the provisions of Article 4(h) and 4(o) of the Constitutive Act of the African Union and underscores the importance of putting the interests of victims at the centre of all actions in sustaining the fight against impunity.

Paradoxically, however, that commitment is qualified: heads of state and senior government officials are to enjoy immunity. Article 46 A *bis* of the Malabo Protocol⁶³ reads:

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

It would appear that ensuring immunity for heads of state and senior state officials is the primary reason for the establishment of the Expanded Court. The dominant view among Africa's leaders – as reflected in the position of the AU – is that heads of state and senior state officials must be accorded absolute immunity. Indeed, while African states themselves have failed seriously to embrace the exercise of universal jurisdiction against high-ranking officials – whether in or out of office – charged with the commission of international crimes, it was the use of universal jurisdiction against senior Rwandese officials a decade ago that sparked the initial call for an African court with jurisdiction over international crimes.

The ICC's indictment of Al Bashir and latterly Kenyatta and Ruto further provoked sufficient outrage to form the basis for the charge by some African leaders that the ICC was biased against Africa. (In 2012 the AU Assembly endorsed a request for an advisory opinion from the ICC 'on the question of immunities, under international law, of Heads of State and senior state officials from states that are not Parties to the Rome Statute of the ICC'.)⁶⁴ At its Extraordinary Summit in October 2013, the Assembly formally decided that 'no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office'.⁶⁵ Finally, a decision of the 22nd Ordinary Session of the Assembly, in January 2014, called on AU states parties to the Rome Statute to support amendments to Article 27 to preclude prosecution of HSOG.⁶⁶

Traditionally, international law differentiates between personal immunity (*ratione personae*) and functional immunity (*ratione materiae*). Personal immunity attaches to the

head of state, or a senior state official, for such time as he or she is in office. The rule is to the effect that such a person cannot be tried for any reason – including international crimes – by the courts of another state. Functional immunity may be invoked by a sitting or former head of state, or senior state official, in respect of official acts. Obviously, an international crime can never be an official act.⁶⁷

Article 46 A *bis* deals with personal immunity. In terms of customary international law, however, personal immunity may only be raised against an indictment for international crimes before the national court of another state; developments in international human rights law and international criminal law have barred a plea of personal immunity before international tribunals. Hence the statutes of the following tribunals all specifically exclude a plea of personal immunity:⁶⁸

- the Versailles Treaty, 1919 (Article 227);
- the Charter of the International Military Tribunal at Nuremberg, 1945 (Article 227);
- the Statutes of the Yugoslav and Rwanda International Criminal Tribunals 1993 and 1994 (Articles 7 and 6 respectively);
- the Rome Statute of the International Criminal Court, 1998 (Article 27); and
- the Statute for the Special Court for Sierra Leone, 2002 (Article 6(2)).

Article 46 A *bis* of the Malabo Protocol represents a major setback in the advance of international criminal justice; in fact, it can only be construed as in the interests of those African leaders fearful of an end to a culture of impunity.

Despite some states having raised concerns about the inclusion of ‘senior state officials’ in Article 46 A *bis* – because of the potential conflict between international and domestic law on this point, the lack of a precise definition of the term and finally, ‘the difficulty in providing an exhaustive list of persons who should be included in the category of senior state officials’⁶⁹ – the HOSG went ahead with its inclusion. The only concession to the concerns raised was to add the phrase ‘based on their function’, which effectively conflated personal and functional immunity.

Not surprisingly, therefore, the Malabo Protocol has been greeted with dismay by civil society groups on the continent and beyond. Admittedly, civil society’s response to the activities of the ICC has not always been homogenous.⁷⁰ Those sceptical of the ICC have questioned the extent to which it can contribute to fundamental societal change. Issues giving rise to prosecutions are often political rather than criminal. Tempting as it might be to criminalise or demonise one of the parties, political solutions require compromise and dialogue.⁷¹ Supporters of the ICC, however, have specifically lauded its attempts to end a culture of impunity. In the face of incapacity or unwillingness on the part of domestic legal systems to take action against African leaders and governments for past atrocities, action by the ICC is seen as vital.

Thus, in May 2014 more than 30 civil society and international organisations with a presence in Africa and working specifically on Africa’s relationship with the ICC, appealed to a meeting of African ministers of justice and attorneys general not to include Article 46 A *bis* in its draft of the Malabo Protocol.⁷² Immediately prior to the Malabo summit Stephen Lamony, of the international NGO Coalition for the ICC, warned that ‘insulating heads of state and senior government officials alleged to have committed serious crimes from trial is outrageous’.⁷³ Meanwhile, on 19 June 2014 Salil Shetty, secretary general of

the London-based NGO Amnesty International, addressed an open letter to AU HOSG in which he warned that the inclusion of Article 46 A *bis* in the Malabo Protocol⁷⁴

poses serious risks to the integrity of the African Court and of the African Union's declared goal of ensuring justice for victims of serious crimes under international law. It evinces an intention to create one rule for those in positions of power and another rule for the masses. If adopted, Article 46A *bis* will prevent the African Court from investigating and prosecuting serving Heads of State and Government who mastermind acts of genocide, crimes against humanity and war crimes such as those that occurred in Rwanda in 1994. The provision would also preclude the prosecution of those who commit atrocities in neighbouring African countries, such as Charles Taylor who was indicted when he was the President of Liberia and later convicted by the Special Court for Sierra Leone for committing war crimes and crimes against humanity in Sierra Leone.

The warning going unheeded, Amnesty International lamented the move as a 'backward step in the fight against impunity and a betrayal of victims of serious violations of human rights.'⁷⁵

CONCLUSION

In the interests of victims it is essential to address the current impasse. The ICC and its African states parties have to enter into a serious and constructive dialogue. The ICC must earnestly tackle the perception of bias against the continent; it is worth noting that all eight current official investigations by the ICC are in Africa.⁷⁶ This, however, is a difficult issue. It is not the ICC that is primarily responsible for its skewed caseload. The combined territory of African states parties constitutes the largest geographical area within which atrocities are alleged to have been committed. Asian and Arab states have been much more reluctant to join the Rome Statute. Therefore, for example, because the countries concerned are not states parties, atrocities allegedly committed in Israel, Palestine, Sri Lanka or Syria cannot be investigated without Security Council referral; the possibilities for such referrals, however, are plagued by rivalries between the permanent members of the Security Council. Nevertheless, as token of its impartiality the ICC needs rigorously to pursue preliminary investigations initiated beyond the African continent, for example those in Afghanistan, Colombia, Georgia, Honduras and Ukraine.⁷⁷

African states parties, for their part, need to stop politicking against the ICC.⁷⁸ It is all too apparent that it is not the victims who complain of ICC bias against Africa; it is the threatened political elite. Besides, the ICC is a court of last resort. If African states are sincerely committed to putting an end to a culture of impunity, the ICC has limited relevance and the continent must itself build a credible system of international criminal justice. Such a system starts with the national court of the territorial state, because it is on this structure that the primary obligation to investigate and prosecute international crimes rests. As the late Italian international law specialist Antonio Cassese observed:⁷⁹

It is healthy, it was thought, to leave the vast majority of cases concerning international crimes to national courts, which may properly exercise their jurisdiction based in a link with

the case (territoriality, nationality) or even universality. Among other things, these national courts may have more means available to collect the necessary evidence and to lay their hands on the accused.

Further, if the expanded court contemplated in the Malabo Protocol is not to become an 'empty and ineffectual shell'⁸⁰ that fails positively to contribute to the prosecution of international crimes, efforts must be made appropriately to integrate it into ICC complementarity structures. African states will also have to ensure that the Malabo Protocol is allowed to function properly: it will have to be comprehensively funded, its political independence has to be guaranteed and, perhaps crucially, its Article 46 A *bis* granting heads of state immunity, must be deleted.

ENDNOTES

- 1 OAU (Organization of African Unity), *African Charter on Human and Peoples' Rights*, OAU CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986, http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf, accessed 17 July 2014.
- 2 South Sudan has yet to deposit an instrument of ratification to become a state party to the Charter.
- 3 AU (African Union), *Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights*, adopted 10 June 1998, entered into force 25 January 2004, http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf, accessed 17 July 2014.
- 4 Article 34(6) of the protocol provides for state declarations permitting access to the ACHPR by individuals and NGOs once local remedies have been exhausted. To date, only seven member states have made Article 34(6) declarations: Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania.
- 5 In its first judgement (*Rev Christopher R Mtikila v The United Republic of Tanzania*), the court considered the right of citizens to participate freely in government; the second (*Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v The Republic of Burkina Faso*) related to the protection of journalists.
- 6 Article 18 of the Constitutive Act provides that a 'Court of Justice of the Union shall be established', 'the statute, composition and functions [of which] shall be defined in a protocol relating thereto.' See <http://www.peaceau.org/uploads/au-act-en.pdf>, accessed 29 July 2014.
- 7 AU, *Protocol of the Court of Justice of the AU*, http://www.au.int/en/sites/default/files/PROTOCOL_COURT_OF_JUSTICE_OF_THE_AFRICAN_UNION.pdf, accessed 17 July 2014.
- 8 AU, *Protocol on the Statute of the African Court of Justice and Human Rights*, http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf, accessed 17 July 2014.
- 9 As of mid-2014, the Merger Protocol had been ratified by Benin, Burkina Faso, the Democratic Republic of the Congo, Libya and Mali.
- 10 AU, *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, Decision Assembly/AU/Dec 213 (XII), adopted in February 2009, http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_FEBRUARY_2009_AUC_TWELFTH_

ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION.pdf, accessed 15 July 2014.

- 11 See Article 11 of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.
- 12 Cassese A, *International Law* (2nd ed). Oxford: Oxford University Press, 2005, p. 451.
- 13 The 'territoriality principle' permits a state to exercise jurisdiction in respect of any crime committed within its territory, irrespective of the nationality of the perpetrator.
- 14 Otherwise known as the 'principle of active personality', the 'nationality principle' requires that the perpetrator of the crime be a national of the state exercising jurisdiction.
- 15 The 'passive personality principle' accords jurisdiction to a state where the victim is a national of that state, irrespective of the nationality of the perpetrator.
- 16 The 'protective principle' permits a state to exercise criminal jurisdiction over acts committed outside its territory by non-nationals, where such acts threaten some vital interest of that state.
- 17 Supreme Court of Israel (1961), *Attorney General of Israel v Eichmann*, Supreme Court of Israel (1962) 36 ILR 277, 36 ILR 18. In 1960, Adolf Eichmann, a former SS officer, was abducted by Israeli intelligence agents from Argentina and brought to trial in Israel. Eichmann was charged on 15 criminal counts, including war crimes, crimes against humanity and crimes against the Jewish people. He was found guilty and executed.
- 18 *Demjanjuk v Petrovsky* (1985) 776 F 2d 57; 79 ILR 534. John Demjanjuk, Ukrainian by birth but a US citizen from 1952, was deported to Israel from the US to stand trial for war crimes committed at the Sobibór extermination camp. He was convicted by an Israeli Court in 1988; this verdict was overturned by the Israeli Supreme Court in 1993. Demjanjuk returned to the US before being deported to Germany, again to stand trial for war crimes. He was convicted by a German court in 2011, but died pending an appeal against his conviction.
- 19 Among prominent African officials against whom charges have been lodged are Maaouya Ould Sid'Ahmed Taya of Mauritania, Laurent Gbagbo of Côte d'Ivoire, Paul Kagame of Rwanda, Ange-Felix Patassé of the Central African Republic, Denis Sassou Nguesso of Congo-Brazzaville, Hissène Habré of Chad and Driss Basri of Morocco (see AU, *Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some non-African states as Recommended by the Conference of Ministers of Justice/Attorneys General*, Assembly/AU/14(XI), p. 13, para 60). To this number may be added Robert Mugabe of Zimbabwe (London, 2004), Teodoro Obiang Nguema of Equatorial Guinea, Omar Bongo of Gabon, Blaise Compaoré of Burkina Faso, and Eduardo Dos Santos of Angola (Paris, 2009).
- 20 Although based on the passive personality principle rather than that of universal jurisdiction, five of the accused had already had arrest warrants issued against them by Jean Louis Brugière, a French investigative judge, in November 2006. As a consequence Rwanda broke off diplomatic relations with France. See Geneuss J, 'Universal jurisdiction reloaded? Fostering a better understanding of universal jurisdiction: A comment on the AU–EU expert report on the principle of universal jurisdiction', *Journal of International Criminal Justice*, 7, 5, pp. 945–962. See also, Commentator, 'The Spanish indictment of high-ranking Rwandan officials', *Journal of International Criminal Justice*, 6, 5, pp. 1003–1011.
- 21 Geneuss J, *op. cit.*, p. 946.
- 22 AU, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, Assembly/AU/14 (XI) Assembly/AU/Dec.199(XI), http://www.au.int/en/sites/default/files/ASSEMBLY_EN_30_JUNE_1_JULY_2008_AUC_ELEVENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20TRIBUTE_RESOLUTION.pdf, accessed 4 June 2014.

- 23 See Abraham G, 'Universal jurisdiction and the African Union (AU) – "... the wrong side of history"?', *African Yearbook on International Humanitarian Law*, 129, pp. 143–146.
- 24 AU, *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, Assembly/AU/3 (XII) Assembly /AU/Dec.213(XII), http://www.pambazuka.org/aumonitor/images/uploads/AU_Assembly_Decision_Jan_09.pdf, accessed 10 June 2014.
- 25 AU, *Decision on the Abuse of the Principle of Universal Jurisdiction*, Doc. Assembly/AU/11(XIII) Assembly/AU/Dec.243 (XIII), http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf, accessed 20 December 2011; AU, *Decision on the Abuse of the Principle of Universal Jurisdiction*, EX.CL/540(XVI) Assembly/AU/Dec.271(XIV), http://www.au.int/en/sites/default/files/ASSEMBLY_EN_31_JANUARY_2_FEBRUARY_2010_BCP_ASSEMBLY_OF_THE_AFRICAN_UNION_FOURTEENTH_ORDINARY_SESSION.pdf, accessed 20 December 2011; AU, *Decision on the Abuse of the Principle of Universal Jurisdiction*, EX.CL/606(XVII) Assembly/AU/Dec.292(XV), http://www.au.int/en/sites/default/files/ASSEMBLYEN_25_27_July_2010_BCP_ASSEMBLY_OF_THE_AFRICAN_UNION_Fifteenth_Ordinary_Session.pdf, accessed 20 December 2011; and AU, *Decision on the Abuse of the Principle of Universal Jurisdiction*, EX.CL/7640(XVIII) Assembly/AU/Dec.335(XVI), http://www.au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AUC_ASSEMBLY_AFRICA.pdf, accessed 20 December 2011.
- 26 Habré, president of Chad from 1982 to 1990, is accused of being responsible for thousands of deaths. Apart from the massacre of ethnic groups in south Chad in 1984, of the Hadjerai in 1987 and the Zaghawa in 1989, Habré is also held to have authorised the murder and torture of tens of thousands of political opponents. See HRW (Human Rights Watch), 'The Trial of Hissène Habré: Time is Running Out for the Victims', Report, 2. New York: HRW, January 2007, <http://www.hrw.org/en/reports/2007/01/26/trial-hiss-ne-habr>, accessed 6 February 2012.
- 27 See AU, *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, para 1, http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf, accessed 23 July 2014.
- 28 *Ibid.*, para 34 & 35.
- 29 AU, *African Charter on Democracy, Elections and Governance* (ACDEG), adopted 30 January 2007; entered into force 15 February 2012, <http://www.achpr.org/instruments/charter-democracy/>, accessed 24 July 2014. As of 3 February 2014 the ACDEG had 23 states parties.
- 30 Although all South American and most European states have ratified, they are fewer in total than African nations. Interestingly, Asia's support is limited: China, India, Indonesia, Iraq, Malaysia, Pakistan and Turkey, among others, have neither signed nor ratified.
- 31 AU, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court* (ICC), Assembly/AU/Dec. 243-267 (XIII) Rev.1 Assembly/AU/Decl.1-5(XIII), http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf, accessed 24 July 2014.
- 32 AU, *Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court* (ICC), Assembly/AU/8(XIV) Assembly/AU/Dec.270(XIV), http://www.nepad.org/system/files/14th%20Assembly_Dec.268-288%20English.pdf, accessed 24 July 2014.
- 33 Article 27(1) of the Rome Statute specifically holds that [the Statute] 'shall apply equally to all persons without any distinction based on official capacity'; official capacity '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.' Article 27, however, applies to states parties to the Rome Statute. In respect of states not party to the Rome Statute, international common law would apply, which arguably continues to recognise 'head of state immunity'. In such circumstances, Article 98 of the Rome Statute is relevant: '(1) 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. (2) 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 State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.'

- 34 AU, *Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting of the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/10(XV) Assembly/AU/Dec.296(XV), http://www.au.int/en/sites/default/files/ASSEMBLY_EN_25_27_July_BCP_ASSEMBLY_OF_THE_AFRICAN_UNION_Fifteenth_Ordinary_Session.pdf, accessed 24 July 2014.
- 35 For discussion on the Kampala Summit generally, see Jalloh CC, *The African Union and the International Criminal Court: The Summer of Our Discontent(s)*. University of Pittsburgh, JURIST-Forum, 6 August 2010, <http://jurist.org/forum/2010/08/the-african-union-and-the-international-criminal-court-the-summer-of-our-discontents.php>, accessed 24 July 2014.
- 36 AU, *Decision on the Implementation of the Decisions on the International Criminal Court*, EX.CL/639(XVIII)' Assembly/AU/Dec.334(XVI), http://www.au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AUC_ASSEMBLY_AFRICA.pdf, accessed 24 July 2014.
- 37 UN Security Council Resolution 1970 (2011).
- 38 AU, *Decision on the Implementation of the Assembly Decisions on the International Criminal Court*, EX.CL/670(XIX)), [http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_\(XVII\)_E.pdf](http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_(XVII)_E.pdf), accessed 24 July 2014.
- 39 Article 16 of the Rome Statute empowers the UN Security Council acting in terms of Chapter VII of the UN Charter to request of the ICC that it defer investigation or prosecution of a matter for a period of 12 months; which period may be renewed.
- 40 AU, *Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)*, EX.CL/710(XX)' Assembly/AU/Dec.397 (XVIII), [http://www.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20\(XVIII\)%20_E.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20(XVIII)%20_E.pdf), accessed 24 July 2014; AU, *Decision on the Implementation of the Decisions of the International Criminal Court (ICC)*, Doc.EX.CL/731(XXI), [http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20\(XIX\)%20_E_Final.pdf](http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20(XIX)%20_E_Final.pdf), accessed 24 July 2014; AU, *Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)*, Assembly/AU/13/(XXI)' Assembly/AU/Dec.482(XXI), http://iccnow.org/documents/AU_decisions_21st_summit_May_2013.pdf, accessed 24 July 2014; AU, *Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court*, Assembly/AU/13(XXII)' Assembly/AU/Dec.493(XXII), [http://www.au.int/en/sites/default/files/Assembly_AU_Dec_493_\(XXII\)_E.pdf](http://www.au.int/en/sites/default/files/Assembly_AU_Dec_493_(XXII)_E.pdf), accessed 24 July 2014.

[www.africapartnershipforum.org/Assembly%20AU%20Dec%20490-519%20\(XXII\)%20_E.PDF](http://www.africapartnershipforum.org/Assembly%20AU%20Dec%20490-519%20(XXII)%20_E.PDF), accessed 24 July 2014.

- 41 Apparently, Algeria (which is not party to the Rome Statute), Ethiopia, Ghana, Kenya, Malawi, Nigeria, Rwanda, South Africa, Sudan, Tanzania, Uganda and Zimbabwe supported the call for the AU to withdraw from the ICC. See Bullock J, 'AU and the ICC – how they voted', *Think Africa Press*, 15 October 2013, <http://thinkafricapress.com/legal/au-and-icc-how-they-voted>, accessed 4 July 2014.
- 42 AU, *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1 (Oct 2013), Extraordinary Session of the Assembly of the African Union, Addis Ababa, 12 October 2013, http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf, accessed 24 July 2014.
- 43 See Deya D, 'Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes', Osisa (Open Society Initiative for Southern Africa), 6 March 2012, <http://www.osisa.org/openspace/regional/african-court-worth-wait>, accessed 10 June 2014; see also Du Plessis M, 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes', ISS (Institute for Security Studies), Paper, 235, June 2012a; Du Plessis M, 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights jurisdiction over international crimes', *European Journal of International Law*, 27 August 2012b, <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>, accessed 10 June 2014; Matasi MW & J Bröhmer, 'The proposed international criminal chamber section of the African Court of Justice and Human Rights: A legal analysis', SSRN (Social Science Research Network), 20 March 2013a, <http://ssrn.com/abstract=2236040>, accessed 6 June 2014; Murungu CB, 'Towards a criminal chamber in the African Court of justice and Human Rights', *Journal of International Criminal Justice*, 9, 2011 p. 1067; Viljoen F, 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol', *AfricLaw*, 23 May 2012, <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>, accessed 10 June 2014.
- 44 Viljoen F, *op. cit.*
- 45 Article 28 B.
- 46 Article 28 C.
- 47 Article 28 D.
- 48 Article 28 E. The 2012 edition of the Malabo Protocol included Article 28 E (3): 'Any act of a sovereign people peacefully exercising their inherent right which results in a change of government shall not constitute an offence under this Article.' This sub article was excluded from the version of the protocol finally adopted. According to the report of the Specialised Technical Committee, the exclusion resulted from a 'lack of consensus' on what constituted the 'popular uprising within the context of unconstitutional changes of government'. The Peace and Security Council is charged with defining the concept for consideration by the Assembly. See AU, *The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs*, EX.CL/846(XXV), para 22, 23, <http://justsecurity.org/wp-content/uploads/2014/07/Legal-Instruments-Adopted-in-Malabo-July-2014.pdf>, accessed 28 July 2014.
- 49 Article 28 F.
- 50 Article 28 G.

- 51 Article 28 H.
- 52 Article 28 I.
- 53 Article 28 I bis.
- 54 Article 28 J.
- 55 Article 28 K.
- 56 Article 28 L.
- 57 Article 28 L bis.
- 58 Article 28 M.
- 59 Du Plessis M, 2012a, *op. cit.*, p. 9.
- 60 Lecture by Deputy President Kgalema Motlanthe, University of Pretoria, 31 March 2014, <http://www.the.presidency.gov.za/pebble.asp?relid=17119>, accessed 24 April 2014.
- 61 Article 4(o) of the Constitutive Act of the African Union, adopted on 11 July 2000, entered into force on 26 May 2001.
- 62 AU, *Decision on the Implementation of the Decisions of the International Criminal Court (ICC)*, EX.CL/731(XXI)' Assembly/AU/Dec.419, [http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20\(XIX\)%20_E_Final.pdf](http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20(XIX)%20_E_Final.pdf), accessed 24 July 2014.
- 63 AU, *The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs*, *op. cit.*, article 46 A bis.
- 64 *Ibid.*
- 65 AU, *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1, http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf, accessed 24 July 2014.
- 66 AU, *Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court*, Assembly/AU/13(XXII) Assembly/AU/Dec.493(XXII), [http://www.africapartnershipforum.org/Assembly%20AU%20Dec%20490-519%20\(XXII\)%20_E.PDF](http://www.africapartnershipforum.org/Assembly%20AU%20Dec%20490-519%20(XXII)%20_E.PDF), accessed 24 July 2014. The amendment sought by Kenya is the inclusion of Article 27(3): 'Notwithstanding paragraph 1 and 2 above, serving heads of states, their deputies and anybody acting, or ... entitled to act as such, may be exempted from prosecution during their current term of office. Such an exemption may be renewed by the court under the same conditions.' See IBA (International Bar Association), 'IBA calls on Kenya to reaffirm the cardinal legal principle that no one is above the law', 2 July 2014, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f31d2218-e2e5-4a8c-8d77-c75cda61746c>, accessed 24 July 2014.
- 67 See, generally, Dugard J, *International Law: A South African Perspective*, 4th ed. Cape Town: Juta & Co, 2011, pp. 250–254; Shaw M, *International Law*, 6th ed. Cambridge: Cambridge University Press, 2008, pp. 735–740. For this reason, Article 46 A bis poses a conundrum. The article relates specifically to the international crimes enumerated; an international crime can never be an official act, yet the article accords immunity to senior state officials 'based on their functions'.
- 68 Shaw M, *op. cit.*, p. 735. However, see also ICJ (International Court of Justice), Arrest Warrant of 11 April 2000 Case (Democratic Republic of Congo v Belgium), ICJ Reports, 2002.
- 69 AU, *The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs*, *op. cit.*, para 25, 26.
- 70 See Murithi T, 'The African Union and the International Criminal Court: An Embattled Relationship?', IJR, Policy Brief, 8 March 2013.
- 71 See, for example, Mbeki T & M Mamdani, 'Courts can't end civil wars', *The New York Times*,

- 5 February 2014, http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html?_r=0, accessed 30 March 2014.
- 72 HRW, 'Joint Civil Society Letter on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights', 12 May 2014, <http://www.hrw.org/news/2014/05/12/joint-civil-society-letter-draft-protocol-amendments-protocol-statute-african-court->, accessed 24 June 2014.
- 73 Coalition for the International Court, 'Civil society opposes immunities in proposed expansion of African Court', *Global Justice*, 4 June 2014, <http://ciccglobaljustice.wordpress.com/2014/06/04/civil-society-opposes-immunities-in-proposed-expansion-of-african-court/>, accessed 24 June 2014.
- 74 Amnesty International, 'Open Letter to the Heads of State and Government of the African Union', 19 June 2014, <http://www.amnesty.org/fr/library/asset/AFR01/012/2014/en/5984bd20-8d1f-4c36-b892-41d054a7d9ee/afr010122014en.pdf>, accessed 24 July 2014.
- 75 AFLA (Africa Legal Aid), 'AU approves immunity for African Leaders in the African Court of justice and Human Rights', Pretoria, <http://www.africalegalaid.com/news/au-approves-immunity-for-african-leaders-in-the-african-court>, accessed 24 July 2014. See also IBA, 'IBA calls on Kenya to reaffirm the cardinal legal principle that no one is above the law', 2 July 2014, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f31d2218-e2e5-4a8c-8d77-c75cda61746c>, accessed 24 July 2014; Allison S, 'AU summit conclusions: Number ones look out for number one, again', *Daily Maverick*, 4 July 2014, <http://www.dailymaverick.co.za/article/2014-07-04-au-summit-conclusions-number-ones-look-out-for-number-one-again/>, accessed 5 July 2014; International Justice Resource Center, 'African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights' Statute', 2 July 2014, <http://www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-government-officials-in-amendment-to-african-court-of-justice-and-human-rights-statute/>, accessed 24 July 2014. For a contrary view, see Gerald JB, 'Leadership, Genocide and War Crimes: An African Perspective'. Montreal: Global Research, 15 July 2014, <http://www.globalresearch.ca/leadership-genocide-and-war-crimes-an-african-perspective/5391325?print=1>, accessed 24 July 2014.
- 76 Uganda, Democratic Republic of the Congo, Central African Republic (CAR), Darfur/Sudan, Kenya, Libya, Côte d'Ivoire & Mali.
- 77 Preliminary investigations continue in respect of two additional African states parties, Guinea and Nigeria; a second investigation has been launched in the CAR.
- 78 See, generally, Black C, 'Some reasons for considering why the ICC may not be considered as an anti-African institution', *African Yearbook on International Humanitarian Law*. Cape Town: Juta & Co, 2009/2010, p. 137; Du Plessis M, Maluwa T & A O'Reilly, *Africa and the International Criminal Court*. London: Royal Institute of International Affairs, 1 July 2013, http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf, accessed 4 July 2014; McNamee T, 'The ICC and Africa: Between Aspiration and Reality: Making International Justice Work Better for Africa', Brenthurst Foundation, Discussion Paper, 2, 15 May 2014, http://www.thebrenthurstfoundation.org/Files/Brenthurst_Commissioned_Resports/Brenthurst-paper-201402-ICC-and-Africa.pdf, accessed 4 June 2014; Mutua M, 'The International Criminal Court in Africa: Challenges and Opportunities', State University of New York, Buffalo Legal Studies Research Paper Series, 003, 2011, <http://ssrn.com/abstract=1684147>, accessed 4 July 2014.
- 79 Cassese A, *op. cit.*, p. 351.
- 80 Viljoen F, *op. cit.*

SAIIA'S FUNDING PROFILE

SAIIA raises funds from governments, charitable foundations, companies and individual donors. Our work is currently being funded by, among others, the Bradlow Foundation, the UK's Department for International Development, the European Commission, the British High Commission of South Africa, the Finnish Ministry for Foreign Affairs, the International Institute for Sustainable Development, INWENT, the Konrad Adenauer Foundation, the Royal Norwegian Ministry of Foreign Affairs, the Royal Danish Ministry of Foreign Affairs, the Royal Netherlands Ministry of Foreign Affairs, the Swedish International Development Cooperation Agency, the Canadian International Development Agency, the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development, the United Nations Economic Commission for Africa, the African Development Bank, and the Open Society Foundation for South Africa. SAIIA's corporate membership is drawn from the South African private sector and international businesses with an interest in Africa. In addition, SAIIA has a substantial number of international diplomatic and mainly South African institutional members.

South African Institute of International Affairs
Jan Smuts House, East Campus, University of the Witwatersrand
PO Box 31596, Braamfontein 2017, Johannesburg, South Africa
Tel +27 (0)11 339-2021 • Fax +27 (0)11 339-2154
www.saiia.org.za • info@saiia.org.za

