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The African Court of Justice and Human Rights and the International Criminal Court:

Unpacking the political dimensions of concurrent jurisdiction

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Introduction: On the spectrum of the politics of justice

The Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) was adopted by the African Union (AU) in June 2014. The Malabo Protocol allows for the mandate of the African Court of Justice and Human Rights (ACJHR, or the African Court) to encompass jurisdiction within the scope of international crimes stipulated in the Rome Statute of the International Criminal Court (ICC), as well as additional crimes. Falling within a wider context of discontent from African leaders towards the work of the ICC, the Malabo Protocol has implications for international justice. As the main judicial organ of the AU, the impending African Court holds the potential to be an instrument of justice. Simultaneously, it will not operate in isolation, entering into an international justice system that is occupied by the Rome Statute and the ICC as the purveyor of international justice. More specifically, this environment will result in the ICC and the African Court holding concurrent jurisdiction on international crimes. Viewed with suspicion by civil society actors, yet welcomed by African governments, the African Court has therefore been framed as an instrument of both justice and politics.

This policy brief will provide an analysis of the implications of the African Court, within the evolving realm of international politics and the specific concerns it raises for justice on the African continent. A discussion primarily shaped by the political relationship between the AU, the ICC and civil society organisations across the continent, the impending creation of the African Court requires a deeper analysis beyond the legalities. Therefore the motivation of this analysis, on one level, is based on the concurrent jurisdiction that will be held by the African Court and the ICC, but on a deeper level it will speak to the inevitable questions raised around legitimacy and alternative instruments for accountability as a result of concurrent jurisdiction. These questions will be explored through an examination of the African Court and the ICC in relation to concepts of complementarity versus primacy, the politics of international criminal justice, and the consideration of continued immunity. These elements will guide the policy brief as well as the adjoining policy recommendations to the AU and governments, the ICC, the African Court, and civil society organisations.

Mapping the movement towards the African Court of Justice and Human Rights

In 1998, the Organisation of African Unity (later to develop into the current formation of the AU) adopted the Protocol to the African Charter on Human and Peoples' Rights. Following from this

protocol, the AU inaugurated the **African Court on Human and Peoples' Rights (AfCHPR)** in January 2004. Established in order to complement and further the protective mandate of the **African Commission on Human and Peoples' Rights**, AfCHPR has been operational, with 29 of the 54 AU member states ratifying the Protocol that subsequently created the AfCHPR.

During this same period, there was an overlap in the creation of the **African Court of Justice (ACJ)** in 2000 through the Constitutive Act of the African Union; however, it was not operationalised. Successively, the AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights, which in effect sought to combine the African Court on Human and Peoples' Rights (AfCHPR) with the African Court of Justice (ACJ), creating a single continental judicial body: the African Court of Justice and Human Rights (ACJHR, or the African Court). The Protocol progressed further and was adopted by the AU in June 2014 as the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, more commonly known as the Malabo Protocol.

Simultaneously to these developments, international justice beyond the African continent was being designed and remoulded through the ratification of the Rome Statue at the United Nations (UN) in 2002. The product of this ratification was the ICC and its mandate to prosecute war crimes, crimes against humanity, genocide and the crime of aggression – crimes not included in the Protocol of AfCHPR. It is widely held that African states actively advocated for the instituting of the ICC, with 47 African countries being present at the drafting of the Rome Statute in 1998 – the same year the Protocol to the African Charter on Human and Peoples' Rights was adopted by governments across the continent.

In recent years, the relationship between the ICC and governments under the AU has faced strain, with the interrogation of selective justice and the politicisation of international criminal tribunals. This is displayed by the ICC's record of prosecutions thus far being conducted solely against Africans despite the vast number of crimes that continue to be committed in various parts of the world.

Situating the Malabo Protocol and the pending creation of the African Court in relation to the condemnation that the ICC is facing from African states may seem politically charged; however, it also has theoretical and practical implications that prior to this were not addressed, or even imagined, indicating a lack of foresight in the thinking of international justice. The resulting concurrent jurisdiction extends beyond ICC but also national judicial systems as they pertain to international crimes. Within these conditions, it therefore becomes clear that the implication of concurrent jurisdiction is a political question, and in analysing the potential operations of the African Court it cannot be seen in isolation to the politics of international and continental bodies such as the AU and ICC.

The Relationship between the AU and the ICC

The fraught relationship between the ICC and AU is shaped by various factors, but can be understood in relation to two specific cases undertaken by the ICC that have gone on to shape the interactions between the two parties. In 2005, the UN Security Council raised concerns about the ensuing conditions of civil war that saw mass displacement and killing of civilians in Sudan. Under the adoption of resolution 1593 (2005), the ICC followed from this referral, issuing arrest warrants for Sudan's President Omar Hassan Al-Bashir and three other government officials. Accused of war crimes, crimes against humanity and genocide, the arrest warrant for Al-Bashir has garnered deep contentions within the AU and was the first step in souring relations. The Sudanese government's objection to the warrants on the basis of infringement of sovereignty was further reinforced by the AU's appeal to cancel the developments taken by the ICC against Al-Bashir.

The call by the AU was invoked through Article 16 of the Rome Statute, pushing for a deferral of investigation and voicing deep concern that the process of the ICC would destabilise the peace efforts taking place. This call by the AU Assembly was further reiterated along with a directive to AU members to renounce cooperation with the ICC. In 2015, South Africa's stance towards the ICC was compromised with the attendance of Al-Bashir at the 25th AU summit. Defying the ban by the South African High Court, the South African government failed to carry out his arrest, with his plane leaving from a state air force base.[1] The decision by South Africa's government is also reflected in the actions of Uganda and Djibouti, who are said to be facing referral by the ICC to the UN Security Council for failing to arrest Al-Bashir.[2] One year following the AU summit in South Africa, the 2016 host government, Rwanda, indicated no plans to arrest Al-Bashir.[3] Rwanda's stance on one level can be explain by its not being party to the Rome Statute; however, as a member of the UN, the government does face the requirement to adhere and carry out arrest on behalf of the ICC . These actions, or rather inactions, on the parts of South Africa, Uganda, Djibouti and, more recently, Rwanda, are explicit

displays of contestations of and disregard for the workings of the ICC.

The second case of fracturing of relations is linked to the issuing of summons in response to post-election violence in Kenya in 2007 and 2008. Six people were identified as recipients of the summons, indicted for committing crimes against humanity. Receiving criticism from the Kenyan parliament, a national resolution was passed calling for the country's exit from the ICC. The AU provided support by assenting to communicate to the UN Security Council that it should halt the ICC's investigation. Kenya's President Uhuru Kenyatta and Deputy-president William Ruto were two of the six people indicted by the Court. Despite the request for a national mechanism of investigation into the matter, as well as the endorsement of this by the AU, charges against Kenyatta and Ruto were carried out, with both of them appearing in front of the court in their newly instated positions in office. As the first serving head of state to appear before the ICC, Kenyatta's appearance at The Hague brought into question the 'tension seemingly between the requirements of international justice within the framework of ICC and an outcome of an electoral democratic process'.[4]

Both instances speak to a fraught relationship that is shaped by selectivity and bias regarding the actions taken against war crimes. A clear example of this bias is indicated by lack of action by the ICC to the UK government's Report of the Iraq Inquiry, also known as the Chilcot Report.[5] In the Report, Tony Blair and George W Bush (former British and US heads of state, respectively) were held responsible for the military invasion of Iraq and the subsequent turmoil that has ensued in the country, which has seen thousands of civilians killed and displaced. The lack of response to the Chilcot Report is a case of international justice being dictated according to power in terms of economics and security, bringing attention to the lack of independence and authority the ICC holds as a purveyor of justice. More so, the ICC's contested workings indicate lacunae that must be addressed. Whether the African Court will fill these lacunae is dependent on its conception of concurrent jurisdiction, firstly with the ICC and secondly with national governments.

Concurrent jurisdiction, complementarity and primacy

The basis of concurrent jurisdiction allows for two (or more) courts to hold jurisdiction over the same case due to the crimes being investigated falling within the mandate of both courts.[6] The relationship between the different courts in this context translates into an equating of capabilities resulting in the question of primacy. Examples of concurrent jurisdiction and the bid for primacy can be seen in the developments that occurred around the International Criminal Tribunal of Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), and the national courts of the respective countries. These interventions saw tensions between the international tribunals and the domestic courts regarding sharing of information and evidence, facilitating investigations and following through with prosecution. Both the cases of Rwanda and the ICTR and the former Yugoslavia and the ICTY are presented as cautionary tales in pointing to the impediments that may arise in cases of concurrent jurisdiction.[7]

In the context of the imminent formation of the African Court, the resulting impediments between national courts and international tribunals are further highlighted, both with concurrent jurisdiction potentially existing across national court systems and the continental and international court system. This requires an unpacking of the link between national, continental and international jurisdiction, and clarification of which court has jurisdiction over the crimes investigated. Ultimately, it is a question of primacy versus complementarity on a legal side, and legitimacy versus sovereignty on the political side, in the operations of the ICC and the impending African Court.

Currently, the ICC holds jurisdiction with regards to crimes of international concern. However, regarded as the 'court of last resort', complementarity of the ICC with national courts indicates a limited power. In discussing complementarity and primacy between the African Court and the ICC, the analysis of concurrent jurisdiction cannot be divorced from the inherent politicisation of international justice that is underpinned by institutions like the UN and, more specifically, the UN Security Council. This politicisation is indicative of how the work of a connected institution like the ICC is influenced. While *legally* it is clear that the ICC does not hold primacy over state jurisdiction, the *non-legal* primacy attached to the ICC is made clear in the line of thinking that the African Court will allow for impunity, and that it is a compromised institution before it has even been constituted.

In response to this thinking, an alternate view would be that the legitimacy that allows for non-legal primacy attached to the ICC is in effect challenged by calls for reforms within the ICC – or the complete withdrawal from the ICC. In acknowledging the need and value in creating a court that is African-led, the debate between primacy and complementarity between the two bodies is one that is pertinent and revealing of the environment within which international justice operates.

Potential areas of concurrent jurisdiction between the ICC and the African Court

The Malabo Protocol permits for a comprehensive jurisdiction over crimes of genocide, war crimes and crimes against humanity. Furthermore, it addresses numerous transnational crimes that include terrorism, piracy, and trafficking in persons and drugs. It also speaks directly to the accountability of governments and multi-national corporations in its mandate to hold jurisdiction over the exploitation of natural resources, money laundering and corruption and unlawful changes of government.

The potential overlapping spheres of operations between the ICC and African Court is specifically with regards to the four crimes over which the ICC has jurisdiction: international crimes of genocide; war crimes; crimes against humanity; and crimes of aggression. This may result in conflicting and overlapping obligations placed on member states in instances of both courts investigating the same case. While parallel in their missions, the two courts will essentially operate in competition, resulting in countries being required to select which obligations to abide by and which to breach, when to cooperate and when not to, thus worsening the current climate of selective and politicised justice.

In speaking to these concerns, the chief executive officer of the Pan African Lawyers Union (PALU), Don Deya, noted the following:

> *The drafters and negotiators are acutely aware of the fact that the proposed Court will be complementary to national courts and will co-exist with other international courts, which will have similar mandates and jurisdictions to it. For instance, part of its general affairs mandate will be shared with the International Court of Justice (ICJ), and also the Courts of the African RECs. Similarly, its human and peoples' rights mandates will be shared with some (if not all) of the Courts of the RECs. Furthermore, its international criminal law mandate (at least in respect of the crimes of genocide, crimes against humanity and war crimes at the moment, and the crime of aggression in the future) will be shared with the ICC.*[8]

Following from this, it is further noted:

> *The drafters and negotiators clearly envisage that, since multiple courts will share jurisdiction, these courts may opt to negotiate among themselves on how best to handle this shared jurisdiction so that the ends of justice are met in an effective, efficient, credible and fair manner. In this regard, it is left to the Courts themselves, once fully constituted, to negotiate how they will work together. The aim is to reduce the possibility of 'politics' or 'political considerations' playing a part in what should essentially be a judicial task.*[9]

While pragmatic and logical in this approach, the nuances of how to operationalise this overlap in mandates are less coherent and straightforward. It is not apparent within the Malabo Protocol how priority will be given to the different instruments when both hold jurisdiction over a particular case, placing state parties in difficult legal circumstances.

A reflection of this vagueness or failure to address the ICC explicitly is captured within the Malabo Protocol. In speaking to 'complementary justice', the Malabo Protocol solely addresses regional and national courts but does not make mention of the ICC. The silence on the matter of the ICC is highlighted in Article 46H of the Malabo Protocol, which states:

> *The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.*[10]

In addressing cooperation and judicial assistance, specific relation to the ICC is also vague in Article 46L(3), that notes:

> *The Court shall be entitled to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose.*[11]

It is clear that the conceptualisation of concurrent jurisdiction must be understood through the interaction between national courts, the ICC and the African Court. The AU comprises 54 member states, with 34 of these states being party to the ICC. The Malabo Protocol, like the Rome Statute, requires for states to enact legislation through national courts that subsume crimes named under the founding pronouncement. This is made possible due to complimentarity, that stipulates that domestic legislation should be reflective of statutes and protocol that states abide by internationally. The domestication of both the Malabo Protocol and Rome Statute will present challenges to African states, due to crimes encompassing varied definitions, as well as the fact that the Malabo Protocol encompasses crimes not

stipulated in the Rome Statute. In practical terms, the enactment of both translates into cooperation with the corresponding institution. Currently, legislation is geared towards cooperation with the ICC, resulting in a need for redraft to include cooperation with the African Court. One particular area where displays of conflicting cooperation will be present is in the *prosecuting* versus *protection* of sitting heads of state by the Rome Statue and Malabo Protocol respectively.

On the question of immunity

Unlike the Rome Statute, Article 46A of the Malabo Protocol[12] stipulates that the Protocol of the African Court grants immunity to sitting heads of states and state officials. This creates another point of contention between the prospective operations of the African Court and the current operations of the ICC, with the continued indictment and prosecution of sitting heads of states. In this particular case the issue of concurrent jurisdiction will become more salient, and the nature of state cooperation might become even more complicated than currently observed. With the Constitutive Act of the AU indicating a strong stance against impunity in Africa, the allowance of immunity of current presidents by the AU is regarded as largely contradictory.

Immunity is further understood in terms of functional and personal, where the former refers to official duties or roles of current and previous senior state officials, and the latter refers directly to the individuals who are current senior state officials while in office. Personal immunity can be applied to international crimes, but functional immunity cannot be invoked in relation to international crimes, as the committing of international crimes is in contempt of the official and acceptable acts of a senior state official.

Immunity towards state officials has a wider history dating back to the 'divine right of kings', which translated into kings being regarded as infallible, and therefore incapable of being accused or indicted by a court.[13] The thinking behind immunity is further expanded with the blurring of state sovereignty and the individual who represents and governs a country, resulting in rulers then, and state officials today, being regarded as sovereign. From this historical overview, immunity of state officials is regarded as a product of international customary law, trumping statutes and protocols that place responsibility on states to prosecute individuals guilty of committing the stipulated crimes.

The Rome Statute is a marker of the change in the approach towards state officials. In practice, there is a shift towards beginning to prosecute former presidents, as seen in the case of Hissène Habré. However, a contentious point that remains is the prosecution of *sitting* heads of states, as seen in the cases of Al-Bashir and Kenyatta. The logic of not prosecuting sitting heads of state is to ensure that, while in office, they are able to carry out their required tasks without their duties being compromised by the lengthy period of a trial. The stance taken towards sitting heads of state by the Malabo Protocol can be regarded as an obstacle to ensuring accountability, preventing the order of criminal responsibility.

The inclusion of the immunity clause has raised concerns within African and international civil society. The greatest concerns are the implications for victim groups of a sitting head of state who implements violence and genocide, both within and outside their country. In preventing the investigation and prosecution of presidents, the African Court will be rendered obsolete before it begins operations. The African Court will therefore embark on the same biased path as the ICC, though for different reasons, missing an opportunity to challenge political and economic power structures and reframe international criminal justice.

Conclusion: The African Court beyond concurrent jurisdiction

The African Court's proposed jurisdiction is expansive and laudable in its attempt to address crimes of an international nature and specific to the continent. Beyond the question of concurrent jurisdiction, there are also considerations that must be taken on a definitional and theoretical level, with the Malabo Protocol forming jurisdiction regarding numerous crimes that are yet to be fully recognised and secured in the broader space of international criminal law. An example of an area that the Malabo Protocol addresses but is yet to be constituted in the jurisdiction of international criminal law would be the undemocratic change of government. As an example, legally addressing the undemocratic change of government is a contentious and subjective issue that falls into definitional and theoretical grey areas, and deeper development is required both legally and politically by the Malabo Protocol. This is specifically important given the history on the African continent of military coups, the rigging of elections, and heads of state refusing to leave office.

However, the African Court should be noted as a pioneering effort, in the endeavour to go beyond simply reflecting existing international law and instead creating new law to reflect the ongoing crimes that take place in African states. The caution is that we must be aware of the power structures and conditions that facilitate the persistence of these crimes, and the interaction

between international and continental politics and courts. International crimes that fail to be fully acknowledged and dealt with through international instruments are largely left unattended because of international politics in the interests of a few. The jurisdiction of international instruments and wider operations is limited by the agreement between key stakeholders and power players on the fundamental components that make a crime one of international concerns. Premised on this need for consensus, the prosecuting of crimes such as the unlawful change of government or the exploitation of natural resources will require the continental unanimity.

Financing is also presented as an area of concern for the operations of the African Court and its capacity to meet its mandate. Member states of both the Rome Statute and the Malabo Protocol will face the pressure of funding both the ICC and the African Court, which could result in a substantial burden for specific countries. Considering the potential impact on the ICC, this may lead to countries' pulling out of the ICC in a bid to finance the African Court. The political economy of international criminal justice holds wide-ranging implications when it comes to the funding of courts which requires efficiency, objectivity and autonomy in their operations. With the AU itself still being largely dependent on Western countries and international financial institutions,[14] there is a clear need for the continental body to become self-reliant if it wishes to build a court that reframes international justice effectively.

Despite these challenges, the African Court holds stimulating prospects for international criminal justice. It should be understood as one of many instruments that hold the potential to reshape the course of justice innovatively, in three ways.

Firstly, it presents the opportunity for a reclaiming of justice, drawing attention to the systemic violence that continues across the continent that would otherwise not be considered to be crimes of an international dimension. Crimes such as trafficking in persons and drugs, as noted in the Malabo Protocol, are indicative of social inequalities that persist. By placing jurisdiction on these crimes, the misreading of international crimes that place them on a hierarchy is rendered obsolete. Instead of being approached as a development that fails to fit within the confines of existing norms, this expanded jurisdiction emphasises the much-needed work that must still be done by international justice. More so, it creates a more nuanced understanding of prosecuting injustices where we are able to link crimes and see them as both products and reinforcements to the continued conflict on the African continent.

Secondly, the African Court may create spaces that enable regional reconciliation. The regional scope of conflicts resulting in a multifaceted crisis comprises combatants, refugees, resources and weapons being unaccounted for across borders. These conditions not only produce a multitude of violations that are neglected, but also create regional environments where cross-border violations are able to be reproduced. Furthermore, the structures that are able to maintain conflict systems remain intact, rendering the peacebuilding and transitional justice programmes incomplete and further preventing reconciliation from taking place. This indicates the need for a reconceptualisation of the strategies and infrastructure we use within the African context. Linking to the notion of African solutions to African problems, the realisation of the African Court in addressing transnational crimes will allow for conditions that may lead towards regional reconciliation.

Finally, in an international sphere of shifting political and economic powers that extends between governments, individuals, civil society, multinational corporations and regional institutions, there is a need to rethink international justice as well as its scope and purveyors. With the developing dimensions of crimes such as human trafficking and terrorism extending beyond borders, a comprehensive response is necessary from international justice.

With Africa being a strategic continent for rising powers in the East and existing powers in the West, it is vital that accountability and monitoring be placed on the activities of both internal and external forces. Representing the potential for a new era of growth and stronger linkages between African countries, the addressing of crimes committed on the continent through a new lens is much needed. While the impending African Court may carry doubt on various points, what should not be doubted is the influence it will have in challenging and disrupting the biased workings of the ICC that have previously been normalised. In time, the African Court holds the potential to usher in a new era for international justice – or to be a missed opportunity for the reframing and advocating for international justice.

Policy recommendations

The African Court

- The African Court must re-evaluate its mandate and projected capacity to ensure the avoidance of selective justice and compromised operations due to a lack of funding or limited workforce in judiciary and investigations.

- The African Court must ensure that its stance is not dictated solely by the operations of the AU, and that instead it remains impartial and committed to its mandate, acting as an instrument towards justice and not a tool for the advancement of the interests of specific individuals.
- The African Court must proactively clarify its relationship with the ICC, and this must be addressed in the groundwork and final Protocol that is passed, as it will dictate the effectiveness of the African Court and its future operations.
- The role of civil society organisations must not be undermined. Instead, the African Court must listen to, and act upon, the concerns raised across the continent and engage with them as legitimate stakeholders in the push for continental justice.

The African Union and governments

- The AU must ensure that all governments share a common understanding of the basis and power of the African Court, committing to the upkeep of an impartial court regardless of the justice processes that transpire.
- African governments must hold extensive public consultations with all national stakeholders, from the legislature and judiciary to civil society organisations and companies operating in the country, in order to ensure transparency and inclusive participation.
- The AU should facilitate the connection between the ICC and African Court, operating from its position of holding a bloc in the Assembly of State Parties, and must lobby for effective cooperation between both bodies.

The ICC

- The ICC must re-evaluate its stance both towards the AU as well as African states individually, through a process of recognition and re-engagement with state parties, in a bid to improve relations with states as well as the continental body.
- The ICC must work to ensure that an institution or position is created to act as a facilitator between the AU and the ICC in connecting the two bodies, as this will be vital for the effective operation of both the African Court and ICC.
- The ICC must also take a clear position on addressing the criticisms placed on the court by African states, civil society and other stakeholders.

African Civil Society

- Civil society must ensure that it holds balanced perspectives of both the ICC and the impending African Court, holding both bodies accountable for their interventions or lack thereof.
- The work of civil society must also be framed and understood as resources that can assist both bodies in various stages of their work, from investigation to prosecution, placing civil society as a key player in the success of both the ICC and the African Court.
- Civil society must continue its advocacy work in victims' rights through dialogue and documenting, ensuring that the gap in practice and mandate is bridged by engaging with local communities and representing their experiences.

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The Institute for Justice and Reconciliation (IJR) was launched in 2000 by officials who worked in the South African Truth and Reconciliation Commission, with the aim of ensuring that lessons learnt from South Africa´s transition from apartheid to democracy are taken into account and utilised in advancing the interests of national reconciliation across Africa. IJR works with partner organisations across Africa to promote reconciliation and socio-economic justice in countries emerging from conflict or undergoing democratic transition. IJR is based in Cape Town, South Africa. For more information, visit **http://www.ijr.org.za**, and for comments or enquiries contact info@ijr.org.za.

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