

The African Criminal Court

Towards an Emancipatory Politics

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The relation between law and politics is a difficult question for every international criminal tribunal; for the proposed African Criminal Court (ACC), it is already subject to heated debate. But it is also a crucial question, for whether the proposed new African court will be legitimate and effective will in large part depend upon whether a viable relationship between law and politics can be negotiated in its establishment and future operation. In this chapter, I will argue that the dominant positions in the debate over the politics of the proposed ACC, while presenting a broad set of possibilities for the court, tend to sidestep what may be the most important aspect of the question: not *whether* politics will shape the proposed court, but, because politics will inevitably shape its operation, *what* political agenda and orientation should determine the court's functioning. Only if the proposed ACC is moulded by progressive, democratic political agency – a possibility enabled by the court's location within the African Union (AU) as well as certain provisions of the Malabo Protocol – will it be able to contribute to an emancipatory politics. To realize this possibility will require effectively addressing the dilemmas revealed by interventions of the other major international criminal tribunal involved in Africa – the International Criminal Court (ICC) – which have tended to entrench the violence of powerful states, both African and Western, and to undermine possibilities for peace and justice. In charting this course for the proposed ACC, the dominant understanding of the relation between politics and law needs to be re-thought and the foundation of the political vision guiding the ACC needs to be critically examined. Otherwise, the proposed African court may be subject to counterproductive instrumentalization by states and may end up replicating the problems seen with the ICC.

This chapter will locate the emancipatory potential of the ACC in specific elements of the Malabo Protocol, in particular in its expanded slate of international crimes and the expanded set of persons and organizations over

whom it claims jurisdiction. It will also locate this potential in the fact that the proposed court is embedded within a regional peace and security architecture, a fact with institutional political importance in terms of allowing broader continental policies and commitments to shape the court, but also with symbolic importance in terms of the kinds of political claims that can be made upon it. Together, these may allow the ACC to respond to and be accountable to African peoples, movements and organizations, representing a significant advance for international criminal tribunals. However, I emphasize that this kind of responsiveness and accountability, and ultimately the court's emancipatory political possibilities, are just that – possibilities – and there is no guarantee that the ACC will realize these progressive dimensions. Indeed, whether or not it can do so depends not so much on the technical legal and institutional developments leading to the future operation of the court – although these are certainly important – but, centrally, on whether democratic movements and struggles can effectively engage with and steer the court's development and operation now and into the future, so that international criminal law becomes a tool of progressive continental politics.

1. LEGALISM AND THE ACC

The idea that politics should guide international criminal tribunals is anathema to the dominant legalist approach, which declares that politics can have no place in determining the operation of international criminal tribunals, which are legitimate and effective only when they are insulated from politics.¹ Legalist arguments have been made on both sides of the debate over the ACC, pitting those who see the proposed court as an important piece in an apolitical global legal architecture against those who see it as a significant threat to that architecture because of its inescapable politicization. Exploring this debate can help illuminate the possibilities faced by the ACC.

For legalist proponents of the ACC, the court can effectively fill in gaps within the existing international criminal law architecture, a structure that reaches from national courts, up through regional mechanisms, to the ICC at its pinnacle. Based on an expansive notion of complementarity, international criminal law is envisioned as most effective when there is a multiplicity of mechanisms with specific geographical or subject-matter competences, providing a comprehensive web of courts to ensure that no case escapes prosecution under international criminal law. Most strongly voiced by the

¹ For the classic treatment of this theme with reference to international tribunals, see J. Shklar, *Legalism* (Cambridge, MA: Harvard University Press, 1964).

AU itself, this position presents the ACC as a good-faith effort by Africa to carry forward the fight against impunity. The proposed ACC brings certain advantages to the existing legal architecture, it is argued, in particular the expansion of the crimes within its jurisdiction to include those particularly relevant to Africa, and the commitment to hold corporations, as well as individuals, legally accountable, both of which will be discussed further later. In this view, there is no politics to the ACC beyond closing the ‘impunity gap’ more effectively and providing justice to victims – fundamentally moral-legal objectives. In Don Deya’s words, the ACC will be in a ‘complementary and harmonious relationship with the ICJ, the ICC and other courts,’ ‘the aim,’ he explains, being ‘to reduce the possibility of “politics” or “political considerations” playing a part in what should essentially be a judicial task.’² This legalist argument identifies significant practical hurdles in the way of an effective, legitimate ACC – ranging from funding gaps, to an overly expansive jurisdiction, to the need for legal development of newly included crimes, to a lack of clarity concerning relations with the ICC and with national courts.³ However, with proper legal design and state support, it is maintained, the ACC will be able to overcome these hurdles and contribute towards the global rule of law.

For the ACC’s legalist critics, however, the court will necessarily be subject to intense and counterproductive politicization by African states, and so its insulation from politics will be impossible. The ACC will be inescapably politicized by African political elites and an AU that represents their interests, critics argue, and so the ACC will undermine the global rule of law, not contribute to it. The most commonly cited evidence for this is the Malabo protocol’s controversial immunity provision, as well as the fact that the most immediate impetus for the development of the court seems to have been the ICC’s prosecution of presidents Omar al-Bashir and Uhuru Kenyatta. The argument against the ACC is thus often paired with a defence of the ICC, as those supporting the former are accused of doing so in order to undermine the latter and, in so doing, the fight against impunity. Critics have, implicitly or explicitly, denounced the proposed ACC as a ploy by African leaders to

² D. Deya, ‘Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes’, *Openspace* 2 (February 2012) 22–6, at 25. See in particular the presentation of this position in V. Nmehielle, “‘Saddling’ the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?’, 7 *African Journal of Legal Studies* (2014) 7–42, at 8.

³ For a sober assessment of these practical obstacles, see A. Abass, ‘The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects’, 60 *Netherlands International Law Review* (2013) 27–50.

guarantee themselves immunity from prosecution through an ineffective, compromised institution that will be under their control in a cynical instrumentalization of international criminal law. This understanding often appears based upon a fundamental distrust of any politics in Africa and an assumption that African sovereignty is little more than a shield for abusive leaders against international human rights. As Murungu argues, the AU may not have ‘any genuine purpose in establishing a Criminal Chamber’ other than ‘trying to protect some of its leaders who are well known for a culture of impunity and the commission of serious international crimes against their own citizens.’⁴ According to Kurt Mills, the proposal for the ACC is ‘designed as [an] attempt to put the brakes on globally based prosecutions of Africans—or at least African heads of state,’⁵ and Max Du Plessis has asked if the ACC is a case of ‘negative complementarity,’ possibly setting the stage for show trials and entrenching impunity.⁶ The ACC is a threat to the ICC and there can be no principled opposition by African states, organizations or intellectuals to the ICC and its actions, according to this position: Richard Dicker of Human Rights Watch asserts that the AU’s challenge to ICC prosecutions of African heads of state reveals that ‘the AU leadership’s objective was to . . . roll back the fight against the most serious crimes under international law’; African states’ opposition to the ICC is thus ‘a rejection of the fight against impunity’.⁷

- ⁴ C. B. Murungu, ‘Towards a Criminal Chamber in the African Court of Justice and Human Rights’, 9 *Journal of International Criminal Justice* (2011) 1067–88, at 1087. See also the ‘Joint Letter to the Justice Ministers and Attorneys General of the African States Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights’, 3 May 2012, available online at www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties (visited 15 September 2016).
- ⁵ K. Mills, ‘“Bashir is Dividing Us”: Africa and the International Criminal Court’, 34 *Human Rights Quarterly* (2012) 404–7, at 423–4. Matasi and Bröhmer conclude that it appears from the provisions discussed above that these are technical maneuvers to oust the jurisdiction of the ICC; see M. Matasi and J. Bröhmer, ‘The Proposed International Criminal Chamber Section of the African Court of Justice and Human Rights: A Legal Analysis’, *SSRN Electronic Journal* (2013), available online at <http://ssrn.com/abstract=2236040> (visited 15 September 2016), at 16.
- ⁶ M. Du Plessis, ‘A Case of Negative Regional Complementarity?’, *EJIL: Talk! Blog of the European Journal of International Law*, 27 August 2012, available at www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/ (last visited 15 September 2016). See the discussion in K. Ambos, ‘Expanding the Focus of the “African Criminal Court”’, in W. Schabas, Y. McDermott and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (New York: Routledge, 2016) 499–529, at 521–4.
- ⁷ R. Dicker, ‘The International Criminal Court (ICC) and Double Standards of International Justice’, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015) 3–12, at 10.

Against these critics of the ACC, AU Legal Counsel and Director of Legal Affairs Vincent Nmehielle points out that categorical condemnation of the ACC takes the AU's effort as being necessarily in bad faith and the proposed court as being entirely subjugated to the will of putatively criminal, corrupt African leaders.⁸ Instead, he argues, the diversity of positions on international criminal accountability among African leaders, and even within the AU on the prosecution of African heads of state, must be recognized. Thus, the practice of the ACC is by no means politically predetermined. Du Plessis similarly agrees that, while there are some countries who seek to use the ACC as a way of undermining the ICC, 'it is too simplistic to claim that the proposal for such a mechanism is simply or purely motivated by a desire to undermine the ICC,' in particular since moves towards an ACC predated the ICC's indictment of al-Bashir.⁹ Thus, the ACC's possibility of being a key piece in a global legal architecture cannot be dismissed out of hand.¹⁰

The legalist critics of the ACC prejudge the counterproductive politicization of the proposed court; the legalist supporters of the ACC tend to assume that politics can be eliminated from the functioning of the court, thus guaranteeing its legitimacy and efficacy. Both, however, ignore the lessons about the relation between politics and law offered by the immediate history of the ICC, which tends to be held up by the critics of the ACC as a model international court. A brief look at the relation between law and politics in the ICC's operation in Africa suggests that politics are an inescapable dimension of international criminal tribunals in Africa and, thus, that instead of the legalist pretence that politics can be eliminated from the workings of international criminal law, the centrality of politics to law should be accepted. Admitting this inevitable politicization would then allow for open debate over what those politics are and should be and how courts can be held accountable by those in whose name they act.

The discussion of the ICC will set the stage for my argument, namely, that although the ACC shares the fundamental limitations revealed by the ICC's work in Africa, the African court is within a sufficiently different context that it

⁸ Nmehielle, *supra* note 2, at 33–4.

⁹ M. du Plessis, T. Maluwa and A. O'Reilly, *Africa and the International Criminal Court*, Chatham House International Law, July 2013, available online at www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf (visited 15 September 2016), at 10.

¹⁰ This was the position articulated by the representatives of Human Rights Watch and Amnesty International at the African Court Research Initiative International Symposium (Arusha, Tanzania, 28–29 July 2016), although both expressed serious reservations about the practical hurdles in the way of the ACC's being able to help address the impunity gap.

has the possibility of contributing towards an emancipatory politics. However, as suggested already, this possibility requires a re-thinking of the relation between the ACC and the political beyond the legalists' false dichotomy of international law either being part of a non-political 'fight against impunity' or being corrupted by politicization.

2. LESSONS FROM THE ICC IN AFRICA

The irony of the legalist critique of the ACC is that many of the arguments being made against the proposed court – that it will be politically instrumentalized by powerful states to the detriment of legality and justice, that it will uphold authoritarian rule instead of challenging it – are precisely the accusations that have been made against the ICC, often by African critics.

Today, fifteen years after the Rome Statute entered into force, there remain few observers who would deny that the ICC's practice in Africa has been guided by pragmatic decisions on the part of the prosecution, shaped by global politics. The ICC's exclusive focus on Africa is fundamentally a product of the global War on Terror: The US was actively opposed to the ICC when it was founded, and so the ICC, under threat before it had even started its first case, decided it would have to conform to US interests if it was to have a chance to survive. As David Bosco has described in detail, the ICC responded to US opposition by making clear that it would target putatively politically meaningless African violence, not the violence of the US or its allies. And so the first, defining case for the ICC, launched at the very moment when US invasions were raging, was the DRC.¹¹ The ICC's turn to Africa represented a strategic response to the changed political landscape after 9/11, but it also drew on a long history of Africa being represented as a terrain of humanity, of incorrigible savages committing atrocities against helpless victims in need of a Western saviour.¹² The ICC's exclusive intervention in Africa was thus a product of international power relations that made Africa the only region weak enough so that international intervention could take place there without accountability and unimportant enough so that the West would allow the ICC to intervene there, and also the historical legacy of the Western civilizing mission in the continent. The result was that there has been a substantive politics behind the ICC's supposedly apolitical legal engagement with Africa: the ICC has

¹¹ D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press, 2014), at 89–90.

¹² M. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 42 *Harvard International Law Journal* (2001) 201–45.

reinforced the relation of subordination between Africa and the West by declaring African sovereignty to be subject to disqualification by a 'global' court that appears structurally unable to intervene anywhere but in Africa.

But avoiding US censure was not enough; the court also had to seek enforcement power – the fundamental dilemma faced by any international criminal tribunal built upon a domestic model of criminal law enforcement. The history of the ICC in Africa has thus been a history of the ICC's constant effort to align itself with Western, in particular US, support in a desperate quest for enforcement capacity.¹³ Constructive relations have emerged between the ICC and Western violence: the crowning moment was in Libya, when the ICC was a partner in regime destruction, but such alignments have also been seen in Uganda, Mali and Ivory Coast. The recent capture of LRA commander Dominic Ongwen, for instance, was enabled by the presence of the US military in Central African Republic as part of the expansion of AFRICOM.

The ICC's decisions as to where to intervene within Africa, its tendency to target certain situations to the exclusion of others and pursue certain parties within those conflicts while ignoring others, have been shaped also by its need for powerful allies *within* the continent as well. Frequently, the ICC allies itself with African states who will facilitate prosecutions and, in exchange, provides those states with effective immunity. The ICC takes sides with the victors or the stronger party to a conflict, even though violence by all sides could fall under the ICC's jurisdiction. In practice, the ICC's capacity appears limited to prosecuting minor warlords who have fallen out with state sponsors and former African leaders who have been overthrown by Western military intervention. The result is that, in every case in which the ICC has become involved, the court has either aligned itself with the interests of the powerful or, when it has tried to prosecute those with power, faced disaster – most notably with the collapse of the cases against Uhuru Kenyatta and William Ruto and the constant disregard of the arrest warrant against Omar Al-Bashir, which have thrown the court into crisis. Thus, the ICC has made it clear that the best way to avoid prosecution is not to abide by the law but to win on the battlefield, to sign up to the War on Terror or to offer up suspects to the ICC.

African states have realized the ICC's dire straits and taken advantage of the situation themselves.¹⁴ The ICC has been instrumentalized by states or,

¹³ A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (New York: Oxford University Press, 2011), at 200–203.

¹⁴ For more on this logic, see P. Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda', in N. Waddell and P. Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008) at 37–45.

sometimes, non-state actors who seek to appropriate for themselves the mantle of 'saviour' so as to legitimize their violence, often through the strategic use of self-referrals. African states can, through ICC intervention, obtain justification for their use of force against those whom the ICC has declared international criminals. This ability to assume the role of human rights enforcer is typically the prerogative of African states with the requisite international patronage, and so global law enforcement can provide a link between the West and its allies, justifying militarized state-building in the name of building the capacity to enforce international justice. Thus, the ICC's practice has conformed most closely not to the liberal rule of law but to international lines of force, ushering in not a post-Westphalian order but a new geography of de facto impunity. Again, the substantive politics behind the court's putative apolitical legality are revealed: to entrench the power of authoritarian African rulers and violent state actors.

The final political dimension to the ICC's operations in Africa stems from its exclusive jurisdiction over atrocity crimes. Because the crimes the ICC has jurisdiction over – war crimes, crimes against humanity and genocide – are so extreme and morally charged, the ICC's practice cannot help but be endowed with a polarizing logic of friend-enemy.¹⁵ That is, perpetrators of atrocity crimes are more than criminals – they are the inhuman enemy, the *hostis humani generis*. At the same time, the crimes are considered so atrocious, so morally evil, that the 'friend' is anyone who will effectively deploy violence in the name of enforcing international law, who will bring such inhuman perpetrators to justice. The result is that, as the ICC gets involved in contexts of widespread, extreme violence, it provides a tempting instrument for those who would seek to criminalize and dehumanize their enemies through international law and would seek to sanctify their own violence as enforcing human rights. This has meant that the ICC intervenes into situations of significant political violence, which it can end up polarizing and intensifying, raising the stakes in dangerous ways. When this tendency is combined with the ICC's political selectivity in terms of where it intervenes, as just discussed, the danger is obvious: in the very pursuit of international legal justice, international courts can become accessories to the violence of the powerful and entrench violence in conformity with existing lines of power.

These negative repercussions of ICC intervention have produced significant resistance to the ICC from within Africa from a broad set of social and

¹⁵ S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21 *European Journal of International Law* (2010) at 941–65.

political actors who have accused the ICC of ruining peace processes and amnesties. ICC involvement, particularly in Northern Uganda, has led to intense controversies over the supposedly universal applicability of the ICC's model of justice, as activists there have mobilized for 'traditional' forms of local justice declared to be more relevant to the victims.¹⁶ In Kenya, activists were divided on whether the ICC had the capacity to deliver justice or whether it would prove ineffective and derail domestic efforts at building peace and reconciliation. And there have been accusations that the ICC ignores local voices and is ignorant of the contexts into which it intervenes.

At heart, these problems stem from the ICC's lack of accountability towards those in whose name it acts. The ICC's practice makes clear the fundamental problem facing any tribunal that attempts to enforce international criminal law on the global level in the absence of a global sovereign or global political community, that is, any court that tries to scale up a domestic criminal legal system to the global level with the assumption that the benefits of a domestic legal system – justice for victims, the enforcement of peaceful social order, deterrence – will be replicated globally. Most obviously, the attempt to enforce international criminal law without a sovereign global state leads to the selective application of the law due to the lack of central enforcement capacity. Equally important are the problems that stem from the lack of a political community at the global level that can be the source of the law and to whom the law is accountable. Without a global political community, any court that purports to enforce international law will suffer from a lack of political accountability and democratic legitimacy. It will be subject to politicization by the powerful, often by the very international actors who most need their impunity to be challenged by a global court. And so, although there is much talk of victims' participation at international tribunals, that participation is restricted to being in the limited spaces allowed by the tribunals; the legal process is in no way accountable to those victims in whose name it acts. Similarly, while the involvement of NGOs and civil society organizations is often proclaimed, those organizations with a voice are exclusively those that are focused on the anti-impunity agenda and the demand for expanding criminal accountability for certain atrocity crimes. As the consequences of the ICC's lack of accountability have become increasingly obvious, so has the ICC's legitimacy faced increasing challenge.

¹⁶ T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006).

Denunciations of ICC intervention, primarily from Africa, have become too loud for the court and its publicists to ignore.¹⁷ Many of the court's legalist supporters admit that the ICC has been politicized; however, they also insist that politicization can be dealt with within the Rome Statute regime of international criminal law. According to Keppler, for instance, 'Efforts should include pressing for the investigation of relevant crimes wherever they are committed, and broader ratification of the Rome Statute.'¹⁸ Thus, the legalist solution to politicization is typically found in insulating the ICC from external political forces, in particular the Security Council, by giving the ICC more autonomy, fostering state cooperation and providing more resources.¹⁹

This supposed solution, however, ignores the fundamental character of the ICC's politicization and treats the court as if it had the possibility to escape political pressure and become a genuinely non-political tool of global law. As I have argued, the politicization of the ICC, its focus on Africa and its subservience to the United Nations Security Council and to Western interests are not simply minor hurdles for the ICC, to be overcome through adjustments in its practice. Instead, given its lack of enforcement capacity, lack of downward accountability and exclusive jurisdiction over atrocity crimes, politicization is the condition of possibility for the ICC to function at all. In the words of William Schabas, international prosecution 'is both selective and political by nature.'²⁰ The proposed ACC will face this same dilemma as an inevitable consequence of its work – but with two key differences that may enable it to have a different relation with the political, as I argue in the next section.

To realize this possibility, however, the very idea of international criminal law as operating effectively and legitimately only when it is insulated from politics, when it is non-political, must be abandoned. We have seen that this idea cannot survive the scaling-up of international criminal law from the domestic to the global level, where the proclamation of apolitical legality only

¹⁷ See, for instance, *Is the International Criminal Court Targeting Africa Inappropriately?*, ICC Forum, Human Rights Project at UCLA School of Law with the support of the Office of the Prosecutor of the ICC, March 2013 – January 2014, available online at <http://iccforum.com/africa> (visited 15 September 2016).

¹⁸ E. Keppler, 'Managing Setbacks for the International Criminal Court in Africa', 56 *Journal of African Law* (2012) 1–14, at 7.

¹⁹ O. Bekou and A. Zidar, 'The International Criminal Court at Ten: Contemporary Challenges', in O. Bekou and A. Zidar (eds), *Contemporary Challenges for the International Criminal Court* (London: British Institute of International and Comparative Law, 2014) 1–10.

²⁰ W. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), at 97.

hides the actual political determination of law enforcement.²¹ Better to admit the inevitable politicization of international criminal law so that it can be held accountable and an emancipatory politics can be put at its centre.

3. THE POLITICS OF THE AFRICAN CRIMINAL COURT: OLD DILEMMAS, NEW POSSIBILITIES

A. *The ACC and the African Peace and Security Architecture*

Can the ACC avoid the destructive repercussions evident in the ICC's problematic relation to politics? The ACC seems to replicate the conditions that led the ICC into difficulties: it is an international court on a domestic model that lacks an enforcement mechanism; it has jurisdiction over atrocity crimes; it has no formalized mechanisms for accountability to the people to whom it is supposed to bring justice. I will argue that, while there is a significant danger that the proposed African court could very well be afflicted by the problems revealed by the ICC's interventions in Africa, the new court has at least the *possibility* of serving more emancipatory ends. This possibility stems from a different relation between the ACC and the political and thus the opportunity for a different politics to inform its work.

Legalism provides one paradigm through which the origins and the future operation of the proposed ACC can be envisaged. In this paradigm, the African court is to bring justice in accordance with international criminal law and function within a coherent global legal architecture; this global legal structure is primary and the ACC's legitimacy and efficacy are grounded in its insulation from politics. But there is a second paradigm that has helped inform and motivate the development of the African court and that provides a vision for its future functioning: a peace and security paradigm, in which the ultimate value underlying African continental institutions, including the ACC, is to ensure lasting peace and overcome Africa's legacy of political violence. Justice has a place in this peace and security framework, but it is not the narrow criminal justice for mass atrocity of the ICC and other international criminal tribunals. Rather, a broader transitional justice is valued, in which trials may play a role determined by concerns of securing a lasting peace instead of by a declared uncompromising commitment to 'ending impunity.' Thus, the proposed court, while remaining a fundamentally legal body, is informed by a continental political agenda and integrated into continental structures for achieving peace.

²¹ See *Ibid.* at 80–97 for a discussion of this dilemma.

The integration of the proposed court into broader continental structures of peace has been made possible by the rapid development of the African Peace and Security Architecture over the last decade, by the foregrounding of transitional justice in the AU, as well as by a broad commitment to a more interventionist peace agenda, which has become a prominent aspect of the AU's operations and rhetoric, most notably, perhaps, in Article 4(h) of the AU Constitutive Act.²² Most immediately, the ACC's conformity to broader goals of continental peace is enabled by specific provisions in the Malabo Protocol: Article 46F on the Exercise of Jurisdiction gives the power to refer situations to the ACC to the AU Assembly of Heads of State and Government and to the AU Peace and Security Council. The Protocol also, in Article 46H, explicitly declares the ACC to be complementary not only to national courts but also to courts of the regional economic communities, further entrenching the ACC in the multi-layered continental peace and security architecture. Also notable is the absence of explicit reference in the Malabo Protocol to the ICC or to the UN Security Council; although what the relation between these bodies and the ACC will be in practice remains to be worked out, the lack of reference to them further emphasizes the new court's primarily continental commitment. Furthermore, the fact that the ACC, with its international criminal law mandate, will be one of the three sections of the proposed African Court of Justice and Human Rights – the others being a General Affairs Section and a Human and People's Rights Section – means that the daily operations of the court as well as the epistemic and professional communities of its staff may be infused with a broader legal and political vision in which criminal trials play only a part. The prosecutor and deputy prosecutors, although comprising an independent office of the prosecutor, will be appointed by the Assembly according to Article 22A (2), again presumably ensuring that they will be committed to the Assembly's broader objectives. Together, these could enable the ACC to be integrated into what Kamari Clarke has called African 'ecologies of justice.'

The other important way in which the ACC will be able to contribute to a continental peace agenda is through its expanded subject-matter and personal

²² T. Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship?', Institute for Justice and Reconciliation Policy Brief, March 2013, available online at <http://ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%20Murithi.pdf> (visited 15 September 2016). Murithi further developed this idea in his comments at the African Court Research Initiative International Symposium (Arusha, Tanzania, 28–29 July 2016).

jurisdictions. First, the ACC claims jurisdiction over an expanded set of crimes,²³ opening possibilities not available under the Rome Statute. Of particular note is the criminalization in Articles 28E through 28L *bis* of the illicit exploitation of natural resources, but also the criminalization of mercenarism, corruption and trafficking in hazardous wastes, all of which have been subject to intense political deliberation and, in some cases, legalization through treaties by the AU and the OAU. One result is that crimes of particular importance to Africa have been enshrined within the mandate of an international court, giving the ACC's subject-matter jurisdiction a particularly African visage.²⁴ Also, as Charles Jalloh has argued, addressing these non-atrocity crimes can play a preventive function for atrocity crimes, dealing with the often overlooked factors that go into producing mass violence.²⁵ Furthermore, expanding the court's remit beyond atrocity crimes will lessen the tendency towards the moralization and political polarization of situations into which the ACC intervenes. Thus, intervention by the ACC may help defuse tense political situations instead of escalating them.

Second, the ACC claims jurisdiction not only over natural persons but also over corporations and not only over Africans but, under certain circumstances, over people and corporations globally. Article 46(C) establishes jurisdiction over corporations, while Article 46E *bis* explains that the court may exercise its jurisdiction '(c) When the victim of the crime is a national of that State;' or when faced with the commission of '(d) Extraterritorial acts by non-nationals which threaten a vital interest of that State'. In so doing, the ACC extends its personal jurisdiction beyond the borders of Africa.²⁶ Those who can be designated as criminals comprise a broader set of actors, enabling a better and more comprehensive reckoning for peace.

Put together, the net effect of the expansion of jurisdiction beyond atrocity crimes and the expansion of the personal jurisdiction beyond Africa is to open a new range of political possibilities through the law. The ACC claims jurisdiction over not just atrocity crimes committed by Africans against Africans, as the ICC effectively did, but over atrocity crimes as well as the broader range of crimes that accompany violence and conflict in Africa. It claims jurisdiction over the global networks of individuals, states and corporations

²³ This is what Charles Jalloh calls the Rome Statute Plus crimes; C. Jalloh, 'Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa', 7 *African Journal of Legal Studies* (2014) 43–59, at 56.

²⁴ Nmehielle, *supra* note 2, at 29–31.

²⁵ C. Jalloh, comments at African Court Research Initiative International Symposium (Arusha, Tanzania, 28–29 July 2016).

²⁶ See Chapter 27, this volume.

that are complicit in that violence. These crimes, from environmental destruction, to corruption, to illegal trafficking, are hidden when the focus is only on those Africans who are deemed ‘most responsible’ (or, in practice, most available) for the most spectacular atrocities. As opposed to the ICC, which takes violence in Africa and then singles out a handful of Africans upon whom it places full responsibility, the ACC can delineate more complex and accurate global narratives of those responsible for violence, potentially contributing more effectively to peace and to justice.

The proposed ACC thus entails a possible radical change in international criminal law’s role in mediating Africa’s relation with the rest of the world. The ICC, as argued above, often served as a tool for legitimating Western intervention and interference in African affairs, as well as for upholding the violent power of unaccountable African states. International criminal law as embodied in the ACC could instead become part of what Rowland J.V. Cole has called an ‘African agenda’ in international law, which he argues can be ‘traced back to the struggle for independence and the articulation of pan-African doctrine’ with a focus on dignity, self-determination and establishing sovereign equality for African states within the international community.²⁷ This is the substantive politics that could be advanced by the ACC’s more immediate political focus on peace and security. The ACC thus has the potential to serve a counter-hegemonic political vision founded on self-determination and sovereign equality, a vision that, Cole and others argue, has informed Africa’s aspirations for international law since decolonization.²⁸

However, any celebration of the ACC as an agent of progressive politics needs to be tempered by the legalist critique of the ACC and the recognition that this vision of an African court contributing to peace remains a largely state-centred agenda. As such, is open to steering or manipulation by state elites in their own interest. This is posed starkly in the contentious issue of head of state immunity, provided for by Article 46A *bis*. In an international context defined by major imbalances of power and resources, and in which the West arrogates to itself the authority to effect ‘regime change’ in the Global South, preventing African heads of state from being subject to politically motivated international criminal prosecution is crucial if self-determination is to have substantive meaning. This is one spirit in which to understand the AU’s declaration that

²⁷ R. Cole, ‘Africa’s Approach to International Law: Aspects of the Political and Economic Denominators’, *African Yearbook of International Law* (2013) 287–310, at 292. See also J. T. Gathii, ‘TWAII: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography’, 3 *Trade, Law and Development* (2011) 26–64.

²⁸ See, more generally, S. Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

it and its member states 'reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent' with regards to the ICC.²⁹ However, providing immunity to heads of state, and even more so to an amorphous group of 'senior state officials,' as the Malabo Protocol does, also sets the stage for the ACC to replicate the worst of the ICC's problems, becoming simply a tool to be wielded by regimes against political opposition. I will explore the ways that the Malabo Protocol's state-centrism opens the door to these forms of counterproductive politicization next.

B. *The ACC and Political Instrumentalization*

The first obstacle in the way of a progressive African court is that, like the ICC before it, the proposed ACC lacks centralized enforcement powers and is dependent primarily upon member states for enforcement, as established in Malabo Protocol Article 46L (1) and (2). Thus, the ACC will face the same pressure to pursue politically viable cases that the ICC has faced and may end up conforming its prosecutorial practice to pragmatic considerations. Equally troubling is the fact that Article 46L (3) declares that "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." This provision raises the spectre of the ACC serving as a subcontractor for Western security interests in the continent, a trend that has been seen with some AU peacekeeping missions in recent years. The fact that the protocol allows for state referrals in 46F (1) also opens the ACC to the kind of politically motivated self-referrals that have plagued the ICC and proven deeply controversial for that court. In the case of the ACC, the problem of self-referrals is even more exaggerated because head of state immunity guarantees that states can make referrals without even the possibility that the ACC might prosecute the referring state's own crimes. This makes self-referral to the ACC a very attractive strategy for any state involved in violent political conflict since there is almost nothing for the state to lose and a great deal to gain.

Second, the Malabo Protocol's expansion of crimes also has the potential to serve the interests of authoritarian states. The ACC proposes to establish jurisdiction over crimes that, according to commentators, are 'not yet fixed

²⁹ *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, adopted 3 July 2009, A.U. Assemb., 13th Ord. Sess., ¶ 5, A.U. Doc. Assembly/AU/13(XIII). Jalloh emphasizes the need to take the grievances of African heads of state seriously on this issue, see Jalloh, *supra* note 23, at 48.

in the international criminal law firmament.³⁰ One such crime included in the protocol which has been subject to intense critique is terrorism; the fear is that states can use the new provisions to criminalize dissent, secure power and legitimate violence.³¹ Another is the criminalization of unconstitutional changes of government, including a ban on constitutional amendments that are considered ‘an infringement on the principles of democratic change of government’ or a ‘substantial modification’ of the electoral laws within six months of elections ‘without the consent of the majority of the political actors.’³² These stipulations are so opaque – what comprises an ‘infringement,’ what is ‘substantial,’ who are the ‘political actors,’ when is a ‘majority’ present? – as to make the inclusion of this crime open to significant political manipulation. This is in addition to the question of whether changes of government through popular uprisings would be included under the law and the dangerous consequences of such criminalization for state repression of popular protest.

In short, the expansion of international crimes within the protocol, while representing a potentially beneficial expansion of the crimes and actors to be held accountable under international law by the African court, also represents a potentially dangerous intensification of the tendency to moralize and polarize politics seen with the ICC’s international criminal law enforcement. Indeed, the recent history of ‘democracy promotion’ and the way that a ‘right to democracy’ has been used to justify devastating military interventions, should give pause to those who seek to promote more liberal political orders through the international criminalization of unappealing domestic political developments. There is thus the danger that the inclusion of such expansive new crimes within the jurisdiction of the ACC may help reinforce African security states and serve Western security regimes.

Indeed, if the ACC actually gets off the ground, it will unavoidably face intense pressure to become incorporated into existing networks and alignments of power and violence within Africa, alignments that are integrated into the interventions and interests of global powers. The ACC may be buffeted by political manipulation while it searches for enforcement powers and may systematically ignore the abuses of the powerful while pursuing the weak. The existence of the ACC could even render the international criminal law

³⁰ Matasi and Bröhmer, *supra* note 5, at 11.

³¹ Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (2016), available online at www.amnesty.org/en/documents/afro1/3063/2016/en/ (visited 16 September 2016), at 16–7.

³² Malabo Protocol Article 28E (1).

regime more arbitrary and international order more opaque as there arises an increasingly inconsistent and incoherent set of regional and global legal institutions, producing more ambiguities that can be manipulated by those with the power to do so. Overlapping jurisdictions between the ACC and the ICC may allow forum-shopping by the powerful, or the pursuit of enforcement by the ACC could lead to ad hoc deployments of force, which could undermine the peace and security infrastructure of the AU instead of strengthening it. Finally, there is the threat that the ACC, in pursuit of enforcement and Western support, might itself sign up to the global War on Terror and become part of the developing transnational networks of unaccountable military and police violence across the continent.

C. *Towards a Democratic Politics for the ACC*

The Malabo Protocol thus has two major aspects; the question becomes how to ensure that the progressive possibilities are realized and the regressive are avoided. Key is the political agenda that will steer the court. This chapter has argued that the fundamental problem with international criminal courts, as witnessed with the ICC in Africa, is their lack of accountability to those in whose name they act. If the African court also comes to be characterized by a lack of downward accountability, the consequences of its politicization by states may be equally dangerous as those witnessed with the ICC. The proposed African court, however, entails novel possibilities for downward political accountability, not so much to those named as victims, but to a broader set of social movements, popular struggles and civil society organizations whose concerns go beyond the anti-impunity agenda. These possibilities may allow the progressive dimensions of the Malabo Protocol to be realized and prevent its more dangerous potentials from arising.

The most important aspect of the ACC that can enable its downward accountability is also the most obvious: its location within Africa. Being within Africa provides the context for a tenuous political community on the regional level – or, really, for multiple political actors speaking in the name of an African political community – to demand accountability from the court. This is made possible by the fact that Africa as a region has shared histories, ideas and legacies of struggle, emancipation and self-determination. It is a continent with a common experience of being subject to a violent international order and to long processes of destructive foreign interference. It has a history of efforts at continental political unity in Pan-Africanism, which bears within it emancipatory, progressive possibilities that are constantly being drawn upon to challenge more authoritarian interpretations of continental unity or national identity.

This is radically distinct from what exists on the global level, and the new possibilities of the ACC can be illuminated through a comparison to the ICC. The ICC functions within a global context that is not characterized by shared histories or common legacies, but rather by a long history of inequality and domination. There is no concrete content to concepts such as global civil society, the international community or 'humanity', no substantive history that can make them the basis for concrete political visions or programmes. As a result, under the cover of a common global community and identity, the ICC's practice reflects actually existing global political order – namely, an order of inequality and violence, which it cannot admit since its legitimacy stems from its proclamation of universality and equality.

Therefore, while the proclaimed universality of the ICC on a global scale, based in an ideological 'humanity', serves to obscure the international inequality and violence that actually define world order and shape ICC practice, the idea of African unity that legitimates the proposed ACC is fundamentally different. It draws upon ideas of continental unity based upon internal legacies of common histories, political struggles and solidarity within Africa, as well as a legacy of unity defined against an external international political and economic system that exploits and oppresses the continent. The idea of Africa thus represents a terrain on which emancipatory political claims can be made, on which certain forms of politics are possible, based on the imagination of an African political community founded through internal organization and against external oppression.

Whereas a domestic criminal legal system has a political structure – the state – to give it efficacy, and a political community – the nation – to provide it legitimacy and hold it accountable, a global court has neither. Thus, when the ICC claims to act in the name of 'humanity', it politically deploys a category that can be manipulated without accountability or without reference to any specific, concrete historical community or institution. However, when the ACC invokes 'Africa', it will have to contend with a host of other visions of the continent embodied in existing communities, historical legacies of Pan-Africanism, internationalism and regional institutions. Legacies of popular and democratic Pan-Africanism, the AU's progressive dimensions, the struggle for self-determination and sovereignty – all these can be drawn upon by those who seek to make the ACC accountable by calling upon it to take action or contesting its anti-democratic or abusive manipulation. Of course, African states and institutions also have a history of internal repression, the cynical manipulation of Pan-Africanism to silence democratic demands, and subservience to and collaboration with foreign political and economic interests and intervention. But with the ACC, at least the possibility exists for plural,

democratic and popular claims to be made on the court. The possibility opens for the ACC to be held accountable in a way that is simply impossible with the ICC, which can dismiss anyone who disagrees with it by claiming for itself the exclusive right to speak for humanity, victims or global justice.

The ACC will not be able to reject criticism made of it as representing corrupt African political interests seeking to undermine supposedly apolitical global justice. Because the ACC is dealing with specific African victims of crimes and not universal, abstract victims, it will find it more difficult to manipulate the victims' discourse to dodge criticism.³³ And, given that African states, organizations and peoples will have to live with the consequences of the ACC's actions – as opposed to the ICC, which can wash its hands of any particular situation without repercussions – perhaps the ACC will have to be more accountable for the outcomes of its interventions. For their part, African states will not be able to reject ACC decisions as a Western conspiracy.

While the proposed ACC certainly does not resolve the dilemmas of scaling a domestic model of international criminal law up to a level where the sovereign state is absent, the pathologies that plague the ICC due to the lack of any global community are ameliorated with the ACC given the more concrete reality of Africa as a political community. Again, this provides no guarantee that the proposed ACC will be any less arbitrary or any less subservient to the interests of powerful states. However, with the ACC, there is at least the possibility that it could be held accountable, in however attenuated a fashion, by those Africans in whose name it acts.

The expanded jurisdiction of the ACC helps enable this kind of democratic politics. As discussed, the Malabo Protocol includes a broad set of crimes, far beyond atrocities, that are of particular importance to Africa; indeed, it even leaves open the possibility of incorporating new crimes. The protocol also expands those agents who can be prosecuted far beyond the borders of the continent. This represents a radically new opportunity in terms of the kinds of claims that can be made on the court by social and political movements, struggles and organizations that speak in the name of Africa's peoples. Whereas the anti-atrocity agenda narrowed the scope of global justice through the agency of the ICC and other tribunals, now the potential scope of the law is expanded vastly and a broad array of social, political, economic and environmental forms of violence and oppression can be brought within the remit of global justice and remedy.

³³ S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2014) 235–62.

It is uncertain to what degree this will prove practicable. But, even if the ACC never actually carries out prosecutions in response to demands made by popular struggles, its mere existence could have a dramatic impact. For the ACC creates a site around which these demands can be made and granted legitimacy – no longer can they be dismissed out of hand as they have been by the ICC. The ACC tells African social movements and struggles that they can decide for themselves what comprises an international crime, whom should be held accountable and what global justice means today.

4. RE-ENVISIONING THE POLITICS OF THE AFRICAN CRIMINAL COURT

The ACC thus has the possibility to help articulate and advance a substantive, emancipatory politics, based on a vision of Africa as a continent with a history of violence committed against it with impunity, but also with a history of struggle to secure self-determination and justice in the face of that violence. The ACC could give legal embodiment to the demand for justice for that legacy of violence, grounded in the legacy of struggle and solidarity. In these ways, the ACC offers the possibility to be in service of a counter-hegemonic, emancipatory political project for the continent. The ACC could thus help realize a vision in which, in Antony Anghie's words, 'international law can be transformed into a means by which the marginalized may be empowered. In short, that law can play its ideal role in limiting and resisting power.'³⁴

However, the ACC will be able to achieve this democratic politics only if it is open to the demands and claims made by popular movements, social struggles and civil societies in the name of Africa's legacies of struggle for self-determination, sovereignty and democracy. This will only occur if those movements and struggles demand that the court be accountable to them – because the state elites currently deciding the shape of the ACC have no interest themselves in making the court democratically accountable. Interestingly, contemporary political developments may be laying a foundation for just such demands for accountability, found in particular in the broad uprising of new forms of protest and social struggle throughout the continent.³⁵ These developments can ground alternative understandings of international law: indeed, there is no need for international criminal justice to be the exclusive

³⁴ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2007), at 318.

³⁵ A. Branch and Z. Mampilly, *Africa Uprising: Popular Protest and Political Change* (London: Zed Books, 2015).

preserve of states. State-centric models of international law have long been challenged by legal scholars and activists, primarily from the Global South, who argue that social movements and struggles can also be sources for international law.³⁶

African lawyers, academics and activists involved in the court can thus look to social movements and popular struggles as proposing new ways of doing international criminal justice and as imagining ways to make international criminal justice responsive and accountable to those it claims to serve.³⁷ Upon that basis, African discourses and institutional experiments around the ACC may be able to help reform dominant understandings of international criminal justice more generally, opening new possibilities that have been foreclosed by the restrictive state-centred international law.³⁸ The ACC may help catalyze a process by which international law comes increasingly to be understood as a fragmented, multi-centric terrain in which multiple histories weave together within a broad ethical-political framework; in Upendra Baxi's words, these Third World understandings of international law build upon 'histories of mentalities of self-determination and self-governance, based on the insistence of the recognition of radical cultural and civilisational plurality and diversity ... They suggest constantly the need for the reinvention of our common insurgent humanness.'³⁹

An approach to international law that looks to popular movements and democratic demands for guidance for the ACC would also ensure that the international courts do not monopolize the discourse of global justice.⁴⁰ International criminal law, embodied in the ACC, will be only one part of broader political struggles, one tool among many used by progressive political forces in the service of emancipation, instead of being a new constitution to which all must conform.

Thus, the decisions and punishments meted out by the ACC may be of less importance than the symbolic value of the legal strategies it legitimates.

³⁶ B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

³⁷ L. Eslava and S. Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law', 3 *Trade, Law and Development* (2011) 103–30.

³⁸ Deya emphasizes the innovative dimension of African international law; Deya, *supra* note 2, at 26.

³⁹ U. Baxi, 'What May the "Third World" Expect from International Law?', 27 *Third World Quarterly* (2006) 713–25, at 714.

⁴⁰ K. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (New York: Cambridge University Press, 2009); S. Nouwen and W. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', 13 *Journal of International Criminal Justice* (2015) 157–76.

The ACC leads to transformations in imaginations, in ideas about what is accepted as normal and what is refused, what is justiciable and what is outside of justice. The ACC shows that there are legitimate alternatives to the vision of global justice embodied in any court and opens the debates over justice to broad plural determination. This reinforces the central lesson of the ICC in Africa: that international criminal tribunals are simply unable to function in accordance with their legitimating ideology of a single, unitary court on the international level. Rather, they are always part of a political context and will always be politically determined. And as that political context, if it is democratic, will be plural and contested, so will international law be articulated differently by different political forces. Legal analysis and activism, at the ACC and more broadly, should begin from a recognition of the plurality of African popular struggles and respond to those struggles through deliberation, debate and contestation instead of rejecting the accountability of international courts through a spurious denial of international criminal law's inescapably political nature.

