



THE AFRICAN UNION'S MALABO PROTOCOL STRENGTHS AND WEAKNESSES, AND THE GROWTH OR DECLINE OF DEMOCRACY - SECURITY AND HUMAN DEVELOPMENT IN AFRICA: AN APPRAISAL

Peter Sakwe Masumbe (PhD)

Lecturer, Departments of Public Law & Public Administration, and Political Science, University of Buea, Cameroon

Abstract: The African Union's desire to create the African Criminal Court (ACC), via the Malabo Protocol, with powers similar to the International Criminal Court (ICC), is yet to materialise, although it evokes multifaceted public reactions. Logically, creating the ACC will be gratifying, given its envisaged jurisdiction over suspected crimes, by African leaders against their citizens. But to what extent will the court be powerful? Already, doubts abound over its authority and efficacy, given the Protocol's Immunity Clause, to prevent prosecuting serving heads of state and senior officials. Other worries include, the court's financing, its civil societies' and the masses' disconnectedness, Africa's democratisation crisis, and the AU/ICC relations. Nonetheless, others see it as an institution for addressing leaders' unaccountability, thus, condemning it before its creation is counter-productive. Because, its potentials might shift leaders' insensitivity to conflicts generation, insecurity, violations of human rights and rule of law, fighting the ICC and not attacking Africa's democratisation crisis. Via the ACC, African leaders might innovate; empower indigenous manpower and environments to enhance public good. Given these controversies, I use the elite theory and the exploratory research design to appraise the Malabo Protocol and its Immunity Clause's strengths and weaknesses to discern the ACC's context, rationale and authority in relations to Africa's democratic growth or decline. I conclude that, in its present content, the Protocol and its envisaged ACC will weaken rather than strengthen democracy, security and human development in Africa.

Keywords: *Protocol, Strengths, Weaknesses, Democracy, Growth, Decline*

Introduction

Ostensibly, since the International Criminal Court (ICC) began stretching its lenses unto African leaders to account for their suspected crimes against humanity in international law, the African Union is envisaging the creation of a similar institution - the African Criminal Court (ACC). Consequently, the AU's General Assembly of Heads of State and Government had in June 2014, in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African

Court of Justice and Human Rights, hereafter referred to as the 'Malabo Protocol', to facilitate the creation of an African Criminal Court (ACC). But as Wodjie (2019) observes, "...the AU sees the ICC as an imperialist institution mounted against African leaders, thus the ACC would act as an alternative to the ICC." However, this slim argument appears persuasive just because, the ICC does not bring wagons of Western leaders into its docks, as it does to Africans.

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But do African leaders not deserve this so-called imperialist institution, given their despotic dispositions that foster declining political, economic and social fortunes in Africa? Their re-emergent dominant political party rules; strangled democracies syndromes, their intrinsically avowed proclivity for undue use of force in nascent police states, involvement in crimes against humanity, ineffective crimes investigations, impartial prosecutions and unaccountability in public affairs are illustrative. Thus, for not providing justice to Africa's victims against these misdeeds, the ICC came to the rescue, an action apparently abhorred by the African Union, (Wodjie 2019:55). For instance, the indictment of; and arrest warrants issued by certain European states against some senior African state officials or quasi officials, under charges of crimes in international law, (see the cases opposing the sons of Obiang Nguema of Equatorial Guinea and Sassou Nguessou of Congo, respectively against the State of France concerning their illicit earnings invested in France); the ICC's indictment and issuance of an arrest warrant against Al-Bashir of Sudan; and the indictment by the ICC of President Uhuru Kenyatta of Kenya and his deputy William Ruto, are according to the AU cases of imperialism against Africa.

But do Uhuru, Ruto and those ranking as such incarnate Africa more than the suffering majority of Africans who are victims of egoistic tendencies of these African politicians? What is the rationale in calling the ICC an imperialist institution, if not to give a serviceable dog a bad name, in order to kill it? Unlike colonialism which comprised entirely of European, does the ICC not have Africans as judges, prosecutors and other senior ranking officials, working there to serve humanity? To a certain

degree, "...the ICC could be an imperialistic institution," observes, (Wodjie 2019:67), yet its place in safeguarding Africa's political, economic and social landscapes is very pertinent.

Nevertheless, to the AU, these events signify abusing the principle of international jurisdiction by the concerned European states, including the biased and unfair targeting of African states by the ICC. Consequently, these events galvanised AU member states' resolve to establish an African regional criminal court, which would basically serve as an alternative to; and to operate simultaneously with the ICC, (Falana, 2019, Wodjie, 2019:34). Given the foregoing, the AU wants its member states to sign and ratify this Protocol.¹ The Malabo Protocol which in its annex² includes amendments to the Statute of the African Court of Justice and Human and Peoples' Rights empowers creating the Court with international criminal jurisdiction, thus, making the Malabo Protocol a crucial legal-political instrument. The Protocol extends the jurisdiction of the envisaged African Court of Justice and Human and Peoples' Rights (ACJHPR) to include crimes under international law. The original plan for the ACJHR³

¹ Malabo Protocol (2014), Preamble, paragraphs 9, 10, 11, 12, and 16.

² The Statute annexed to the Malabo Protocol is the Statute of the African Court of Justice and Human Rights (as amended by the Malabo Protocol), which shall hereinafter be cited as amended ACJHR Statute.

³ The original plan was the merger of the African Court on Human and Peoples rights (ACHPR) on the one side and the Court of Justice (ACJ) of the African Union (on the other side) into one single court, forming the African Court of Justice and Human Rights through the 2008 Merger Protocol. See Decisions Assembly/AU/Dec.45 (III) and Assembly/AU/Dec.83 (V) of the Assembly of the Union adopted respectively at its third (6-8 July 2004 Addis Ababa, Ethiopia) and Fifth (4-5 July 2005, Sirte, Libya) Ordinary session, to merge the African Court on Human and People rights and the court of Justice of



was a court with two sections - a general affairs section and a human rights section.⁴ The Protocol introduces a third section:⁵ the international criminal law section. Thus, if the Malabo Protocol comes into force, the ACJHR will have jurisdiction to reduce conflicts, improve security and democracy by minimising the occurrences of the ensuing fourteen issues: genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, corruption, money laundering, human rights abuses, hazardous wastes disposal and drugs and human trafficking, illicit exploitation of natural resources, and the issues that impede transparent, political and economic resources management. In essence, the international criminal law section of the ACJHR will serve as an African regional criminal court, operating in a manner akin to the International Criminal Court (ICC) but within a narrowly defined geographical scope and over a massively expanded list of crimes.⁶

Appraising the Content, Context and Relevance of an African Criminal Court (ACC)

the African Union into a single court. Following this decisions, the Assembly adopted the Protocol on Statute of the African Court of justice and Human rights at the 11th ordinary session of the Assembly of the Union in Sham El-Sheikh, Egypt, 01, July 2008. This protocol shall hereinafter be cited as the Statute of the African Court of Justice and Human Rights as amended by Merger Protocol (2008). In short amended ACJHR Statute 2008. See also Paragraph 4 of the Malabo Protocol 2014.

⁴See Article 16 of the Statute of the African Court of Justice and Human Rights (ACJHR) as amended by Merger Protocol (2008).

⁵Article 16 of the amended ACJHR Statute (2014).

⁶Amended ACJHR Statute, Article 28A.

In its Article 46A (bis) the Malabo Protocol stipulates: “Immunities: No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.” The inclusion of this clause certainly vexes many Africans. In fact, the AU’s simple fact of adopting the Malabo Protocol appears positively ambitious and gratifying, “...especially with the possibilities of fixing the souring relationships between acceptable democratic cultures and the simmering return to dominant political party rules in African countries” (Masumbe, 2016). Consequently, the stipulated principles and values underlying the Protocol appear praiseworthy. These include: the respect for human rights and sanctity of life, peace, and reduction of conflicts; ensuring security and stability; and the prevention of violations of human rights and protection of privacy.⁷ Indeed, if ratified, the ACC can potentially play a vastly positive role in Africa, which has persistently been afflicted by undemocratic rules, conflicts and impunity of crimes under international law; including the violation of human rights through muzzling of dissenting voices. In the past and in the ongoing conflicts, tens of thousands of civilians have been imprisoned, lost their lives and untold numbers psychologically devastated, maimed and displaced from their homes. Emerging from these bad governance-induced-conflicts are disturbing and

⁷Malabo Protocols (2014) preamble, Paragraphs 9,10,11,12 and 16.



horrifying accounts of killings, tortures, rapes, mutilation of bodies, and the inordinate conscription of children and women as soldiers and wanton ruin of property in a continent surging within poorly harnessed resources (Bana, 2018, Falana, 2019:2).

In essence, the blatant violations of human rights and humanitarian laws are common progenitors of sectoral or ethnic conflicts and incessant grand features of bad governance in the continent. Irrefutably, armed groups and Government civil and armed forces alike egoistically abet these incessant abuses. For instance, in North-Eastern Nigeria and the Far North Cameroon, evidence abound suggesting that crimes against humanity and war crimes might have been committed by Boko Haram, a terrorist outfit and even by regular Nigerian and Cameroonian Security Forces.⁸ In Cameroon, the Anglophone Separatist Fighters and the regular Cameroon Defence Forces have often allegedly committed crimes under universal law that might amount to war crimes.⁹ In South Sudan, the African Union Commission of Inquiry established in March 2014 to investigate human rights violations in the conflict that erupted in that country in December 2013 has reasonable grounds for war crimes such as murder, rape, and torture,

which might have been committed by both the Government and rebel forces.¹⁰

Thus, across the continent, cries from victims of injustice are abound in loud and clear terms.¹¹ Yet, acts of impunity are a common denominator in Africa's political landscapes, as those suspected of crimes under international law are rarely held accountable. Regularly, national governments have been unwilling or unable to conduct prompt, independent, impartial, and effective investigations into allegations of crimes under international law; with the view to ultimately bringing all those suspected of criminal responsibility to justice in fair trials. Thus, the ACC as envisaged under the Malabo Protocol has the potential to fill the accountability gap, which is now highly relevant and very much evident at domestic levels in African countries.¹² Consequently, the truth is that, there can be no democratic growth without an adequate justice system – a justice system which guarantees human and material security and citizens' hopes for their improved well-being in congenial atmospheres.

However, some actors have expressed extensive concerns about the proposal to establish the criminal chamber of

⁸Amnesty International, 'Our job is to shoot, slaughter and kill': Boko Haram's reign of terror in north-east Nigeria (Index: AFR 44/1360/2015), April 2015; Amnesty International; Stars on their shoulders, blood on their hands: War crimes committed by the Nigerian military (Index: AFR 44/1657/2015), June 2015.

⁹Amnesty International, Human rights under fire: Attacks and violations in Cameroon's struggle with Boko Haram (Index: AFR 17/1991/2015), September 2015.

¹⁰Final report of the African Union Commission of Inquiry on South Sudan available at www.peaceau.org/uploads/auaiss.final.report.pdf (accessed on 19 October 2017).

¹¹See for example Amnesty International, Crying for justice: Victims' perspectives on justice for the post-election violence in Kenya (Index: AFR 32/001/2014), July 2014.

¹²Malabo Protocols (2014) preamble, Paragraph 17.



the ACJHR.¹³ As they argue that such a proposal is an attempt by the AU to shield African heads of states and their senior state officials from being accountable for crimes they might have committed within the ambits of international law.¹⁴ It is also argued that the proposal is an effort to score political points with the ICC rather than address the needs for human rights justice and accountability for crimes committed during in or out of tenure. Beyond the couched drive in the Malabo Protocol, this work concerns some of the legal and political standards contained in the Protocol and the capacity of the Court to deliver on its expanded mandate. This mandate, it is believed can slow down the human rights injustice system and promote democracy in Africa. The AU's decision to include criminal jurisdiction within the ACJHR could have far-reaching human rights implications and this study believes that analysis of these implications is imperative, because, it is such that civil

society organisations (CSOs) should have strong inputs. Consequently, the foregoing explains the context, content and relevance of an African Criminal Court (ACC) and above all the impetus for mounting this research work.

The Theoretical Framework of Analysis: Mosca, Pareto and Michel's Elite Theory of Politics

The argument by Africans who have lost faith in the envisaged African Criminal Court (ACC) even before its take-off is that, the African Union's Malabo Additional Protocol is anchored on elite interests and preferences. According to them, the idea, character, activities and modalities orchestrated by this Protocol, regarding this court are too narrow, since *ab initio* the envisaged court premise is completely disconnected from the general public, the civil societies organizations and community based organisations; especially on how to emasculate the growing African's democratisation decline, epitomized by flagrant abuses of the rule of law; and the non-propulsion of citizens' economic and social development in the continent. The Protocol ignores public opinion, particularly on how to deal with the numerous money laundering and other economic crimes perpetuated by African political and economic leaders (Remodjo, 2918, Shilodize, 2019).

Thus, the African Union's Malabo Protocol envisages protecting the interests and preferences of the ruling elites such as heads of states and other senior government officials by inserting the immunity clause. Obviously, with the immunity clause, no African leader suspected of crime would be brought to book. This according to this

¹³Note that that Malabo Protocol changes the nomenclature of the court from the African Court of justice and Human Rights to African Court of Justice and Human and Peoples' Rights. The change made here is the addition of 'Peoples'

¹⁴See for examples 'Immunity before the African Court of Justice and Human and Peoples' Rights – The potential outlier' available at www.justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/ (Last accessed on 4 November 2017); G. Abraham 'Africa's evolving continental court structures: At the crossroads? SAIIA Occasional Paper 209, January 2015, available at www.saiia.org.za/occasional-papers/africas-evolving-continental-court-structures-at-the-crossroads (Last accessed 4 November 2017); 'Protecting the powerful: The African Union's response to allegations of human rights violations' available at <http://cjiicl.org.uk/2015/02/02/protecting-powerful-african-unions-response-allegations-human-rights-violations/> (Last accessed 4 November 2017).



group of Africans is miscarriage of security desires of the general public and for the growth of democracy in the continent. Consequently, the court's premises are according to this group of Africans; more of an elitist affair alone; rather than the consensus of both the elites and the masses'; which should appear in contents and spirit (Ikpe 2018, Yanusa, 2019). The thinking is that, the African Union's ambition to create this court is rather an intra-class direct affront between it and the International Criminal Court, which African Heads of States accuse of bringing to judgment only African leaders and Government or Non-Government officials deemed to have caused a decrease in the continent's democratic content, in terms of abusing human rights, waging wars against their people with act of genocide; and plundering Africa's economic political resources with alacrity. Thus, to avoid bringing such people to judgment, the argument continues, the African Union is envisaging creating its own Court, which will never bring to judgement such people, given the embeddedness of the immunity clause in the Malabo Protocol, which is the legal-political instrument for the envisaged ACC. This group continues that, if there was no International Criminal Court, which has opened its doors wide to judge African leaders, the African Union would not be thinking of creating the African Criminal Court, in spite of the immeasurable acts of misrule in African countries. Thus, the existence of the International Criminal Court and the incessant bickering between African leaders and the ICC, creates the contextual ambition for creating an African Criminal Court, through the skewed Malabo Additional Protocol,

(Mdluhlala, 2018, Ngwashiri 2018, Uchenna, 2018, Ademola 2018 and Kikongo, 2019).

Elitism, the Malabo Protocol's Immunity Clause, Democratisation, Conflicts, Insecurity and Instability in Africa

The foregoing analysis explains to infer the elite character of the African Union's insertion of the immunity clause in the Malabo Protocol. Thus, the basic implication is that, this insertion is undemocratic as it is the preference of the few ruling elite who have marginalised the majority populations' opinion. *Ab initio*, this threatens the security and stability as well as reinforcing conflicts and emasculating democracy in Africa. The immunity clause is a dare-devil affront by the few African leaders upon their teaming populations, who are considered politically, economically and socially inept, ignorant, headless and unknowledgeable to contribute to any serious and sensible debate on issues of governance and national interest in the continent. Accordingly, the masses are there only to guzzle food, and not to partake in its preparation. That is the essence of how African leaders want to translate politics in Africa. Invariably, this theory as conceived in political science, sociology, law and other social sciences and humanities, by Gaetano Mosca, Vilfredo Pareto and Robert Michels, is a set of belief that seeks to describe and explain power relationships among contending parties, (in the case of Africa's landscape, it is the rulers and the ruled) as being skewed in favour of a few over the many people in contemporary societies. Accordingly, the rulers, who are usually few, possess political, economic and social power over the majority, which do not possess such power, except that of sovereignty, which also could be manipulated by the elites.



In this theory, Pareto opines that elites always rule, with their constant flair of the minority group to dominate over the majority group. Ostensibly, in the foregoing process, the history politics appears to be just the story of one group of elite replacing another. This is what Pareto calls the “circulation of elites”. So, according to this theory, the immunity clause in the Malabo Protocol provides that, when the current group of African ruling elite starts to decline, their well-being would continue to be assured by another group of leaders, who would start protecting their own immediate self-interests and preferences of the past rulers over that of the ruled; and the vicious circle would continue. As Pareto postulates, “...this comes about in two ways: either through assimilation - the new elite merging with elements of the old, or through revolution - the new elite wiping out the old.” He used the metaphor of a river to make his point. Most of the time, the river flows continuously and smoothly incorporating its tributaries, but sometimes, after a storm, it floods and breaks its banks.

Thus, the theory assumes that a small minority, consisting of few members of a society, who controls massive economic and political power – public policymaking and strategic planning networks, holds most of the power for governing societies. Consequently, this power is independent of the democratic and security culture, since the masses must not be involved in the exercise of such power. Through positions in governments, corporations or on corporate boards, and influence over policy-planning networks, through financial support of foundations or positions with think-tanks, or policy-discussion groups, members of the elite exert significant power over corporate and government decisions. The basic misleading characteristics of this theory are that power and knowledge of society must be

concentrated in the hands of a few. Accordingly, the elites are unified; the non-elites are diverse; are majority and powerless. In the process, the elites' interests and preferences are consensual due to common backgrounds and positions and the defining characteristics of power in various institutional positions (Ake, 1996, Lukas, 2015).

In direct affront to democratic norms, the elite theory opposes pluralism, a tradition that assumes that all individuals, or at least the multitude of social groups, have equal power and balance each other out in contributing to democratic political outcomes representing the emergent, aggregate will of society. Elitism argues either that democracy is a utopian folly, as it is traditionally viewed in the conservative Italian tradition, or that democracy is not realizable within capitalism, as is the view of the more Marxist-compatible contemporary elite theory permutation. Even when entire groups are ostensibly completely excluded from the state's traditional networks of power (historically, on the basis of arbitrary criteria such as nobility, race, gender, or religion), elite theory recognizes that "counter-elites" frequently develop within such excluded groups. Negotiations between such disenfranchised groups and the state can be analysed as negotiations between elites and counter-elites. A major problem, in turn, is the ability of elites to co-opt counter-elites; which tenets are usually problematic given the core proclivity of elite corps to arrogate supremacy of knowledge of society over the masses. This, thus, explains the background or framework for understanding the African Union's Malabo Protocol's immunity clause enshrined ostensibly to protect the interest of African Heads of States and other Senior Government officials against prosecution in the event that, these leaders commit crimes against their people.



History and Antecedents of the Malabo Protocol: 1980 - 2008

This was first suggested in the early 1980s during the drafting of the African Charter on Human and Peoples' Rights, otherwise called the African Charter.¹⁵ In particular, the Republic of Guinea Conakry proposed that an African human rights court should be established to try violations of human rights as well as crimes under international law.¹⁶ At this stage, it was however felt 'premature' to establish an African human rights court. Rather, the African Commission on Human and Peoples' Rights hereafter referred to as the African Commission, an 11 member quasi-judicial treaty body, was established. The possibility for a court was however left open, as the idea was thought to be good and useful, which could be introduced in future by means of an additional protocol to the Charter.¹⁷

Debates on the possibility of establishing an African Criminal Court resurfaced in July 2004, when the election of judges to the African Court on Human and Peoples' Rights, came before the AU Assembly. By this time, two important institutional developments had occurred within

the AU. Firstly, it was the AU's adoption of the Protocol of the Court of Justice of the African Union, laying down the legal framework for the operationalisation of the African Court of Justice as 'the principal judicial organ of the Union'.¹⁸ Secondly, in January of the same year (2004), the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights had come into force, paving way for the election of judges. The primary role envisaged for the African Human Rights Court was and is to complement the protective mandate of the African Commission, by hearing cases and issuing binding judgments on human rights violations.

The election of judges to the African Human Rights Court did not however take place in July 2004 because too few candidates had been nominated. Instead, the discussion at the AU Assembly took a different and unexpected twist. The then chairperson of the Assembly, Nigerian President Olusegun Obasanjo, proposed that the African Court of Justice and the African Human Rights Court should be merged into one court. In his remarks, he hinted at the possibility of conferring the proposed merged court with criminal jurisdiction. He stated:

'Why should the Court of Justice not take along with it the Court on Human and Peoples' Rights so that we have a Court of Justice which will have a division, if you like, for border issues, a

¹⁵ OAU CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986.

¹⁶ Meeting of ministers, 7-19 January 1981 cited in F Ouguergouz, *La Charte Africaine des Droits de l'Homme et des Peuples*, Presses Universitaires de France, Paris, 1993, at 72.

¹⁷ Draft African Charter on Human and Peoples' Rights, prepared for the Meeting of Experts in Dakar, Senegal, 28 November – 8 December 1979, OAU/CAB/LEG/67/1, introduction, para 4; reprinted in C. Heyns (ed.), *Human Rights Law in Africa 1999*, Kluwer Law International, at p.65.

¹⁸ Protocol of the Court of Justice of the African Union, Article 2(2).



division for human rights issues, a division for cross-border criminal issues or whatever?¹⁹ Following that, the AU Assembly decided to merge the African Court of Justice with the African Human Rights Court.²⁰ This decision reversed an earlier decision by the AU Executive Council, which in July 2003, had considered the question of the merger and decided that ‘the African Court of Human and Peoples’ Rights shall remain a separate and distinct institution from the Court of Justice of the African Union’.²¹

In January 2006, the AU Assembly established a committee of jurists to advise the AU on the modalities of bringing Chad’s former President Hissene Habre to justice.²² This committee prepared a report in which it

reflected not only on how to specifically deal with the Hissene Habre’s case, but also discussed how the AU should in future deal with crimes under international law. Consequently, the Committee recommended that the proposed merged court should be empowered to try crimes under international laws.²³ Furthermore, the Committee recommended the court’s expansion to: “...be allowed to operate as an independent institution free from all forms of pressure, so that it can be impartial.... There should be a rapid response mechanism within the Court to ensure that Africa can act with dispatch in situations of gross violations and so give teeth to the notion of “total rejection of impunity”. There should be an ad hoc monitoring mechanism to ensure the independence and impartiality of the institutions existing both in theory and in reality. Such monitoring would affirm the credibility of the regional institutions and options.²⁴

Meanwhile many stakeholders were already concerned that the merger of jurisdictions would have a negative impact on the human rights role of the Court. For example, the African Commission mandated its Bureau to meet the leadership of the AU to call on them to reconsider the decision to merge the African Court of

¹⁹ Report on the Decision of the Assembly of the Union to merge the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union, Executive Council, Sixth Ordinary Session, 24-28 January 2005, Abuja, Nigeria, EX.CL/162, pp. 1-2.

²⁰ Decision on the seats of the organs of the African Union, Assembly/AU/Dec.45(III). See also Decision on the Merger of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union, Assembly/AU/Dec.83(V).

²¹ Decision on the Draft Protocol of the Court of Justice, Executive Council, EX/CL/59(III).

²² Decision on the Hissene Habre Case and the African Union, Assembly/AU/Dec.103 (VI). After long and protracted negotiations, the AU and Senegal signed on 22 August 2012 the Agreement on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System. The Extraordinary Chambers were inaugurated on 8 February 2013. Hissene Habre was tried before the Extraordinary Chambers for crimes against humanity, torture and war crimes. For an overview of the Hissene Habre Case see ‘The case of Hissene Habre before the Extraordinary African Chambers in Senegal: Questions and Answers’ available at www.hrw.org/news/2015/08/31/qa-case-hissene-habre

[extraordinary-african-chambers-senegal](http://www.hrw.org/news/2015/08/31/qa-case-hissene-habre) ²³ (accessed on 15th June 2019).

²³ Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, paras. 35 and 39. The Report is available at www.hrw.org/legacy/justice/habre/CEJA_Report0506.pdf (accessed on 12th June 2019).

²⁴ Ibid., paras. 40 - 42.



Justice with the African Human Rights Court.²⁵ In May 2005, during its 37th ordinary session, the African Commission adopted a resolution in which it expressed deep concern that the July 2004 decision of the AU Assembly would have a negative impact on the establishment of an effective African Human Rights Court.²⁶ Amnesty International raised a similar concern in August 2005 and urged the AU Assembly to “ensure that the fundamental principles, which necessitated the adoption of the African Human Rights Court and the African Charter, are not undermined” by the decision to merge the two courts.²⁷

Nevertheless, the merger initiative did go on as planned. In July 2008, the AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights. Slightly more than a year before, in January 2007, the AU Assembly had adopted the African Charter on Democracy, Elections and Good Governance. The Charter hinted at the future creation of an African

Regional Criminal Court. As article 25(5) of the Charter provides, ‘perpetrators of unconstitutional change of government may also be tried before the competent court of the Union’, however, given Africans’ usual neo-colonial mentalities, the AU did not state which court it would be.

A Brief Review of AU’s Activities Between 2009 and 2014 Concerning the ACJHR

In February 2009, the AU General Assembly requested the AU Commission in consultation with the African Court of Human and Peoples’ Rights, ‘to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report to the Assembly in 2010’.²⁸ Pursuant to this directive, the AU Commission contracted the secretariat of the Pan African Lawyers Union (PALU) to recommend legal instruments which would amend the Protocol on the ACJHR. PALU submitted its reports to the AU Commission in June and August 2010. Annexed to PALU’s June 2010 report was a first draft of the Protocol. Validation workshops, coordinated by the Pan-African Parliament, involving representatives of the AU organs and Regional Economic Communities (RECs), were held in South Africa in August and November 2010 to discuss the draft prepared

²⁵ Final Communiqué of the 36th ordinary session of the African Commission on Human and Peoples’ Rights, para 16, available at www.achpr.org/files/sessions/36th/info/communique/achpr36_f_incom_2004_eng.pdf (accessed 10th June 2019).

²⁶ ACHPR/Res.76 (XXXVII) 05, Resolution on the Establishment of an Effective African Court on Human and Peoples’ Rights, adopted in Banjul, Gambia, 11 May 2005, available at www.achpr.org/sessions/37th/resolutions/76/ (accessed on 10th June 2019).

²⁷ Amnesty International, African Union: Establishment of independent African Court on Human and Peoples’ Rights must be top priority’, available at www.amnesty.org.au/news/comments/943/ (accessed 1 October 2017).

²⁸ Decision on the implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction, Decision Assembly/AU/Dec. 213(XII), 4February 2009. See also Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366 (XVII), para 8.



by Pan African Lawyers' Union (PALU). In November 2011, meetings of government experts took place in Addis Ababa, Ethiopia. Therein the meetings considered the Draft Protocol. Between 7th and 11th May 2012, a final meeting of government legal experts was convened to review the November 2011 draft. Prior to this meeting, a total of 47 African Civil Society Organisations (CSOs) and international organisations with a presence in Africa wrote a joint open letter to ministers of justice and attorneys general of African state parties to the Rome Statute asking them to carefully study and address a number of issues of concern²⁹. Among the concerns raised in the letter included that the proposed expansion of the jurisdiction of the ACJHR would not only undermine the human rights mandate of the African Human Rights Court but would also slow down the fight against impunity on the continent. The meeting of government experts was immediately followed by a meeting of African ministers of justice and attorneys general who considered and endorsed the Draft Protocol, albeit without reaching an agreement on the definition of the crime of unconstitutional change of government.³⁰

29 Joint Letter to the Justice Ministers and Attorneys General of the African State Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights, available at www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys--general-african-state-parties (Last accessed on 7 November 2017).

30 See The Report, The Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General on Legal Matters, Min/Legal/Rpt, available at www.peaceau.org/uploads/ex-cl-731-xxi-e.pdf (Last accessed

There is no indication that the meeting of government legal experts or that of ministers of justice and attorneys general took into account the aforementioned and other concerns raised by CSOs. As such, the endorsement of the Draft Protocol was greeted with criticisms.³¹ Critics argued that the drafting process was 'rushed with complexity'.³² Others opined that it lacked transparency and full participation from stakeholders.³³

on 6 November 2017). See also 'Opening Statement by H.E. Mr. Erastus Mwencha, Deputy Chairperson of the African Union Commission, at the First Session of the Specialized Technical Committee on Justice and Legal Affairs, 15 May 2014, Addis Ababa, Ethiopia, available at www.au.int/en/sites/default/files/newsevents/workingdocuments/13148-wd-dcp-speech.pdf (Last accessed 6 November 2017).

31 See for example M. du Plessis, 'A new regional international criminal court for Africa?' 2 SACJ (2012) 286; F Viljoen 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol', Africa Law, 23 May 2012, <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>(Last accessed 7 November 2017); Institute for Security Studies, Implications of the AU decision to give the African Court jurisdiction over international crimes', Paper No. 235, June 2012, available at www.issafrica.org/uploads/Papers235-AfricaCourt.pdf (accessed on 4 November 2017).

32 M. du Plessis, 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes', 27 August 2012, EJIL Talk, <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>(accessed 6 November 2017)

33 M. du Plessis, 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes', 27 August 2012, EJIL Talk, <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>



During the 19th ordinary session of the AU General Assembly held in July 2012, the Draft Protocol was tabled for adoption but the GA did not adopt the draft. Instead, it requested the AU Commission in collaboration with the African Human Rights Court to: (1) prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the ACJHR; and (2) propose a definition of the crime of unconstitutional change of government.³⁴ The AU Commission convened a meeting in December 2012 in Arusha, Tanzania, to consider these two issues. At the meeting, the question as to whether “popular uprising” would constitute a crime of unconstitutional change of government emerged to be the most contentious and was debated at length. In the end the meeting resolved to revise a subparagraph of the definition of the crime of unconstitutional change of government to read as follows: “Where the Peace and Security Council of the African Union determines that the change of government through popular uprising is not an unconstitutional change of government, the Court shall not be seized of the matter”.³⁵ In this, I argue like Laslett that, “...since a Government must obtain power from the sovereign consent of the population, the very population has the right to unseat such a Government if considered mischievous. And this could done through popular

uprisings or any other popular sovereign means, (See Peter Laslett, in John Locke on Two Treatises of Government (1963:375). On the question of financial implications, the meeting adopted with necessary changes the report presented by PALU.³⁶ This report on the financial implications for expanding the jurisdiction of the ACJHR to cover international crimes indicated that the human resources required to operationalise the new court would be “marginal”.³⁷ The report estimated that at minimally, the new Court would require a staff component of 211 at a cost of USD 4,422,530.³⁸ The AU Executive Council appeared unsatisfied by the recommendations of the Arusha meeting. Thus, in January 2013, it requested the AU Commission to conduct ‘a more thorough reflection, in collaboration with the AU’s Peace and Security Council (PSC), on the issue of popular uprising in all its dimensions’.³⁹ It also requested the AU Commission to submit yet another report on the structural and financial implications of expanding the jurisdiction of the ACJHR to try international crimes.⁴⁰ In October 2013, Kenya, with the

34 Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/Dec.427(XIX), para 2.

35 Report on the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implications, AfCHPR/LEGAL/Doc.3, para. 12.

36Ibid, para. 16.

37 Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, EX.CL/773(XXII) Annex 2 Rev., para. 4.

38 Ibid.

39 Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/Dec.766 (XXII) para 2.

40 Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and



support of the AU,⁴¹ requested the UN Security Council to defer the proceedings against the President and his Deputy at the ICC for a period of one year, but the UNSC refused the request.⁴² The AU General Assembly was ‘deeply disappointed’.⁴³ Consequently, the GA asked the AU Commission to move with speed to conclude the process of extending the jurisdiction of the ACJHR.⁴⁴

On 15th and 16th May 2014, the first AU Ministerial Meeting of the Specialised Technical Committee (STC) on Justice and Legal Affairs met in Addis Ababa, Ethiopia, to consider the 2012 Draft Protocol.⁴⁵ The key objective was to resolve the question of the definition of the crime of unconstitutional change of government

which had been left pending since 2012.⁴⁶ Another objective was to consider issues relating to immunities of heads of state and consequently inserts a new provision on this subject into the Protocol.⁴⁷ Thus, a key decision made during that meeting, and one that has become the most controversial aspect of the Malabo Protocol, was to grant immunity from the criminal jurisdiction of the ACJHR not only to heads of state and government but also to an undefined category of senior state officials; and this accounts for one of the Protocol’s weaknesses. Of course, the 2012 Draft of the Malabo Protocol had, in accordance with international law, not provided for immunity for state officials including heads of state and ministers of foreign affairs.

Despite criticisms of the revisions introduced by the Specialised Technical Committee (STC) from a wide cross-section of stakeholders,⁴⁸ particularly on the question of immunities, the AU GA at its 23rd Ordinary Session in Malabo, Equatorial Guinea, adopted the

Human Rights Doc.PRC/Rpt(XXV), EX.CL/Dec.766 (XXII) para 3.

41 See for example Decision on Africa’s Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013).

42 See Identical Letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2013/624, available at www.securitycouncilreport.org/atf/cf/%B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf (accessed 3 October 2017).

43 Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.493(XXII) para 6.

44 Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.493(XXII) para 13.

45 ‘Press Release: African Union hosts Meeting of Ministers of Justice and Attorneys General’, available at www.au.int/en/sites/default/files/newsevents/pressrelease/1314_8-pr-pr-102_-_african_union_hosts_meeting_of_ministers_of_justice_andattorneys_general.pdf (Last accessed on 10 August 2017).

46 Opening statement by Prof. Vincent O. Nmehielle, Legal Counsel and Director for Legal Affairs of the African Union Commission’, 1st Session of the Specialized Technical Committee on Justice and Legal Affairs (Government Legal Experts), available at www.au.int/en/sites/default/files/newsevents/workingdocument/s/13148-wd-lc-opening_statement-stc_meeting-experts-may_2014_0.pdf (Last accessed 1 November 2017).

47 Ibid.

48 See, for example, Amnesty International, Open letter to the heads of state and government of the African Union, Ref: AFR 01/012/2014; Human Rights Watch ‘Statement regarding immunity for sitting officials before the expanded African Court of Justice and Human Rights’ available at www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and (Last accessed on 24 November 2017)



Malabo Protocol.⁴⁹ The Malabo Protocol was annexed to the amended Statute of the African Court of Justice and Human Rights (Amended ACJHR Statute). The Malabo Protocol ought to come into force 30 days after the deposit of instruments of ratification by 15 member states. In January 2015, the AU General Assembly proposed the ratification of the Malabo Protocol to be fast-tracked.⁵⁰ As at November 2017, only nine member States (Kenya, Benin, Congo Brazzaville, Guinea-Bissau, Mauritania, Chad, Ghana, Sierra Leone and Sao Tome & Principe) had signed the Protocol and non-had ratified it,⁵¹ with Kenya pledging USD 1 million to assist in the establishment of the ACJHR. But such a pledge appear to be motivated by the eagerness of Uhuru Kenyatta's ambition to see the materialisation of the African Criminal Court, given his rejected pursuit for crimes against the Kenyan people levelled against him by the International Criminal Court resulting from the disputed 2007 presidential election in Kenya in which Uhuru was declared winner (Kelechi 2018, Ugkaragi 2018).

Some Glaring Weaknesses of the Malabo Protocol Compared to the ICC

An aspect which the Protocol has been strongly challenged by international human rights and criminal

justice institutions is the exclusion of individuals and NGO's from having access and being heard in the court except those accredited to the African Union or to its organs.⁵² In addition, there is also the requirement of state declaration of acceptance of the competence of the court over cases brought before court by individuals or Non-Governmental Organisations (NGOs) before the court can assume jurisdiction to handle such cases. For instance, for NGOs and individuals to have access to the court, the state against whom the case is brought has to make a 'declaration of acceptance' accepting the competence of the court to receive cases from the above mentioned categories of people; and this is clear misnomer if the AU must enhance democracy in Africa.

Moreover, only individuals and NGOs with observer status before the African Commission on Human and Peoples' rights may have access to the court. At this stage, no state party have made such declaration. This simply means the court cannot hear matters from those categories of persons. While the primary users of the protective functions of the African court are individuals and NGOs,⁵³ automatic access to the court is granted to only the African Commission, State and Intergovernmental Organisations.

⁴⁹ Decision on the Draft Legal Instruments, Assembly/AU/Dec.529 (XXIII).

⁵⁰ Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court, Assembly/AU/Dec.547 (XXIV), para 15 and 17(b).

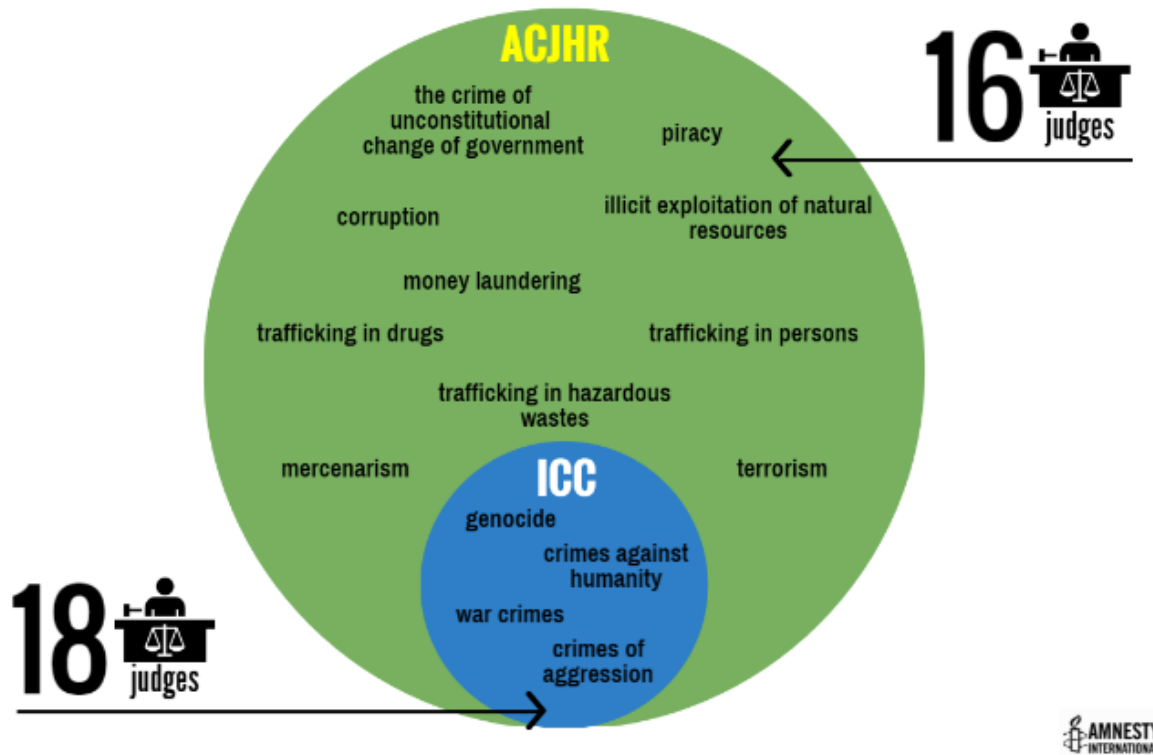
⁵¹Review of the causes of the slow rate of ratification of the Malabo Protocol at the third Ordinary session of the Specialized Technical Committee on Justice and Legal Affairs (Legal Expert) 6-11 November 2017, Addis Ababa, Ethiopia.

⁵²Article 30 (f) *ibid*.

⁵³See generally Dan Juman, 'Access to the African Court on Human and Peoples' Rights: A case of the Poacher turned Gamekeeper' *Essex Human Rights Review*, (2007) 4, 8, available at <<http://projects.essex.ac.uk/ehrr/V4N2/juma.pdf>> accessed 10 August 2017, Makau Mutua, 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 HRQ 342, 355; AP van der Mei, 'The Advisory Jurisdiction of the African Court on Human and Peoples' Rights' (2005) 5 AHRLJ, 28.



Criminal jurisdiction of the African Court of Justice and Human Rights (ACJHR) vs International Criminal Court (ICC)



Source: Amnesty International: The Malabo Protocol’s Legal and Institutional Implications of the Merged and Expanded African Court

The Immunity Clause, ACC, Democratisation and Human Development in Africa

The immunity clause is considered to be the most controversial provision in the Amended ACJHR Statute. It reads:

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

despite the fact that during discussions delegations at the Ministerial Meeting raised concerns regarding its conformity with international law, domestic laws of Member States and jurisprudence.¹¹⁹

Delegations also underlined the challenges inherent in widening immunities, the lack of a precise definition of senior state official and the difficulty in providing an exhaustive list of persons who should be included in the category of senior state officials.¹²⁰ Under general customary



international law serving Heads of State and Government and Senior State Officials enjoy immunity from criminal jurisdiction of a third state. However, there are exceptions to this general rule. The international crimes section will perhaps be the most affected by the shortage of judges. This raises questions around the capacity of the Court to deliver justice with any form of relative speed. The experience of the ICC shows that for a case to proceed from the pre-trial to the appellate stage, a total of eleven judges are required: three judges are required for the pre-trial chamber, three for the trial chamber, and five for the appellate chamber. However, in order to deal with the Court's workload, the ICC has eighteen judges. Of these, the five appellate judges can only be assigned to the Appeal's Chamber, with the other judges being assigned to pre-trial and trial chambers.

Judges in the pre-trial and trial chambers can be temporarily attached to the other, provided that a pre-trial judge cannot serve on the same proceeding at the trial phase. Unfortunately, even with its eighteen judges, the ICC has to deal regularly with issues of cross-contamination of judges, many of whom do not stay in the same division throughout their nine-year term. Cross-contamination of judges occurs when judges sit in a division of a particular case, having already sat in another division at a different phase of the trial. Therefore, with only six judges dedicated to the International Crimes Section of the ACJHR, it is clear that there will be insufficient judges to cover a trial through to appeal. It appears that the Amended ACJHR Statute envisages that judges will sit in more than one stage of a trial. It provides that the pre-trial chamber shall be duly constituted by one judge, the trial chamber by three judges,

and the appellate chamber by five judges. Yet, the International Criminal Section has six judges only. As described above this will have obvious risks in terms of cross-contamination of the trial chambers and may cast doubt on the fairness of the trial process. Furthermore, with one-third of the judges compared to the ICC, and with the much increased scope of work for the International Crimes Section, it seems likely that the number of judges will be insufficient to meet the demands which may be placed upon it.

THE MALABO PROTOCOL'S LEGAL AND INSTITUTIONAL IMPLICATIONS OF THE MERGED AND EXPANDED AFRICAN COURT

Heads of State and Government and Senior State Officials do not necessarily enjoy immunity from criminal proceedings initiated before international criminal courts such as the ACJHR. In this regard, article 27(1) of the Rome Statute) provides that:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Article 27(2) further provides that: Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person. Other international criminal or hybrid courts have not provided immunity for heads of state or senior officials and this is reflected in their Statutes. The Special Court for Sierra Leone, in relation to Charles Taylor, for example, held



that ‘[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court’.¹²¹In addition, the practice of the ACJHR will also deviate from the established practice of international criminal courts including the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR. The immunity clause will have serious implications for the fight against impunity for international crimes in Africa and for the legitimacy and credibility of the ACJHR. The clause will effectively prevent the investigation and prosecution of serving Heads of State and Government who use their position or authority to order, plan, finance or otherwise mastermind crimes against humanity, war crimes or acts of genocide. Experience has shown that on the African continent, as elsewhere, it is those in positions of power who typically abuse their authority and state resources to commit international crimes.

The immunity clause essentially promotes and strengthens the culture of impunity that is already entrenched in most African countries. It rolls back the gains that have already been realised in the fight against impunity in some African countries. It is also instructive that the immunity clause is at odds with and incompatible with the objectives and organising principles of the AU. A key objective of the AU is the promotion and protection of human rights as contained in the African Charter and other human rights instruments. Article 4(h) of the AU Constitutive Act grants the AU the right to intervene if war crimes, crimes against humanity and acts of genocide are being committed in a member state. Article 4(m) requires the AU to respect human rights while

article 4(o) requires it to ensure the sanctity of human life and to reject impunity. The immunity clause undermines these objectives and principles. For the ACJHR, the immunity clause will pose serious risks to its integrity, legitimacy and credibility. The court will lack the capacity to address the scourge of war crimes, crimes against humanity and genocide that have afflicted the continent for decades now. As such, and contrary to what is stated in the preamble of the Malabo Protocol, the court will neither “complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples’ rights” nor will it ensure accountability for these violations wherever they occur. Ultimately, the court will struggle to enjoy or harness the confidence and support of the African population and especially of the victims of gross violations of human rights.

In almost every critique of the Malabo Protocol,⁵⁴ there is one controversial provision that remains the focal point which raises several questions about the efficacy and legitimacy of the proposed ACC. This provision is article 46A (bis) which gives heads of state and other senior public officials’ immunity from prosecution by the African Criminal Court during their stay in office. However, the Legal Counsel and Director of Legal Affairs of the African Union, Namir Negm argues that “this provision is a practical solution which avoids the criticism to the Rome statute by AU member states and captures a rule of customary international law” This provision further cast doubt on

⁵⁴See, for example, du Plessis (n. 16), Abraham (n. 5), Abass (n. 1).



the capacity of the court to protect human rights in Africa, given its immunity provision.⁵⁵ The provision was inserted due to a directive by the peace and justice.⁵⁶ African Union General Assembly, on the basis that it is consistent with the AU's policy on sequencing

In essence, the AU argues that the removal of a sitting head of state is a recipe for destabilizing a state even further and causing chaos at a time when peaceful existence should be prioritized. Libya and Somalia are often cited as examples of failures to sequence peace and justice, while the trials of former presidents Laurent Gbagbo of Côte d'Ivoire, Hissène Habré of Chad and Charles Taylor of Liberia are cited as examples of Heads of States being removed and tried once the country had returned to relative peace and stability. However, it is unlikely this was the sole motivation behind the provision. The granting of immunity is seen as an avenue for African leaders to entrench themselves in power. That sitting heads of state should enjoy immunity, even for international crimes, has unequivocally become the bone of contention between the AU and the ICC. Thus, it is believed that leaders support this article simply for self-aggrandisement, which culminates into avoiding

being held accountable for their actions, particularly if they see the court as a replacement, rather than an ally, of the ICC. Whatever the motivations, the justifications provided by the AU are weak in the extreme and problematic for several reasons:

- One of the most significant threats to sustainable peace, human rights and security on the continent, and one of the greatest betrayals of the rights of victims, is impunity, particularly amongst the political elite, hence the choice of this work's theoretical framework – Mosca and Pareto's elite theory in politics, which the AU promotes with alacrity. It is the ability of those in power to act, knowing there will likely be no serious consequences, which so often enables individuals to commit atrocities, leaving helpless victims in their wake. Indeed, the AU Constitutive Act recognizes this Article 4(o), which specifically 'rejects impunity'. It sends a conflicting message that a court is set up to address impunity and to hold individuals to account, yet provides immunity for individuals occupying positions that would allow them to commit mass, organized crimes. As a letter by a group of Civil Society Organizations (CSOs) to the AU pointed out: the 'irrelevance of official capacity is at the core of making accountability for the gravest crimes meaningful. The alternative would carve out a sphere of impunity for high-level perpetrators'.⁵⁷

⁵⁵Article 46A bis of the Protocol on amendment to the Protocol on the Statute of African Court of Justice and Human Rights (Malabo Protocol)

⁵⁶PALU, 'A Brief on the Malabo Protocol Granting International Criminal Jurisdiction to the African Court of Justice & Human Rights' (2015).

⁵⁷Joint Civil Society Letter on the Draft Protocol on Amendments to the Protocol on the Statute of the ACJHR, (2014)



- Although perpetrators may still be tried at a later date, this provides a perverse incentive for a head of state or senior state official to cling onto power for as long as they can. While the African Governance Architecture (AGA) has provisions that are supposed to ensure leaders only stay in power constitutionally, there have undoubtedly been extensions of power by heads of state since the establishment of the AGA that are, at the very least, questionable, yet have resulted in little or no action from the AU.
- Many of the crimes in the Protocol are likely to be committed by, or at the very least involve, heads of state or senior state officials. For example, the crime of aggression commonly involves invasions, bombardments or other violations of a state's sovereignty by 'a person in a position effectively to exercise control over or to direct the political or military action of a state or organization' (Art. 28M of Malabo Protocol). It is extremely unlikely that decisions to carry out such acts of aggression do not involve the head of state, senior state civil or military officials. Similarly, it would appear rather absurd that, if a person comes to power through an unconstitutional change of government (such as a coup d'état) and then claims immunity as a sitting head of state, he or she cannot be tried for the crime of 'Unconstitutional Change of Government' until he or she leaves power.
- By joining the ICC and introducing implementing legislation of the Rome Statute domestically, many AU member states accepted that official capacity is irrelevant with regards to international crimes. For example, the South Africa's International Crimes Act, which implements the Rome Statute, provides that 'the fact that a person is or was a head of state or government is neither a defence to a crime; nor a ground for any possible reduction of sentence' (Section 4(2) (a)).
- The irrationality of the AU's position is further betrayed by the fact that, the immunity provision only applies to an AU head of state and senior government officials. If the AU genuinely believes sitting heads of state should enjoy immunity under international law, why not extend the immunity provisions to heads of state out of Africa? This question was answered in an interview by the Legal Counsel of AU that by doing that it will become extra-territorial. The AU's policy of sequencing peace and justice has proven to be flexible. In South Sudan, for example, the AU decided to investigate human rights violations parallel to peace negotiations – and this should be encouraged. A rigid policy, whereby peace and justice are treated as mutually exclusive, is neither rational nor constructive. The immunity provision provides an unwelcome and unnecessary suggestion that it would never be in the best interests of an AU state to try a sitting head of state or senior state official. A possible alternative would be to remove the immunity article and instead have a provision that allows the Peace and Security Council of the AU to submit a request to a separate chamber of the Court to defer a trial, if it was in the interest of peace and stability. This would be much



like the relationship between the Security Council and the ICC, with the difference being that in the case of the African Court; it would be the judges who would have the final say as to whether a deferral should be granted. Of course, the relationship between the ICC and the Security Council is not without its critics. For many, the idea that a political body can subvert the mission of a judicial entity is unpalatable. For example, the former Chief Prosecutor for the ICTY and ICTR, Louise Arbour, has long advocated for ‘a separation of the justice and political agendas’.⁵⁸ This is the reason why it would be preferable to have the AU Peace and Security Council mandated to make a request for reflection and determination by the Court.

The Issue of Financing the African Criminal Court of Justice and Human Rights (ACCHJR)

Another major problem associated with the protocol is the problem of additional costs that will come with the addition of a third chamber in the African Court. The AU and its institutions are chronically underfunded and heavily reliant on international donors – who provide 72 per cent of the AU’s budget – which was the main reason why it was suggested that the ACJ and AfCHPR be merged.⁵⁹ Moreover, international criminal trials have proven to be incredibly costly; it has been estimated that a single international criminal

trial costs US\$20 million.⁶⁰ Said differently, the AU’s total budget for 2016 is roughly US\$416 million, with US\$10 million going to the AfCHPR⁶¹ by comparison, the total budget of the ICC for 2016 is €139 million or approximately US\$153 million at the time of writing.⁶² Lack of adequate funds not only risks impacting on the efficiency of the court, but has a direct impact on the fairness and credibility of trials. Adequate funds are needed to allow for thorough investigations, adequate defence of the accused, and robust protection of witnesses and victims.

⁵⁸Kersten M, ‘The UN Security Council and the ICC: Between a Rock and a Hard Place’.

⁵⁹Du Plessis M, ‘Implications of the AU decision to give the African Court jurisdiction over international crimes’ [2012] ISS Paper 235, 8.

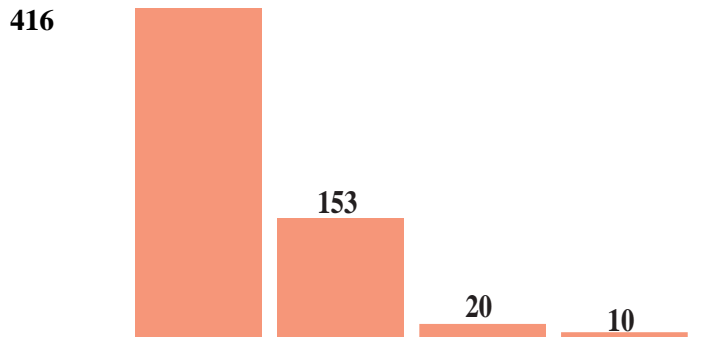
⁶⁰Du Plessis M, ‘Implications of the AU decision to give the African Court jurisdiction over international crimes’ [2012] ISS Paper 235, 9.

⁶¹Decision No: Assembly/AU/Dec. 577(XXV), available at <http://www.saflii.org/au/AUDECISIONS/2015/19.html> accessed December 1, 2017.

⁶²Resolution ICC-ASP/14/Res.1, available at < https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf > accessed August 19, 2017



Total Budget (USD million)



AUICC on Trial Average

The ICC, for instance, strives to place victims' interests at the heart of its operations, yet its Trust Fund for Victims remains 'scandalously underfunded'⁶³ and therefore often unable to provide any, let alone sufficient, victim support.⁶⁴ The AU will have to come up with an answer as to how it will raise significantly more money in order to fund the court. If it cannot, then the court is unlikely to ever get off the ground, let alone conduct high profile cases and protect human rights in Africa. Nevertheless, there are promising signs that the AU is looking into creative ways of increasing its budget and reducing its dependence on donors. At an AU summit in 2015, heads of state reconsidered proposals originally put forward in 2012 by a panel chaired by former

president of Nigeria, Olusegun Obasanjo that new taxes on airline tickets, hotel stays and text messages could bring in up to US\$2.3 billion per year.⁶⁵ Although those particular proposals have faced resistance from AU states reliant on tourism, it is at least an encouraging indication that the AU is aware of the need to drastically increase its budget. Nevertheless, the question of finance remains a problem identified in the Protocol.

The Need for Adequately Qualified Judges and Auxiliary Legal Staff for the ACJHR

Merging jurisdiction over international law (IL), international human rights law (IHRL) and international criminal law (ICL) into one, means that the 'scope of the court's jurisdictional reach is breathtaking.'⁶⁶ Not only does this make the court's work incredibly complex, but also it raises questions

⁶³Support and Funding for Victims Is Crucial for the I.C.C., New York Times, <<http://www.nytimes.com/roomfordebate/2014/12/11/do-we-need-the-international-criminal-court/support-and-funding-for-victims-is-crucial-for-the-icc>>.

⁶⁴Goetz AM, 'Support and Funding for Victims Is Crucial for the I.C.C.'.

⁶⁵Progress Report of the High Level Panel on Alternative Sources of Financing the African Union, available at <http://ccpau.org/wp-content/uploads/2014/03/Obasanjo-Panel-Progress-Report-Assembly-AU-18-XIX-2012-_E.pdf>accessed August 19, 2017.

⁶⁶Ibid.



as to the capacity of judges to handle the array of possible cases. Article 4 of the Protocol stipulates that five judges shall be elected with experience and competence in IL, five judges shall be elected with experience and competence in IHRL, and six will be elected with experience and competence in ICL – making a total of 16 judges. The ICC experience has shown that even the 18 judges they have dedicated to criminal trials have been insufficient to ensure speedy judicial process, and therefore the 16 judges of the ACJHR would be spread far too thin to allow for swift trials.

Furthermore, neither five nor six judges would be capable of stretching themselves over the three chambers (pre-trial, trial, and appeals) so as to ensure that, for example, only ICL judges heard ICL trials. Alternatively, if the Protocol was intended to allow any of the judges to try any case, regardless of whether they have sufficient expertise in that particular area of law or not, then this risks unfair trials and inconsistent jurisprudence. Quite clearly, the court needs a larger roster of judges if it is to carry out its work efficiently and effectively.

The Problem of Additional Crimes

Although there are positive elements for including additional crimes, there exist potential problems as follows: (i) To pick apart the definitions of each of the new crimes is outside the scope of this discussion, but one definition that is in particular need of attention is that of Unconstitutional Change of Government (Art. 28E). It is an extremely broad definition that was

somewhat tempered with by the inclusion of an exception for ‘any act of a sovereign people peacefully exercising their inherent right’, but this exception was unfortunately removed during the drafting process. In comparison, the definition of terrorism (Art. 28G) has an exception for ‘struggle waged by peoples according to the principles of international law for their liberation or self-determination’, which was not removed. As Du Plessis points out:

‘The perverse results of these two provisions, when read together, is that any person peacefully exercising his or her rights, which results in an ‘unconstitutional change of government’ may be guilty of a crime, but a person who commits violent acts – including those that cause ‘death to ... any number of persons’ – and does so with the purpose of causing ‘general insurrection’ in a state, may be excused from criminal liability.’⁶⁷

(ii) The addition of so many crimes injects a level of complexity that will make the judges’ work difficult, at least to begin with. An enormous number of interpretational questions will have to be answered before the definitions will be of sufficient clarity to be applied, which will slow the progress of cases significantly. (iii) Although the Protocol requires crimes to be ‘of sufficient gravity’ before the court can exercise jurisdiction (Art. 46H), there is the potential for the court to be flooded with cases that allow it to

⁶⁷du Plessis, M, *Shambolic, shameful and symbolic: Implications of the African Union’s Immunity for African leaders*, page 5 <<https://issafrica.s3.amazonaws.com/site/uploads/Paper278.pdf>> accessed July 02, 2017.



avoid tackling sensitive cases. For example, individual terrorists and pirates could be continually hauled before the inadequately staffed ACJHR so as to distract the court from, say, high-level politicians orchestrating major corruption or violent conflict. This, of course, is not certain and would be avoided by judges interpreting the threshold of ‘sufficient gravity’ strictly and ensuring the prosecutor appointed has the necessary integrity and independence to pursue sensitive cases.

African Political Leaders, Limited Political Will and the Fear of their Shadows

The lack of political will is not only a problem with the Malabo Protocol itself, but also the climate in which the ACJHR would operate. No matter how robust the provisions and how qualified the staff, the court will fail at inception, if there is no genuine commitment by states and politicians. Sincere cooperation with the court by governments will be crucial to ensure that witnesses and victims are protected, suspects are surrendered, evidence is collected, and sentences are properly enforced. There are already worrying indications of a lack of commitment to holding individuals to account for international crimes, particularly if that individual is a high-ranking state official. Thus, the enshrining of the immunity provision demonstrates an unwillingness of the political elite to hold themselves to the same standards as others.

Also, the AU’s calls for non-cooperation attitude with the ICC and epitomized by the ICC discovery that

Kenya was refusing to cooperate, sets a dangerous precedence that a state only has to cooperate with the court if it ‘agrees’ with the cases before it. This is also evident in the suspension of the SADC Tribunal for its ruling against Mugabe’s policies. Lastly, the slow rate of ratifying the Protocol (only ten states so far since 2014),⁶⁸ indicates how most African states are reluctant to usher in a court, which they perceive would chop off their despotisms. To some critiques, the Malabo Protocol appears to reinforce a “club of old school boys” approach to justice on the continent, rooted in a protectionist agenda rather than fighting impunity.⁶⁹ Thus, these criticisms frame the argument that the new court is merely an attempt to avoid justice for leaders who perpetrate the worlds’ most egregious crimes. This is incompatible with quintessential rule of law principles, since neither the individual nor the state is above the law and courts need to be strong in upholding this principle.

The Strengths and Opportunities of the Malabo Protocol

It is useful to emphasize the strengths of the Africa Union’s Malabo Protocol, in spite of its great weakness orchestrated by the immunity clause. In Africa, the mere creation of this court is in itself a major strength which must be harnessed, because with time and space, amendments could be made in terms

⁶⁸Annex 3 to this research.

⁶⁹Betu Kajigi, (2012), *The International Criminal Court in Africa: NGOs’ Perceptions of the ICC’s Legitimacy in Uganda*, Lambert Academic Publishing pp. 75-77.



of strengthening the perceived weaknesses. Talking about the Defence of Office at the ACC, only one – the Special Tribunal for Lebanon – has a defence Office as an independent organ of the court. The ICC, for example, has an Office of Public Counsel for the defence that is part of the Registry, whereas the Office of the Prosecutor is an independent organ of the court. For some critics, therefore, one of the greatest weaknesses of international criminal tribunals in general is that the defence counsels often have poor capacity and little institutional support.⁷⁰ This risks exposing defendants to unfair trials that are tilted in favour of a stronger and more independent prosecution.

The Strength of the Malabo Protocol is the creation of a Defence Office as a separate and independent organ of the court, alongside the Presidency, Office of the Prosecutor, and Registry (Art. 2(4). The Protocol goes even further, adding provisions under Article 22(c) that: entrenches the Defence Office’s duty to protect the rights of the accused; requires ‘adequate facilities for defence counsel and persons entitled to legal assistance’; and creates a Principal Defender who will enjoy ‘equal status with the Prosecutor in respect of rights of audience and negotiations’. A provision requiring ‘adequate facilities’ is significant; as it specifically addresses the problem of inadequate funding that has afflicted international criminal

tribunals, particularly the ICTR.⁷¹ Furthermore, placing the Principal Defender on equal footing with the Prosecutor is an important innovation of the Protocol that would help ensure the principle of ‘equality of arms’ and provide a more effective channel through which concerns about defence can be raised and addressed. As Max Du Plessis notes: ‘Defence Counsel plays a crucial role in all criminal trials to ensure fairness of proceedings and the legitimacy of the outcome. International criminal trials are no different. For these reasons, the revisions of the ACJHPR that seek to entrench and support the independence and efficacy of defence counsel before that institution are most welcome for enhancing justice delivery.’⁷²

The Office of the Victims

Due to the character of international criminal trials that often involve powerful individuals, sometimes with strong access to state machinery, witnesses and victims become vulnerable to intimidation, harassment, bribery, and even outright assassination. Indeed, of all the lessons learned from the Kenyan cases before the ICC, the most significant is the crucial need for the protection of victims and witnesses (Wodjie, 2018:50). Adequate protection is not only necessary for the sake of the individuals, but also essential for maintaining strong and credible cases. In light of this, it is laudable

⁷⁰ Tuinstra J., ‘Defending the defenders: The Role of Defence Counsel in International Criminal Trials’ [2010] *JICL* 8, 463–486.

⁷¹Kerr K, ‘Fair Trial at the International Criminal Tribunals: Examining the Parameters of the International Right to Counsel,’ [2005]*GJIL*36,1227

⁷²Du Plessis M., ‘Shambolic, Shameful and Symbolic: Implications of the African Union’s Immunity for African Leaders,’ [2014] *ISS Paper* 278, 4.



that the Malabo Protocol creates a Victims and Witnesses Unit (VWU) within the Registry to provide, among other things, ‘protective measures and security arrangements, counselling and other appropriate assistance’ (Art. 22(b)). In addition, Article 46(m) establishes a Trust Fund ‘for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families.’ These aspects are close emulations from the ICC, which also has a ‘Victims and Witnesses Unit’, as well as a Trust Fund. It is hoped that the protection of, and respect for victims and witnesses would be taken seriously not only by the ACJHR but also by states themselves. The experience of the ICC indicates that no matter what protections are created by the Protocol, if states became complicit in intimidation, bribery and assassination of witnesses or victims, the court would quickly lose both its credibility.

Additional Crimes

As explained earlier, Africa has grappled with certain crimes that are unique, if not in natural in their pervasiveness on the continent and the damage they cause. One motivation behind creating an African court, therefore, is to find a way to address serious crimes that are too complex or politically charged for national courts, yet not ‘serious’ enough for the ICC. The Malabo Protocol would not only vest jurisdiction over the ‘core’ international crimes of genocide, crimes against humanity, war crimes, and aggression, but adds an additional ten crimes (Art. 28A): unconstitutional change of government, piracy,

terrorism, mercantilism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources. Even if such a large list of crimes raises concerns, it provides an exciting opportunity to address crimes that are well known to the continent, yet the subject of relatively few trials and convictions.

An important rationale for placing these crimes on the same level as the so-called ‘core’ international crimes is that many of them are capable of destabilising a state, which in turn leads to the proliferation of core international crimes. For example, several of the civil wars in Africa were preceded by an unconstitutional change of government that threw the state into chaos in which core crimes were committed. Thus, it is arguably more sensible and forward-looking to address the crimes that may lead to serious conflict or civil war, rather than waiting for violence to happen. In addition, there is often a mutually causative and reinforcing relationship between these crimes and core international crimes. The Protocol also explicitly includes rape as a method of genocide, and refines the definition of war crimes to include additional elements of international humanitarian law. Both are welcome changes to the definitions of crimes that are in line with increasing recognition of sexual and gender-based violence as a weapon in conflict.

Corporate Liability

Africa has not only suffered at the hands of individuals, but also corporations– the human rights violations of mining companies in the Congo are but



one example. Foreign and multinational companies can be particularly damaging to African economies: a recent study showed that Africa loses billions of US dollars every year to tax dodging and illicit financial outflows.⁷³ The Malabo Protocol, in recognition of this, provides that ‘the Court shall have jurisdiction over legal persons, with the exception of States’ (Art. 46C).

There is a number of challenges related to corporate liabilities that the ACJHR will have to overcome. Firstly, the court will have to be careful to separate instances of individual actions and corporate policy. Secondly, proving the mental element (or mens rea) of a crime is much harder to do with a corporation made up of numerous individuals, each with different motivations and states of mind, than it is for one individual. Nevertheless, there are serious merits in extending liability to corporations, particularly in the African context. Firstly, many corporations operating on the continent are foreign multinational and have tended to avoid prosecutions by arguing that an African state has no jurisdiction to try them, irrespective of the harm they have caused. The Malabo Protocol would nullify this argument with regards to serious crimes. Secondly, many of the crimes in the Protocol would undoubtedly have significant

institutional and corporate elements to them, particularly corruption, trafficking in hazardous waste, illicit exploitation of natural resources and money laundering. Lastly, it would send an important message that corporations are held to the same moral standards as individuals, and are deserving of the same stigma and retribution should they pursue criminal policies.

Proximity

As well as the positive aspects of the Malabo Protocol, there is a more general advantage to having international crimes tried by an African court, because this allows trials to be conducted where possible in, or at least closer to the region in which the atrocities were committed. This has clear benefits for investigations by the prosecution, who will arguably have easier access to evidence and witnesses. More importantly, however, it gives victims and citizens a greater sense of ‘ownership’ over the trial and would likely facilitate greater interest, participation and reconciliation. This is combined with a sense of empowerment that African institutions are capable of handling trials, rather than relying on international tribunals, and hopefully eliminates the toxic debates around neo-imperialism and bias that have plagued the ICC trials. Indeed, it is because of these advantages that one of the founding principles of the ICC is ‘complementarity’– the principle that the ICC should be a court of last resort, and should prioritise facilitating and encouraging trials at the national level (Art. 1, Rome Statute).

⁷³HealthPovertyAction, ‘HonestAccounts ?The true story of Africa’s billion-dollar losses’ (PDF 2014) <http://www.francophonie.org/IMG/pdf/honest-accounts_final-version.pdf>



CONCLUSION

At the beginning, we stated that, although the African Union's Malabo Protocol is yet to materialise with the creation of the African Criminal Court (ACC), there have been multifaceted reactions particularly against its capacity to further democracy, accountability, rule of law; reduce conflicts, guarantee security, stability and ensure human development in Africa, especially, given its immunity clause. In this direction we opined that, although there is nothing wrong creating an African Criminal Court with jurisdiction over international crimes, we join the several critics to express serious concerns about the authority, efficacy, and independence of the proposed ACC, particularly as serving heads of state and other high ranking government officials cannot be held accountable for suspected crimes in international law among other issues.

Using the exploratory research design and the elite theory of politics as this work's methodology and theoretical framework, we appraised the strengths and weaknesses of the Malabo Protocol to determine its context, rationale, effectiveness, efficiency, authority and economy for ensuring the growth or decline of democracy in Africa. Consequently, we discovered that, the Protocol and its immunity clause is purely the preferences of the few ruling elite – African Leaders, rather than those of the African masses. Consequently, the Protocol is a complete disconnect from Africa's general public, which seeks good governance through exemplary democratic rules. Given this, we discerned

that, except the immunity clause is expunged from the Protocol, before the ACC is created, the creation of the ACC within the precincts of its present contents would be the height of the journey to finally bury alive the lay Africans more than what colonisation, imperialism and neo-colonisation did and have continued to do to the psyches of Africans, even to those yet unborn.

Away from the foregoing, we agreed that, the creation of the ACC would offer Africans greater opportunities to positively re-condition their political, economic, social and even cultural landscapes, which have suffered extensive deficits in human growth. With the expunging of the primitive immunity clause, the other obstacles can be overcome because they are less injurious to democracy as much as the immunity clause. An amended Malabo Protocol would create an ACC that would have the potentials for shifting Africa's focus from constantly bickering over the ICC, to working for an innovative, empowering, and credible environment that confronts crimes which damage the continent's image.

RECOMMENDATIONS

From the foregoing analysis, I offer the following recommendations:

- The Protocol's provision for amendments to be adopted by a simple majority of the GA, upon recommendation by a State Party or The Court (Art. 12) should be used to amend the Protocol before Malabo Protocol enters into force, so as to strengthen its authority and efficacy.
- Accordingly, Article 46A (bis) should be expunged, because immunity should not be



provided to any individual, regardless of his or her official position. Doing so would not place the Malabo Protocol in congruence with the AU Constitutive Act, which rejects impunity, and accepts the international criminal tribunals' policy world-over. Also, this measure would disentangle Africa's strangulated democratisation processes, which are now scourging under emerging syndromes of dominant political party rules, which confiscate all the political, economic and social gains of the 1990's heralded multiparty politics. More importantly, such immunity emasculates democracy to install despotism.

- The usually ignored stakeholders whose interests are sacrosanct which the ACC is meant to protect under the Malabo Protocol are the victims of crimes supposedly committed by African leaders, including the continent's patrimony. One surest way to guarantee security of persons and property is to prioritise the safeguarding of these interests.
- Should the ACC be created, important lessons could be obtained from the ICC's experiences with victims and witnesses, particularly the vulnerabilities of their victims and witness unit and the consequences of an underfunded victims' Trust Fund. The ACC must strive to do better by ensuring that its equivalent bodies are better staffed and funded, and that victims are properly represented throughout the various cases.
- The witness intimidation and bribery that blight previous attempts to hold individuals accountable,

as illustrated by the 2007 post-election violence in Kenya, should be stamped out through systematic prosecutions of suspected offenders by the ACC.

- Lay Africans should have the occasions to clearly make their voices heard concerning the inputs into the envisaged African Criminal Court, under the Malabo Protocol. This would encourage the growth of democracy, as it will persuade the decline of conflicts, insecurity and inhuman rights in Africa.
- To allow the Protocol to operate within the AU's policy to sequence peace and justice, a provision can be added to the Protocol that allows the Peace and Security Council of the AU to request the Court to defer a trial of a serving head of state, if it was in the interest of peace and stability. The final determination to grant the request for deferral must however lie with the judges, to avoid a situation that currently occurs at the ICC where the UN Security Council's power to defer judicial proceedings amounts to a political interference with the independence of the Court.
- The number of judges should be expanded to at least 27. That is 9 experienced judges in each of the Court's three jurisdictional bases. This would enable the Court to handle cases in a more efficient and effective manner.
- The definition of the crime of unconstitutional change of government (Art. 28E) should be amended to reintroduce a proviso that: 'any act of



a sovereign people peacefully exercising their inherent right shall not constitute an offence under this article'. This will limit an otherwise extremely broad definition that criminalises the democratic right of a people to initiate peaceful uprising against despotism. This recommendation hinges on the principle of the Social Contract, which civilised democracies have since enshrined in their constitutive instruments of governance.

- Article 46H on 'complementary jurisdiction' should be amended to cement the Court's commitment to work with the ICC and make it clear to African states that being a member of the ACJHR does not exclude their obligations under the Rome Statute. This could simply entail amending section 1 of the Article to state: 'The jurisdiction of the Court shall be complementary to that of the National Courts, the Courts of the Regional Economic Communities, provided for by the Communities, and the ICC'.
- The AU must find innovative ways to increase its budget, and that those of its various institutions to ensure that the AU is not financed by imperial powers. For instance, taxes on mobile phone use could represent a promising source of funding for the AU. If the AU and the ACC are to function authoritatively, effectively and efficiently, its budget must be self-sustaining.

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