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A Review of the Malabo Protocol on the Statute of the African Court of Justice and Human Rights – Part I: Jurisdiction over International Crimes – Jessie Chella

This two-part series examines the Malabo Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR). When it comes into effect, the Malabo Protocol will empower the ACJHR to exercise jurisdiction over international crimes as well as introduce a regulatory scheme for corporate criminal liability. This is a milestone for the regional court and the African continent. Additionally, this is a significant innovation for international criminal law, which traditionally has not recognised the criminal liability of corporate entities.

Historical Development of the ACJHR

As early as 1988, the Organisation for African Unity, later known as the African Union (AU), adopted the Protocol to the African Charter on Human and Peoples' Rights (https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-

african-court-human-and), which laid the foundation for the establishment of the African Court on Human and Peoples' Rights (ACHPR) in 2004. Currently, 30 of the 55 AU members have ratified (https://au.int/en/treaties/1164) the ACHPR Protocol. In 2000, the AU also created the African Court of Justice (ACJ). Later, in 2005, the AU established the African Court of Justice and Human Rights (ACJHR) by merging the ACHPR and the ACJ.

Then in June 2014, the AU met in Malabo, Equatorial Guinea, at the twenty-third Ordinary Session of the Assembly. There it adopted the Protocol on Amendments to the Protocol on the Statute to the African Court of Justice and Human Rights, commonly known as the Malabo Protocol (https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights). The Malabo Protocol empowers the ACJHR with jurisdiction over international crimes as well as introducing a regulatory scheme for corporate criminal liability.

The international criminal law section of the ACJHR is off to a slow, rocky start. According to Article 11 of the Malabo Protocol, the Protocol shall enter into force 30 days after 15 members deposit instruments of ratification with the court. Of the 55 AU members, only 15 have signed (https://au.int/en/treaties/1164) the Protocol; none have ratified it.

International Crimes and Transboundary Offences

The Malabo Protocol criminalises a wide range of offences. According to Article 28A(1), the ACJHR shall have power to try persons for the crimes of genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression. The elements of crime with respect to these offenses are detailed in Articles 28B-M of the Malabo Protocol. Pursuant to Article 28A(2), the ACJHR may 'incorporate additional crimes to reflect developments in international law'. Furthermore, Article 28A(3) provides that there shall be no statute of limitations regarding the prosecution of crimes falling within the court's jurisdiction.

Most of the offences criminalised under the Malabo Protocol are well-established core international crimes reflected in the *Rome Statute* (https://www.icc-cpi.int/resource-library/Pages/default.aspx) of the International Criminal Court (ICC). This includes genocide, crimes against humanity, and war crimes, for example. The perpetration of these core international crimes is also prohibited by the legal instruments of the *ad hoc* tribunals and special courts. In Africa, these include the International Criminal Tribunal for Rwanda (https://unictr.irmct.org/en/documents/statute-and-creation) (ICTR) and the Sierra Leone Special Court (http://www.rscsl.org/RSCSL-Documents.html) (SCSL).

Arguably, the remaining offences provided in Articles 28E-28L*bis* of the Malabo Protocol are transnational crimes—for example, piracy, terrorism, and money laundering. These are transboundary, i.e., crimes with a cross-border effect; they do not fall within international criminal law jurisdiction. Their transnational nature is a radical departure from the typical core international crimes ordinarily prohibited in international criminal law. They fall into definitional

and theoretical grey areas, and as a result their inclusion in the Malabo Protocol has met with some resistance. Academics caution the failure to distinguish international crimes from those that are 'merely transnational in nature and only characterized as international crimes because they have universal jurisdiction fastened onto them (https://www.tandfonline.com/doi/full/10.1080/09744053.2014.883755)' [p 37].

Granted, some of the *ad hoc* tribunals and special courts have prosecuted crimes that typically fall outside known core international crimes. However, these were hybrid *ad hoc* institutions; that is, institutions that adopted a blend of both international criminal law and domestic criminal law in their legal instruments. Most of those crimes were not of the nature seen at the ACJHR. For instance, Article 5 of the SCSL Statute (http://www.rscsl.org/RSCSL-Documents.html) allowed for the prosecution of offences relating to the wanton destruction of property under the *Malicious Damage Act*, including setting fire to dwellings and other buildings.

Tailor-made Provisions Suited for the African Context

The Malabo Protocol also introduces a regulatory regime of corporate criminal liability, which goes beyond the criminalisation of core international crimes to include an extensive and ambitious list of transnational crimes as described above. For example, Article 28L of the Protocol criminalises the trafficking of hazardous waste. The dumping of toxic waste in African countries by corporate actors has caused growing concern regarding the prevention of corporate human rights abuses. Coupled with dysfunctional government policies on toxic waste management, this issue has been plagued by the creation of 'legal uncertainties and jurisdictional loopholes, with devastating consequences (https://www.amnesty.org/en/latest/news/2012/09/report-slams-failure-prevent-toxic-waste-dumping-west-africa/).'

The inclusion of transnational crimes in the Protocol may be seen as a pragmatic approach to ensuring that it is well equipped to deal with the African context for which it was designed. For example, Article 28L*bis* of the Protocol prohibits illicit exploitation of natural resources if the act is 'of a serious nature affecting the stability of a state, region or the Union'. Of the seven acts prohibited in Article 28L*bis*, some that may constitute illicit exploitation of natural resources include: '(a) concluding an agreement to exploit resources, in violation of the principle of peoples' sovereignty over their natural resources'; and, '(f) exploiting natural resources without complying with norms relating to the protection of the natural environment and the security of the people and the staff'.

Many of Africa's ongoing conflicts are financed predominantly by the illicit trade in natural resources. For example, the findings (https://www.globalpolicy.org/global-taxes/41606-final-report-of-the-un-panel-of-experts.html) of a UN Panel of Experts on the illicit trade in diamonds in Angola exemplifies the kind of activity prohibited by Article 28L*bis* of the Malabo Protocol. The UN Panel of Experts claim that businesses obtained vast amounts of diamonds from the notorious rebel group known as the National Union for the Total Independence for Angola (UNITA). UNITA did not have legal title in the diamonds, yet they sold the diamonds to corporations and

individuals, and then used the proceeds of sales to sustain their illegal activities. In this vein, academics have observed (https://heinonline.org/HOL/P?h=hein.journals/jicj8&i=316) that there have been many instances where business entities operating in Africa should have been held liable for the war crime of pillaging. Hence, the introduction of Article 28L*bis* of the Malabo Protocol uniquely places the ACJHR to prosecute the illicit trade in natural resources, particularly where corporate entities are complicit in the perpetration of crimes.

The transnational crimes prohibited under Articles 28E–28L*bis* of the Malabo Protocol are yet to be recognised and prohibited under international criminal law. This does not spell doom for the ACJHR. Rather, it provides the court with an opportunity to address those types of criminal offences which fall outside the purview of the ICC. Arguably, the ACJHR could be better placed as an innovative judicial institution that responds to a growing body of international norms.

Challenges Facing the Court

The ACJHR's jurisdiction overlaps with the ICC. Both are established as permanent courts. The ACJHR is silent on the issue of complementary jurisdiction with the ICC, while the *Rome Statute* (which established the ICC) is silent on the issue of complementary jurisdiction with any regional court. Both Article 1 and paragraph 10 of the Preamble of the *Rome Statute* stipulate that the Court shall be complementary to national criminal jurisdictions. Furthermore, Article 46H of the Malabo Protocol states the ACJHR shall be complementary to national criminal jurisdictions and to courts of the Regional Economic Communities. Both courts have international treaties empowering them to exercise jurisdiction over core international crimes. Of the 55 African states, 33 have ratified the *Rome Statute*, becoming State Parties to the ICC. These African states are likely to have competing obligations to both the ICC and the ACJHR.

With respect to immunities, Article 46A*bis* provides that:

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 a provision on immunities for serious crimes committed in violation of international law has gravely alarmed (https://www.hrw.org/news/2014/05/12/joint-civil-society-letter-draft-protocol-amendments-protocol-statute-african-court) African civil society organisations and international organisations with a presence in Africa. Some academics have warned (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293988) that the '…regional court will only insulate the "dictators club" from facing international criminal justice' [p 720]. On this point, the ACJHR stands alone; the legal instruments of the ICC along with *ad hoc* tribunals and special courts do not contain such limiting provisions.

Another concern is the financing of the ACJHR. This is a concern given that over half of the court's Member States are also State Parties to the *Rome Statute*. Financial obligations may be called into question, causing members to pull resources from one court to support the other; as for which one

remains to be seen. A deeply problematic factor is the number of African states that failed to honour their financial obligations in the Hissene Habré trial (https://theconversation.com/the-trial-of-hisse-ne-habre-a-pivotal-case-for-international-justice-in-africa-61052) held in Senegal, despite pledging funds for the establishment of the Extraordinary African Chambers. That trial involved the prosecution of Habré, former Head of State of Chad, for international crimes perpetrated during his official tenure. Critics argue (https://academic.oup.com/jicj/article-abstract/9/5/1067/2188970) that if these states failed to support one case of great significance for the continent, what more could they do to support the ACJHR?

Furthermore, the court's parent body, the AU, has equally been under fire for continually establishing additional institutions yet failing to garner resources for its own operations. The AU is heavily reliant on international donor funds, and in some instances, these donors are reported to have threatened to pull resources (https://www.amnesty.org/en/documents/afr01/6137/2017/en/) if the ACJHR continues to hold on to the Article 46A*bis* Malabo Protocol immunity provisions.

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