

MALABO PROTOCOL:

LEGAL AND INSTITUTIONAL IMPLICATIONS OF
THE MERGED AND EXPANDED AFRICAN COURT

SNAPSHOTS

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SNAPSHOTS OF LEGAL AND INSTITUTIONAL IMPLICATIONS OF THE MALABO PROTOCOL

In June 2014, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) was adopted by the African Union. The Malabo Protocol provides for the inclusion of criminal jurisdiction within the remit of the proposed African Court of Justice and Human Rights (ACJHR).

While the ACJHR can play a vastly positive role in a continent persistently afflicted by the scourge of conflict and impunity for crimes under international law, **there are several legal and institutional implications that arise from the adoption of the Malabo Protocol.**

9 countries that have signed the Malabo Protocol (as at May 2017)

0 countries that have ratified the Malabo Protocol (as at May 2017)



The date of adoption of the Malabo Protocol by the African Union



**ARUSHA
TANZANIA**
proposed seat of the ACJHR

15

**AFRICAN UNION
MEMBER STATES**

that need to deposit their instruments of ratification for Malabo Protocol to come into force

IMMUNITY

One of the most controversial aspects of the Malabo Protocol is the immunity from prosecution before the Court granted to serving “Heads of State or Government”, or “other senior state officials”. While, under customary international law, serving heads of state and senior state officials enjoy immunity from criminal jurisdiction of

a third state, such officials do not enjoy such immunity before international criminal courts. This clause will prevent the investigation of heads of state and senior state officials who often abuse their position to commit crimes under international law. The immunity clause will undermine the legitimacy of the court and the fight against impunity on

the continent, and is at odds with the founding and organizational principles of the AU.

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. (Article 46A bis)

IMMUNITY CLAUSE

will have serious implications for the legitimacy and credibility of the ACJHR

SERVING HEADS OF STATE AND GOVERNMENT WILL BE IMMUNE

from investigation
and prosecution

CAPACITY

With a jurisdiction covering three areas of international law, it is questionable whether the new court, as envisaged under the Malabo Protocol, will have the capacity to effectively and efficiently deliver on its mandate. The proposed Court will have jurisdiction over 14 crimes, with the potential of new ones to be added. Only 3 core international

crimes fall under the jurisdiction of the ICC, and for that the court is still at times vastly short on expertise, resources and capacity. Undoubtedly, some of the crimes have a particular resonance in Africa, like unconstitutional changes of government and illicit exploitation of natural resources. Still, the number of judges envisaged for the ACJHR is

insufficient for it to operate efficiently. With the jurisdiction to deal with only 3 crimes, the ICC has 18 judges. Yet, the proposed ACJHR will have only 6 judges dedicated to the International Crimes Section which will have jurisdiction over 14 crimes.

14

CRIMES

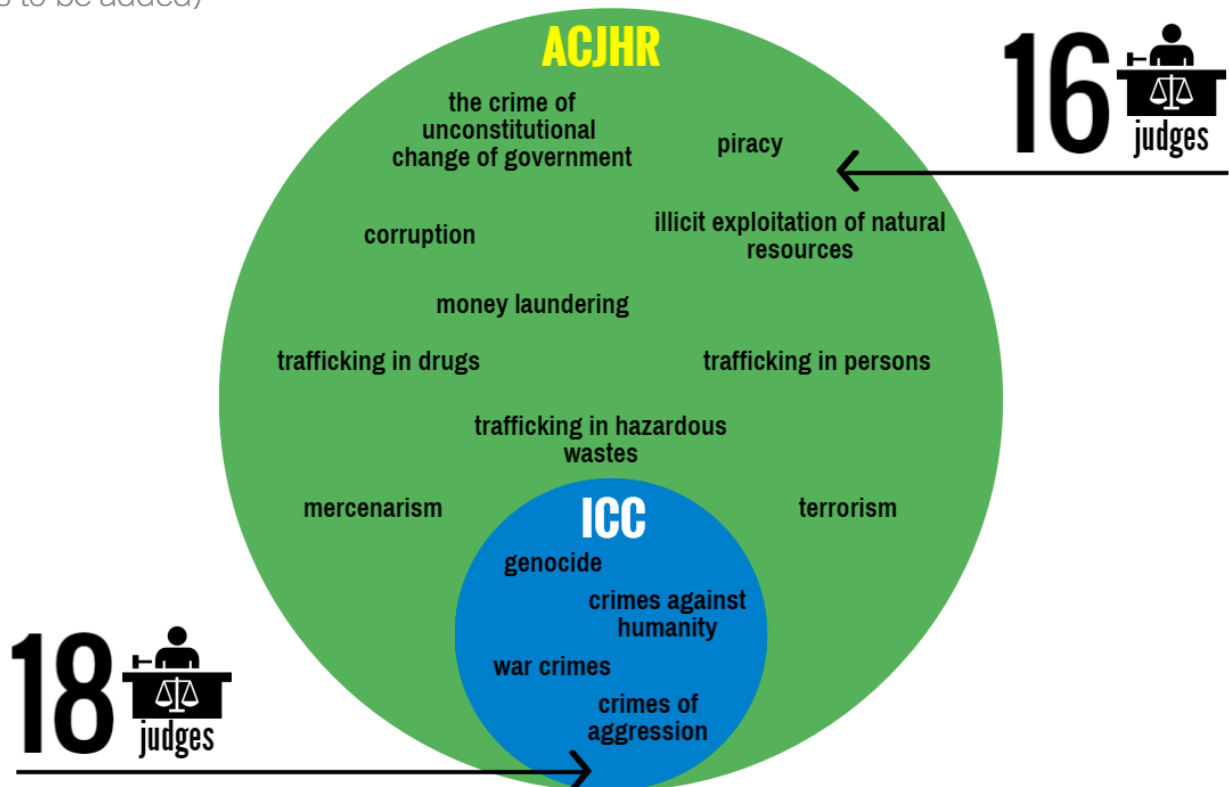
which will fall under jurisdiction of ACJHR (with a possibility of new ones to be added)



3

CRIMES

over which the ICC has jurisdiction



DEFINITIONS OF CRIMES

There are concerns about the implications of vague/broadly defined crimes in the ACJHR Statute, and in particular, with respect to the crimes of terrorism and unconstitutional change of government, which may therefore be used to clamp down on the legitimate exercise of freedom of expression,

association, assembly and human rights. The broad formulation of the crimes as currently drafted, raise serious concerns as to compliance with the principle of legality established under international law.

DEFINITION OF *UNCONSTITUTIONAL CHANGE OF GOVERNMENT*

in the Malabo Protocol
may potentially criminalize
popular protests



DEFINITION OF *TERRORISM*

in the Malabo
Protocol is overly
broad

Article 28G: Terrorism

For the purposes of this Statute, 'terrorism' means any of the following acts:

A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

- 1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or*
- 2. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or*
- 3. create general insurrection in a State.*

B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to(3).

C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

D. The acts covered by international Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.

E. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.

Article 28E: The Crime of Unconstitutional Change of Government

1. For the purposes of this Statute, 'unconstitutional change of government' means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:

- a) A putsch or coup d'état against a democratically elected government;
- b) An intervention by mercenaries to replace a democratically elected government;
- c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
- d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
- f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.

2. For purposes of this Statute, "democratically elected government" has the same meaning as contained in AU instruments.

IMPACT ON HUMAN RIGHTS JURISDICTION OF THE COURT

The Malabo Protocol may have a deleterious effect on the human rights jurisdiction of the court, including possibly negative new implications on future ratifications of the statute of the current African Court on Human and Peoples' Rights. Malabo Protocol envisages the reductions of judges

responsible for human rights issues from 11 to 5. For the existing African Court, such reduction will significantly impact the capacity of the Court to expeditiously hear human rights cases. The backlog of the African Court is growing: as at the end of June 2016, the Court had received 101 cases, of which only 27

were finalized and 4 transferred to the African Commission.

reduction of current number of judges at the African Court on Human and Peoples' Rights, working solely on human rights issues as envisaged by the Malabo Protocol



11 > 5
JUDGES

FUNDING



It is unclear whether the AU will have the requisite resources to operationalize and sustain the ACJHR. The AU struggles to adequately finance its own operations, including its human rights treaty bodies. It funds less than 25% of its budget (excluding peace and security budget which is funded almost 100% by donors). Yet, the AU continues to establish more institutions. Some donors who have traditionally financed the AU (e.g. the EU) have already indicated that they would not finance the ACJHR on account of the immunity clause.

9

**MILLION
USD**

2016 budget of the African Court on Human and Peoples' Rights¹



71

**MILLION
EUR**

2016 budget of the European Court of Human Rights²

211

STAFF

minimum requirement for expansion of the jurisdiction of the court to cover international crimes (according to 2012 assessment conducted by PALU)



1309

STAFF

current staff number at the International Criminal Court

4.42

**MILLION
USD**

AU's estimated staffing cost of the ACJHR (according to 2012 assessment conducted by PALU)

8.6

**MILLION
EUR**

Final budget to try Hissène Habré in the Extraordinary African Chambers in Senegal³

30

**MILLION
USD**

average annual operating cost of the Special Court for Sierra Leone

¹ 2016 Activity Report of the African Court on Human and Peoples' Rights

² Council of Europe Programme and Budget 2016-2017 (2017 adjusted). Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806d8d29>

³ Brody, R. "Victims bring a Dictator to Justice: The Case of Hissène Habré", available at https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis70-The_Habre_Case.pdf

COMPETING OBLIGATIONS

African Union members, that are also states parties to the Rome Statute, are likely to face several challenges. The Rome Statute, the treaty that established the ICC, has been ratified by 34 AU member states. These states will have obligations both to the ICC and the ACJHR. It is not clear how these competing obligations will be addressed by the Malabo Protocol. In the event that the ACJHR and the ICC indict the same person and order his or

her surrender, a state party to both the Rome Statute and the Malabo Protocol may have to choose which obligation to fulfil and which one to breach. The same dilemma may also arise in relation to competing cooperation requests. The Malabo Protocol provides for the ACJHR to seek the cooperation or assistance of regional or international courts. But if the existing tension between the AU and the ICC continues way into the existence of the ACJHR, then the likelihood of the

ACJHR cooperating with the ICC will be rather slim. Moreover, both the Rome Statute and Malabo Protocol require domestic implementing legislation, but the two treaties have a number of differences, like the definitions of crimes, which will pose another challenge to state parties to both instruments.

ICC & ACJHR COOPERATION

Malabo Protocol has no reference to the Rome Statute and the ICC & it does not clarify how the two courts will work together



DOUBLE FINANCIAL BURDEN

for AU member states that are also states parties to the Rome Statute



DOMESTICATION OF THE MALABO PROTOCOL

African ICC member states considering to ratify the Malabo Protocol will face harmonising challenges as a result of competing legal obligations and differences in definition of crimes



34
African state parties to the International Criminal Court

NGOs AND INDIVIDUALS

RESTRICTED ACCESS FOR CIVIL SOCIETY

will have limited access to the ACJHR:

- only AU organs will be able to seek advisory opinion;
- only African individuals or African NGOs will be able to access the ACJHR.

Under the Malabo Protocol and previous amendments, AU member states have introduced amendments that could restrict the ability of NGOs in Africa from accessing the ACJHR. Only AU organs and institutions will be allowed to seek for advisory opinions under the Malabo Protocol. NGOs will lose the access they enjoy before the existing African Human Rights Court.

Article 30: Other Entities Eligible to Submit Cases to the Court

The following entities shall also be entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned:

- a) State Parties to the present Protocol;
- b) the African Commission on Human and Peoples' Rights;
- c) the African Committee of Experts on the Rights and Welfare of the Child;
- d) African Intergovernmental Organizations accredited to the Union or its organs;
- e) African National Human Rights Institutions;
- f) African individuals or African Non-Governmental Organizations with Observer Status with the African Union or its organs or institutions, but only with regard to a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a State Party which has not made a Declaration in accordance with Article 9(3) of this Protocol .

“African Intergovernmental Organisations” means an organisation that has been established with the aim of ensuring socio-economic integration, and to which some Member States have ceded certain competences to act on their behalf, as well as other sub-regional, regional or inter-African Organisations;


“African Non-Governmental Organizations” means Non-Governmental Organizations at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council;

Article 53: Request for Advisory Opinion

1. The Court may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions or any other organ of the Union as may be authorized by the Assembly.
2. A request for an advisory opinion shall be in writing and shall contain an exact statement of the question upon which the opinion is required and shall be accompanied by all relevant documents.
3. A request for an advisory opinion must not be related to a pending application before the African Commission or the African Committee of Experts.

RECOMMENDATIONS

Amnesty International has outlined a set of recommendations to the AU member states, AU Legal Counsel and CSOs, which if taken into account, might move the to-be-established court closer to achieving its initial noble purpose. Among the number of recommendations targeted at different actors, Amnesty International is calling on the **AU member states**:



to study the implications and concerns related to the expansion of the jurisdiction of the proposed ACJHR;

adopt a transparent budget allocation process for the Court to ensure its independence;

amend the immunity clause (Article 46A *bis*) or enter reservations upon ratification if not amended;

ensure the definition of crimes, including terrorism conforms with the principle of legality;

amend the article which limits the access to the ACJHR by individuals and CSOs.


For more details on the information provided in this brief, please refer to the full report published by Amnesty International in January 2016, available at <https://www.amnesty.org/en/documents/afr01/3063/2016/en/> .



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TO ONE PERSON, IT
MATTERS TO US ALL.**

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SNAPSHOTS

In June 2014, the African Union (AU) adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (Malabo Protocol). The Protocol extends the jurisdiction of the yet-to-be established African Court of Justice and Human Rights (ACJHR) to crimes under international law and transnational crimes. The Court will have jurisdiction to try 14 different crimes, including genocide, crimes against humanity, and war crimes. The ACJHR, as envisaged in the Malabo Protocol, can play a vastly positive role in a continent persistently afflicted by the scourge of conflict and impunity for crimes under international law.

However, there are a number of concerns and implications arising from the proposal to expand the jurisdiction of the ACJHR. With an expanded jurisdiction, it is doubtful whether the Court with 16 judges will have the capacity to effectively and efficiently deliver on its mandate. It is also unclear whether the AU will have the requisite resources to sustain an efficient ACJHR. The immunity clause included in the Malabo Protocol violates international consensus and practice by providing immunities to heads of states and senior state officials. The report calls on AU member states to amend specific provisions of the Malabo Protocol. It also calls on civil society organisation and citizens to engage with their governments and the AU to address these concerns and to ensure that the ACJHR, if and when it is established, becomes the most effective possible regional court.

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