

Preface

On 27 June 2014, the Assembly of Heads of State and Government of the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ('Malabo Protocol'). The Malabo Protocol, which seeks to establish the first-ever African court with a tripartite jurisdiction over human rights, criminal and general matters is aimed at complementing national, sub-regional and continental bodies and institutions in preventing serious and massive violations of human rights in Africa through, among other things, the prosecutions of the perpetrators of such crimes as specified in the statute annexed to the treaty. To date, the Malabo Protocol has only been signed by 11 out of 55 African Union (AU) member states. No states have ratified it. Although, in accordance with its Article 11 and AU treaty-making practice, fifteen such ratifications will be required for the treaty to enter into force. There is no guarantee that the Malabo Protocol will achieve the requisite number of ratifications anytime soon. Especially given that some AU treaties have failed to secure the support they need to enter into force two decades, and in one extreme case, three decades after its adoption. It is indeed noteworthy that, as of this writing, of the six other treaties adopted by the AU Assembly in the same meeting as the Malabo Protocol in June 2014, only one of the agreements has managed to garner seventeen signatures and five ratifications, the highest amongst the seven instruments (though this means that, about four years after its adoption, forty-four of the fifty-five AU member states have elected not to sign it). If the Malabo Protocol achieves the fifteen required ratifications to enter into force in the next ten to fifteen years, it might take years for the AU states to allocate the resources required for the new court to be established so that it can function in accordance with its high ambitions set out in the Statute and Annexure. That said, thirty-three African States are parties to the Rome Statute of the International Criminal Court and given the currently tense relationship between the Hague-based court and the AU, it is possible that

African States may have reason to fast track their signatures and ratifications of the Malabo Protocol in the future thereby bringing it into force sooner than we might otherwise anticipate.

The premise of this book is that the Malabo Protocol, which is one of the most interesting and complex treaties to ever be produced by a regional body for the purpose of creating a regional judicial mechanism, merits serious scholarly inquiry. Part of the reason for this is that while international criminal law has for the last half century only been conceptualized as applicable at the national and international levels, with a variation of 'hybrid courts' mixing the national and international to different degrees to proffer a third enforcement model, if and when it comes to force, the Malabo Protocol would become the first regional criminal jurisdiction capable of prosecuting serious crimes condemned by international law such as genocide, the crime of aggression, war crimes and crimes against humanity. It would also be the first such tribunal to prosecute crimes of particular concern to the Africa region such as unconstitutional changes of government or illicit exploitation of natural resources as well as environmental and other related crimes, including when committed by natural persons as well as corporations. This 'regionalization' and 'Africanization' of international criminal law enforcement possesses serious potential to add to the menu of accountability options available to States in order to more effectively counter serious international and transnational crimes. It is a model that is already apparently generating interest in other regions, such as Latin America, where a project is underway to propose a regional court with jurisdiction over drug trafficking offences under the banner of COPLA – an initiative supported by Argentina and a number of other states.

Though, historically, there have been some tensions between regionalization and universalization in the context of other subfields of international law, such as human rights and trade law, the existence of human rights courts have proven to be effective devices to the process of development and application of a global body of human rights standards at a level that was previously unimaginable. That complex web of human rights commissions and courts in Europe, the Americas and Africa, which now exhibits a multilayered system of norm enforcement coupled with the experimentation with ad hoc criminal tribunals, suggests that it could be worth exploring the potential of an equivalent multilevel system in the field of international criminal law. And that is just what the African Court Research Initiative (ACRI) sought to address when embarking on a four-year, three-phase project to launch a transnational research process that would provide rigorous research about the emergence of new regional mechanisms, while also providing technical assistance to the AU's Office of Legal Counsel and the future court.

This book, which is a key outcome of ACRI's efforts, aims to offer the first comprehensive analysis of the Malabo Protocol with an examination of its human rights, general and criminal jurisdictions. In addition to conducting a widespread critical analysis about the components of the future court, we have also been working on the Elements of Crimes in order to enhance further clarity in what will shape future interpretation and application of the Malabo Protocol for the African Court of Justice and Human and People's Rights. These, along with a range of research studies aimed at uncovering the factors that may delay the ratification of the Malabo Protocol, have allowed us to work on the mobilization of key information related to how the Court should be understood in Africa and internationally.

This volume, which we are pleased to present after about four years of intensive research which took place in Africa and across several other continents, will hopefully advance global scholarly engagement with the substance of the first treaty anywhere in the world to merge general, civil and human rights issues under one roof in what we describe in the introduction to this book as the 'One Court' concept.

As the project took a few years to finish, and benefited from the input and support of many people, we wish to take a few moments to thank some of them. We apologize that space constraints do not permit us to mention everyone here and ask for the understanding of those who might have been omitted. First, since it would not have been possible to convene ACRI's research without the enduring confidence of the African Union Commission, particularly the Office of the Legal Counsel for the robust access to information it granted which helped in making the research and ultimately the book a reality, we are grateful for their support. Connected to the African Union is the strong moral and political commitment from our project partners and fiscal sponsors, the Africa Regional Office of the Open Society Foundation, especially Pascal Kambale and Eleanor Thompson based in Dakar, Senegal. They supported the proposal for our independent academic research project from the first time we raised the idea. As experts on issues of accountability in Africa, they immediately grasped the need for ACRI and its desire to promote strong scholarly engagement with the substance of the Malabo Protocol. To our delight, they never wavered throughout the multi-year phases of the project, even as the project grew to encompass a wider team of authors and many more conferences than the one or two that we initially envisaged. We therefore wish to express our gratitude to them, even as we look forward to our continuing collaboration on the more practical side of ACRI aimed at developing ancillary legal instruments in an attempt to help 'fix' some of the major drafting problems and gaps in the Malabo Protocol.

Second, we are grateful to all our contributing authors. Not only did they accept to write thoughtful and original chapters, but they proved willing to engage with us, whether at the conferences we organized on the subject of the book in Miami, Arusha or The Hague. They also deserve a special medal for their deep generosity in understanding the delays in the sending of the book to publication that arose as a function of the expansion of our initial one-year project to a three- to four-year effort.

Third, we wish to thank our various research assistants and interns at Florida International University (FIU), Yale University, The University of Pennsylvania and Carleton University for their support of this project over the years. The lead project researchers contributed in important ways at crucial stages and we are grateful for their support. This included Tina Palivos, Godfrey Musila, Ermias Kassaye, Tewodros Dawit and Sixsy Alfonso, as well as Alysson Ford Ouoba and Irene Thomas towards the later stages of this work. We also thank Sarah-Jane Koulen for her research support throughout every phase of the process. And as we worked to submit the manuscript, Heather Owens, Amirah Mohammad and Priscilla de Varona, all JD candidates at FIU Law, worked to bring greater coherence and consistency to the manuscript through language edits and footnote checks. We are indebted to them all and thank them for their crucial contributions.

Fourth, we wish to acknowledge and thank the team in our partner organizations, especially the Pan African Lawyers Union. A special thank you to the always thoughtful Donald Deya, whose knowledge of the Malabo Protocol's history as its key drafter for PALU provided helpful context in often late-night conversations or lengthy Skype meetings or overlaps at key conferences in Dakar or at the AU in Addis Ababa; as well as his wonderfully capable associate, Irini Anastassiou, who was the focal point for the project in its first two years. We also thank Brian Mossi and Francis Goudabout, also at PALU, for their financial administration of the project. In the third phase of ACRI, we were grateful for the help of the team at the West African Civil Society Institute (WACS), based in Accra, Ghana.

Last but not least, we are indebted to Judge Chile Eboe-Osuji of the International Criminal Court (who has since assumed the mantle of President) for taking time out of his busy schedule to give the keynote speech in July 2016 to ACRI's Arusha international symposium. Due to the focus of the speech, on immunity, we have included it in the relevant part of this book.

In all, we could not ask for a better network of interlocutors, researchers and administrators with whom to go on this journey and we are immensely appreciative for the support that they have offered us over the years.