1

Introduction

Origins and Issues of the African Court of Justice and Human and Peoples' Rights

KAMARI M. CLARKE, CHARLES C. JALLOH
AND VINCENT O. NMEHIELLE

1. INTRODUCTION

In June 2014, at its summit in Malabo, Equatorial Guinea, the Assembly of Heads of State and Government ('Assembly') of the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the 'Malabo Protocol'). The so-called Malabo Protocol was one of eight legal instruments adopted by African Union (AU) leaders, but undoubtedly one of its most significant. The significance stems, partly, from the consideration and addition of a third section to the proposed African Court of Justice and Human Rights (ACJHR) which had already formally anticipated the possibility of a regional tribunal with jurisdiction over human rights issues as well as general disputes arising between African States. The new Court will, once its statute enters into force upon achievement of the 15 required ratifications additionally possess the competence to investigate and try 14 international, transnational and other crimes in a highly ambitious tribunal with three separate chambers and jurisdictions:[1] (1) the General Affairs Section, (2) the Human and Peoples' Rights Section and (3) the International Criminal Law Section. The merger of these three chambers addressing inter-state disputes, human rights and penal aspects into a single court with a common set of judges represents a significant development in Africa and in wider regional institution building and law making.

The adoption of the Malabo Protocol is the culmination of a process that began long before what many African Court sceptics see as the outcome of the

[1] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, available online at: www.africancourtcoalition.org/images/docs/legal-texts/Protocol_on_amendments_to_the_Protocol_on_the_Statute_of_the_African_Court_of_Justice_and_Human_Rights%20.pdf (Malabo Protocol).

indictment by the International Criminal Court (ICC) of President Omar Al-Bashir of Sudan. It is true that between 2009 and 2014, the draft protocol was subject to a series of politically driven calls to expedite the expansion of the criminal jurisdiction of the proposed merged court as a sort of African alternative to the ICC. The calls had been preceded by a decision of African leaders taken in February 2009 during the Twelfth Ordinary Session of the Assembly directing the AU Commission to assess the implications of the present African Human Rights Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes. This would later lead to the AU Commission's preparation of a draft legal instrument. The draft was then presented to and debated by African states over the course of several years. The process of negotiating and adopting the Malabo Protocol was influenced by political concerns and push back at the ICC by some African States under the scrutiny of The Hague, including most prominently Kenya. That context would lead to a key amendment to the clause concerning immunity of high-level officials and also fast tracked the eventual adoption of the draft regional treaty at Malabo towards the end of June 2014.

However, although these circumstances led to the unfortunate perception of the African Court among scholars and practitioners of international criminal law as a rebel court against the ICC that should be ignored rather than studied, a careful review of the evolution of African human rights institutions generally and the criminal jurisdiction of the African Court in particular confirms that the journey to Malabo began long before the Al-Bashir saga and 2009.

2. THE JOURNEY TO THE AFRICAN COURT MALABO PROTOCOL

One early marker for the beginning of the court formation process was the 1981 adoption of the African Charter on Human and Peoples' Rights by the Organization of African Unity (OAU), the AU's predecessor.[2] This Charter

[2] G. Abraham, Africa's Evolving Continental Court Structures: At the Crossroads?, South African Institute of International Affairs (SAIIA), Occasional Paper 209, January 2015, available online at: www.saiia.org.za/cat_view/2-occasional-papers?dir=DESC&limit=10&order=name&start=220, at 7. For further historical accounts of the lead up to the Malabo Protocol, see A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', European Journal of International Law 24(3) (2013) 933; D. Deya, Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes, Open Society Initiative for Southern Africa (OSISA), 6 March 2012, available online at: www.osisa.org/openspace/regional/african-court-worth-wait; M. du Plessis, Implications of the AU decision to give the African Court jurisdiction over international crimes, Institute for Security Studies (ISS), ISS Paper 235, June 2012, available online at: www.issafrica.org/publications/papers/

entered into force in 1986 and enabled the 1987 establishment of the African Commission on Human and People's Rights, a quasi-judicial oversight body tasked with interpreting the charter and hearing complaints of human rights violations brought by individuals against their home states.[3] Yet another and even earlier marker for establishment of an African court was the 1961 Lagos Conference on Primacy of Law in which an idea emerged to adopt an African human rights convention with the view to establishing an African human rights court modelled on the European and Inter-American Courts of Human Rights.[4] This proposal resurfaced in 1969 at the UN Seminar on the Creation of Regional Commissions on Human Rights with specific reference to Africa held in Cairo in 1969. At the time, the UN's recommendation to the OAU went unimplemented.[5]

However, scholars such as C. R. M. Dlamini have documented several initiatives and seminars held over a period of 10 years to discuss and advocate for the establishment of an African Commission on Human Rights or court[6]

implications-of-the-au-decision-to-give-the-african-court-jurisdiction-over-international-crimes; M. Hansungule, 'African courts and the African Commission on Human and Peoples' Rights' in A. Bosl and J. Diescho, *Human Rights in Africa* (Namibia: Konrad-Adenauer-Stiftung, 2009) 233, available online at: www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf; V. O. Nmehielle, '"Saddling" the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?', 7 *African Journal of Legal Studies* (2014) 7; K. Rau, 'Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights', Minnesota Law Review 97 (2012) 669; M. Sirleaf, 'Regionalism, Regime Complexes and International Criminal Justice in Africa', Columbia Journal of Transnational Law (2016), Forthcoming, available online at: http://d-scholarship.pitt.edu/27276/1/Sirleaf_Regionalism%2C_Regime_Complexes_and_International_Criminal_Justice_3–19-16.pdf; F. K. Tiba, 'Regional International Criminal Courts: An Idea Whose Time Has Come?', Cardozo Journal of Conflict Resolution 17 (2016) 521; Deakin Law School Legal Studies; F. Viljoen, 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol', AfricLaw, 23 May 2012, available online at: https://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/; International Federation for Human Rights (FIDH), The African Court on Human and Peoples' Rights: towards the African Court of Justice and Human Rights, April 2010, available online at: www.fidh.org/IMG/pdf/african_court_guide.pdf.

[3] Ibid.

[4] C. R. M. Dlamini, 'Towards a regional Protection of human rights in Africa: The African Charter on Human and Peoples' Rights' XXIV CILSA 1991.

[5] Dlamani, citing Weinstein 'Africa's Approach to Human Rights at the United Nations', unpublished paper.

[6] These include the following: 'Seminar on measures to be taken on the national level for the implementation of the United Nations Instrument aimed at combating and eliminating racial discrimination and for the promotion of harmonious racial relations' held in Yaounde, 16–21 June 1971; 'Seminar on the participation of women in economic life', Libreville, Gabon

such as the 1961 conferences and seminars that the UN and the International Commission of Jurists organized on the rule of law in Dakar (1976), Dar es Salaam (1976) and Dakar (1978). All these meetings led to successive resolutions urging the OAU to adopt a regional human rights instrument for Africa.[7] By 1979, at a symposium convened by the UN in Monrovia, Liberia adopted a strong position on the need to create such a body, which reportedly influenced the decision of the Assembly of the Organization of African Union (OAU). A series of political developments centred on human rights violations in several African states in Uganda, the Central African Republic and South Africa as well as a concerted campaign to create an African Commission resulted in the historic decision of the OAU Assembly at its February 1979 Summit requesting the organization's Secretary-General to convene a meeting of experts which would propose the establishment of relevant bodies for the protection of human rights on the continent in the form of the African Charter on Human and Peoples' Rights.[8]

In January 1981, an OAU Council of Ministers adopted a preliminary draft of an African Charter in Banjul, The Gambia, which had been prepared in 1979 by a Committee of Experts headed by renowned Senegalese jurist Kéba Mbaye. Mbaye and the other legal experts had debated a number of proposals. The focus of most of the proposals was largely on the human rights issues. But, for our limited purposes, one of the most significant was a proposal submitted by the Republic of Guinea suggesting that the future court should also be endowed with jurisdiction to prosecute gross violations of human rights constituting international crimes such as crimes against humanity. The Guinean proposal seemed to have been motivated by a desire to condemn the gross human rights violations taking place in South Africa under a ruthless apartheid regime at the time. The proposal was not successful. And the experts proved to also not be convinced that African states were ready for a human rights court. They therefore recommended the establishment of a human rights commission, while urging the return to the idea of a court capable of issuing binding decisions in the future. The eventual Charter, endorsing the commission idea, was adopted by the OAU Assembly Summit held in Nairobi,

27–29 1971; 'Seminar on the study of new ways and means for promoting human rights with special attention on the problems and needs if Africa' Dar es salaam Tanzania 23 October–5 November 1973. See See Dlamini, 190 citing UO Omuzurike, 'The African Charter on Human and Peoples', Rights' American Journal of International Law 903–4.

7 Dlamini, citing Kannyo, 'Human Rights in Africa: Problems and Prospects (1980) 24 et seq.

8 Dlamini, 191. Dlamini records that a meeting of experts subsequently convened by the UN in Morovia in September to discuss the creation of the African Commission would make proposals to the OAU on a model of the Commission.

Kenya in June 1981[9] and came into force in 1986. The African Commission, the institution established under the Charter to interpret the treaty and to help protect and promote human rights in Africa, was established in November 1987 and based in Banjul, The Gambia.[10]

In an attempt to bolster the charter and hear grievances, the African Court of Human Rights (ACHPR), which complements the protective mandate of the African Commission on Human and Peoples Rights,[11] was inaugurated in 2006. This was based on a recognition that the Banjul Charter entailed some limitations s well as a desire to enhance its efficiency. The African Court sits in Arusha, Tanzania and besides the power to issue advisory opinions, may hear individual applications relating to human rights violations brought before it by the AU Commission, as well as complaints initiated by individuals as well as African intergovernmental organisations and member states.[12] It was created by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, adopted on 10 June 1998, which entered into force on 25 January 2005.[13] A significant legal limitation to the jurisdiction is that a special declaration by a state is required for the Court to have competence to entertain individual human rights complaints against it, which perhaps unsurprisingly given the current state of human rights on the continent, has, at the time of this writing, only been entered by seven African states.

The push to establish an African Court is as old as the African Charter itself, having been considered but rejected on various grounds by the Committee of Experts that drafted the African Charter in 1979.[14] It was motivated, in part, by the need to strengthen the African human rights system and enhance the system's capacity to engender positive responses from states through binding decisions. However, the subject matter jurisdiction of this Court was limited to human rights violations and did not extend to international crimes, except in the context of 'massive violations'.[15] It interprets and applies the African Charter on Human Rights, the Protocol Establishing

[9] See Dlamini, 193 citing Kannyo at 20.
[10] Art 45 African Charter.
[11] Rt 1, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
[12] Ibid. at 8.
[13] Currently 27 of 54 possible states are party to it.
[14] On the drafting history of the Charter, see Rapporteur's Report, Committee of Experts. See also, Frans Viljoen, 'A Human Rights Court for African, and Africans' Brooklyn Journal of International Law, 30:1 (2004) 1–66 pp 4–6.
[15] See Article 48, African Charter.

the Court and any other relevant (human rights) instrument ratified by the states concerned.[16] At the same time, the decisions of the African Commission are mere recommendations.[17]

However, with the transition from the OAU to the AU in 2000, several organs were created by the AU's Constitutive Act. One of these organs of the AU, which addressed aspects of the expressed commitment to promote deeper commitment to human rights by condemning and rejecting impunity, is the African Court of Justice. In 2001, a second inter-state court structure was included in the AU's Constitutive Act and was further developed in the 2003 Protocol of the Court of Justice of the AU, becoming known as the African Court of Justice (ACJ).[18] The ACJ was intended to be the principal judicial organ of the AU, with authority to rule on disputes over the interpretation of AU treaties.[19] Although this protocol entered into force in 2010, the ACJ was superseded by the Protocol on the Statute of the African Court of Justice and Human Rights (the Merger Protocol).[20]

In explaining the merger of the courts, among other factors, many believed that the proliferation of institutions was problematic and that the viability of these institutions was in question in view of funding constraints. There also remained some apprehension about the extent of commitment to the establishment of a robust court. In 2007, a group of African legal experts was commissioned by the AU to advise on a possible conjunction of the ACHPR and the ACJ.[21] The Assembly requested the AU Commission to appoint a Committee of Experts to consider a possible merger and prepare a protocol for the same.[22] The Committee of Experts was appointed and produced a draft protocol. A merger of the African Court on Human Rights and the African Court of Justice was justified as part of the rationalization and cost-cutting measures undertaken by the AU. This merged court would become the ACJHR.[23]

[16] Art 3, Protocol Establishing the African Court.
[17] Art 58(2). See Frans Viljoen, 'A Human Rights Court for African, and Africans' Brooklyn Journal of International Law, 30:1 (2004) 1–66 at 13.
[18] Ibid.
[19] Ibid.
[20] African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, available online at: www.au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (Merger Protocol).
[21] Ibid.
[22] AU Commission Report on the decision of the Assembly of the Union to merge the Court on Human and Peoples' Rights and the Court of Justice of the African Union, EX CL/162 (VI) Sixth Ordinary Session. 24–28 January 2005, pp 1–4.
[23] Sirleaf, supra note 2 at 20.

During the meeting of Experts and Ministers of Justice and Attorneys General held at the AU Headquarters in Addis Ababa in April 2008, the Protocol on the African Court of Justice and Human Rights was considered and approved. The Assembly subsequently adopted the Protocol of the Merged Court at its 6th Ordinary Session in Sharm El Sheikh, Egypt in July 2008. The joining of the two courts into a 'Merged Court' contemplated two jurisdictional chambers: a general chamber to consider inter-state issues and labour matters affecting employees of the AU (which was the original jurisdiction of the ACJ) and a human and peoples' rights chamber with the same powers as the ACHPR. The AU urged member states to proceed with speedy ratification.[24] The Merger Protocol was to enter into force after 15 ratifications, the current threshold for most AU treaties. To date, only five states have ratified it.[25]

However, it was the eruption of the contentious debate in 2008 on universal jurisdiction following the indictment of Rwandese officials by courts in France and Spain coupled with the controversy over the indictment of Sudanese President Al-Bashir by the Prosecutor of the ICC in 2009 that complicated the path to ratification when the AU redirected its efforts towards expanding the jurisdiction of the Human Rights Court before the Protocol establishing the Merged Court could come into force.[26] By this time, the African Court on Human Rights that had been inaugurated in 2006 was engaged in setting up its structures and negotiating a working relationship with the African Commission. As a consequence of a UN Security Council Article 13(b) referral of the Sudan Situation in March 2005, the ICC issued an indictment on two charges of war crimes and three charges of crimes against humanity against President Al-Bashir of Sudan.[27] The controversy revolved around the ICC prosecutor's refusal to not reconsider the application for the issuance of the arrest warrants, despite Sudan being a non-party to the Rome Statute and the AU's concerns about the ongoing peace process to end the conflict in Darfur. The first arrest warrant

[24] AU Assembly Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the African Court of Justice Doc.Assembly/AU/13 (XI).

[25] Ibid.

[26] Charles C. Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', Criminal Law Forum 21(1) (2010) 1–65; Charles C. Jalloh, 'Regionalizing International Criminal Law', International Criminal Law Review 9(3) (2009) 455–99.

[27] Situation in Darfur, Sudan Prosecutor v Omar Hassan Al Bashir available at www.icc-cpi.int/iccdocs/doc/doc639078.pdf.

was issued on 4 March 2009 while the second, which added charges relating to the crime of genocide, was issued on 12 July 2010.

Within months of the adoption of the Protocol Establishing the Merged Court, and during its Twelfth Ordinary Session held between 1–3 February 2009 in Addis Ababa, the Assembly of Heads of State and Government requested the AU Commission, in consultation with the African Commission on Human and Peoples' Rights, and the African Court on 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'.[28] In its decision of 3 February 2009, the AU had argued for an 'accommodation' to allow the continental body more time to find a negotiated solution to the armed conflict in Darfur, cautioning that these peacemaking efforts could be undermined by the indictment of President Al-Bashir.[29] The AU indicated that it was not opposed to accountability for atrocity crimes in Sudan, irrespective of who were the perpetrators, but that timely political resolution of the conflict could be undermined by an untimely prosecution. In other words, the question of peace versus justice, or rather the sequencing of peace and justice, which had been already raised in the Uganda Situation now took centrality in what would prove to be an ICC-AU debacle that continues to this day.[30]

At the close of its Thirteenth Ordinary Session in Sirte, Libya on 3 July 2009, the Assembly renewed its call to the AU Commission, expressing its desire to have the process speeded up and urged the commission to aim for an 'early implementation' of its February decision.[31] The Assembly 'expressed its deep concern at the indictment issued by the Pre-Trial Chamber of the ICC against President Omar Hassan Ahmed Al-Bashir of the Republic of the Sudan'.[32] In its view, the indictment had prejudiced its efforts to find peace in Darfur. It noted, with concern:

> *the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to*

[28] See farr, para 9.

[29] AU Assembly, 'Decision on the application by the International Criminal Court Prosecutor for the Indictment for the President of the Republic of Sudan' the 12th Ordinary Session in Addis Ababa Ethiopia on 3 February 2009 during Assembly/AU/Dec.221 (XII).

[30] For more on the wider Africa-ICC relationship, see Kamari Clarke et al. (eds), Africa and the ICC (Cambridge University Press, 2016); Charles Jalloh and Ilias Bantekas (eds), The International Criminal Court and Africa (Oxford University Press, 2017).

[31] AU Assembly Decision on the meeting of African States Parties to the Statute of the Rome Statute of the International Criminal Court, (ICC) Doc. Assembly/AU/13(XIII), Sirte, Libya, 3 July 2009, para 5.

[32] AU Assembly of the African Union, 'Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court' (ICC)(Doc. Assembly/AU/13(XIII)) Thirteenth Ordinary Session, held in Sirte Libya on 1–3 July 2009, para 2.

undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.[33]

It is clear from the Sirte decision that the AU's concerns over the Al-Bashir indictment directly influenced its decision to call on relevant AU organs to speed up the work on its request made earlier in the year, to investigate the prospects of vesting the ACJHR with a criminal prosecution mandate. A central factor, which preceded the Al-Bashir indictment controversy and that was also very important to understanding the origins of the criminal jurisdiction idea, had been the 2006 recommendation of a separate committee of AU experts relating to the trial of Chadian president Hissiéne Habré. That committee proposed that Senegal be entrusted with the responsibility of trying the former Chadian president, but also urged consideration for the addition of a criminal jurisdiction to the existing African Human Rights Court in order to have a mechanism to prosecute any similar cases that might arise in the future. And by late 2009, in response to the directives received from the Assembly, the Office of the Legal Counsel of the AU commissioned the Pan African Lawyers Union (PALU) to carryout a study and prepare recommendations and a form of draft amendment to the Merger Protocol to enable the Court to try international crimes 'such as' genocide, crimes against humanity and war crimes.[34]

PALU submitted its first draft report and draft legal instrument to the Office of the Legal Counsel (OLC) of the AUC in June 2010, proposing amendments to the existing Protocol as well as its Statute. In August 2010, PALU submitted the second draft report and draft legal instrument, incorporating the directives and suggestions of the OLC.[35] Following this, two validation workshops were held in South Africa in August and October/November 2010. The meetings were privately organized and brought together the AUC and the legal advisors of all relevant AU organs and institutions, as well as the legal advisors of the Regional Economic Communities (RECs), to consider the draft report and draft legal instrument.[36] A number of individuals were reportedly invited to participate in the meetings, based on their connection to the principals of PALU. Civil society organizations, academia and independent legal experts in international criminal law were not formally included in the process. An opportunity was thus lost to take advantage of the availability of specialists in these issues from within Africa as well as internationally.

[33] AU, Assembly of the African Union, Thirteenth Ordinary Session, held in Sirte Libya on 1–3 July 2009, para 3.
[34] Ibid.; Deya, supra note 2 at 24.
[35] Ibid.
[36] Ibid.

In any event, between March and November 2011, three additional meetings of government experts took place in Addis Ababa, Ethiopia to consider the draft report and draft legal instrument. Both the draft report and draft legal instrument were amended at each stage based on directives and suggestions from each of the meetings.[37] After further discussions, delays and amendments, in May 2014, a revised version of the 2012 draft was put before the first session of the AU Specialised Technical Committee (STC) on Justice and Legal Affairs in Addis Ababa. The STC is composed of Ministers of Justice and/or Attorneys General, Ministers responsible for constitutional development and rule law as well as Ministers charged with Human Rights responsibilities in the AU member states. At this meeting, attended by legal representatives of 38 AU member states, two AU organs and one REC, the draft was adopted and submitted for consideration and adoption to the AU Assembly, through its Executive Council. Three independent legal experts, two of whom are co-editors of this book (Jalloh and Clarke), were invited by the third co-editor (Nmehielle – who was then legal counsel to the African Union Commission) in the week just before the STC opened to provide feedback on the draft instrument. The key limitation was that the draft instrument, having been approved at the ministerial level twice, was not subject to further substantive changes. Neither for that matter, in accordance with AU treaty making process, were the seven other legal instruments under consideration in the same meeting of the STC. Nonetheless, based on the assistance of the independent experts, the legal counsel was successful in advocating for the STC to adopt a number of significant last-minute amendments relating to, for example, definitions of crimes as well as the establishment of a full-fledged Defence Office to ensure principled equality of arms with the prosecution. Some of the delegations seemed uncomfortable with the mere presence of the legal experts. So it was even more remarkable that the consensus was not broken over the AUC counsel's proposed amendments. Together with the then new AU legal counsel, we could only wish that we had been involved at an earlier stage of the drafting process as that might have assisted in addressing some of the key issues with and gaps in the Malabo Protocol.

From that point on, the legislative process of the Malabo Protocol – from the commissioning of PALU in late 2009, to the Ministerial meetings held in October and November 2012 to agree on a draft protocol that would involve the addition of criminal jurisdiction to the African Court – followed a number of starts and stops. However, it was the ICC's indictment of Uhuru Kenyatta and William Ruto, two prominent politicians from Kenya, who

[37] du Plessis, supra note 2 at 4.