THE CREATION OF AN AFRICAN INTERNATIONAL CRIMINAL JUSTICE: THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES’ RIGHTS

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Scope of Presentation

• OVERVIEW OF MALABO PROTOCOL

• THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES’ RIGHTS AND THE FIGHT AGAINST IMPUNITY IN AFRICA

• PROBLEMS & CHALLENGES WITH THE MALABO PROTOCOL

• RECOMMENDATIONS
Overview of Malabo Protocol
What is the Malabo Protocol

- In June 2014, at its twenty-fifth ordinary session, the Assembly of Heads of State and Governments of the African Union (AU) adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples’ Rights, also known as the Malabo Protocol.

- The Protocol was enacted to extend the jurisdiction of the yet to be established African Court of Justice and Human and Peoples’ Rights to include criminal matters.

- This Court is to operate as a “chamber” of the African Court of Justice and Human and Peoples’ Rights and serve as a regional criminal justice mechanism for Africa.
• As at April 2019, only 15 out of the 55 African States had signed the Protocol

• Unfortunately, there has been no ratification by any of these signatory States

• This raises serious concerns and doubts as to the readiness and commitment of the African States towards the establishment of the Court and the fight against impunity generally
The African Court of Justice and Human and Peoples’ Rights and the fight against Impunity in Africa
Organs of the Court

- Article 2 of the Protocol provides for the following organs:
  - The Presidency;
  - The Office of the Prosecutor;
  - The Registry; and
  - The Defence Office

- The Court is vested with original and appellate jurisdiction, including international criminal jurisdiction – Article 3

- The Court is to complement the protective mandate of the African Commission on Human and Peoples’ Rights
• The Protocol extends the jurisdiction of the Court beyond the well known international crimes, namely: Genocide, Crimes Against Humanity and 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;
• The Crime of Aggression.
• The Protocol also explicitly includes Rape or any other form of sexual violence as a method of Genocide

• It also greatly expands on the definition of War Crimes

• Also, in addition to the 14 crimes within the jurisdiction of the Court, there is the possibility of the addition of new crimes to the subject matter jurisdiction of the Court – Article 28(A)(2)
• As already indicated, the Protocol establishes an Office of the Public Defender as a separate and independent organ of the court tasked with providing representation for accused persons before the Court.

• The Protocol also creates a trust fund for legal aid and assistance to victims of crimes and their families – to provide reparations and compensation where necessary.

• The Protocol establishes a Victims and Witnesses Unit within the Registry to provide “protective measures and security arrangements, counseling and other appropriate assistance” among others – Article 22B.
Problems and Challenges with the Malabo Protocol
• Immunity for Heads of States and Government

• Inadequate Number of Judges

• Breadth of the Court’s Jurisdiction

• Definition of Crimes

• Finances
Immunity for Heads of States

- Article 46A of the Protocol 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.”

- This controversial provision will definitely undermine the legitimacy of the Court and the fight against impunity in Africa, and is even at odds with the founding and organizational principles of the AU.
Inadequate Number of Judges

• The Protocol provides that the Court will be comprised of Sixteen (16) Judges who are nationals of State parties; elected from among persons of high moral character and qualified in their countries to occupy the highest judicial offices, or are qualified and experienced in International Law, International Human Rights Law, International Humanitarian Law or International Criminal Law

• Given the expansive jurisdiction of the Court granted by the Protocol, 16 Judges will be inadequate for the proper functioning of the Court in respect of expedited trials and the management of the various sections of the Court
Breadth of the Court’s Jurisdiction

• The Protocol appears to represent an unrealistic attempt at fighting impunity in Africa, by overloading the Court with an overly expansive scope of jurisdiction.

• The Court’s ability to effectively and efficiently handle the numerous offences within its jurisdiction is a great concern considering the inadequate number of Judges provided for under the Protocol.

• The Court’s authority and legitimacy seems to be undermined by the sheer magnitude of its task even before it begins work!
Definition of Crimes

• Some of the crimes included under the jurisdiction of the Court are yet to be well defined and established in International Law and even under the Protocol

• Unconstitutional Change of Government – The definition of this crime was contentious throughout the drafting process of the Protocol and is still problematic

• This offence is not known to be widely prosecuted as a crime under International law and it remains to be seen what effect this criminalization by the Protocol will have on the African continent
Finances

• The addition of a third chamber to the Court raises concerns as to the additional costs that will come with it.

• This is because, the AU and its institutions appear to be continually underfunded and heavily reliant on international/foreign donors/development partners.

• Thus, there are doubts that the AU has the financial capacity to effectively and efficiently deliver on its mandate, given the potential new crimes to be added to the Court’s jurisdiction.
Recommendations
• **Immunity for Heads of State** – Article 46A should be repealed entirely. No immunity should be provided to any individual, regardless of their official position or capacity.

• **Composition of the Court** – The number of Judges should be increased to enhance the proper, speedy and effective functioning of the Court in the discharge of its mandate.

• **Complementarity** – AU member States must resolve to affirm the Court’s commitment to complement the International Criminal Court (ICC) and the fulfillment of their obligations under the Rome Statute.

• The Court must not be seen to undermine the mandate of the ICC but must give effect to such partnerships with national and international mechanisms in the fight against impunity.
• The Protocol should also provide for a framework for cooperation between the proposed Court and other regional and international courts.

• This will ensure a holistic and universal approach to fighting impunity on the continent in a manner that complements rather than undermines global efforts in that regard.

• The expansive criminal jurisdiction of the Court can then be greatly reduced so as not to overburden it.
• **Definition of Crimes** – Some of the crimes need to be looked at again

• For instance, the crime of unconstitutional change of government must be defined to the effect that:

• “Any act of a sovereign people peacefully exercising their inherent right shall not constitute an offence under the provision”
• **Finances** – The Protocol is silent on the financial implications of State parties towards the running of the Court

• Questions as to whether all member States will provide support towards the running of the Court financially or if the Court will depend on foreign aid, for instance, remain unanswered

• **Civil Society Organizations** – should be engaged in efforts to set up the Court and the actual functioning of the Court

• They can undertake thorough reviews, provide constructive criticisms and recommendations to inform necessary amendments to the Protocol
• **Public Education and Awareness Creation** – The AU should undertake extensive public education regarding the proposed Court and provide appropriate platforms and forums for victims and members of the general public to contribute to the discussion.

• **The Criminal Justice Framework in Africa** – must strive to focus on and cater for the interests of the thousands of victims across the continent.

• Decisions by the AU and the Court must be taken with a genuine commitment to place the protection and empowerment of victims and witnesses at the heart of its considerations.
QUESTIONS?