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Perspectives on the International Criminal Jurisdiction of the African Court of Justice and Human Rights Pursuant to the Malabo Protocol (2014)

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1. INTRODUCTION

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014) (as it is formally known) ('Malabo Protocol (2014)') could be said to represent many things, depending on one's perspective. For some, it is a genuine attempt by African States to address international and transnational crimes that bedevil the African continent.[1] For others, it is a cynical response to decisions of the International Criminal Court (ICC) that African leaders do not like, and the so-called 'abuse' of universal jurisdiction by Western states for crimes committed on the African continent.[2] The aim of this chapter, however,

The views expressed herein are those of the authors and do not necessarily reflect the views of the Special Tribunal for Lebanon.

[1] *See for example* M. Sirleaf, 'The African Justice Cascade and the Malabo Protocol' 11(1) *International Journal of Transitional Justice* (2017) 71–91; A. Abass, 'Historical and Political Background of the Malabo Protocol', in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (T.M.C. Asser/Springer, The Hague/Berlin, 2017), pp. 15–16.

[2] *See for example* H. van der Wilt, 'Complementary Jurisdiction (Article 46H)', in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (T.M.C. Asser/Springer, The Hague/Berlin, 2017), pp. 189–90; C. Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' 9(5) *Journal of International Criminal Justice* (2011) 1067–88, at 1077–9, 1088. *See also African Union*, *Decision* No. Ext/Assembly/AU/Dec.1 (October 2013), *Decision on Africa's Relationship with the International Criminal Court (ICC)*, 12 October 2013, paras 4, 10(ii), 10(iv); *African Union*, *Decision* No. Assembly/AU/Dec.547(XXIV), *Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC)*, Doc. Assembly/AU/18(XXIV), 30–31 January 2015, paras 3, 4(a)–(b), 9, 17(b), 17(d)–(e).

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is to simply offer objective perspectives on the provisions of the Malabo Protocol (2014) that add international criminal jurisdiction to the African Court of Justice and Human Rights (ACJHR), particularly those relating to genocide (Article 28B), war crimes (Article 28D), crimes against humanity (Article 28C) and aggression (Article 28M).

At the outset, one often forgotten matter should be recalled. The Malabo Protocol (2014) as a whole was the result of debates and negotiations between African States which manifested themselves in specific language, omissions and compromises. As with all treaties, one cannot expect a perfect outcome – it is hard, if not impossible, to please all interested parties. As a result, some of the ideas reflected in the Malabo Protocol (2014) are very innovative, salutary and make a positive contribution to the development of international criminal law. Other ideas may be unrealistic. Others are outright retrogressive and undesirable. But as it relates to core international crimes alone, the Malabo Protocol (2014), as detailed below, brings much good to the international criminal law table.

2. A MOST CONVOLUTED ARCHITECTURE: THE INTERACTION OF AT LEAST FOUR DIFFERENT TREATY REGIMES

Before delving into the substantive crimes under the Malabo Protocol (2014), one issue cannot escape attention. That is the convoluted and complex legal architecture of the ACJHR as envisaged by the Malabo Protocol (2014). As the inclusion of the word 'protocol' in its name suggests, the Malabo Protocol (2014) is not a treaty that stands on its own. Rather, it is the last of at least 4 different treaty regimes that endeavour to work and interact together to create – among other things – Africa's regional court for international crimes.

The first of these is the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) (African Human Rights Court Protocol). This established the African Court on Human and Peoples' Rights – the African equivalent of the European Court of Human Rights and the Inter-American Court of Human Rights. Its mandate is to guard against violations of the African Charter on Human and Peoples' Rights (1981) – Africa's regional human rights treaty. It hears and adjudicates on complaints from the African Commission on Human and Peoples' Rights, States parties, African intergovernmental organizations, non-governmental organizations and individuals; it may also render advisory opinions at the

request of African Union (AU) member states.[3] The African Human Rights Court Protocol entered into force (and the court was established) on 25 January 2004, 30 days after the 15th AU state (Comoros) deposited its instrument of ratification.[4] As of 15 June 2017, 52 of the AU's 55 member states have signed the African Human Rights Court Protocol (1998), while 30 member states have ratified or acceded to it.[5] The first set of judges were sworn in 2006 and the court is currently up and running and actively fulfilling its mandate.

The second relevant treaty is the Protocol of the Court of Justice of the African Union (2003) (African Court of Justice Protocol). This established an entirely different court, the African Court of Justice – the African equivalent of the International Court of Justice and the European Court of Justice. The court was originally envisaged by the Constitutive Act of the African Union (2000) (AU Constitutive Act), but its statute, composition and functions were left to be finalized in a separate protocol at a later time.[6] The African Court of Justice's jurisdiction extends to the interpretation and application of the AU Constitutive Act (2000), AU treaties and subsidiary legal instruments (including regulations and directives), as well as any question of international law and all matters where states parties specifically agree to confer jurisdiction upon it.[7] As of 15 June 2017, 44 of the AU's 55 member states have signed the African Court of Justice Protocol (2003), while 18 member states have ratified or acceded to it.[8] It entered into force on 11 February 2009, 30 days after the 15th AU state (Algeria) deposited its instrument of ratification.[9] However, unlike the African Court on Human and Peoples' Rights, the African Court of Justice exits only on paper. The Assembly of Heads of State and

[3] *See generally* Arts. 2, 3(1), 4(1), 5(1)–(2), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

[4] *See* Art. 34(3), Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

[5] *See* African Union, List of Countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998), available at: https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 25 November 2018).

[6] *See* Arts. 5(1)(d), 18(1)–(2), 26, Constitutive Act of the African Union (2000).

[7] *See* Art. 19(1)–(2), Protocol of the Court of Justice of the African Union (2003).

[8] *See* African Union, List of Countries which have signed, ratified/acceded to the Protocol of the Court of Justice of the African Union (2003), available at: https://au.int/sites/default/files/treaties/7784-sl-protocol_of_the_court_of_justice_of_the_african_union_1.pdf (accessed 25 November 2018).

[9] *See* Article 60, Protocol of the Court of Justice of the African Union (2003).

Government of the AU determined in 2004 that the African Court of Justice should be merged with the African Court on Human and Peoples' Rights, but without prejudice to the operationalization and continued existence of the latter.[10]

This merger brings us to the third relevant treaty: the Protocol on the Statute of the African Court of Justice and Human Rights (2008) (African Court of Justice and Human Rights Protocol). This treaty envisages a new court – the ACJHR – which, as aforementioned, would combine the functions and mandates of the African Court on Human and Peoples' Rights and the African Court of Justice. As of 8 February 2018, 31 of the AU's 55 member states have signed the African Court of Justice and Human Rights Protocol (2008), while only 6 member states have ratified or acceded to it.[11] 15 AU member states are needed to ratify (or accede to) the African Court of Justice and Human Rights Protocol (2008) before it enters into force,[12] and thus the protocol – and the ACJHR – remains only on paper for the time being.

To the ACJHR, the AU has added a fourth treaty layer: the Malabo Protocol (2014). This protocol, which is the focus of this chapter, adds international and transnational crimes to the jurisdiction of the proposed ACJHR, as well as procedural and other provisions to facilitate their investigation and prosecution. 15 AU member states must ratify (or accede to) the Malabo Protocol (2014) before it can enter into force.[13] As of 8 February 2018, only 11 of the AU's 55 member states have signed the Malabo Protocol (2014), and no member state has ratified or acceded to it.[14]

[10] *See* African Union, *Decision on the Seats of the African Union*, Assembly/AU/Dec.45 (III) Rev.1, Assembly of the African Union, Third Ordinary Session, 6–8 July 2004, para. 4; African Union, *Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union*, EX.CL/Dec.165 (VI), Executive Council, Sixth Ordinary Session, 24–28 January 2005, para. 2.

[11] *See* African Union, List of Countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights (2008), available at: https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_3.pdf (accessed 25 November 2018).

[12] *See* Article 9(1), Protocol on the Statute of the African Court of Justice and Human Rights (2008).

[13] *See* Art. 9(1), Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014).

[14] *See* African Union, List of Countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014), available at: https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf (accessed 25 November 2018).

Aside from the substantive content of the ACJHR as envisaged by the Malabo Protocol (2014), this practice of stacking treaties on top of existing treaties – particularly when they are intimately linked together in the fashion outlined above – is inelegant and prone to cause confusion. For example, it is not entirely clear whether one treaty is a prerequisite for the next treaty. Must an AU member state first ratify/accede to the African Human Rights Court Protocol (1998) (or the African Charter on Human and Peoples' Rights (1981)) and/or the African Court of Justice Protocol (2003) before it can ratify/accede to the African Court of Justice and Human Rights Protocol (2008) and only then can it do so with respect the Malabo Protocol (2014)? The text of these treaties does not provide clear answers. If it was indeed necessary for (yet) another protocol to have been adopted, then it would have made more sense, at the very least, to have explicitly stated that only states parties to the African Court of Justice and Human Rights Protocol (2008) could become states parties to the Malabo Protocol (2014).

Nevertheless, just as one would, at some point, question the wisdom of constantly upgrading a computer instead of purchasing a new one, there is something to be said about the wisdom of the number of amendments and changes (i.e. 'upgrades') that have been put into place by the complicated and convoluted treaty regime that is present here. One wonders whether it would have been more advisable to simply create a new court from scratch.

3. CORE INTERNATIONAL CRIMES AT THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS UNDER THE MALABO PROTOCOL (2014)

The crimes that would fall within the jurisdiction of the ACJHR under the Malabo Protocol (2014) include the 'traditional' or 'core' international crimes: genocide, crimes against humanity, war crimes and the crime of aggression. With respect to these crimes, the ACJHR Statute under the Malabo Protocol (2014) largely replicates the definitions found in the Rome Statute of the ICC (1998) (Rome Statute). However, in several instances it introduces innovative ideas that are salutary. In other places things could have been better, while in others, substantive omissions are apparent.

A. *Genocide*

The Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Genocide Convention) contains closed and narrow categories

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with respect to its 'protected groups', since they are expressly limited by that treaty to only four: national, ethnical, racial or religious groups.[15] This is replicated in the Rome Statute (1998).[16] Thus, if similar actions were carried out on any other group – regardless of whether the group is viewed objectively or subjectively – they would fall outside of the scope of the crime of genocide (although they would likely be considered, at a minimum, as persecution as a crime against humanity). This situation has attracted criticism directed at the definition of genocide over the years. The same criticism might also be repeated with respect to Article 28B of the ACJHR Statute under the Malabo Protocol (2014), since it lists the same four protected groups.

Some early jurisprudence from the International Criminal Tribunal for Rwanda (ICTR) viewed genocide's protected groups differently. Consider the following pronouncement in *Akayesu*:

> Moreover, the Chamber considered whether the groups protected by the Genocide Convention [(1948)], echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention [(1948)], if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention [(1948)]. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention [(1948)], which according to the *travaux préparatoires*, was patently to ensure the protection of *any stable and permanent group*.[17]

This holding, that the Genocide Convention (1948) protects any stable and permanent group – as opposed to only national, ethnical, racial or religious

[15] *See* Art. II, Genocide Convention (1948).

[16] *See* Art. 6, Rome St. (1998). It should be noted that during the negotiations leading to the Rome Statute (1998), some States tried to expand genocide's protected groups, but this was met with reluctance by the majority of States. The attempts were ultimately unsuccessful. *See* H. von Hebel and D. Robinson, 'Crimes Within the Jurisdiction of the Court', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague/London/Boston, Kluwer Law International, 1999), p. 89; W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2010), p. 129; W. A. Schabas, 'Article 6: Genocide', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition (Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2016), margin No. 16, p. 135.

[17] Trial Judgment, *Prosecutor v. Akayesu*, (ICTR-96–4-T), ICTR, 2 September 1998, para. 516 (emphasis added).

groups – has not been wholeheartedly embraced by subsequent jurisprudence. Only the same ICTR Trial Chamber both in *Rutaganda* and *Musema* adopted it, albeit with slight modifications,[18] and one can also catch a glimpse of it in the International Criminal Tribunal for the former Yugoslavia (ICTY)'s *Krstić* case.[19]

Some AU countries also appear to have moved away from the closed protected groups found in the Genocide Convention (1948) by the manner in which genocide has been incorporated into their domestic law. Thus, while some have included only the four protected groups found in the Genocide Convention (1948),[20] others have gone beyond this and added political groups,[21] political and 'colour' groups,[22] social groups,[23] any other

[18] Trial Judgment, *Prosecutor* v. *Musema*, (ICTR-96–13-T), ICTR, 27 January 2000, para. 162:

> It appears, from a reading of the *travaux préparatoires* of the Genocide Convention [(1948)], that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "non stable" or "mobile groups" which one joins through individual, voluntary commitment. That would seem to suggest *a contrario* that the [Genocide] Convention [(1948)] was presumably intended to cover relatively stable and permanent groups. Therefore, the Chamber holds that in assessing whether a particular group may be considered protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the political, social and cultural context in which the acts allegedly took place.

See also Trial Judgment, *Prosecutor* v. *Rutaganda*, (ICTR-96–3-T), ICTR, 6 December 1999, paras 57–58.

[19] Trial Judgment, *Prosecutor* v. *Krstić*, (IT-98–33-T), ICTR, 2 August 2001, para. 556:

> The preparatory work of the [Genocide] Convention [(1948)] shows that setting out such a list [of protected groups] was designed more to describe a single phenomenon, roughly corresponding to what was recognized, before the Second World War, as "national minorities", rather than to refer to several distinct prototypes of human groups.

[20] As in Angola (Art. 367, Penal Code of Angola); Burundi (Art. 195, Penal Code of Burundi); Djibouti (Art. 481, Penal Code of Djibouti); Eritrea (Art. 107, Penal Code of Eritrea); Ghana (Section 49A, Criminal Code (1960)); Guinea-Bissau (Art. 101, Penal Code of Guinea-Bissau); Kenya (Section 5, International Crimes Act (2008)); Mali (Art. 30, Penal Code of Mali); Mozambique (Art. 160(2)(j), Penal Code of Mozambique); Mauritius (Sections 2, 4(1)(b), Schedule, Part II, International Criminal Court Act (2011)); Rwanda (Article 2, Loi No. 33 bis/2003, 6 September 2003); South Africa (Sections 1, 4(1), Schedule 1, Part 1, Implementation of the Rome Statute of the International Criminal Court Act (2002)); Sudan (Art. 187, Criminal (Amendment) Law (2009)); Uganda (Sections 7(1)(a), 7(2), Schedule 1, International Criminal Court Act (2010)); Zimbabwe (Section 4, Genocide Act (2000)).

[21] As in Côte D'Ivoire (Art. 137, Penal Code of Côte D'Ivoire).

[22] As in Ethiopia (Art. 269, Criminal Code of Ethiopia).

[23] As in São Tomé and Príncipe (Art.210, Penal Code of São Tomé and Príncipe).

groups based on 'any arbitrary criterion',[24] or any other identifiable group.[25] Given this African reality, and the aforementioned (but limited and controversial[26]) jurisprudence arising from *Akayesu*, a question might be asked: was an opportunity lost to incrementally modernize genocide so that any stable and permanent group could be protected, somewhere halfway perhaps between those AU member states that have incorporated the four protected groups of the Genocide Convention (1948) into domestic law and those that have gone beyond?

Such a change would have moved genocide away from customary international law (assuming that genocide's definition is the same under custom and it is in the Genocide Convention (1948)). Yet, it is also true that the treaty's original drafters could only express their vision for the protected groups through the prism and frame of reference of 1948, that is, the prevailing permanent and stable groups at that time: national, ethnical, religious and racial groups. Today, for example, it is not at all uncommon for a person to move from one religion to another. Nonetheless, a conscious decision was made to remain faithful to Article II of the Genocide Convention (1948) by the drafters of the Malabo Protocol (2014). In the absence of cases in modern times where stable and permanent groups have been targeted for genocidal acts, but were found not to fit within either national, ethnical, racial or religious groups, it appears unjustified to modify the protected groups at this time. It remains to be seen whether this continues to hold true in the future.

[24] As in Burkina Faso (Art.313, Penal Code of Burkina Faso); Cape Verde (Art. 268, Penal Code of Cape Verde)); the Central African Republic (Art. 152, Penal Code of the Central African Republic); Comoros (Art. 17, Loi No. 11–022, 13 December 2011); the Congo (Art. 1, Loi No. 8–98, 31 October 1998); the Democratic Republic of the Congo (Art. 1, Law No. 8–98, 31 October 1998); Niger (Art. 208(1), Penal Code of Niger); Senegal (Art. 431(1), Penal Code of Senegal).

[25] As in Lesotho (Section 93, Penal Code Act (2010)).

[26] For criticism of *Akayesu*'s above pronouncement on genocide's protected groups, *see* G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford, Oxford University Press, 2006), p. 230; W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, (2nd Edition Cambridge, Cambridge University Press, 2009), pp. 151–3. As one commentator has noted, it 'looks increasingly idiosyncratic as time goes by': W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2010), p. 129; W. A. Schabas, 'Article 6: Genocide', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (3rd Edition Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2016), margin No. 17, p. 135; C. J. Tams, L. Berster and B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2014), margin No. 60, p. 115.

The ACJHR Statute as per the Malabo Protocol (2014) also adds to the enumerated list of acts and conduct that can constitute genocide. In addition to those found in Article 6(a)–(e) of the Rome Statute (1998) (which replicates Article II(a)–(e) of the Genocide Convention (1948)), Article 28B(f) adds 'rape or any other form of sexual violence' as acts of genocide *per se*. Of course, this should not be interpreted as saying that such acts could not have constituted genocide before this innovation. Indeed, the notion that rape and similar conduct, under the right conditions, could form the *actus reus* of genocide was first held by the ICTR's *Akayesu* judgement[27] and consistently recognized by international criminal case law ever since.[28] But it is the first time that this jurisprudence has been formally codified as such into a definition of genocide under international law.[29] Until now, rape and other forms of sexual violence has been prosecuted as genocide before international criminal tribunals as acts that cause serious bodily or mental harm,[30] not as rape and sexual violence *per se*. It is important that such actions – particularly those directed against women – be expressly recognized as capable of constituting genocide rather than being subsumed within a broader range of criminal acts. Therefore, the addition of such acts within the enumerated list of the *actus reus* component of the definition of genocide is a welcome development.

[27] Trial Judgment, *Prosecutor v. Akayesu*, (ICTR-96–4-T), ICTR, 2 September 1998, paras 731–4.

[28] *See for example*, Trial Judgment, *Prosecutor v. Kayishema and Ruzindana*, (ICTR-95–1-T), ICTR, 21 May 1999, para. 108; Trial Judgment, *Prosecutor v. Rutaganda*, (ICTR-96–3-T), ICTY, 6 December 1999, para. 51; Trial Judgment, *Prosecutor v. Musema*, (ICTR-96–13-T), 27 January 2000, para. 156; Trial Judgment, *Prosecutor v. Bagilishema*, (ICTR-95–1A-T), 7 June 2001, para. 59; Trial Judgment, *Prosecutor v. Krstić*, (IT-98–33-T), ICTY, 2 August 2001, para. 513; Trial Judgment, *Prosecutor v. Semanza*, (ICTR-97–20-T), 15 May 2003, para. 320; Trial Judgment, *Prosecutor v. Stakić*, (IT-97–24-T), ICTY, 31 July 2003, para. 516; Trial Judgment, *Prosecutor v. Kajelijeli*, (ICTR-98–44A-T), 1 December 2003, para. 815; Trial Judgment, *Prosecutor v. Brđanin*, (IT-99–36-T), ICTY, 1 September 2004, para. 690; Trial Judgment, *Prosecutor v. Blagojević and Jokić*, (IT-02–60-T), ICTY, 17 January 2005, para. 646; Trial Judgment, *Prosecutor v. Muvunyi*, (ICTR-2000–55A-T), 12 September 2006, para. 487; Appeal Judgment, *Prosecutor v. Seromba*, (ICTR-2001–66-A), 12 March 2008, para. 46; Trial Judgment, *Prosecutor v. Popović et al.*, (IT-05–88-T), ICTY, 10 June 2010, para. 812; Trial Judgment, *Prosecutor v. Tolimir*, (IT-05–88/2-T), ICTY, 12 December 2012, para. 737; Trial Judgment, *Prosecutor v. Karadžić*, (IT-95–5/18-T), ICTY, 24 March 2016, para. 545.

[29] It should be noted that some States have already explicitly included rape and sexual violence as the *actus reus* of genocide for the purposes of their domestic law. *See* section 268.4(2), *Criminal Code* (1995) (Australia); Art. 2, Organic Law No. 08/96 (1996) on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes Against Humanity since 1 October 1990 (Rwanda); Article 607(1)(2), *Código Penal* (Spain).

[30] *See* Art. 4(2)(b), ICTY St.; Article 2(2)(b), ICTR St.; Article 4, ECCC Law; Art. 6(b), ICC St. (1998).

On the other hand, one substantive omission from genocide under the ACJHR Statute as per the Malabo Protocol (2014) is the inchoate offence of direct and public incitement to commit genocide, which is found in Article III(c) of the Genocide Convention (1948). In the Rome Statute (1998), this offence is not found in its provision on genocide (Article 6), but is instead included in Article 25 which governs modes of liability at the ICC (specifically, Article 25(3)(e)) (a matter that invoked some disagreements among the drafters)).[31] However, direct and public incitement to commit genocide is found neither in Article 28B (genocide) or 28N (modes liability) of the ACJHR Statute as per the Malabo Protocol (2014). To be fair, incitement is expressly listed in Article 28N(i) and it applies to all crimes equally.[32] That is, however, not the same thing as *direct* and *public* incitement to commit genocide. Indeed, the jurisprudence[33] has made it quite clear that these are substantive elements of the offence, with the 'public' requirement in particular having engendered some controversy in the case law.[34] Thus, under the Malabo Protocol (2014), mere incitement is punishable vis-à-vis genocide – a distinct shift away from the Rome Statute (1998). This unfortunately also departs from the original intent of the drafters of the Genocide Convention (1948), who, by

[31] *See* K. Ambos, 'Article 25: Individual Criminal Responsibility', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (3rd Edition Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2016), margin No. 35, p. 1016.

[32] Art. 28N(i) reads (emphasis added):

> An offence in committed by any person who, in relation to any of the crimes or offences provided for in this Statute:
>
> (i) *Incites*, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute[.]

[33] It is worth noting that this jurisprudence only arises from cases originating at the ICTR. No accused was ever charged with direct and public incitement to commit genocide at the ICTY, and hence no ICTY jurisprudence exists. At the Extraordinary Chambers in the Courts of Cambodia (ECCC), this crime was not specifically included in its governing statute, while the Special Court for Sierra Leone (SCSL) did not have jurisdiction over genocide at all.

[34] *Compare* Appeal Judgment, *Kalimanzira v. The Prosecutor*, (ICTR-05–88-A), 20 October 2010, para. 157 and Appeal Judgment, *Ngirabatware v. The Prosecutor*, (MICT-12–29-A), 18 December 2014, paras 52–4 (both pointing to widely circulated speeches and articles rather than speeches to small and closed groups) *with* Appeal Judgment, *Nzabonimana v. The Prosecutor*, (ICTR-98–44D-A), 29 September 2014, para. 128; Appeal Judgment – Partially Dissenting and Separate Opinion of Judge Pocar,*Prosecutor v. Kalimanzira*, (ICTR-05–88-A), 20 October 2010, para. 45 (both pointing out that the size of the audience when a speech was given was not an element of the offence).

specifying the 'direct' and 'public' requirements, wished to allay concerns regarding freedom of speech and expression.[35]

B. *War Crimes*

The ACJHR Statute under the Malabo Protocol (2014) also introduces innovations regarding the definition of war crimes in Article 28D. While it largely replicates the lists of war crimes in the context of international and non-international armed conflicts that is found in the Rome Statute (1998) (including, notably, the 2010 ICC Kampala Amendments on war crimes in non-international armed conflicts),[36] it also adds a significant number of new ones. To the list of war crimes committed during international armed conflicts the following are added:

- Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated (Article 28D(b)(v));
- Unjustifiably delaying the repatriation of prisoners of war or civilians (Article 28D(b)(xxviii));
- Willfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination (Article 28D(b)(xxix));
- Making non-defended localities and demilitarized zones the object of attack (Article 28D(b)(xxx));
- Slavery and deportation to slave labour (Article 28D(b)(xxxi));
- Collective punishments (Article 28D(b)(xxxii); and
- Despoliation of the wounded, sick, shipwrecked or dead (Article 28D(b)(xxxiii)).

[35] *See* W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, (2nd Edition Cambridge, Cambridge University Press, 2009), pp. 319–24; C. J. Tams, L. Berster and B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2014), margin numbers 6–8, pp. 160–61.

[36] *See* Art. 8(2)(a)(i)–(viii), Rome St. (1998) (grave breaches of the Geneva Conventions (1949); Art. 8(2)(b)(i)–(xxvi), Rome St. (1998) (other serious violations of the law and customs of international armed conflicts); Art. 8(2)(c)(i)–((iv), Rome St. (1998) (serious violations of Common Art. 3 of the Geneva Conventions (1949)); Art. 8(2)(e)(i)–(xv), Rome St. (1998) (other serious violations of the law and customs of non-international armed conflicts).

In addition, in a particularly refreshing move away from the Rome Statute (1998), the following war crime is included in Article 28D(b)(xxi): 'Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law or armed conflict'.

This is to be contrasted to the equivalent provision in Article 8(2)(b)(xx) of the Rome Statute (1998) (emphasis added):

> Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law or armed conflict, *provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123*[.]

As is well known, this provision was the compromise solution that resulted from the controversy, difficulties and eventual deadlock that ensued during the negotiations on the inclusion of prohibited weapons in the Rome Statute (1998). It pitted those states that opposed the inclusion of nuclear weapons as a prohibited weapon in the Rome Statute (1998) against those states that, as a result of this position on nuclear weapons, opposed the inclusion of biological and chemical weapons (i.e. the poor man's nuclear weapon) as a prohibited weapon in the Rome Statute (1998).[37] However, in the words of the late Professor Cassese, 'given the extreme unlikelihood that such amendment will ever be agreed upon, the use of those weapons, projectiles, etc. may eventually not amount to a war crime within the jurisdiction of the [ICC] [under Article 8(2)(b)(xx)]'.[38] These prophetic words have proved to be right, at least so far. The ICC is now some 16 years old and we are no closer to the amendment required under this article, despite the efforts of some states (particularly

[37] For a more complete history of the negotiations leading to this compromise solution, *see* H. von Hebel and D. Robinson, 'Crimes Within the Jurisdiction of the Court', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague/London/Boston, Kluwer Law International, 1999), pp. 113–16; R. S. Clark, 'Building on Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare' 12(3) *New Criminal Law Review* (2009) 366–89, at 369–77; M. Cottier and D. Křivánek, 'Article 8(2)(b)(xvii)–(xx): Prohibited Weapons', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (3rd Edition Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2016), margin numbers 565–73, pp. 454–7.

[38] A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' 10(1) *European Journal of International Law* (1999) 144–71, at 152.

Belgium and Mexico) in the lead up to the 2010 ICC Review Conference held in Kampala, Uganda. It remains a dead letter. However, the ACJHR Statute under the Malabo Protocol (2014) has boldly included Article 28D(b)(xxi) as a general provision without any strings attached. This means that a determination of whether a particular weapon causes 'superfluous injury or unnecessary suffering or [is] inherently indiscriminate' has been left to judges and, potentially, future judicial evolution – something that the drafters of Article 8 (2)(b)(xx) of the Rome Statute (1998) were particularly weary of.

Similarly, to the list of war crimes committed during non-international armed conflicts, the ACJHR Statute under the Malabo Protocol (2014) adds the following:

- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies (Article 28D(e)(xvi));
- Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations (Article 28D(e)(xvii));
- Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage (Article 28D(e)(xviii));
- Making non-defended localities and demilitarized zones the object of attack (Article 28D(e)(xix));
- Slavery (Article 28D(e)(xx));
- Collective punishment (Article 28D(e)(xxi)); and
- Despoliation of the wounded, sick, shipwrecked or dead (Article 28D(e)(xxii)).

While these provisions are mostly carbon copies of the same crime committed in international armed conflicts (i.e. the corresponding crime found under Article 28D(b)), the substantive differences found in Article 28D(e)(xviii) and Article 28D(e)(xx) are worth noting.

With respect to Article 28D(e)(xviii), that provision should be contrasted to its international armed conflict twin, Article 28D(b)(iv) (emphasis added): 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians *or damage to civilian objects or widespread, long-term and severe damage to the natural environment* which would be *clearly* excessive in relation to the concrete and direct overall military advantage anticipated'.

While the language of Article 28D(e)(xviii) is not exactly the same as that contained in Article 28D(b)(iv), the underlying idea largely aligns and is

readily identifiable in both provisions. There are however, some important substantive differences. For one, Article 28D(e)(xviii) does not explicitly include damage to civilian objects, although this could perhaps be read into the concept of 'civilian damage'. But more importantly, is that the standard under Article 28D(e)(xviii) appears to be *lower* than that under Article 28D(b)(iv); the former only requires the incidental damage/injury/loss to be excessive but the latter requires the incidental damage/injury/loss to be *clearly* excessive. In other words, the standard appears to have been set higher in the context of an international armed conflict ('clearly excessive' – Article 28D(b)(iv)) than under a non-international armed conflict ('excessive' – Article 28D(e)(xviii)). One struggles to understand why this should be so. The same could be said with respect to the omission of crimes against the environment in Article 28D(e)(xviii), particularly in light of the International Commission of the Red Cross' customary international humanitarian law study which determined that customary rules had 'arguably' developed with respect to the protection of the environment in non-international armed conflicts.[39]

Concerning Article 28D(e)(xx), its international armed conflict counterpart, Article 28D(b)(xxxi)), includes additional substantive language (emphasis added): '[s]lavery *and deportation to slave labour*'. Clearly, the drafters of the provision had in mind the events of World War II, when Nazi Germany deported millions of foreign civilians and prisoners of war to provide slave labour to the German war industry; numerous individuals were charged and tried for slave labour as a war crime and/or crime against humanity in the war's aftermath.[40] However, considering that deportation generally occurs when

[39] *See* J-M. Henckaerts and L. Doswald-Beck (eds), *International Committee of the Red Cross Customary International Humanitarian Law – Volume I: Rules* (Cambridge, Cambridge University Press, 2009), p. 151, Rule 45: 'The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.' *See also* pp. 143–51, Rules 43–4.

[40] *See* Judgment, *United States of America et al.* v. *Göring et al.*, in *Trial of the Major War Criminals before the International Military Tribunal – Volume 1: Official Documents* (Nuremberg, International Military Tribunal, 1947); Judgment, *United States of America* v. *Milch*, Case No. 2, Military Tribunal II, 16 April 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 – Volume II* (Washington, Nuernberg Military Tribunals, 1949); Judgment, *United States of America* v. *Flick et al.*, Case No. 5, Military Tribunal IV, 22 December 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 – Volume VI* (Washington, Nuernberg Military Tribunals, 1952); Judgment, *United States of America* v. *Krauch et al.*, Case No. 6, Military Tribunal VI, 29 July 1948, in *Trials of the War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 – Volume VIII* (Washington, Nuernberg Military Tribunals, 1952); Judgment, *United States of America* v. *Krupp von Bohlen und Halbach et al.*, Case No. 10, Military Tribunal III, 31 July 1948, in *Trials of the War Criminals*

there is an expulsion of persons across a *de jure* border from one country to another (or in some cases a *de facto* border)[41] and that individuals have been convicted of this crime during a non-international armed conflict,[42] there would appear to be little room to doubt that deportation to slave labour could take place on the African continent during a non-international armed conflict. This would be particularly so where the relevant armed group operates across state boundaries. The Lord's Resistance Army, which allegedly operates in Uganda, South Sudan and the Democratic Republic of the Congo, comes to mind. Whether such an offence would be in violation of customary international law applicable in non-international armed conflicts would remain to be seen, but is not, on the face of it, far-fetched.

These criticisms aside, a positive development relating to war crimes can be seen in the crime of conscripting or enlisting children into national armed forces in an international armed conflict (Article 28D(b)(xxvii)) or armed forces during a non-international armed conflict (Article 28D(e)(vii)). While these provisions largely copy the same provisions found in the Rome Statute (1998) (in international and non-international armed conflicts),[43] the provisions of the ACJHR Statute under the Malabo Protocol (2014) differ in one important way: no child *under the age of eighteen years* can be conscripted or enlisted. This is consonant with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000)[44] and with the

before the Nuernberg Military Tribunals under Control Council Law No. 10 – Volume IX (Washington, Nuernberg Military Tribunals, 1950); Judgment, *United States of America v. von Weizsäcker et al.*, Case No. 11, Military Tribunal IV, 11 April 1949, in *Trials of the War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 – Volume XIV* (Washington, Nuernberg Military Tribunals, 1949).

[41] *See* Appeal Judgment, *Prosecutor v. Stakić*, (IT-97–24-A), ICTY, 22 March 2006, paras 278, 300 (in the context of a crime against humanity); *see also* Appeal Judgment, *Prosecutor v. Naletilić and Martinović*, (IT-98–34-A), ICTY, 3 May 2006, para. 152. This holding was subsequently applied to cases involving deportation as a war crime: Trial Judgment, *Prosecutor v. Prlić*, (IT-04–74-T), ICTY, 29 May 2013, Vol. 1, para. 132; Vol. 3, paras 810–39; *see also* Trial Judgment, *Prosecutor v. Krnojelac*, (IT-97–25-T), ICTY, 15 March 2002, para. 473.

[42] *See for example* Trial Judgment, *Prosecutor v. Milutinović et al.*, (IT-05–87-T), ICTY, 26 February 2009, Vol. 3, paras 475, 630, 788, 930, 1138 and Trial Judgment, *Prosecutor v. Đorđević*, (IT-05–87/1-T), ICTY, 23 February 2011, para. 2230 (where the accused were convicted of, *inter alia*, deportation as a crime against humanity during 1999 Kosovo War between Serbia/Yugoslavia and Kosovo Albanians (a separate international armed conflict ensued between the member States of the North Atlantic Treaty Organization and Serbia/Yugoslavia)).

[43] *See* Art. 8(2)(b)(xxvi), Rome St. (1998) (international armed conflicts); Art. 8(2)(e)(vii), Rome St. (1998) (non-international armed conflicts).

[44] *See* Art. 1–4, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000) (however, while the conscription of children under the age of eighteen years is prohibited (Article 2), Article 3(1) still nonetheless

African Charter on the Rights and Welfare of the Child (1990).[45] It is, however, different from the Rome Statute (1998),[46] Additional Protocols I and II to the Geneva Conventions (1977)[47] and the Statute of the Special Court for Sierra Leone (SCSL Statute),[48] which only forbid the enlistment and recruitment of children under *fifteen years of age*. In other words, the ACJHR Statute under the Malabo Protocol (2014) affords greater protection for children than the ICC, the Geneva Conventions and the Special Court for Sierra Leone (SCSL).

But perhaps the most interesting of all the 'new' war crimes is the crime of 'using nuclear weapons or other weapons of mass destruction' (Article 28D (g)). As aforementioned, attempts during the negotiations that led to the Rome Statute (1998) to criminalize the use of nuclear weapons proved controversial and divisive in light of stout opposition by some P5 states.[49] Therefore, its inclusion in the ACJHR Statute under the Malabo Protocol (2014), which is in line with the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba) (1996),[50] is a most welcome innovation. Given the horrendous short- and long-term effects of the use of such weapons, their use should not be permitted, notwithstanding the 1996 advisory opinion of the International Court of Justice (ICJ) on the subject.[51]

permits the recruitment of children over the age of fifteen eighteen years into the national army of States, provided that it is voluntary, with parental consent, fully informed and with reliable proof of age (in contrast, under Article 4(1), armed groups are prohibited from recruiting children under the age of eighteen years at an time)).

[45] *See* Arts. 2, 22(2), African Charter on the Rights and Welfare of the Child (1990). As of 15 June 2017, 44 of the AU's 55 member States have signed this treaty, while 48 member States have ratified or acceded to it. *See* African Union, List of Countries which have signed, ratified/acceded to the African Charter on the Rights and Welfare of the Child (1990), available at: https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf (accessed 25 November 2018).

[46] *See* supra fn. 43.

[47] *See* Art. 77(2), Additional Protocol I to the Geneva Conventions (1977); Art. 4(3)(c), Additional Protocol II to the Geneva Conventions (1977).

[48] *See* Art. 4(c), SCSL Statute. *See also* Art. 4(c), Residual SCSL St.

[49] *See* supra fn. 37.

[50] *See* Art. 2–6, African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba) (1996). As of 15 June 2017, 52 of the AU's 55 member states have signed this treaty, while 41 member States have ratified or acceded to it. *See* African Union, List of Countries which have signed, ratified/acceded to the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba) (1996), available at: https://au.int/sites/default/files/treaties/7777-sl-the_african_nuclear-weapon-free_zone_treaty_the_treaty_of_pelindaba_3.pdf (accessed 25 November 2018).

[51] *See Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226 (where the ICJ did not, under any branch of international law at that time, find that nuclear weapons were illegal *per se*). *See generally* G. Nystuen, S. Casey-Maslen and A. G. Bersagel (eds), *Nuclear Weapons Under International Law* (Cambridge, Cambridge University Press, 2014).

Furthermore, the manner of this provision's inclusion also helps to expose the futility of dividing war crimes between international and non-international armed conflicts, since Article 28D(g) is not included in any of the four lists of war crimes that can be committed in those two types of conflicts,[52] but stands on its own. This would suggest that this crime can be committed in the course of either an international or non-international armed conflict. In other words, the prosecution of this crime would not need to establish the classification of the armed conflict as an element of the offence but merely the existence of an armed conflict regardless of its character – in the spirit of Article 3 of the ICTY Statute.

Indeed, classification can be a difficult task, particularly where non-state armed groups are involved. For example, in the ICC's *Lubanga* case, the Pre-Trial Chamber's decision confirming the charges determined that the relevant conflict was international in nature due to Uganda's occupation of the Ituri region and only became non-international upon Uganda's withdrawal.[53] In contrast, the Trial Chamber subsequently determined that the conflict was in fact of a non-international character for the entire period and accordingly re-characterized the charges under Regulation 55.[54] This was, after all, a case/conflict that involved no less than six armed groups and three states in and around the Ituri area in the Democratic Republic of the Congo.[55] There is no doubt that similarly complex African classification situations will eventually be adjudicated pursuant to the ACJHR Statute under the Malabo Protocol (2014). Yet, the difficulties involved in classification could have been avoided by *not* dividing up war crimes into lists of those committed in international and non-international armed conflicts, at least as much as possible, particularly when we consider that many of the underlying war crimes are found in both lists

[52] *I.e.* Art. 28D(2)(a)(i)–(viii) (grave breaches of the Geneva Conventions (1949); Art. 28D(2)(b)(i)–(xxxiii) (grave breaches of Additional Protocol I to the Geneva Conventions (1977) and other serious violations of the law and customs of international armed conflicts); Art. 28D(2)(c)(i)–(iv) (serious violations of Common Art. 3 of the Geneva Conventions (1949)); Art. 28D(2)(e)(i)–(xxii) (other serious violations of the law and customs of non-international armed conflicts).

[53] *See* Decision on the Confirmation of Charges, *Prosecutor* v. *Lubanga*, (ICC-01/04–01/06–803-tENG), 29 January 2007, paras 220, 235–7.

[54] *See*, Judgment Pursuant to Article 74 of the Statute, *Prosecutor* v. *Lubanga*, (ICC-01/04–01/06–2842), 14 March 2012, paras 563–7.

[55] Namely, the Union des Patriotes Congolais (UPC) (and its military wing, the Force Patriotique pour la Libération du Congo (FPLC)), Rassemblement Congolais pour la Démocratie – Kisangani/Mouvement de Libération (RCD-ML) (and its military wing, the Armée Populaire Congolaise (APC)), Front des Nationalistes Intégrationnistes (FNI), Force de Résistance Patriotique en Ituri (FRPI), Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo (PUSIC) and the Forces Armées du Peuple Congolais (FAPC), together with Uganda, Rwanda and the Democratic Republic of Congo (DRC). *See*, Judgment Pursuant to Article 74 of the Statute, *Prosecutor* v. *Lubanga*, (ICC-01/04–01/06–2842), 14 March 2012, paras 503–67.

anyway (especially violations of the laws and customs of war). Rather, a more attractive option would have been something similar to, or an adaption of, that found in Article 3 of the ICTY Statute, which simply states that the ICTY has the power to prosecute those who violate the law and customs of war and then provides a non-exhaustive list of such violations.[56] This architecture, and ICTY jurisprudence,[57] led the ICTY, in Article 3 cases, to skip conflict classification altogether and the tricky problems that they can entail.

One last war crime is worth mentioning. However, this is not because of its inclusion in the ACJHR Statute under the Malabo Protocol (2014), but rather because of its absence. This is the crime of terror (as it was known at the ICTY) or terrorism (as it was known at the SCSL/ICTR) as a war crime. It is simply not found in any of the war crimes provisions. Neither of course, is it found in the Rome Statute (1998) or explicitly in the ICTY Statute (despite convictions under Article 3 of the ICTY Statute for this crime), but it was found in the SCSL and ICTR Statutes.[58] It must be remembered that this particularly odious offence is one of the very few crimes (when one excludes genocide convictions) that have attracted life sentences at any of the international criminal tribunals.[59] Given this fact, and the various cases concerning this offence that were prosecuted at the ICTY and the SCSL,[60] it is somewhat perplexing that this war crime was not included in the ACJHR Statute under the Malabo Protocol (2014).

[56] Article 3, ICTY Statute, states, in full, that:

> The International Tribunal [ICTY] shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
> (e) plunder of public or private property.

[57] *See* Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić*, (IT-94–1-AR72), ICTY, 2 October 1995, paras 87–93.

[58] *See* Art. 4(d), ICTR St.; Art. 3(d), SCSL St.; *see also* Art. 3(d), Residual SCSL St.

[59] *See* Appeal Judgment, *Prosecutor v. Galić*, (IT-98–29-A), ICTY, 30 November 2006, Disposition (for the campaign of shelling and sniping undertaken by Bosnian Serbs forces during the notorious 3-year, 10 month siege of Sarajevo in Bosnia and Herzegovina).

[60] *See* Trial Judgment, *Prosecutor* v. *D. Milošević*, (IT-98–29/1-T), ICTY, 12 December 2007; Appeal Judgment, *Prosecutor* v. *D. Milošević*, (IT-98–29/1-A), ICTY, 12 November 2009; Trial Judgment, *Prosecutor v. Brima et al.*, (SCSL-04–16-T), SCSL, 20 June 2007; Appeal Judgment,

C. *Crimes Against Humanity*

Crimes against humanity in the ACJHR Statute under the Malabo Protocol (2014) – Article 28C – is mostly a carbon copy of the provision on crimes against humanity found in the Rome Statute (1998).[61] However, a few salient matters are worth pointing out. The *chapeau* to Article 28C could be read as expanding the reach of crimes against humanity's contextual element. This is so because it refers to 'a widespread or systematic attack *or enterprise* directed against any civilian population, with knowledge of the attack *or enterprise*'. This is an interesting development, because there exists jurisprudence and academic commentary to the effect that the word 'attack' denotes violent and, in certain circumstances, non-violent acts.[62] If that is so, one wonders what sort of additional acts the terms 'or enterprise' are supposed to cover. Is the term 'enterprise' subsumed under the term 'attack'? An alternative view, however, is simply that the words 'or enterprise' serve to add further clarity to the notion that non-violent acts are encompassed by the contextual *chapeau* element, especially when we consider that the term 'attack' has also been interpreted by some jurisprudence to denote the existence of violence, a view supported by some commentators.[63]

Prosecutor v. *Brima et al.*, (SCSL-2004–16-A) , 22 February 2008; Trial Judgment, *Prosecutor* v. *Fofana and Kondewa*, (SCSL-04–14-T), 2 August 2007; Appeal Judgment, *Prosecutor* v. *Fofana and Kondewa*, (SCSL-04–14-A), 28 May 2008; Trial Judgment, *Prosecutor* v. *Sesay et al.*, (SCSL-04–15-T), 2 March 2009; Appeal Judgment, *Prosecutor v. Sesay et al.*, (SCSL-04–15-A), 26 October 2009; Trial Judgment, *Prosecutor* v. *Taylor*, (SCSL-03–01-T), 18 May 2012; Appeal Judgment, *Prosecutor* v. *Taylor*, (SCSL-03–01-A), 26 September 2013.

[61] *See* Art. 7, Rome St. (1998).

[62] Trial Judgment, *Prosecutor* v. *Akayesu*, (ICTR-96–4-T), 2 September 1998, para. 581: '[a]n attack may also be non violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner'; Trial Judgment, *Prosecutor* v. *Musema*, (ICTR-96–13-T), 27 January 2000, para. 205: '[a]n attack may also be non-violent in nature'; K. Ambos, *Treatise on International Criminal Law – Volume II: The Crimes and Sentencing* (Oxford, Oxford University Press, 2014), p. 58: 'the attack need not necessarily be "violent in nature" (e.g., the system of apartheid)'; W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2010), p. 153: '[a]lthough many of the specific acts of crimes against humanity involve physical violence, such offences as persecution and apartheid, for example, may be perpetrated as a result of legislation and government policy.'

[63] *See* Appeal Judgment, *Nahimana v. The Prosecutor*, (ICTR-99–52-A), 28 November 2007, para. 918: 'an attack . . . means the perpetration . . . of a series of acts of violence, or of the kind of mistreatment referred to in sub-paragraphs (a) to (i) of the Article [Article 3, ICTR Statute]'; Case 002/01 Trial Judgment, *Co-Prosecutors v. Nuon and Khieu*, (002/19–09–2007/ECCC/TC/E313), 7 August 2014, para. 178: '[a]n attack is a course of conduct involving the commission of a series of acts of violence'; G. Mettraux, International Crimes and the *Ad Hoc* Tribunals (Oxford, Oxford University Press, 2006), p. 156 (after citing *Akayesu* (see supra fn. 62)): '[t]he

Largely incorporating the crimes against humanity definition of the Rome Statute (1998) also means that the ACJHR Statute under the Malabo Protocol (2014) has included the requirement of 'a State or organizational policy' in Article 28C(2)(a).[64] In so doing, this requirement has been added to crimes against humanity's contextual element, thus departing from consistent ICTY and ICTR jurisprudence holding that it is not required under customary international law.[65] As to what constitutes an 'organization' for the purposes of an 'organizational policy', this is an issue that has been the subject ongoing controversy at the ICC. Two views have arisen on the matter. The first view sees this term as not being defined or limited by 'the formal nature of the group and the level of its organization' (although this is relevant), but rather 'on whether a group has the capability to perform acts which infringe on basic human values.'[66] In other words, its 'capacities for action, mutual agreement and coordination[] . . . are essential features to defining an organization that, by very reason of the means and resources it possesses and its membership, allow an attack to be executed.'[67] The late Judge Kaul succinctly expressed

author does not agree with the view that the establishment and maintenance of such a system of apartheid can be regarded as "non-violent" or that, for that matter, any "attack" within the meaning of crimes against humanity could be non-violent in the broad sense of the word'; G. Boas, J. L. Bischoff and N. L. Reid, *International Criminal Law Practitioner Library – Volume II: Elements of Crimes under International Law* (Cambridge, Cambridge University Press, 2008), p. 41: '[a]n "attack" for the purposes of crimes against humanity[] [. . .] has been simply and consistently described by *ad hoc* chambers as "a course of conduct involving the commission of acts of violence"'.

[64] *See* Art. 7(2)(a), Rome St. (1998).

[65] *See* Appeal Judgment, *Prosecutor* v. *Kunarac et al.*, (IT-96–23 & IT- 96–23/1-A), ICTY, 12 June 2002, paras 98–101; Appeal Judgment, *Prosecutor v. Blaškić*, (IT-95–14-A), ICTY, 29 July 2004, para. 120; Appeal Judgment, *Semanza* v. *The Prosecutor*, (ICTR-97–20-A), 20 May 2005, para. 269; Appeal Judgment, *Gacumbitsi* v. *The Prosecutor*, (ICTR-2001–64-A), 7 July 2006, para. 84. However, some commentators have been critical of the ICTY Appeals Chamber's original analysis in *Kunarac* that underlies this holding: *see* M. C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), pp. 25–8.

[66] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, (ICC-01/09–19-Corr), 31 March 2010, para. 90. *See also* Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, (ICC-02/11–14-Corr), 15 November 2011, para. 46; Decision on the Confirmation of Charges Pursuant to Article 67(1)(a) and (b) of the Rome Statute, *Prosecutor* v. *Ruto et al.*, (ICC-01/09–01/11–373), 23 January 2012, para. 33; Decision on the Confirmation of Charges Pursuant to Article 67(1)(a) and (b) of the Rome Statute, *Prosecutor* v. *Muthaura et al.*, (ICC-01/09–02/11–382-Red), 23 January 2012, para. 114.

[67] Judgment Pursuant to Article 74 of the Statute, *Prosecutor v. Katanga*, (ICC-01/04–01/07–3436-tENG), 7 March 2014, paras 1119–1120. *See also* Judgment Pursuant to Article 74 of the Statute, *Prosecutor* v. *Bemba*, (ICC-01/05–01/08–3343), 21 March 2016, para. 158.

the second view. According to him, the relevant organization must 'partake of some characteristics of a State[] [which] eventually turns the private "organization" into an entity which may act like a State or has quasi-State abilities.'[68] Without this requirement, he avers that perhaps the mafia or other similar criminal organizations would be able to commit crimes against humanity.[69] The ICC Appeals Chamber has not yet pronounced itself on this matter. Consequently, uncertainty remains, although Ambos has rightly pointed out that the criteria or characteristics outlined by both sides of the debate 'as possible distinguishing features for the determination of an "organization" shows[] ... that those criteria are in large part identical ... and only differ substantially insofar as [Judge] Kaul regards them as indications of state-likeness[.]'[70]

With respect to the underlying crimes, it is noticeable that not only is torture criminalized – as is the case at all modern international criminal tribunals and courts[71] – but also, for the first time, Article 28C(f) explicitly adds 'cruel, inhuman and degrading treatment or punishment' as well. Of course, this language originates from the Torture Convention (1984) and was designed to capture conduct that, while odious and deplorable, might not

[68] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya – Dissenting Opinion of Judge Hans-Peter Kaul, *Situation in the Republic of Kenya*, (ICC-01/09–19-Corr), 31 March 2010, para. 51. *See also*, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', *Prosecutor v. Ruto et al.*, (ICC-01/09–01/11–2), 15 March 2011; Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', *Prosecutor* v. *Muthaura et al.*, (ICC-01/09–02/11–3), 15 March 2011; Decision on the Confirmation of Charges Pursuant to Article 67(1)(a) and (b) of the Rome Statute – Dissenting Opinion of Judge Hans-Peter Kaul, *Prosecutor* v. *Ruto et al.*, (ICC-01/09–01/11–373), 23 January 2012; Decision on the Confirmation of Charges Pursuant to Article 67(1)(a) and (b) of the Rome Statute – Dissenting Opinion of Judge Hans-Peter Kaul, *Prosecutor* v. *Muthaura et al.*, (ICC-01/09–02/11–382-Red), 23 January 2012.

[69] *See generally* Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya – Dissenting Opinion of Judge Hans-Peter Kaul, *Situation in the Republic of Kenya*, (ICC-01/09–19-Corr), 31 March 2010, paras 33–70.

[70] K. Ambos, *Treatise on International Criminal Law – Volume II: The Crimes and Sentencing* (Oxford, Oxford University Press, 2014), pp. 74–75. *See also* C. K. Hall and K. Ambos, 'Article 7 [(2)(a)]: Crimes Against Humanity', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (3rd Edition Munich/Oxford/Baden-Baden, Verlag C. H. Beck/Hart Publishing/Nomos, 2016), margin No. 110, p. 249.

[71] *See* Art. 7(1)(f), Rome St. (1998); Art. 5(f), ICTY St.; Art. 3(f), ICTR St.; Art. 2(f), SCSL St.; Art. 2(f) Residual SCSL St.; Art. 5, ECCC Law.

necessarily amount to torture as defined in Article 1(1) of that treaty.[72] However, its inclusion in the ACJHR Statute under the Malabo Protocol (2014) raises a question: where does this leave 'other inhumane acts' in Article 28C(1)(k)? Surely there is overlap, since many of the acts that could amount to cruel, inhuman or degrading treatment or punishment could have already been prosecuted as 'other inhumane acts' under Article 28C(1)(k).[73] The danger here is that by including both of these provisions, the drafters could have – perhaps inadvertently – rendered one of them superfluous, unless the two can be somehow distinguished. It remains to be seen how this matter will be resolved by the judges of the ACJHR.

Finally, one interesting omission can be seen in Article 28C when compared to the Rome Statute (1998). Included (somewhat awkwardly) in the crimes against humanity provision at the ICC, is Article 7(3) of the Rome Statute (1998) which provides for a definition of 'gender' for the treaty as a whole, and states that the term 'refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.' This provision has been described by one commentator as 'the most puzzling and bizarre language ever included in an international treaty',[74] but was added in order to address concerns that the term 'gender' might be read to include sexual orientation.[75] The result was the compromise contained in Article 7(3). However, with its omission from the ACJHR Statute under the Malabo Protocol (2014), the judges of the ACJHR will be free from any constraining definition. Since 'gender' is expressly listed as one of the groups

[72] *See* Art. 16(1)–(2), Torture Convention (1984).

[73] *See* Trial Judgment, *Prosecutor v. Kupreškić et al.*, (IT-96–16-T), ICTY, 14 January 2000, para. 566 (inhumane and degrading treatment as an 'other inhumane act'); Trial Judgment, *Prosecutor v. Tadić*, (IT-94–1-T), ICTY, 7 May 1997, para. 730 (beatings as an 'other inhumane act'); ICTY, *Prosecutor v. Kvočka et al.*, Trial Judgment, Case No. IT-98/30/1-T, 2 November 2001, para. 209 (beatings and humiliation as 'other inhumane acts'); Trial Judgment, *Prosecutor v. Akayesu*, (ICTR-96–4-T), 2 September 1998, para. 697 (forced undressing and public nakedness as 'other inhumane acts'); Trial Judgment, *Co-Prosecutors v. Kaing*, (001/18–07–2007/ECCC/TC/E188), 26 July 2010, para. 372 (imposition of deplorable conditions of detention as an 'other inhumane act').

[74] T. van Boven, quoted in D. M. Koenig and K. D. Askin, 'International Criminal Law and the International Criminal Court Statute: Crimes Against Women', in K. D. Askin and D. M. Koenig (eds), *Women and International Human Rights Law*, Vol. 2, p. 20, fn. 73.

[75] *See* W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2010), p. 186; C. Steains, 'Gender Issues', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague/London/Boston, Kluwer Law International, 1999), pp. 371–5; V. Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* (2005) 55–84, at 58–66.

upon whom persecution as a crime against humanity can be carried out (as per Article 28C(1)(h)), it will be interesting to see if and how the concept of gender will develop.

D. *Aggression*

The ACJHR Statute under the Malabo Protocol (2014) also shows innovation in respect of the crime of aggression (Article 28M). In spite of some ambiguities, it is, on the whole, a marked improvement from the 2010 ICC Kampala Amendments on aggression (i.e. Articles 8 *bis*, 15 *bis*, 15 *ter*, Rome Statute (1998)). With respect to the substantive crime, while broadly mirroring Article 8 *bis* of the Rome Statute (1998), the most notable aspect of Article 28M is that, unlike Article 8 *bis*, it encompasses not only acts of aggression carried out by states but also those carried out by *non-state* actors.[76] Thus, it covers both the illegal initiation of international and *non-international* armed conflicts. This is important because non-international armed conflicts significantly outnumber international armed conflicts. Indeed, a recent study found that in 2012 at least 37 armed conflicts took place and of these only one was an 'active international armed conflict . . ., narrowly defined' while 'belligerent occupations continued [in] parts of nine states and territories.'[77] In 2013, the same study found that the total number of armed conflicts had risen to 39, with two active international armed conflicts and the number of belligerent occupations remaining unchanged.[78] In 2014, armed conflicts rose again to 42, with only three active international armed conflicts and situations of belligerent occupation rising to 10.[79]

Nevertheless, this raises some questions, since in the Rome Statute (1998), an act of aggression is intimately linked to a manifest violation of Article 2(4) of the UN Charter (1945) – the prohibition on the use of force. That provision is of no relevance to a non-international armed conflict since this prohibition is

[76] This is not to say that the actions of non-State actors could *never* fall within the definition of aggression under Art. 8 *bis*. Indeed, Art. 8 *bis*(2)(g) specifically refers to the actions of 'armed bands, groups, irregulars or mercenaries' against a State provided that they are of sufficient gravity and that were 'sen[t] by or on behalf of a State' or a State was 'substantially involve[d] therein.' In other words, unless the actions of a non-State actor can be attributed to a State or a State can be proved to be substantially involved in them, they would stand to be excluded from Art. 8 *bis*.

[77] 'Armed Conflicts in 2012 and their Impacts', in S. Casey-Maslen (ed.), *The War Report: 2012* (Oxford, Oxford University Press, 2013), pp. 3–4.

[78] 'Armed Conflicts in 2013 and their Impacts', in S. Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013* (Oxford, Oxford University Press, 2014), pp. 27–9.

[79] 'Summary', in A. Bellal (ed.), *The War Report: Armed Conflict in 2014* (Oxford, Oxford University Press, 2015), p. 7.

addressed to states and does not apply to non-state actors (at international law).[80] Article 28M(A) of the ACJHR Statute under the Malabo Protocol (2014) attempts to overcome this by, in addition to the UN Charter (1945), referring to, in the alternative, a manifest violation of the Constitutive Act of the African Union (2000) 'and with regard to the territorial integrity and human security of the population of a State Party.' Yet, the Constitutive Act of the African Union (2000), like the UN Charter (1945), appears to address AU member states only[81] and contains no express provision regarding the use of force by non-state actors, but instead merely 'condemn[s] and reject[s] ... unconstitutional changes of governments.'[82]

In addition, the ICC's aggression leadership element found in Article 8 *bis* (1) is also adopted into Article 28M, albeit in a slightly modified fashion – to account for the fact that aggression under the ACJHR Statute pursuant to the Malabo Protocol (2014) applies to non-international armed conflicts and non-state actors. Thus, according to Article 28M(A), the person accused of the crime of aggression must be 'in a position effectively to exercise *control over or to direct* the political or military action of a state or *organization*.' Two issues arise. The first issue, is that the 'control or direct' standard, which was copied from Article 8 *bis*(1), actually *narrows* the class of persons who could be criminally responsible for aggression when compared to the crimes against peace (as aggression was then known) jurisprudence of World War II. In fact, a number of defendants were convicted after World War II not on the basis that they controlled or directed the political or military action of their respective states, but instead because they were in a position to *shape or influence* such action – a less restrictive standard.[83] In other words, the scope for

[80] M. Shaw, *International Law*, (6th Edition Cambridge, Cambridge University Press, 2008), p. 1148–9: 'Article 2(4) of the UN Charter [(1945)] prohibits the threat or use of force in international relations, not in domestic situations. There is no rule against rebellion in international law. It is within the domestic jurisdiction of states and is left to be dealt with by internal law.' *But see* E. Lieblich, 'Internal *Jus Ad Bellum*' 67(3) *Hasting Law Journal* (2016) 687–748 (where the author proposes a novel theory of *jus ad bellum* which would apply *within* a State – both to governments as well as non-State armed groups).

[81] *See* Arts. 4(a), (e)–(g), (i), Constitutive Act of the African Union (2000).

[82] Art. 4(p), Constitutive Act of the African Union (2000).

[83] For a detailed account of the relevant jurisprudence, see K. J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' 18(3) *European Journal of International Law* (2007) 477–97. *See also* C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge, Cambridge University Press, 2013), p. 182: 'A comparison between the definition of a potential perpetrator under Article 8 *bis* (1) and the range of persons prosecuted by the post-war Tribunals show that Heller was right to conclude that the decision to adopt the control or direct standard "represents a significant *retreat* from the Nuremberg principles – not their codification"'.

criminal responsibility for aggression under customary international law[84] is wider than that found in Article 8 *bis*(1) and now Article 28M(A).

The second issue, is that Article 28M(A) introduces the same interpretational difficulties that one finds in crimes against humanity, since the question that will inevitably arise is what an 'organization' means in this context and whether it is the same as, or different from, that found in Article 7(2)(a) of the Rome Statute (1998) (see discussion above) and Article 28C(2)(a) of the ACJHR Statute under the Malabo Protocol (2014). Here, Judge Kaul's view that the organization must be 'state-like' (in the context of crimes against humanity)[85] finds more favour, since the idea that the African equivalent of the mafia could be responsible for acts of aggression really begins to stretch international criminal law to a place that, frankly, gives such criminal thugs more credit than they deserve.

But the most refreshing aspect of aggression as per Article 28M – and of all the core international crimes in the ACJHR Statute pursuant to the Malabo Protocol (2014) – is that it comes, on paper, with absolutely no strings attached. No special articles, unique requirements or jurisdictional provisions that only apply to aggression are included. In stark contrast, Article 15 *bis* and Article 15 *ter* of the Rome Statute (1998) purposefully put into place barriers and jurisdictional hoops that have to be jumped through and overcome, thereby ensuring that the ICC will unlikely adjudicate upon an aggression case anytime soon. Thus, Article 15 *bis*(2) and Article 15 *ter*(2) require one year to elapse after the requisite number of ICC States Parties (30) have ratified the 2010 ICC Kampala Amendments[86] before the ICC can exercise jurisdiction over aggression; Article 15 *bis*(3) and Article 15 *ter*(3) require a decision to be made after 1 January 2017 to activate the ICC's jurisdiction over aggression (this is in addition to the one year period stipulated in Article 15 *bis*(2) and

[84] As various international criminal tribunals have held on numerous occasions, World War II-era jurisprudence is 'indicative of customary international law': Appeal Judgment, *Prosecutor* v. *Taylor*, (SCSL-03–01-A), 26 September 2013, para. 417 (and the case law cited therein). *See also* Appeal Judgment, *Prosecutor* v. *Šainović et al.*, (IT-05–87-A), ICTY, 23 January 2014, paras 1627–42.

[85] *See* supra fns 68–69.

[86] As of 25 November 2018, 37 ICC States Parties have ratified the 2010 ICC Kampala Amendments on the crime of aggression: Andorra, Argentina, Austria, Belgium, Botswana, Chile, Costa Rica, Croatia, Cyprus, the Czech Republic, El Salvador, Estonia, Finland, Georgia, Germany, Guyana, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, The Netherlands, Palestine, Panama, Poland, Portugal, Samoa, San Marino, Slovakia, Slovenia, Spain, Switzerland, Trinidad and Tobago and Uruguay.

Article 15 *ter*(2));[87] Article 15 *bis*(4) permits states to 'opt out' of aggression at the ICC where the ICC Prosecutor acts *proprio motu* or where there is a state referral[88]; Article 15 *bis*(5) provides that the ICC only has jurisdiction over aggression where the state of nationality of the accused *and* the state on which the crime takes have *both* ratified the 2010 ICC Kampala Amendments on aggression (unless the UN Security Council, acting under Chapter VII of the UN Charter, refers the matter). The ACJHR Statute under the Malabo Protocol (2014) does not contain any such provisions with respect to aggression. Rather, aggression is treated just like any other international crime; as it should be. Africa deserves credit for this straightforward approach.

4. CONCLUSION

Taking into account all the matters discussed in this chapter, Africa must be commended for many of the bold approaches it appears to have taken with respect to core international crimes. There are certainly a number of interesting, innovative and admirable provisions in this regard contained in the Malabo Protocol (2014) that international criminal law as a discipline should reflect upon. But the Malabo Protocol (2014) is about more than just those provisions that have been detailed and considered in this chapter.

Other positive steps can be seen with the addition of a whole host of crimes that have previously been generally considered as better dealt with through inter-state cooperation and national prosecution rather than by an international or regional criminal court (with the exception of terrorism at the Special Tribunal for Lebanon) – these include the crime of piracy (Article 28F), terrorism (Article 28G), mercenarism (Article 28H), corruption (Article 28I), money laundering (Article 28I *bis*), trafficking in persons (Article 28J), trafficking in drugs (Article 28K), trafficking in hazardous wastes (Article 28L) and the illicit

[87] Accordingly, the ICC's jurisdiction over the crime of aggression was only activated as of 17 July 2018 by the ICC Assembly of States Parties in December 2017: see ICC, Resolution ICC-ASP/16/Res.5, Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017.

[88] As of 25 November 2018, only Kenya and Guatemala have lodged an Art. 15 *bis*(4) declarations opting out of the 2010 ICC Kampala Amendments on the crime of aggression. The existence of Art. 15 *bis*(4) is difficult to reconcile with Art. 120 of the Rome Statute (1998) which provides that '[n]o reservations may be made to this Statute'. Particularly as it applies to new ICC States Parties, it would appear to be the very definition of a reservation as contained in Article 2(d) of the Vienna Convention on the Law of Treaties (1969): '"reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.

exploitation of natural resources (Article 28L *bis*). Further positive steps can be seen with the inclusion of passive personality and extraterritorial protective jurisdiction (Article 46E *bis*(2)(c)–(d)), corporate criminal liability (Article 48C), the creation of a Defence Office as an independent organ (Articles 2 (4), 22C) and the exclusion of the death penalty (Article 43A(1)–(2)).

On the other hand, eyebrows are raised by the inclusion, for example, of the crime of unconstitutional change of government (Article 28E), particularly when one considers the habitual vote-rigging, violence and other irregularities that have accompanied many of Africa's elections in recent times. Difficulty arises in establishing that a given government is truly a 'democratically elected government'. We must also not forget that elections, in and of themselves, are no guarantee or insurance policy against future tyranny.[89] Other concerns emanate from the reality that significant additional resources will have to be invested into the ACJHR, given the wide-ranging and diverse mandate envisaged by the Malabo Protocol (2014).[90] Despite an AU commitment to ensure that the ACJHR is adequately funded,[91] where all the additional money will actually come from is presently unknown.

But the most controversial provision of all is Article 46A *bis*, which provides complete immunity for incumbent Heads of State or Government and 'other

[89] This might explain, perhaps, why numerous States, including a number in Africa, have included a 'right to rebel' within their domestic law. *See* Benin (Art. 66, Constitution of the Republic of Benin); Burkina Faso (Art. 167, Constitution of Burkina Faso); Chad (Preamble, Constitution of Republic of Chad); Cuba (Art. 3, Constitution of the Republic of Cuba); the Czech Republic (Art. 23, Czech Charter of Fundamental Rights and Freedoms); the Democratic Republic of the Congo (Art. 64, Constitution of the Democratic Republic of the Congo); Ecuador (Art. 98, Constitution of the Republic of Ecuador); El Salvador (Arts. 87–88, Constitution of the Republic of El Salvador); Estonia (Art. 54, Constitution of the Republic of Estonia); Germany (Art. 20(4), Basic Law for the Federal Republic of Germany); Greece (Art. 120(4), Constitution of Greece); Honduras (Art. 3, Constitution of Honduras); Liberia (Art. 1, Constitution of the Republic of Liberia); Peru (Art. 46, Constitution of Peru); Portugal (Arts. 7(3), 21, Constitution of the Portuguese Republic); Slovakia (Art. 32, Constitution of the Slovak Republic); Togo (Art. 45, Constitution of the Republic of Togo); and Venezuela (Art. 350, Constitution of the Bolivarian Republic of Venezuela).

[90] To put things into some perspective, consider that the ICC's approved budget for 2016 was €139.59 million (approximately $US151.55 million at 14 November 2016) (*see* ICC, *Resolution on the Programme budget for 2016, the Working Capital Fund and the Contingency Fund for 2016, scale of assessments for the apportionment of expenses of the International Criminal Court and financing appropriations for 2016*, Resolution ICC-ASP/14/Res.1, 26 November 2015); while the entire AU's budget for the same year was $US416.86 million (*see* African Union, *Decision on the Budget of the African Union for the 2016 Financial Year*, Decision No. Assembly/AU/Dec. 577(XXV), 14–15 June 2015).

[91] *See* African Union, *Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) Doc. Assembly/AU/18(XXIV)*, Decision No. Assembly/AU/Dec.547(XXIV), 30–31 January 2015, paras 15–16, 17(b).

senior state officials'. This is an issue that has, for good reason, taken over much of the debate and discussion concerning the Malabo Protocol (2014). Article 46A *bis* is plainly a regressive choice by Africa, since it hardwires a double standard whereby one set of laws applies to the politically weak and another to the politically strong. It is also the direct result of sentiment common among African leaders that the ICC has unfairly and in a racist manner targeted Africa in its investigations and prosecutions. Yet, one must keep in mind that this anti-ICC rhetoric only began when politically powerful Africans were sought by the ICC (such as President Al-Bashir of the Sudan or President Kenyatta and Deputy President Ruto of Kenya). It was conspicuously absent when the ICC sought politically weak Africans (such as the likes of Lubanga, Katanga, Mbarushimana, Ngudjolo and Laurent Gbagbo), and remained absent when, well after the criticisms had begun, the ICC sought other politically weak Africans (like Ongwen and Al Mahdi).[92] It would thus appear, as Desmond Tutu has observed, that African leaders 'conveniently accuse the ICC of racism.'[93]

And so, can it be said that the Malabo Protocol (2014) simultaneously represents a step forward and backwards in the fight against impunity? Indeed, it is not often that one hears both of these seemingly contradictory notions contained in the one judicial entity. Or are the negatives offset by the many innovations contained in the ACJHR Statute pursuant to the Malabo Protocol (2014), so that, on the whole, international criminal justice is well served? That is ultimately a matter for you the reader to decide, being guided by the various authors of this book. Suffice to say that, for now at least, the jury appears to be still out on these questions.

[92] *See* M. J. Ventura and A. J. Bleeker, 'Universal Jurisdiction, African Perceptions of the International Criminal Court and the New AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights', in E. A. Ankumah (ed.), *The International Criminal Court and Africa: One Decade On* (Cambridge/Antwerp/Portland, Intersentia, 2016), pp. 442–4; S. Batohi, 'Africa and the International Criminal Court: A Prosecutor's Perspective', in G. Werle, L. Fernandez, M. Vormbaum (eds), *Africa and the International Criminal Court* (The Hague/Berlin, T.M.C. Asser Press/Springer, 2014), p. 50; T. Murithi, 'Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court', in G. Werle, L. Fernandez, M. Vormbaum (eds), *Africa and the International Criminal Court* (The Hague/Berlin, T.M.C. Asser Press/Springer, 2014), pp. 182–f4.

[93] D. Tutu, 'In Africa, Seeking a License to Kill', *The New York Times*, 10 October 2013.