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THE SEARCH FOR ALTERNATIVES: THE “AFRICAN CRIMINAL COURT”

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At its Twelfth Ordinary Session in February 2009 in Addis Ababa, Ethiopia, the Assembly of the African Union requested the Commission of the African Union “in consultation with the African Commission on Human and Peoples’ Rights, and the African Court on Human and Peoples’ Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes”.

Since then, the African Union (AU) has repeatedly adopted resolutions to establish an international, or more precisely, an intra-continental criminal jurisdiction for Africa. Finally, in June 2014, the African Union, at its summit in Malabo, Equatorial Guinea, adopted a protocol (the “Malabo Protocol”) which included in its Annex an amendment to the Statute of the African Court of Justice and Human and Peoples’ Rights. The Court is a merger of the African Court of Justice and the African Court on Human and Peoples’ Rights. Its merger protocol currently awaits ratification. According to the Statute as amended by the Annex to the Malabo Protocol, the Court will have three Sections, namely “a General Affairs Section, a Human and Peoples’ Rights Section and an International Criminal Law Section” (see Article 16 of the Annex to the Malabo Protocol). Even though the ratification of the Malabo Protocol and its Annex may be a protracted process with some important questions still to be unresolved, the establishment of, simply speaking, an “African Criminal Court” is becoming an increasingly concrete possibility.

Whereas the resolutions of the African Union to empower the African Court of Justice and Human and Peoples’ Rights with criminal jurisdiction initially attracted scant public attention, the situation has now changed, in particularly because some African countries, including South Africa and Burundi, have given notice of their withdrawal from the International Criminal Court. It seems, however, that the current debate is less about a thorough legal analysis and more about either broadly supporting or opposing the efforts to create an “African Criminal Court”. To its supporters, the envisaged Court has the potential of contributing to
the development of international criminal law and could, eventually, become even a useful complement to the International Criminal Court. To critics, it is no more than a political ploy by the African Union to weaken the International Criminal Court, which, for the last couple of years, has been the target of its pointed attacks.

The starting point of an overall analysis of the Malabo Protocol and the annexed Statute is that a regional court with jurisdiction over international crimes would be a novel phenomenon in the landscape of international courts and tribunals. Until now, so-called hybrid courts for special situations have been established in different countries. Notably, in the African context, are the Extraordinary African Chambers in the Courts of Senegal that in 2016 convicted the former Chadian President Hissène Habré for systematic crimes committed in Chad on the basis of universal jurisdiction. The UN-ad hoc Tribunals have also exercised jurisdiction in specific regions, in particular, the Yugoslavian Tribunal for the Balkan region. What has not taken place is the regionalization of international criminal law in the sense of developing a body of international criminal law that is particularly suitable for a specific region. Such regionalization of international criminal law could consist in extending the catalogue of crimes over which a regional court could have jurisdiction, while retaining the four core crimes under international law, namely war crimes, crimes against humanity, genocide and aggression. And this is exactly what is provided for in the Annex to the Malabo Protocol. Beside the four core crimes under international law, the Malabo Protocol gives the future African Criminal Court jurisdiction over a considerable number of other crimes with special relevance in the African context, namely the crime of unconstitutional change of government, piracy, terrorism, mercenarism, trafficking in persons and trafficking in drugs, corruption and money laundering, and environmental crimes, i.e. trafficking in hazardous waste and illicit exploitation of natural resources.

In general, such regionalization is not a retrogressive step. In the field of human rights law, regionalization has taken place through the adoption of human rights treaties in Europe, America and Africa. This has not watered down the core content of universally accepted human rights; on the contrary, human rights have been undoubtedly strengthened through the work of regional human rights courts. A similar development is conceivable in the field of international criminal law. The Annex to the Malabo Protocol does not in any way question the validity of the international core crimes. What the protocol does, however, is to add crimes of specific relevance in the African context. Here, the best example is the crime of unconstitutional change of government (Article 28 E). Outside of Africa, unconstitutional changes of governments have become a rare phenomenon, even in regions such as South America where such changes occurred commonly only a few decades ago. In Africa, by contrast, violent coups or leaders who remain in office unconstitutionally are a common phenomenon, with countries like Burundi and The Gambia as only the most recent cases in point. Such unconstitutional coups threaten, in the worst case, to destabilize states and even regions without the possibility of the culprits being prosecuted before national courts. It, therefore, made sense that already in 2007 the African Charter on Democracy, Election and Governance declared such conduct an international crime, punishable by a court of the AU. Article 28 E of the Statute in the Annex to the Malabo Protocol follows up on this attempt.

If then, the creation of an African Criminal Court is not to be rejected from the outset, and indeed could enrich the international criminal justice landscape, a closer analysis of the protocol’s contents does nevertheless raise concerns. In particular, some provisions clearly need improvement. Moreover, the provision of immunity for Heads of State and Heads of Government, as well as for high-ranking officials (Article 46 A bis), is a feature which could constitute the Achilles’ heel of the future African Criminal Court. Other provisions of the Annex to the Malabo Protocol (for example Article 46 E bis, which deals with the preconditions to exercise jurisdiction) seem to be even incomplete.
However, one has to be clear that, whatever its present flaws, the Statute of the African Court of Justice and Human and Peoples’ Rights, as amended by the Annex to the Malabo Protocol, will not be changed or amended. This means that, should it, together with its annexed Statute, receive the necessary number of ratifications, the Malabo Protocol will become operational as it stands now. Until then, therefore, it is crucial to clarify the contents of the future Statute of the African Court of Justice and Human and Peoples’ Rights.