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International Criminal Law and the Malabo Protocol

About Scholarly Reception, Rebellion and Role Models

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1. Introduction

We would like to start this contribution by expressing our enormous respect and admiration for Baroness Judge Christine van den Wyngaert and by thanking her for being a role model for us and for other talented young women and men. With much fondness, we think back to a number of dinners and lunches we had together during which the three of us discussed developments and concerns regarding the field of international criminal law – the area of law for which we share a passion and dedication. We hope there will be many more such meetings.

Baroness Judge Christine van den Wyngaert has witnessed the birth and the heyday of international criminal law (ICL). In fact, together with other pioneers such as Bassiouni, she discussed and advocated the establishment of an international criminal court well before the fall of the Berlin Wall.¹ At the time, such ideas were considered to be mere “scholarly reverie”. Yet, through the unrelenting activism that seized upon the momentum of 1990, a new type of international criminal law was developed and applied by international tribunals, and the International Criminal Court (ICC), which actually materialized from an idea into reality. Through her work as an ICC judge, and perhaps in particular through her vocal and engaged dissents, Van den Wyngaert has contributed to the further development and consolidation of international criminal law, as she had previously done at the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY).

The judicial landscape is diverse and there is a plurality of courts involved in ICL matters, both in The Hague and beyond. This chapter focuses on one such court, or rather on a proposal for the extension of the jurisdiction of a newly proposed court: the Malabo Protocol. This Protocol proposes to add international criminal jurisdiction to the African Court of Justice and Human Rights (ACJHR). The Malabo Protocol was adopted by the African Union in June 2014 and amends the merger protocol on the Statute of the ACJHR proposing to extend the jurisdiction of the yet to be established ACJHR to crimes under international law (international crimes) and transnational crimes.² International and transnational crimes are traditionally kept separate as they are regarded different in substance and in nature. They each come with their own area of law: international criminal law and transnational criminal law.³

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¹ These ideas were discussed for instance in seminars and summer schools organized at the Syracuse International Institute for Criminal Justice and Human Rights.

² See Amnesty International, *Malabo Protocol; Legal and Institutional Implications of the Merged and Expanded African Court*, 2016.

³ For a critical discussion of this distinction see K.J. Heller, “What is an International Crime? (A Revisionist History)”, *Harvard International Law Journal*, Vol. 58, No. 2, 2017, (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2836889).

Christine van den Wyngaert is one of very few scholars to have gained a stellar reputation in both areas of law. It is therefore appropriate we dedicate some thoughts on the Malabo Protocol in this *liber amicorum* to honour her work.

We start by offering some reflections on ICL's epistemic community, Christine van den Wyngaert's position therein and, more generally, the scholarly reception of the Malabo Protocol. Subsequently, we explore two opposing perspectives on the Malabo Protocol, namely the Malabo Protocol as a Rebel and the Malabo Protocol as a Role Model. On the one hand, the Malabo Protocol can be portrayed as a rebel against the ICC, inspired by anti-ICC sentiments and meant to operate as a shield against further ICC scrutiny into African crimes. By way of justification for the move away from the ICC it is argued that justice is better provided at the regional level. This perspective has very strong political dynamics but, from a more technical criminal law point of view, the question arises whether in fact a new regional court would be the best means to actually effectuate regional accountability. On the other hand, the Malabo Protocol can also be seen as offering a new template for ICL with additional crimes and novel forms of international responsibility. It could serve as a corrective and, going one step further, even become a role model, albeit - for the time being - only on paper.

2. CvdW, the ICL Epistemic Community and the Scholarly Reception of the Malabo Protocol

The physical existence of any international court is preceded by an idea, and epistemic communities are the natural environment for the birth of such ideas. As noted above, the idea of an international criminal court surfaced well before the ICC actually came into being. In fact, already in 1925, Vespasian Pella proposed a criminal chamber within the Permanent Court of International Justice to try individuals, well before Cassese, Bassiouni and Triffterer were even born.⁴ Pella articulated this proposal in his capacity as *rapporteur* of the Conference of the Interparliamentary Union, thus offering an early example of the blending of scholarship and advocacy that has nowadays become so characteristic of international criminal law. The function of eminent writers in ordering and shaping international law has been recognized more generally,⁵ and the role of activist scholars as critical actors in the development of international law, both through the conception of new ideas as well as through their great influence in unleashing the transformative power of these ideas, has been extensively discussed elsewhere.⁶ In these discussions, it has been observed that the dynamic between scholarship and practice in international criminal law, as a young area of international law, has been particularly intense and

⁴ V. Pella, "Towards an International Criminal Court", 44 *American Journal of International Law* 37-69, 1950, pp. 37-38.

⁵ M. Wood, "Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute)", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2011, at para. 3 (available at: www.mpepil.com).

⁶ See e.g., C. Stahn and E. De Brabandere, "The Future of International Legal Scholarship: Some Thoughts on 'Practice', 'Growth', and 'Dissemination'", 27 *Leiden Journal of International Law* 1-10, 2014. Also see I. Feichtner, "Realizing Utopia through the Practice of International Law", 23 *European Journal of International Law* 4: 1143-1157, 2012 and A. Peters, "Realizing Utopia as a Scholarly Endeavour", 24 *European Journal of International Law* 2: 533-552, 2013, discussing whether activism can be a scholarly endeavor or should rather be seen as practitioner's terrain.

multifaceted.⁷ Christine van den Wyngaert has fostered this dynamic in a unique way, as a scholar who became a judge. She has contributed to the maturing and dissemination of international criminal law through her judicial work, particularly her eloquent and powerful dissents, but also through her continuous encounters and interactions with academia in the form of journal articles and conference presentations.⁸ In addition, she has made indirect contributions by stimulating others, particularly young scholars, to critically engage with and reflect on international criminal law.

In terms of orientation, Christine van den Wyngaert cannot easily be categorized or pigeonholed. Her dissents are inspired by more idealistic human rights purposes,⁹ as well as a strong belief in the importance of adhering to fundamental criminal law principles¹⁰ and recognition of the limits of international criminal courts.¹¹ It is also noteworthy that Judge Van den Wyngaert's ICTY experience has opened her up to the merits of the common law system, even though she originates from a civil law system herself. Such multiple identities also undergird international criminal law more generally and they have found expression in different types of ICL scholarship as identified in Vasiliev's typology of genre, where he distinguishes between theoretical, doctrinal, activist, critical and empirical scholarship.¹²

The scholarly reception of the Malabo Protocol is similarly informed by different approaches. Clarke and Jalloh's work as well as Werle's commentary are largely doctrinal or article-by-article exercises¹³ that have some parallels with ICC commentaries, including those of Cassese, Schabas or Ambos and Triffterer.¹⁴ Other works reflect on the strategy of regionalizing criminal justice from more theoretical perspectives, such as Nicole de Silva's paper drawing on institutional choice theory.¹⁵ Activist or critical scholarship offer, depending on the perspective, different analyses portraying the Malabo Protocol as either a rebel or a role model. As for the rebel role, it is observed that the Malabo Protocol is conspicuously silent on its relationship with the ICC.¹⁶ Not only may such silence create legal complexities regarding parallel implementation efforts, but it also reinforces the suggestion that the Protocol was

⁷ E. van Sliedregt, "International Criminal Law: Over-studied and Underachieving?", 29 *Leiden Journal of International Law* 1-12, 2016, p. 2.

⁸ See, e.g., C. van den Wyngaert, "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge", 44 *Case Western Reserve Journal of International Law* 475, 2011.

⁹ Dissenting opinion of Judge van den Wyngaert in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep 3.

¹⁰ See, e.g., Dissenting opinion of Judge van den Wyngaert in Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-3319), Trial Chamber II, 21 November 2012.

¹¹ See van den Wyngaert (n 8), pp. 491-492 on equal access to justice before international courts and tribunals: "It may be too much to expect from the ICC to be a retributive (fighting impunity) and a restorative mechanism at the same time."

¹² S. Vasiliev, "On Trajectories and Destinations of International Criminal Law Scholarship", 28 *Leiden Journal of International Law* 701-716, 2015, pp. 711-712.

¹³ K. Clarke and C. Jalloh (eds.), *The African Court of Justice and Human and People's Rights*, Cambridge University Press, 2017; G. Werle and M. Vormbaum (eds.), *The African Criminal Court; A Commentary on the Malabo Protocol*, Asser Press, 2017.

¹⁴ A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002; and O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, Beck/Hart, 2016..

¹⁵ N. De Silva, African opposition to the ICC and proposed regional criminal courts, prize winning paper of ISA 2017.

¹⁶ As also noted by Max Du Plessis in "Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes", Institute for Security Studies, ISS Paper No. 235, June 2012.

motivated by anti-ICC sentiments.¹⁷ Deviant arrangements regarding immunities also contribute to seeing the Malabo Protocol as a maverick exercise.¹⁸ As for the role modelling, it has also been suggested that the Malabo Protocol should be regarded as a regional corrective, offering an alternative vision of criminal accountability and tailoring it to the context, needs and aspirations of the African continent.¹⁹ It serves as a role model for international criminal law more generally as it introduces new crimes and additional forms of responsibility that may complement the current ICL register, thereby fostering the potential for more comprehensive accountability efforts.²⁰

Jointly, and despite their fundamental differences, those voices, constituting the epistemic community of ICL, animate a proposal that does not necessarily have much viability on its own. The scholarly discussion on the Malabo Protocol illustrates that a draft proposal to a draft amendment to an existing institution may make a significant imprint on the development of international law despite its tentative nature, underscoring the role of intellectual production in international law's formation.²¹ We now turn to discuss each of these perspectives, the rebel and the role model, in turn.

3. The Malabo Protocol as an Expression of Rebellion

The Malabo Protocol has been said to pave the way for a rebel court: rebellious for the novelties that it introduces and also because it has been seen as a direct reaction to claims of ICC bias. Abass has indicated that this is too narrow a view and has pointed to a different set of historical and legal rationales that underpin the Malabo Protocol and that go far beyond the Bashir fall out.²² Even so, it is still remarkable that the Malabo Protocol fully ignores the ICC. This omission does raise certain queries, particularly in light of the Malabo Protocol's purported goal of fostering regional justice.²³ Hence, the question: is the Malabo Protocol a rebel without a cause?

Indeed, the argument could be made that if there were a genuine desire to strengthen regional accountability efforts, initiatives other than creating a new court should be considered and that, in fact, the Malabo Protocol is a distraction therefrom. Such initiatives could include reinforcing domestic systems and particularly also cooperation and mutual legal assistance schemes underlying domestic prosecutions. Going one step further, it could even be said that the Malabo Protocol not only detracts attention from such (more important) initiatives that need to be taken, but it also complicates and poses additional hurdles to creating the legal environment needed to prosecute crimes at the domestic level. Instead of the Malabo Protocol, new initiatives to strengthen regional accountability schemes could also invest in horizontal state cooperation, such as a pan-African extradition regime and effective cross-continental mutual legal assistance arrangements that go beyond the sub-

¹⁷ See Du Plessis/ISS (n 16) for a detailed analysis on the implications of the Malabo Protocol.

¹⁸ See further Section 3.2 below.

¹⁹ Matiangai Sirleaf, "The African Justice Cascade and the Malabo Protocol", 11 *International Journal of Transitional Justice* 1 71-91, 2017.

²⁰ I. Tallgren, "The Sensibility and Sense of International Criminal Law", 13 *European Journal of International Law* 1 561-595, 2002, p. 595, quote: "some acts and responsibilities excluded".

²¹ T. Krever, "International Criminal Law: An Ideology Critique", 26 *Leiden Journal of International Law* 701-723, 2013, p. 703.

²² A. Abass, "Historical and Political Background to the Malabo Protocol" in Werle and Vormbaum (n 13), p.15-20.

²³ See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AU Doc. Assembly/AU/Dec.529 (XXIII) (the Malabo Protocol), Preamble: "Bearing in mind the commitment to promote peace, security and stability on the continent". See also Sirleaf (n 19) on the Malabo Protocol as "an important, alternative vision of regional criminal justice", p. 72.

regional schemes of SADC, ECOWAS and the East African Community and culminate in an encompassing AU regime. The underlying, more general, argument here is that modern ICL should return some of the limelight to transnational criminal law in order to be effective.²⁴ It is noteworthy in this respect that Judge Van den Wyngaert started her career in this area of law, also referred to as traditional international criminal law.²⁵

3.1 *Rewriting crime definitions*

As noted, the Malabo Protocol could be said to detract attention from much-needed efforts in the sphere of transnational criminal law, and perhaps more disturbingly the Protocol complicates present schemes. It does so through the creation of new crimes and by rewriting existing crimes. With regard to the latter, the Protocol extends the international definition of genocide by explicitly including rape as one of the acts of genocide. The crimes against humanity definition is broadened by significantly lowering the threshold of application; an attack against a civilian population that is “systematic” or by an “enterprise” qualifies as a crime against humanity whereas the ICC definition requires that an attack emanates from a state or state-like entity. The war crimes provision is added to by 16 acts. The definitions of transnational crimes are drawn from a number of international and regional conventions. Again, like the international crime definitions, they are tweaked, adding clauses on modes of liability or applying it to specific situations.²⁶

Although the introduction of new crimes in the Statute can have important corrective effects (as discussed in the next section) for the specific question of implementation and horizontal state cooperation, the Malabo Protocol may result in obligation-overload and an inextricable patchwork of differing obligations for states. If the Malabo Protocol enters into force, state parties must adapt domestic laws in order to ensure corresponding crime definitions and to introduce new crimes, as well as to enable domestic prosecution and cooperation. This requires an enormous implementation effort, while so far the majority of African ICC state parties has not introduced any implementing legislation for the ICC.²⁷ And even if capacity limits were overcome, the co-existence of all kinds of slightly different definitions can pose true hurdles for horizontal state cooperation also in light of the rule of dual criminality. For this reason, the on-going work of the Special Rapporteur in the ILC for a new Convention concerning Crimes against Humanity is very clearly premised

²⁴ See Van Sliedregt, n. 7, p. 2.

²⁵ As exemplified by the following publications, C. Van den Wyngaert, *Is uitlevering naar een staat waar de opgeeste persoon de doodstraf riskeert nog langer verenigbaar met het E.V.R.M. ? : beschouwingen naar het arrest Soering van het Europees Hof voor de rechten van de mens*, *Rechtskundig weekblad*, vol. 53, p. 761, 1990; *De internationale strafrechtelijke samenwerking bij de bestrijding van de E.E.G.-fraude*, *Rechtskundig weekblad*, vol. 55, p. 417, 1991. Also see J. Dugard and C. Van den Wyngaert, “Reconciling extradition with human rights”, *92 American Journal of International Law* 2: 187-212, 1998.

²⁶ Convention for the Elimination of Mercenarism in Africa, adopted 3 July 1977, entered into force April 2002; OAU/AU Convention on the Prevention and Combating of Terrorism, adopted 1 July 1899, entered into force December 2002; AU Convention on Preventing and Combating Corruption, adopted 1 July 2003 and entered into force 5 August 2006; Bamako Convention on the Ban of the Import into Africa and the control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted 30 January 1991 and entered into force 22 April 1998.

²⁷ A. Abass, “The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects”, *60 Netherlands International Law Review* 1: 27-50, 2013, p. 48. See also Du Plessis/ISS (n 16), p. 10.

on a deliberate choice to leave the ICC-definition untouched.²⁸ The political architects of the Malabo Protocol made different choices.

In addition to different crime definitions, another dimension of the patchwork that is produced by the parallel operation of the ICC and an African Court relates to uneven ratification. There will be states party to the ICC that have not ratified the Malabo Protocol, states that have ratified the Malabo Protocol but are not party to the ICC, states that are party to both, and states that are party to none – and, in addition, there will be states with implementing legislation for neither or both. This situation may not smoothen cooperation, as it would not always be easy to deconstruct the mosaic of obligations. It is further exacerbated by the absence of any provision indicating how to balance competing requests from the ICC and the African court. Hence, the Malabo Protocol's ability to reduce the accountability gap is disputable, and so it risks becoming a rebel for the wrong cause.

3.2 *Immunity*

The most obvious sign that the Malabo Protocol is a rebel; designed, not as a complementary mechanism but as an alternative that *opposes* the ICC, is the Protocol's provision on immunity. Article 46(B) provides the general position in ICL:

Subject to the provisions of Article 46Abis of this Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment.

Art. 46Abis, however, stipulates:

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

The clause was originally not part of the Malabo protocol; in the 2012 Draft there had been no immunity provision. Accepting immunity for state officials is a step back; it takes us back to pre-Nuremberg times. Without discussing this provision at length, we would like to make two brief comments. First of all, there is a question of internal inconsistency. Art. 28I of the Protocol, which is taken from the AU Convention on Corruption, criminalizes “illicit enrichment” by *public officials*. This seems to allow for prosecution of senior state officials, including Heads of State, presidents and prime ministers. How this sits with the immunity clause in Article 46Abis not clear. Secondly, and in relation to section 4 below, we wonder whether the immunity-clause cannot backfire in the realm of corporate liability. With a provision providing for immunity of state officials, it will be difficult to counter a claim by a state-owned company of a claim of immunity. This is not far-fetched. Currently, there is litigation in the US where Chinese companies who face litigation before American courts (for health problems of inhabitants of houses with bad quality dry walls installed by that company) argue they are acting on behalf of the State and hence enjoy immunity.²⁹

²⁸ See, e.g., International Law Commission Special Rapporteur S.D. Murphy, “Second Report on Crimes against Humanity” UN Doc. A/CN.4/690, para 2; L.N. Sadat, “A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity”, 2010, p.9 (available at: <http://law.wustl.edu/harris/CAH/docs/CompHistoryFinal01-06-11.pdf>).

²⁹ XXX

Quite a number of Chinese companies are active in Africa, and they might feel untouchable with this explicit recognition of state immunity.

4. The Malabo Protocol as a Role Model

Having portrayed the Malabo protocol as an expression of rebellion, and having considered the potential problems the Malabo Protocol raises when it comes to State cooperation and immunity, we submit that the Protocol can also be seen as a role model.

4.1 Crimes

The Malabo Protocol grants the Court jurisdiction over 14 crimes³⁰, 4 international crimes and 10 transnational crimes; crimes that have a cross-border effect and that require transnational inter-state cooperation to be effectively countered domestically. Leaving aside the problem of implementation and state-cooperation due to tweaked crime definitions, in itself, the incorporation of transnational crimes may be welcomed.

While we see a host of practical problems due to changes to established crime definitions, in principle we are not opposed to including transnational crimes in the jurisdiction of the Court. This way, the Malabo Protocol comports with the increased recognition that the two categories of crime should not be kept separate since they are often committed in *tandem*, especially in Africa. The intersection between international crimes and illicit exploitation of natural resources is well documented. It is no coincidence that three out of four convictions (Lubanga, Katanga, Bemba) at the ICC concern individuals commanding rebel groups in the mineral-rich area of Ituri. As the UN special rapporteur on human rights in the DRC reported in 2003, “despite the ethnic appearance of the conflict, its root causes are of an economic nature”.³¹

One offence is conspicuously lacking in the list of 14: forced labour/slavery. In Nuremberg, it was the central charge in the trial of industrialists and still today it qualifies as a war crime or crime against humanity. However, since long it has been recognized as a stand-alone (transnational) crime and it is puzzling why the drafters decided to leave it out in the list of 14. Much of the illegal trade comes with forced labour, in particular in the diamond mines in Congo.³²

4.2 Criminal corporate liability

The other novelty that we regard as a welcome addition to ICL is the introduction of corporate criminal responsibility. In ICL, the focus for a long time has been on the

³⁰ Art. 46A Malabo Protocol: Genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, crime of aggression.

³¹ Interim report of the Special Rapporteur on the situation of human rights in DR Congo (A/58/534).

³² See for instance Global Witness report:

<https://www.globalwitness.org/sites/default/files/library/Congo%27s%20minerals%20trade%20in%20the%20balance%20low%20res.pdf>

The crime can be added under the residual clause of Art. 28(A)(2): The Assembly may extend upon the consensus of States Parties the jurisdiction of the Court to incorporate additional crimes to reflect developments in international law.

individual. While there was an attempt in Nuremberg to hold organizations criminally responsible for international crimes, the International Military Tribunal (IMT) was not ready to punish an organization or a corporation as such.³³ The collective criminality theory at Nuremberg, which aimed at the IMT declaring political and military organisations criminal which then in subsequent trials would enable prosecutions of large numbers of its members without a showing of individual guilt, failed. Courts were uncomfortable with the idea of strict liability and mass punishment. At the same time, the trials of the industrialists – Krupp, IG Farben, Zyklon B – was about punishing individuals for their wilful and knowing involvement in corporation carrying out criminal activities. The *I.G. Farben* trial has been referred to as the case where the tribunal recognized that the company itself had committed violations of international law, there was at the end of the day a strong commitment to individual responsibility. As the Court stated,

Corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.³⁴

The tide is turning towards holding corporations accountable for criminal offences. For some time now domestic jurisdictions have accepted that legal entities can commit offences and be held accountable, either under civil law or criminal law.³⁵ At the international level, we have a normative system in place that provides for monitoring and supervision of corporations to ensure they respect human rights. Corporations can be taken to court for violating international law, in particular human rights. The *Talisman Energy*³⁶ and *Kiobel*³⁷ cases are notable examples.³⁸ In 2014, the Special Tribunal for Lebanon (STL) held that legal persons can be the subject of contempt proceedings. Three TV stations were held in contempt because of revealing names of witnesses that should have been kept concealed.³⁹ Corporate liability was read into the Statute; the term ‘person’ was thought to extend to natural and legal persons. In justifying this reading the Tribunal referred to Lebanese law and “[a] general trend in most countries towards bringing corporate entities to book for their criminal acts or the criminal acts of their officers”.⁴⁰ In this context, we should also mention the work of International Law Commission on a Convention on crimes

³³ N.H.B. Jorgensen, *The Responsibility of States for International Crimes*, Oxford: Oxford University Press 2001.; E. van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford: Oxford University Press, 2012..

³⁴ Trial of Carl Krauch and Twenty-Two Others (I.G. Farben Trial), United States Military Tribunal, Nuremberg, 14th August 1947–29th July 1948, *Law Reports of Trials of War Criminals* (UNWCC), Volume X (His Majesty’s Stationary Office 1949), 52.

³⁵ C. Wells, *Corporations and Criminal Responsibility* (2nd edition OUP 2001); D.E. Stoichkova, *Towards Corporate Liability in International Criminal Law*, Intersentia, 2010; J. Kyriakakis, ‘Corporations before International Criminal Courts: Implications for the International Criminal Justice Project’, 30 *Leiden Journal of International Law*, p. 221-240, 2017.

³⁶ *Presbyterian Church of Sudan v. Talisman Energy Inc* (582 5F.3 244, 259), 2 October 2009. See also US Supreme Court, *Presbyterian Church of Sudan et al. v. Talisman Energy Inc* (No. 09-1262), Amicus Curiae of international law scholars, 30 April 2010; available online via <http://www.earthrights.org/sites/default/files/documents/amicus-talisman-supreme-court.pdf> (visited 22 March 2017).

³⁷ *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013).

³⁸ The *Kiobel* case, however, limits extra-territorial jurisdiction of American courts under the Alien Tort Statute.

³⁹ *In the Case against New TVS A.L. Karma Mohamed Thasin Al Khayat*, STL-14-05, 31 January 2014.

⁴⁰ *Ibidem*, para. 26 citing a report by Clifford Chance “Corporate Liability in Europe”, January 2012, http://www.cliffordchance.com/content/dam/cliffordchance/PDF/European_Technical_Bulletin.pdf, p. 1.

against humanity⁴¹ where the Drafting Committee has been requested to consider including a provision on the criminal responsibility of legal persons.⁴²

The Malabo Protocol, by explicitly providing for jurisdiction over legal persons alongside natural persons, changes ICL in a revolutionary way. It is worth reiterating the relevant provision, art. 46C(1):

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.

In one simple sentence, by extending the power to adjudicate over legal entities, it recognizes corporate criminal liability. Bearing in mind the fact that those drafting the ICC Statute discussed including corporate criminal responsibility in the Statute but abandoned the idea because of a lack of agreement on criminal responsibility of legal entities⁴³, the Malabo protocol, by recognizing corporate criminal liability for international and transnational crimes, takes ICL to another level.

In the following we will explore corporate criminal conduct in the realm of ICL and take a closer look at criminal corporate liability and the relevant provision in the Malabo Protocol.

5. Criminal corporate liability

5.1 Corporate Reality

Research shows that corporations can get involved in international crimes as direct perpetrators through their employees and managers.⁴⁴ One such example is the private military company Blackwater where the company and its director as well as several of its private contractors had been charged with war crimes committed against civilians in Iraq.⁴⁵ Most often, however, corporations are accomplices through their assistance to the commission of international crimes by the principal perpetrator(s).⁴⁶ Corporations may facilitate the commission of international crimes by providing logistical support and by passing on certain information. Canadian company Talisman Energy Inc. was charged with aiding and abetting human rights abuses and international crimes in Sudan for providing logistical support (airfields, roads) to the military in Sudan who committed crimes against civilians.⁴⁷ A more indirect form of involvement is to benefit from the commission of international crimes.⁴⁸ Examples are the violent repression of protests against the companies' activity by the police or security forces of a certain regime. An even more 'detached' form of involvement is

⁴¹ A/CN.4/680 and Corr.1.

⁴² Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10), paras. 79-81.

⁴³ See *infra* n. 52.

⁴⁴ L.J. van den Herik and J.L. Cernic, 'Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again', 8 *Journal of International Criminal Justice*, p. 725-743, 2010.

⁴⁵ E. van Sliedregt, W. Huisman, 'Rogue Traders. Dutch Businessmen, International Crimes and Corporate Complicity' 8 *Journal of International Criminal Justice*, 816 2010.

⁴⁶ W. Huisman, *Business as Usual? The Involvement of Corporations with International Crimes* (The Hague: Boom Legal Publishers, 2010).

⁴⁷ The company was taken to court under the Aliens Tort Claims Act (ATCA). The Court ruled in favour of the company, *Presbyterian Church of Sudan v. Talisman Energy Inc* (582 5F.3 244, 259).

⁴⁸ Referred to by Clapham and Jerbi as beneficial or indirect complicity: A. Clapham and S. Jerbi, Categories of Corporate Complicity in Human Rights Abuses, 24 *Hastings International and Comparative Law Review* (2001) 339-349.

that of silent approval. By continuing to do business with dictatorial regimes, business entities contribute to the political legitimization and economic viability of such regimes while they do not directly benefit from or contribute to international crimes. The TRC in South Africa, for instance, concluded that the Apartheid regime could not have survived without the business support of certain companies, such as IBM and Ford.

Greed and profit-seeking are important motives for corporate crime.⁴⁹ However, financial interests can take different forms. In most cases, rather than profit maximization, loss minimization seems to be the dominant motive. Especially in the capital intensive extraction of natural resources, such as oil and gold, the risk of loss of investments that were already made, appears to be the most important reason for corporations to stay in a country or area and as a result become involved in international crimes.⁵⁰

Transnational crimes capture the reality of business misconduct in Africa. Corporations in search of extractive resources and inexpensive labour operate in countries such as DRC, Angola, Guinea, Cote d'Ivoire, Nigeria, CAR, Liberia and Zimbabwe. They are involved in the oil industry, mining business, diamond and timber trade and dodgy land-deals in the palm oil industry. Companies come from all over the world: UK, the Netherlands, United States, Lebanon and China. This corporate misconduct qualifies as corruption, money laundering, illicit exploitation of natural resources. As was made clear in section 3, the international crime definitions in the Malabo Protocol deviate from established international definitions. They have also been given a 'corporate make-over'. The chapeau-requirement for crimes against humanity has been extended to include an attack "by an enterprise". In a similar vein, the Protocol alters transnational crime definitions to capture corporate misconduct. Thus, art.1(16) of the Bamako Convention explicitly extends liability to legal entities and art 1(3) of the Convention on Elimination of Mercenarism in Africa provides that: any person, *natural or juridical* who commits the crime of mercenarism (...), shall be punished as such.

The examples we mentioned so far concern corporate complicity, thus indirect liability. This form of liability captures the type of corporate conduct we find with regard to international crimes. Direct liability lies more in the ambit of economic crimes: corruption, money laundering, illicit exploitation of natural resources.

5.2 *Three Approaches*

So how do we construct liability of an entity? In general, there are 3 approaches: (i) through individual liability (ii) aggregation, or (iii) separate self-identity.⁵¹ The first

⁴⁹ M. Punch, *Dirty Business: Exploring Corporate Misconduct, Analysis and Cases* (London: Sage Publications, 1996).

⁵⁰ Take the example of Anglo-Ashanti Gold. The company had bought concessions for the extraction of gold in an area of 8,000 square kilometers from the Congolese state mining corporation in 1998. Shortly thereafter, a civil war broke out. When the area was relatively quiet in 2004, the corporation could not wait to start the exploitation of the gold. This turned out to be too soon, because the FNI rebel movement appeared to be in charge of the area and the corporation was forced to pay them and to provide logistical support to the movements operations. B. Prosansky, 'Mining Gold in a Conflict Zone: The Context, Ramifications and Lessons of AngloGold Ashanti's Activities in the Democratic Republic of the Congo', 5 *Northwestern Journal of International Human Rights*, p. 236-274, 2007.

⁵¹ E. Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward

approach comes in two forms: vicarious liability and direct liability. Vicarious liability is based on the legal fiction that whatever a person does through an agent, he/she is deemed to have done him/herself. In attributing liability to an entity you perform a two-prong test and determine: (i) whether the elements of the offence were met in the conduct of the agent and (ii) whether the conduct can be ascribed to the entity on the basis of the relationship of agency (e.g. employment). Direct liability provides for liability of the entity through identifying actions and thought patterns of particular individuals within the corporation. Those individuals act within the scope of their authority and on behalf of the corporate body. Their conduct is regarded as the conduct of the legal body itself. Again, a two-prong test applies, where (i) the performance of the individual is considered; (ii) the identification process is performed separately, to explore whether it is proper, under the circumstances, to regard that specific human being as a corporate organ. A combination of these approaches was part of the French proposal for the ICC Statute. Liability would attach to juridical persons alongside natural persons who were *in a position of control within the juridical person, and who acted on behalf of and consent of the juridical person and in the course of its activities*.⁵² The proposal never made it.

In the second approach, aggregation, knowledge and intent of different agents is assembled and attributed to the corporation. The behaviour of one agent can be joined to the knowledge of the other. The fiction underlying attribution is that the corporation controls the agents' conduct. Again, there is a two-prong test where elements of liability are fulfilled through conduct of agents, which is then ascribed to the entity.

The third approach is a corporate approach, where liability is attached to the corporation for its *own* conduct and knowledge. Conceptually, this is the most challenging approach. Thinking about criminal responsibility in terms of abstract legal entities without a body to kick and a soul to damn does not sit well with the agency concept that underlies our thinking about culpability. Elements that can be used to construe corporate liability are corporate culture, corporate attitude, strategy reports and monitoring proceedings. The enquiry into the organizational *mens rea*, however, will often still rely on aggregation and assembling attitudes from a number of agents, often at management level. Reasonableness plays a role in circumscribing liability. For instance was the risk of crimes reasonably foreseeable. Corporate fault can be established when the company operates flawed formal procedures or informal practices that have been approved, encouraged or condoned at management level.

5.3 Art. 46C MP

The provision on corporate liability in the Malabo protocol seems to be a combination of at least two of the three approaches: the aggregate and self-identity approaches. Here are the relevant paragraphs of Article 46C:

2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.

Aggregation and the Search for Self-Identity', 4 *Buffalo Criminal Law Review* 641 2000-2001.

⁵² Working Paper on Article 23, paras.5–6, A/ Conf.183/ C.1/ WGGP/ L.5/ Rev.2, 3 July 1998. See A. Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in: M. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* (2000), 139.

3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

Section 2, referring to corporate intention by proof of a policy, displays the holistic approach: the corporation as a separate identity. Section 3 expands on that by stipulating how this may be established. The element of reasonableness, which requires answering the question what is generally perceived as reasonable, may be viewed as circumscribing liability.⁵³ Section 4 equates corporate knowledge to knowledge of information of wrongdoing within the corporation, which suffices as proof of intent. Sections 4 and 5 further make clear that knowledge can be construed by deducing it from reports and/or monitoring procedures and by combining it from a collectivity of agents; the aggregate approach. Section 6 stipulates that corporate liability and liability of natural persons are independent of one another; one does not depend on the other. This differs from the French proposal for the draft ICC Statute.

The real problem with corporate liability and corporate complicity is *mens rea*. Some domestic jurisdictions dispense with it all together. In Australia for instance the statutory provisions providing for organisational liability in relation to federal offences, rely on the concept of 'corporate ethos' and 'corporate culture'.⁵⁴ If intention, knowledge or recklessness is the fault element of the underlying offence, it is attributed to the entity that expressly authorized or permitted the commission of the offence. Such authorization or permission is then established by proving that a corporate culture existed within the organization that directed, encouraged, tolerated or led to non-compliance of the law.⁵⁵

The provision on corporate complicity in the Malabo Protocol provides for knowledge as the appropriate mental standard with regard to the underlying offence ('base crime'). At the level of individual criminal responsibility, there has been debate about the appropriate *mens rea* standard for aiding and abetting international crimes. The ICC Statute, in art. 25(3)(c) requires a purposive attitude towards the commission of crimes by the perpetrator; knowledge of the base crime is insufficient. On the other hand, the knowledge-test has been consistently applied in WWII cases, and ICTY, ICTR and SCSL case law.⁵⁶ The knowledge test is less onerous/burdensome in proving criminal complicity and generally preferred by international prosecutors.

The issue of which test - purpose/intent or knowledge – was central to the case against the *Talisman Energy* company under the Alien Tort Claims Act in the United States. The judges, in finding in favour of the company, had relied on the ICC standard and held that, '[p]laintiffs have not established Talisman's purposeful complicity in

⁵³ Stoichkova, n. 32, p. 119 (so-called 'Laufer test').

⁵⁴ 'Corporate culture' is defined as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'. Criminal Code Act, 1995 § 12.3(6)

⁵⁵ Lederman, n. 48, at 699-700.

⁵⁶ See M. Jackson, *Complicity in International Law*, Oxford: Oxford University Press, 2016, p. 75-76.

human rights abuses'.⁵⁷ As *amici curiae*, in a brief addressed to the US Supreme Court, a group of international scholars argued convincingly that under customary international law, aiding and abetting liability requires that an accused *knowingly* provide substantial assistance to the perpetrator or tortfeasor. The U.S. Supreme Court never ruled on the issue; it would not review the case.

The Malabo Protocol is clear: corporate knowledge is the *mens rea* for corporate liability. This is appropriate. It is closer to the corporate reality where companies rarely have criminal *intentions* that make them complicit in international crimes. Other than that, the corporate complicity provision is a rather vague and open provision and it remains to be seen how the different approaches to corporate liability play out and comport to one another. To a certain extent, the provision looks like those provisions in conventions that criminalise transnational crimes and require further implementation at the domestic level. Rather than fully legislating/outlining a legal concept, it quite roughly outlines a legal concept and provides for different options that states can further develop and chose from when implementing domestically.

5.4 Extended Liability

Article 28N of the Malabo Protocol provides for modes of liability and attempt liability. It applies to legal persons as well natural persons (“any person”):

An offence is 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;
- ii. Aids or abets the commission of any of the offences set forth in the present Statute;
- iii. Is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences set forth in the present Statute;
- iv. Attempts to commit any of the offences set forth in the present Statute.

It seems corporate complicity will come under section (ii) of this provision.

5.5 The question of penalties

The Malabo Protocol contains a gap when it comes to sentencing. There is no provision on penalties for legal persons. Article 43A on ‘sentences and penalties under the international criminal jurisdiction of the court’, seems to apply to natural persons.⁵⁸ Since corporations cannot be subjected to classic criminal law punishment -

⁵⁷See n. 41, at 2.

⁵⁸ Art. 43A:

1. Without prejudice to the provisions of Article 43, the Court shall pronounce judgment and impose sentences and/ or penalties, other than the death penalty, for persons convicted of international crimes under this Statute.
2. For the avoidance of doubt, the penalties imposed by the Court shall be limited to prison sentences and/ or pecuniary fines.
3. The sentences and/ or penalties shall be pronounced in public and, wherever possible, in the presence of the accused.
4. In imposing the sentences and/ or penalties, the Court should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
5. In addition to the sentences and/ or penalties, the Court may order the forfeiture of any property, proceeds or

a prison sentence – and the default penalty is thus a fine, this should have been addressed. The Malabo Protocol could have drawn on art. 10(4) of the UN Convention on Transnational Organized Crime⁵⁹ on penalties for legal persons. This clause requires effective and proportionate sentences for legal persons, including monetary sanctions. For serious crimes committed by a wealthy company, this means imposing a very serious fine. The drafters of the Malabo Protocol could have also looked at some of the domestic sanctions following a finding of corporate liability. Think of the American example of requiring companies, alongside a monetary sanction, to implement a compliance monitoring system or the French penalty of closing down a company; the so-called corporate death penalty. If the drafters were *really* serious about corporate liability, this is what they should have spent time on when legislating on the topic.

6. Concluding observations

The Malabo Protocol can be viewed as either a rebel or a role model. As a rebel, it provides for immunity of sitting Heads of State undermining a long-standing principle of international criminal law. Moreover, by redefining existing and well-established crime definitions it risks obstructing implementation at the domestic level and state-cooperation. As a role model, it extends jurisdiction to transnational crimes and corporate liability. This way, the Protocol aligns with the reality of international criminality in Africa. The ICC Statute with its focus on the ‘classic’ core crimes and employing a strict standard of complicity liability, applicable only to individuals and providing for high culpability criteria risks not capturing the true origins of conflict and mass atrocities in Africa (or elsewhere). This is why we see a role for a regional criminal court in Africa, that could serve as a corrective to the ICC.

So far, however, the Malabo Protocol is only a role model on paper. This begs the question, how serious should we take this initiative? Not so serious, would be our response. Indeed, (i) the controversial and contrived immunity provision, (ii) the lack of thinking about penalties, and (iii) the unclear and sketchy provision on corporate liability, are just a few factors that point towards the Malabo Protocol being a legally expedient fig leaf. The Malabo Protocol is, at best, not sufficiently thought through and, at worse, a *lex imperfecta*, never designed to work but simply there to communicate and express moral disapproval. This leads us to regard the Malabo Protocol primarily as a rebel. As for Christine van den Wyngaert, however, who in many ways may also be regarded a rebel; through her dissents, and already early in her career by speaking (and singing!) out against the Vietnam war, we prefer to strike a different balance: to us she is a role model. And we thank her for it.

any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State.

⁵⁹ Adopted by General Assembly resolution A/RES/55/25 of 15 November 2000.