

UNDERSTANDING THE MALABO PROTOCOL: THE POTENTIAL, THE PITFALLS AND WAY FORWARD FOR INTERNATIONAL JUSTICE IN AFRICA CONFERENCE, SOUTHERN SUN HOTEL PRETORIA, SOUTH AFRICA, 7-8 NOVEMBER 2016

FINAL COMMUNIQUÉ

1. The Foundation for Human Rights, Amnesty International, Southern Africa Litigation Centre, Lawyers for Human Rights, Centre for Human Rights-University of Pretoria and Southern African Liaison Office organized a two-day consultation with leading civil society groups, professional associations, government representatives, AU representatives, academics and key media leaders drawn from the Southern Africa region to reflect on the African Union Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), its potential, pitfalls and the way forward for international justice in Africa.

2. The meeting took place at the Southern Sun Hotel, Pretoria, South Africa, on 7 and 8 November 2016, attracting over 80 people from Eastern and Southern Africa.

3. The meeting reflected critically on of the following specific issues relevant to the Malabo Protocol:

- I. The International Criminal Court (ICC), Africa and the implications of South Africa's withdrawal from the ICC;
- II. Understanding the Malabo Protocol: legal, institutional and human rights implications;
- III. The African regional human rights and criminal justice landscape: existing and emerging mechanisms – levels of effectiveness;
- IV. Implications of the Malabo Protocol on justice, accountability and human rights in Africa;

- V. Domestic implications of the Malabo Protocol, including on member states to the Rome Statute; and
- VI. International justice and the gender perspective.

4. In a key-note address, followed by question and answers, the Deputy Minister of Justice and Constitutional Development of the Republic of South Africa, Mr. John Jeffery, gave participants an assurance that the Republic of South Africa would consider ratifying the Malabo Protocol only after a critical review of the Protocol. This process allows an opportunity for engagement to various stakeholders, including civil society, in a critical review of the Protocol in order to evaluate its legal, institutional, justice, accountability and human rights implications. The participants welcomed this approach and undertook to follow up with the South African government.

5. The meeting noted and welcomed the stipulated principles and values underlying the Malabo Protocol including respect for human rights and sanctity of life; condemnation, rejection and fighting of impunity; strengthening of AU's commitment to promote sustained peace, security and stability; and prevention of serious and massive violations of human rights. The meeting applauded the ambition and expression of AU heads of state and government to create a regional criminal court that can potentially address the continent's persistent challenges, including the scourge of conflict and impunity.

6. The meeting acknowledged that the Malabo Protocol identifies some serious crimes of particular relevance to Africa, such as money laundering, illicit exploitation of natural resources; and that it may play a facilitating role contributing to the commission of some of the more core international crimes. It also noted that the Court need to be highly functional and not merely aspirational order to be effective.

7. The meeting was seriously concerned that the framing of some of the crimes in the Malabo Protocol falls foul of the principle of legality owing to the vagueness, broadness and wideness of the crimes. There is a need for greater clarity of the crimes so that people can

regulate their conduct in a way in which they can predict the consequences of their conduct and choices with certainty. As an example the meeting noted that while it is desirable to tackle terrorism and extremism, the way in which the Malabo Protocol identifies terrorism in Article 28G is vague, overbroad, too wide and dangerous for enjoyment of human rights as it could be manipulated. It does not provide sufficient exceptions to lawful and constitutionally protected conduct such as peaceful protest, use of social media, legitimate agitation for improved service delivery, and human rights issues including economic social and cultural rights.

8. The meeting expressed significant concern about a number of other crimes in the Malabo Protocol that cover important areas for Africa to tackle impunity but seriously breach the principle of legality such as the crime of corruption and unconstitutional change of government among others which are vaguely, broadly and widely defined. Any government that wishes to sign and ratify the Malabo Protocol would need to reflect seriously on these observations.

9. The meeting also came to the conclusion that there should be no immunity for mass atrocities in order to conform not only with the principles of customary international law but also the letter and spirit of the AU Constitutive Act and the core AU human rights instruments that identify impunity as an impediment to the development of Africa. The immunity clause in the Malabo Protocol is potentially ultra vires the AU Constitutive Act. The meeting found no legal basis for the inclusion in the Malabo Protocol of article 46A *bis*, which extends immunity to an ambiguous group of state officials, as this can only fuel impunity and defeat the very primary objective of the Malabo Protocol of creating an instrument and framework to effectively tackle impunity in Africa. The meeting found the wording of the immunity clause for heads of state and senior state officials to encourage impunity and potentially refusal of heads of state to leave office and remain in power at any cost.

10. The meeting appealed to the AU States to seriously reflect on these concerns, take them into account including taking corrective

measures so that the Protocol can be an effective legal instrument to contribute to tackling impunity in Africa and bring about justice and accountability for perpetrators, while offering real and effective remedies for victims of serious crimes and human rights violations.

11. The meeting acknowledged the protocols commitment to equitable gender representation at the level of the structure and make-up of the court; the inclusion of rape specifically and gender-based violence in general as a crime against humanity. The meeting however, called on member states to ensure that the court is not only representative in terms of its composition, but, gender responsive in terms of all of its operations.

12. The participants pledged to continue working with the AU and African governments to contribute to combating impunity in Africa including adopting a Protocol that addresses the above concerns adequately so that the impunity for serious crimes is effectively tackled in Africa.

Done at Pretoria South Africa, 8 November 2016.

ANNEXURE 1

Foundation for Human Rights (FHR)

Amnesty International (AI)

Southern African Litigation Centre (SALC)

Southern African Liaison Organisation (SALO)

Lawyers for Human Rights -SA

Centre for Human Rights – University of Pretoria

Dennis Hurley Peace Institute

Centre for Applied Legal Studies (Wits University)

Pan African Lawyers Union (PALU)

International Commission of Jurists

Institute of Security Studies (ISS)

Zimbabwe lawyers for human rights

COSATU

Human Rights Institute of South Africa (HURISA)

ICJ-Kenya

**African Centre for the Constructive Resolution of Conflict
(Accord)**

Wits Law School

Law Association of Zambia

Commission on Gender Equality

UN Women

Zimbabwe Human Rights NGO Forum

Khulumani Support Group

Black Management Forum

National Alliance for the development of community advice offices (NADCAO)

ZimRights

Centre for Human Rights and Rehabilitation Malawi (CHRR)

UNESCO Oliver Tambo Chair for HR (Fort Hare)

ASCHPR (African Court on Human and Peoples Rights)

Coalition for the International Criminal Court (CICC)

Council for the Advancement of the SA constitution (AMEC)

Legal Assistance Centre (Namibia)

Transformation Resource Centre (Malawi)

Ditshwanelo (Botswana)

University of Johannesburg

Africa Middle East Centre (AMEC)

South African Human Rights Commission (SAHRC)

Clingendael Institute

IBAHRI (Academic Research Institute) Benin

UN Special Rapporteur on Eritrea

Africa Forum

ACAOSA

Action Support Centre

New Development Bank-Africa

Minara Chamber of Commerce

Zimbabwe exiles forum

Sudan Solidarity Network

Institute for small businesses in SA