

International Criminal Justice Series

Volume 10

Series editors

Gerhard Werle, Berlin, Germany

Lovell Fernandez, Bellville, South Africa

Moritz Vormbaum, Berlin, Germany

Series Information

The *International Criminal Justice Series* aims to create a platform for publications in the whole field of international criminal justice. It, therefore, deals with issues relating, among others, to:

- the work of international criminal courts and tribunals;
- transitional justice approaches in different countries;
- international anti-corruption and anti-money laundering initiatives;
- the history of international criminal law.

The series concentrates on themes pertinent to developing countries. It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars, in particular from African countries.

Editorial Office

Prof. Dr. Gerhard Werle
Humboldt-Universität zu Berlin
Faculty of Law
Unter den Linden 6,
10099 Berlin, Germany
gerhard.werle@rewi.hu-berlin.de
moritz.vormbaum@rewi.hu-berlin.de

More information about this series at <http://www.springer.com/series/13470>

Gerhard Werle · Moritz Vormbaum
Editors

The African Criminal Court

A Commentary on the Malabo Protocol



Editors

Gerhard Werle
Faculty of Law
Humboldt-Universität zu Berlin
Berlin
Germany

Moritz Vormbaum
Faculty of Law
Humboldt-Universität zu Berlin
Berlin
Germany

ISSN 2352-6718 ISSN 2352-6726 (electronic)
International Criminal Justice Series
ISBN 978-94-6265-149-4 ISBN 978-94-6265-150-0 (eBook)
DOI 10.1007/978-94-6265-150-0

Library of Congress Control Number: 2016950894

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the authors 2017

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Printed on acid-free paper

This Springer imprint is published by Springer Nature
The registered company is Springer Science+Business Media B.V.
The registered company address is: Van Godewijkstraat 30, 3311 GX Dordrecht, The Netherlands

Acknowledgements

This book is based on a meeting of experts that convened in July 2015 at Humboldt-Universität zu Berlin to discuss the issues surrounding the African Union’s Protocol aimed at vesting the African Court of Justice and Human and Peoples’ Rights with criminal jurisdiction. The meeting was organized by the South African-German Centre for Transnational Criminal Justice, which is run cooperatively by the Law Faculties of the University of the Western Cape and Humboldt-Universität zu Berlin. The editors would like to express their gratitude to the German Academic Exchange Service (DAAD) and the German Federal Foreign Office for generously funding the centre in the framework of the “African Excellence” initiative.

We would also like to express our thanks to Hanna Takeuchi and Rebecca van Es, who proofread the chapters, to Marshet Tadesse Tessema, who helped select the materials in the appendix to the book, and to Anna-Julia Egger and Nella Sayatz for formatting the chapters.

While editing this book, South Africa and Burundi notified the Secretary General of the United Nations of their intention to withdraw from the Statute of the International Criminal Court. Other African states have expressed an intention to do similarly. It remains to be seen which impact this will have on the work of the International Criminal Court in Africa. It is clear, however, that alternative approaches to prosecute crimes under international law in Africa, including the creation of an “African Criminal Court”, will become increasingly important.

Berlin, November 2016

Gerhard Werle
Moritz Vormbaum

Contents

Part I Introduction

- 1 **Creating an African Criminal Court** 3
Gerhard Werle and Moritz Vormbaum
- 2 **Historical and Political Background to the Malabo Protocol** 11
Ademola Abass

Part II The Crimes in the Annex to the Malabo Protocol

- 3 **Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)** 31
Kai Ambos
- 4 **The Crime of Unconstitutional Change of Government (Article 28E)** 57
Gerhard Kemp and Selemani Kinyunyu
- 5 **Piracy (Article 28F), Terrorism (Article 28G) and Mercenarism (Article 28H)** 71
Florian Jeßberger
- 6 **Corruption (Article 28I) and Money Laundering (Article 28Ibis)** 89
Lovell D. Fernandez
- 7 **Trafficking in Persons (Article 28J) and Trafficking in Drugs (Article 28K)** 109
Fatuma Mninde-Silungwe
- 8 **Trafficking in Hazardous Wastes (Article 28L) and Illicit Exploitation of Natural Resources (Article 28Lbis)** 125
Martin Heger

**Part III General Principles and Rules of Procedure
in the Annex to the Malabo Protocol**

9 Modes of Responsibility (Article 28N), Individual Criminal Responsibility (Article 46B) and Corporate Criminal Liability (Article 46C) 139
Chantal Meloni

10 Preconditions to the Exercise of Jurisdiction (Article 46Ebis), Exercise of Jurisdiction (Article 46F) and the Prosecutor (Article 46G). 157
Volker Nerlich

11 Complementary Jurisdiction (Article 46H) 187
Harmen van der Wilt

12 Immunities (Article 46Abis) 203
Dire Tladi

Annexes 219

Index. 345

Editors and Contributors

About the Editors

Gerhard Werle is Professor of German and International Criminal Law, Criminal Procedure and Modern Legal History at Humboldt-Universität zu Berlin and Director at the South African-German Centre for Transnational Criminal Justice. In addition, he is Extraordinary Professor at the University of the Western Cape and Honorary Professor at North-West University of Political Science and Law (Xi'an, China).

Moritz Vormbaum obtained his doctoral degree in criminal law from the University of Münster (Germany) and his postdoctoral degree from Humboldt-Universität zu Berlin. He is Senior Researcher at Humboldt-Universität, as well as a coordinator and lecturer at the South African-German Centre for Transnational Criminal Justice. Currently, he is Adjunct Professor at Universität Hamburg.

Contributors

Ademola Abass is a special adviser to the Governor, Office of Overseas Affairs and Investment, in Lagos State, Nigeria. Previously he was, among others, a research fellow and the Head of the Peace and Security Programme at the United Nations University Institute on Comparative Regional Integration Studies (UNU-CRIS), Brugge (Belgium).

Kai Ambos is Professor of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at Georg-August-Universität Göttingen, where he is also the Director of the Research Centre for Latin-American Criminal Law and Criminal Procedure. He also serves as a Judge of the District Court of Göttingen.

Lovell D Fernandez is Professor of Criminal Law at the University of the Western Cape and Director at the South African-German Centre for Transnational Criminal Justice. Before joining UWC Law Faculty, he lectured at the University of Witwatersrand, University of Cape Town and the University of Namibia.

Martin Heger is Professor for Criminal Law, Criminal Procedure, European Criminal Law and Modern Legal History at Humboldt-Universität zu Berlin, where he is also the Director of the student exchange program “Network East-West”.

Florian Jeßberger is Professor of Criminal Law, Criminal Procedure, International Criminal Law and Modern Legal History at Universität Hamburg. Amongst others, he serves as the Director of the Institute of Criminal Justice Studies and Vice Dean of the Faculty of Law and is a Co-Editor of the Journal of International Criminal Justice.

Gerhard Kemp is Professor of International Criminal Law, Criminal Law and Criminal Procedure at Stellenbosch University, South Africa. Among others, he serves on the editorial board of the African Yearbook on International Humanitarian Law.

Selemani Kinyunyu is an advocate in the High Court of Tanzania and has worked for the Pan African Lawyers Union, where he assisted in drafting the Protocol to vest the African Court with criminal jurisdiction. He currently serves as coordinator of the African Governance Architecture Programme of the African Court on Human and Peoples’ Rights.

Chantal Meloni is Associate Professor of Criminal Law at the University of Milan. She has worked as a legal assistant at the International Criminal Court and serves as a Legal Adviser for the International Crimes and Accountability Program at the European Center for Constitutional and Human Rights.

Fatuma Mninde-Silungwe is a national legal expert in the UN Development Programme’s Elections Project. Previously she worked as a prosecutor in Malawi. Currently she is working on her doctoral thesis on regionalization of international criminal justice in Africa.

Volker Nerlich is Legal Adviser at the International Criminal Court, currently seconded to the Extraordinary Chambers in the Courts of Cambodia, and Honorary Professor at Humboldt-Universität zu Berlin. Prior to his post at the International Criminal Court, he was an associate expert in the United Nations Office on Drugs and Crime.

Dire Tladi is Professor of International Law at the University of Pretoria and an Extraordinary Professor at the University of Stellenbosch and a member of the UN International Law Commission. Previously, he served as the Principal State Law Adviser for International Law for the South African Department of International Relations and Cooperation.

Harmen van der Wilt is Professor of International Criminal Law at the University of Amsterdam and a Judge ad litem in the Extradition Chamber of the District Court in Amsterdam. In addition, he has been a member of the Research Council of the EU (F7)-project on the European Arrest Warrant.

Abbreviations

AC	Appeals Chamber
AU	African Union
AUCPCC	African Union Convention on Preventing and Combating Corruption
DRC	Democratic Republic of Congo
EAC	East African Community
EC	European Commission
ECOWAS	Economic Community of West African States
ed(s)	editor(s)
edn	edition
e.g.	for example (<i>exempli gratia</i>)
EJIL	European Journal of International Law
et al.	and others (<i>et alii</i>)
et seq.	and the following (<i>et sequens; et sequentes</i>)
EU	European Union
FATF	Financial Action Task Force
GA	General Assembly
i.e.	that is (<i>id est</i>)
ibid.	in the same place (<i>ibidem</i>)
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JICJ	Journal of International Criminal Justice
marg. number(s)	marginal number(s)
n., nn.	footnote(s) (<i>nota, notae</i>)
NGO	Non-Governmental Organization
no(s).	number(s)
OAU	Organization of African Unity
OTP	Office of the Prosecutor (at the International Criminal Court)

p, pp	page(s)
para(s)	paragraph(s)
PTC	Pre-Trial Chamber
Res.	Resolution
SADC	Southern African Development Community
SCSL	Special Court for Sierra Leone
SERAP	Socio-Economic Rights and Accountability Project
TC	Trial Chamber
UN	United Nations
UNCAC	United Nations Convention against Corruption
UN Doc.	Documents of the United Nations
UNTOC	United Nations Convention against Transnational Organized Crime
UNTS	United Nations Treaty Series
USAID	United States Agency for International Development
USD	United States Dollars
v	against (<i>versus</i>)
VCLT	Vienna Convention on the Law of Treaties of 1969