A Conversation with Prof. Charles C. Jalloh, Lead Editor of The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges (CUP, 2019) edited by Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmehielle

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About the book

Jalloh The African CourtThe treaty creating the African Court of Justice and Human and Peoples' Rights, which was adopted by all 54 countries that were members of the regional organization known as the African Union in June 2014, is the first international legal instrument that combines in a single court three distinctive jurisdictions over criminal, human rights, and general matters. The treaty has so far been signed by 15 African States from different subregions of the continent. It requires 15 ratifications to enter into force. Based on the practice of African States, securing the magic number of 15 ratifications might take at least several years. Taking advantage of the time needed for the treaty to come into force, this volume, which brings together both African and other scholars and practitioners from other regions of the world with known expertise in international criminal law, human rights and transitional justice, offers the first 360 degree view of the African Union's Protocol on Amendment to the Protocol on the Statute of the African Court of Justice on Human Rights (the so-called 'Malabo Protocol') situating it within the wider fields of international law and international relations. While there have been one or two other works on the Malabo Protocol, their focus has been on the criminal jurisdiction without much consideration of the other two innovative forms of jurisdiction in the same instrument.

This book, edited by Professors Jalloh (Florida International University), Clarke (University of California, Los Angeles) and Nmehielle (formerly African Union Commission), fills the gap by offering critically engaged and practical analyses of some of the most challenging questions about the Malabo

Protocol and its place in the architecture of modern international courts and tribunals. The book seeks to take seriously the proposal of African States in the Malabo Protocol to create a new court, as an object of academic inquiry, by examining the pros and cons of the instrument on key issues starting with the wider context of transitional justice in Africa and the place of criminal accountability in that broader context. The book then turns to a more technical analysis focusing on the criminal jurisdiction, starting with the definitions and substance of the 14 international and transnational crimes within its jurisdiction, the institutional and procedural framework, the modes of criminal participation, immunity, defenses, sentences, and reparations before picking up on the court's human rights jurisdiction and general jurisdiction. Along the way, several of the authors highlight significant issues such as the recognition of corporate liability in addition to individual criminal liability, cooperation and the question of whether the regional African Court would compete with, or complement, the regional human rights mechanism or the world's only permanent International Criminal Court (ICC) based in The Hague, which is supported by 123 States of which 33 are African States. In the last part of the book, contributors examine the important issue of funding for the future court and the complicated role of civil society in developing the regional instrument.

Q. Why this book, and why now?

There are many reasons why this book and why now. Let me highlight two. First, the idea of creating an African Court of Justice and Human and Peoples' Rights was popular in certain government circles in Africa a few years ago but was quite unpopular among international lawyers especially those living and working in The Hague. Many die-hard international justice supporters, surprisingly including academics, thought that the decision by African States to announce the creation of their own regional court that will have jurisdiction to prosecute crimes against humanity, genocide and war crimes, among other crimes, was competition for the International Criminal Court. As a result, many scholars reflexively caricatured the African Court as a kind of rebel regional court against the universal global criminal court, but to my great surprise, they did so without first engaging its legal merits at all. In fact, once you ask why they were opposed to it, you quickly realize that many scholars knew little about the African Court, let alone the many innovations embedded in its founding instrument.

Second, since African States will need at least until 2025 if not longer before their regional treaty enters into force and before the African Court would be actually created and become operational, we felt that scholars should take advantage of the abundant time we have now to methodically address the pros and cons of this new African Court instrument. This includes delicate issues that the framers of the African Court statute glossed over. For example, the drafters of the Malabo Protocol in the Africa Union Commission failed to address the type of relationship we should expect between the future African Court and the current global criminal court.

Yet, with the ICC in the Hague involved with mostly African situations referred to it by the African countries where the situations have arisen and prosecuting mostly African defendants for the foreseeable future, it seemed to me to be quite important for the future success of both courts, once the African Court is established, that they collaborate - rather than compete - with each other. This

would not only be beneficial for Africa and the international community, and its global court that has so far been endorsed by 123 countries including 33 from Africa, but also for the future of the global anti-impunity project. After all, we are talking here about a long and storied fight against impunity for genocide, crimes against humanity and other heinous crimes such as torture all of which are crimes condemned by international law.

Interesting, in what could be a significant parallel development, other regions of world, such as Latin America, were or are now already considering creating new regional courts to prosecute crimes of interest to their regions. The decision of a wider community of States to not include drug trafficking in the Rome Statute, the interest in which had precipitated Trinidad and Tobago's proposal that had in fact resuscitated the idea of the ICC, stands as another reason why States in certain regions such as the Americas might desire to establish their own regional criminal courts. There is, at this point, no better example of this than the Latin American and Caribbean Criminal Court against Transnational Organized Crime (referred to as COPLA, its abbreviation in Spanish).The COPLA draft statute, supported by Argentina and parliamentarians in the Southern Common Market (MERCUSOR, its abbreviation in Spanish) as well as civil society organizations, would include drug trafficking, much like the AU's Malabo Protocol, which also includes that same crime as well as human trafficking, trafficking in hazardous wastes, mercenarism, unconstitutional change of government and other crimes that were deemed to be of particular concern to African States but are expressly not provided for under the Rome Statute. This is what I have described, in my academic work, as "ICC Plus jurisdiction" since there were ten additional crimes to the four "core crimes" recognized by the Rome Statute. It is the significance of what we could learn, and its relevance for the international community that led us to put together this team of top-notch scholars to study the Malabo Protocol. It is also probably why, somewhat unusually for law professors, we were able to attract over a million dollars in funding to carryout this multi-year study.

Q. Who should read this book?

Breaking new ground on the African Court, but also treating old concepts of international dispute settlement in a novel and relevant way, our book is largely written by leading legal academics for other lawyers, judges, practitioners and students of law. But, in another way, the justice issues we address are much broader and more universal. Come to think of it, they really should appeal to anyone interested in the role that international courts play in resolving disputes between States, holding States accountable for respecting the human rights of their citizens or in prosecuting individuals at the regional and international levels for crimes that shock the conscience of humanity but that far too often go unpunished whether for political, capacity or other reasons within domestic courts.

By the way, one thing I should mention is that, due to the generosity of the Africa Regional Office of the Open Society Foundation, which sponsored this research, our volume is also available as an Open Access book on Cambridge Core. Basically, this means you can download the entire book or any of the chapters as free PDFs: https://www.cambridge.org/core/books/african-court-of-justice-and-human-and-peoples-rights-in-context/416534A44F3C6E177535B89FD8A1BFBB#fndtn-contents. We are glad

that this is the case so that the knowledge produced is equally available to any researchers with basic internet access anywhere in the world.

Q. What is the most important takeaway for your readers from this book?

Great question. After years of careful research, and three conferences convening leading scholars on three separate continents, I would say our most important takeaway is surprisingly simple: that is, the African Court is unlikely to be a competitor or threat to the permanent International Criminal Court. Rather, if you look at the underlying legal framework of each distinct court, each tribunal can play a key role in the ongoing struggle to offer the numerous African victims of atrocity crimes some measure of justice for the pain and suffering they and their families have endured.

Another point that our group study, including specifically in my own contribution to the book, lays bare is that there is a long history of perceived competition between the “international” and “regional”. This dates back at least to the immediate post-World War II period when the international community was discussing the possibility of adopting a global human rights instrument. The perception then, was that the emergence of human rights instruments at the regional level, starting in Europe followed by the Americas, would create a kind of competition for the protection of human rights in the international regime. It would be a way to undermine the international by focusing on the regional.

The universalists’ suspicious attitude towards the regional, which we see parallels with today when it comes to the supporters of the ICC and the African Court of Justice and Human and Peoples’ Rights, should never have taken hold because even the United Nations Charter recognized, in the context of peace and security, that the regional and international complement each other. The UN foundational legal instrument therefore recognized what is described as “regional arrangements” in Chapter VIII. Made up of three articles, this part of the UN Charter basically reaffirms that the fact that States were creating an international organization to address peace and security issues that did not preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action. The only caveat was that such arrangements or agencies and their activities be consistent with the Purposes and Principles of the United Nations.

Something similar has happened, though not by similar deliberate design, in the area of international human rights law. Today, no one can imagine, let alone deny, that the efficiency of the global human rights regime and the protection it offers people everywhere can exist without the multiple layers of national, sub-regional, regional and international processes. This includes courts and commissions that, with few exceptions, work in tandem with each other to advance basic human rights and human dignity for people in most parts of the world.

In much the same vein in other areas of international law, regionalism and internationalism are now common and complement each other, for example, in the area of international economic law. The WTO- centered system takes for granted the existence of Regional Trade Agreements, or “RTAs”,

with just about every single country being party to one or more of these agreements, according to the Geneva-based World Trade Organization. The RTAs are all formally accepted in GATT 1947 and GATT 1994, and so long as the Most Favored Nation and National Treatment Principles are respected, they allow sovereigns to come together in smaller subsets to do more to advance the broader objective of advancing global free trade.

I could go on and on with more examples. But I think the point has been made. The essence then, is that while history seems to be repeating itself in international criminal law (ICL) to parallel what happened in International Human Rights Law and International Economic Law, I hope that the diverse works of the excellent scholarly contributions in the Malabo Protocol book will help drive us towards, at a minimum, a more open conversation to weigh the pros and cons of regionalism and internationalism in the field of ICL. There are some established academics, such as William Burke-White, who has been thinking about regionalism's implications for ICL for a few years and thoughtful newer voices like Matiangai Sirleaf who are bringing fresh Pan African insights to add to the discourse.

Of course, I am not naïve enough to suggest that the Malabo Protocol is perfect or that it does not have a dark or shadow side to it. That side may be more reflective of the cynicism and politicization of justice that we sometimes see from some African political elites rather than ordinary African citizens who, for the most part, seem to care more about whether they get any justice at all rather than where that justice comes from: the heart of Europe in The Hague or the heart of Africa in Arusha. We should recognize, even if we disagree on the details, that there are potentially multiple national, regional and international sites that can, if carefully coordinated, complement each other to help ensure that we provide even more avenues to find justice for the victims of atrocious international crimes.

Q. How did you decide on the title and cover art?

The title we selected accurately reflects the subject of our book: The African Court of Justice and Human and Peoples' Rights. The subtitle speaks to "Development and Challenges", two elements that are central themes throughout the work and indeed to the future court.

Concerning the cover, we thought something that captures Africa and the notion of justice would be appropriate. The map of the African continent was easy. "Justice" was a bit harder. We couldn't find anything that beats the classic scales of justice. Juxtaposing the symbol of the world's second largest continent against the symbol of justice, and the symbol of justice against the world's second largest continent, and then both against a wider background scene that reminds me of the Serengeti Plains of Tanzania famously depicted in the Lion King movie just did it for me. I hope it does it for our readers too!

Q. Is there anything else you'd like to add?

Allow me to end with a huge thank you, *un grand merci*, to the Global Justice Journal for the opportunity to discuss this book. In particular, I'd like to single out Dr. Joseph Rikhof, a fellow ICL traveler whom I've known for a few years, as well as Mr. James Hendry, Editor, for the opportunity.

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About Professor Charles Jalloh

Dr. Charles C. JallohDr. Charles C. Jalloh is professor of law at Florida International University in Miami, USA. He has published widely in the field of international criminal law, and in 2018-2019, was the Fulbright Distinguished Chair in Public International Law at the Lund University and Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Sweden. He is the Founding Editor-in-Chief of the African Journal of International Criminal Justice and Founding Director of the African Court Research Initiative - a project funded by the Africa Regional Office of the Open Society Foundations. He holds degrees from Guelph, McGill, Oxford and Amsterdam.