13

Jurisdiction of the Criminal Chamber of the African Court of Justice and African Court of Justice and Human and Peoples' Rights

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1. INTRODUCTION

This chapter examines the inclusion of trafficking in drugs within the transnational crimes jurisdiction of the Criminal Chamber of the African Court of Justice Peoples and Human Rights (hereinafter the Criminal Chamber) established under article 28(1) of the amended Statute of the Court. Drug trafficking is not a crime within the jurisdiction of any other international or regional tribunal and there is thus no practice yet to draw on for interpretive purposes.[1] For this reason, in addition to an orthodox textual analysis, given that the complementarity provision article 46H (1) states that 'the jurisdiction of the Court shall be complementary to that of the national courts, and to that of regional economic communities where specifically provided for by the Communities', the Criminal Chamber can seek guidance in the interpretation of article 28K in the UN drug control conventions[2] and the practice of

[1] In 1989 Trinidad and Tobago precipitated the development of the ICC when it called upon the UN General Assembly to create an ICC with jurisdiction over drug trafficking across national frontiers – see UNGAOR 6th Comm 44th Sess. UN Doc A/c.6/44/SR.38–41 (1989). This effort failed as the ICC evolved into a court with jurisdiction over those crimes for which individual responsibility under international criminal law was clearly established in customary international criminal law. The failure of subsequent efforts to achieve this goal may serve as an unstated rationale for the inclusion of treaty crimes like drug trafficking in the jurisdiction of the African Court. See generally Neil Boister, 'The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics' 3 *Journal of Conflict and Security Law* (1998) 27; Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues Negotiations and Results* (The Hague: Kluwer, 1999) 79, 85–7; Darryl Robinson, 'The Missing Crimes' in Antonio Cassese, Paolo Gaeta and J.R.W.D. Jones (eds.). *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 497, 498.

[2] See generally N. Boister, *Penal Aspects of the UN Drug Conventions* (The Hague: Kluwer, 2001).

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AU member States in the implementation of these treaties. This chapter follows suit and resorts for interpretive guidance to the amended Statute of the Court, the terms of the international drug conventions to which AU members are party and selected examples of state practice from AU member States, as well as to regional arrangements made by AU members.

2. RATIONALE FOR INCLUDING DRUG TRAFFICKING IN THE JURISDICTION OF THE CRIMINAL CHAMBER

Freedom from the social ill-effects of non-medical and non-scientific drug use falls within the general goal of promotion of 'development of the Continent' articulated in the Preamble of the amended Statute.[3] Although data is limited,[4] the AU's rolling Action Plan on Drug Control[5] notes that the production, trafficking and use of illicit drugs is a growing challenge in Africa.[6] Similar sentiments have been articulated at a sub-regional level in the ECOWAS Political Declaration on Drug Trafficking and Other Organised Crimes in West Africa and the ECOWAS Regional Action Plan to Address the Growing Problem of Illicit Drug Trafficking, Organised Crimes and Drug Abuse in West Africa.[7] A particular concern is the use by South American drug traffickers of West Africa for transhipment of Cocaine. Tamfuh records:

> Since the US administration got tough on traffickers from Latin America, Africa is increasingly becoming a transit hub for Latin American drugs destined for the Europe and the US, with the Gulf of Guinea playing the key role. West Africa has also become a passageway for illicit drugs from South America. The South American cartels and their local accomplices are gradually turning Central Africa into a stepping stone along their "cocaine route" to Europe by exploiting local weaknesses such as deficient controls at ports, poor traveller inspection equipment, porous land and sea borders and endemic corruption and overwhelming insecurity.[8]

S v Archula,[9] a case involving the trial in Sierra Leone of 18 accused including a number of Colombians for smuggling more than a tonne of cocaine on an

[3] Preambular paragraph 12.
[4] UNODC, *World Drug Report 2015* (Vienna: UNODC, 2015), xiv.
[5] The latest iteration is the AU Plan on Drug Control (2013–2017), CAMDC/EXP/2(V).
[6] Para 12.
[7] Adopted in Abuja in 2008 (extended to 2013).
See www.unodc.org/westandcentralafrica/en/ecowasresponseactionplan.html.
[8] Wilson Y.N. Tamfuh, 'Drugs and Drug Control in Cameroon), in Anita Kalunta-Crumpton (ed.), *Pan African Issues in Drug Control* (Farnham: Ashgate, 2015), 17 at 26.
[9] [2009] SLHC 21, 16 March 2009.

Antonov aircraft disguised as a Red Cross plane through Sierra Leone, is a graphic illustration of the complexity of these operations. West Africa is also a source of methamphetamine smuggled into East and South-East Asia, while East Africa is growing in importance as a transit area for Afghan heroin bound for Europe and elsewhere.[10]

A key priority of the AU's Action Plan is improved criminal justice capacity in the investigation and prosecution of drug-related organised crime.[11] The Criminal Chamber can provide some capacity regarding large-scale drug trafficking offences, but there is a danger that it will be swamped under the potentially huge number of offences, which necessitates caution in selecting cases. In the International Law Commission's scheme for inclusion of the treaty crimes within the jurisdiction of the then proposed ICC, it was recommended that they had to reach a threshold of seriousness in order to fall under the ICC's jurisdiction, a measure designed to prevent the ICC from being overwhelmed by minor cases.[12] There is nothing in article 28K or the drug conventions that serves as a threshold to sift out those cases worth prosecuting from the potentially thousands of cases of no individual moment. Given the Criminal Chamber's potentially enormous jurisdiction it will be necessary to filter out all but the most serious cases. The Court must rely on State authorities exercising a degree of self-discipline in these cases by not submitting cases to the court that are trivial simply because they do not have the wherewithal to prosecute themselves. At the Court itself, the exercise of prosecutorial discretion to screen potential cases will be the main mechanism for doing so (whether cases are taken up by the prosecutor, by authorised AU organs or submitted by AU member states or individuals or NGOS within those states).[13] The Rome Statute's[14] guidance regarding gravity of offences may prove of some use regarding the necessity to prosecute only offences of regional concern and not to overburden the court.[15] The gravity threshold in article 17(1)(d) is

[10] UNODC, *World Drug Report 2015*, (Vienne: UNODC, 2015), xiii.

[11] Para 36(d)(i).

[12] 'Report of the ILC, 45th session' *UNGAOR* 48th Sess. Supp. No.10 UN Doc. A/48/10 (1993) at 284.

[13] Article 29 of the Statute as amended by Article 15 of the Protocol.

[14] Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 5.

[15] See generally Susana Sacouto and Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' (2007) 23 *American University Law Review* 809; Margaret De Guzman "Choosing to Prosecute: Expressive Selection at the International Criminal Court (2012) 33 *Michigan Journal of International Law* 265.

undefined, but in relation to situations the ICC in the *Kenya*[16] and the *Ivory Coast*[17] decisions has held that the role and position (high rank) of the alleged offenders is a crucial factor when assessing gravity. In the *Gaza*[18] case the court felt that that the gravity requirement may be judged in relation to the crime itself or its alleged perpetrators, meaning that the status of the accused could transform a non-serious crime into a grave crime. However, while in *Lubanga*[19] the ICC based admissibility of specific cases on (1) seniority and (2) the systematic or large-scale nature of the conduct, later cases such as *Ntaganda*,[20] *Abu Garda*[21] and *Muthaura*[22] have rejected reliance on the perpetrator's status and taken the view that gravity should involve a quantitative and qualitative assessment from the victim's perspective. Given that in drug trafficking the notional victim is the African Union, State(s) and by extension society itself, some assessment of the scale and nature of the crime, the manner of its commission and its impact on the State and on the community, is indicated. Yardsticks for seriousness that provide a useful guide of scale and impact include the scale of the operation measured by transnationality,[23] involvement of organised criminal groups, tenure of the operation, complexity of the operation, mass of drugs involved, size of profits, the potential number of users, presence of violence, corruption or abuse of public office. The status of individuals whether as key members of the drug trafficking network or as senior officials (given the potential for corruption) and influential members of the community must also be potential indicators of seriousness. These criteria should not be cumulative; a nuanced assessment of the case may require only one or a selection to exist before prosecution is justified. The governing principle should be that it is the illicit drug traffic that is the Chamber's target (something implicitly recognised in the fact that all of the offences within the Criminal Chamber's jurisdiction are supply side offences).

[16] *Situation in the Republic of Kenya* ICC Pre Trial Chamber II, ICC-01/09–19, 31 March 2010 at [45].

[17] *Situation in the Republic of Cote dIvoire* ICC Pre Trial Chamber II, ICC-02/11–14, 30 October 2011 at [205].

[18] *Situation on the Registered vessels of the Union of the Comoros, the Hellenic Republic & the Kingdom of Cambodia* ICC Pre Trial Chamber I ICC-01/13–34, 16 July 2015 at [22].

[19] *Prosecutor v Lubanga* ICC Pre Trial Chamber I, ICC-01/04/-01/06, 24 February 2006 at [42]

[20] *Situation in the Democratic Republic of Congo* ICC Appeals Chamber, ICC-01/04–169, 13 July 2006 at [76].

[21] *Prosecutor v Abu Garda* ICC Pre Trial Chamber I, ICC-02/05–02/09–243, 8 February 2010 at [31]

[22] *Prosecutor v Muthaura, Kenyatta and Ali* ICC Pre Trial Chamber II, ICC-01/09–02/11–338, 23 January 2012 at [47].

[23] As defined in article 2 of the UN Convention against Transnational Organised Crime, 15 November 2000, 2237 UNTS 319, in force 9 September 2003.

3. THE SOURCES OF THE LAW

Although one of its goals is to strengthen legal frameworks[24] the AU's Plan of Action on Drug Control 2013–7 does not address the legal requirements on AU member states under the UN drug control conventions to take steps against the illicit manufacture and trafficking of drugs. Nor, in comparison to some of the other transnational offences in the protocol, is there an AU treaty regarding drug trafficking so the Criminal Chamber will not be enforcing a pre-existing AU definition of the offence. It is the Statute of the Court as amended by the Protocol, which establishes the crime of drug trafficking in the Criminal Chamber's jurisdiction. Article 28K defines 'trafficking in drugs' as follows:

1. For the purposes of this Statute, trafficking in drugs means:
   (a) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;
   (b) The cultivation of opium poppy, coca bush or cannabis plant;
   (c) The possession or purchase of drugs with a view to conducting one of the activities listed in (a);
   (d) The manufacture, transport or distribution of precursors knowing that they are to be used in or for the illicit production or manufacture of drugs.
2. The conduct described in paragraph 1 shall not be included in the scope of this Statute when it is committed by perpetrators for their own personal consumption as defined by national law.
3. For the purposes of this Article:
   (A) "Drugs" shall mean any of the substances covered by the following United Nations Conventions:
      (a) The 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs of 1961;
      (b) The 1971 Vienna Convention on Psychotropic Substances.
   (B). "Precursors" shall mean any substance scheduled pursuant to Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

[24] Para 36(c)(i).

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The definition in article 28K reflects the text in selected parts of article 3(1) of the 1988 UN Drug Trafficking Convention[25] (although tailored to suit), which in turn originates in article 36(1) of the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol).[26] The only African States that are not party to the 1988 Convention are South Sudan and Somalia. The fact that almost every AU member State has thus promised to enact these offences, makes the incorporation of the substance of these offences into the Protocol a plausible argument to defence challenges based on the principle of legality. This defence argument might gain some traction though where the State implementing the drug conventions has enacted an offence that bears little or no resemblance to the text of the treaties. The common objectives of these conventions are to specifically limit 'the production, manufacture, export, import, distribution of, trade in, use and possession of' the drugs scheduled under the treaties 'to medical and scientific purposes'[27] and to 'suppress' other illicit activities.[28] The ultimate purpose is to benefit the 'health and welfare of mankind'.[29]

4. THE SUBSTANCES UNDER CONTROL

The first condition for suppression of certain activities regarding drugs is listing (and chemically defining) the drugs regarding which the enumerated actions are illegal. The drug conventions provide a system for the scheduling of substances with dependence producing properties, and for the tabling of precursor substances (substances frequently used in the illicit production or manufacture of drugs).[30] These schedules and tables are continually updated as new substances with similar properties are discovered or invented.

Scheduling identifies the substances subject to control and the appropriate level of control. Thus under the 1961 Convention, Schedule I drugs (more addictive narcotics such as opium) are subject to greater control than those in

[25] Vienna, 20 December 1988, 1582 UNTS 95; in force 11 November 1990.
[26] 30 March 1961, 520 UNTS 151, in force 13 December 1964.
[27] Preambular para 8 and art 4(c), 1961 Convention; preambular para 5 and art 5(2) 1972 Convention.
[28] Preambular paras 5, 10 and 13, and art 2 of the 1988 Convention.
[29] Preambular para 1 of the 1961, 1971 and 1988 Conventions. GA Resolution 69/201, 18 December 2014, preambular para 6. See Richard M. Lines, *The Fifth Stage of International Drug Control: International Law, Dynamic Interpretation and Human rights* (Unpublished PhD Thesis, Middlesex University, 2014), 176–81 [permission].
[30] Scheduling is governed by articles 2 and 3 of the Single Convention; Tabling by article 12 of the 1988 Drug Trafficking convention. See Boister, *An Introduction to Transnational Criminal Law*, 2nd edition, 93; Bernard Leroy, 'Drug trafficking' in Neil Boister and Robert Currie (eds), *The Routledge Handbook of Transnational Criminal Law* (London, 2014), 229, 235.

Schedule II (less addictive narcotics such as codeine). Inclusion in either schedule by the UN's Commission on Narcotic Drugs) (the functional commission of ECOSOC which supervises the application of the international drug conventions) on the recommendation of a WHO Expert Committee in the first instance depends on whether the substance in question is liable to similar abuse to the substances already in that schedule. Schedule III is limited to preparations not liable to abuse, while Schedule IV contains a selection of Schedule I drugs considered particularly liable to abuse (such as heroin) not offset by therapeutic advantage and thus subject to special control measures. In similar manner, psychotropic substances are scheduled in four schedules under the 1971 Convention. Under the 1988 Drug Trafficking Convention, drug precursor substances are arranged in two different tables by the International Narcotics Control Board (the independent body which monitors implementation of the drug conventions). Article 28K (3) of the amended Statute of the Court incorporates by reference the scheduling/tabling system in the drug conventions. It provides that for the purposes of article 28K, '[d]rugs shall mean any of the substances covered by' the Single Convention (as amended by its 1972 Protocol[31]) and the 1971 Convention on Psychotropic Substances,[32] while precursors are those 'substances scheduled'[33] pursuant to article 12 of the 1988 UN Drug Trafficking Convention.

Drug legislation in some AU members refers directly to the international classification system. For example, article 2 of Algeria's 2004 drug law[34] defines 'stupéfiant' as the substances scheduled in the 1961 Convention but separates out 'substances psychotrope' as those substances scheduled under the 1971 Convention. Direct reference of this kind to the international schedules provides a more exact and up-to-date guide than legislation like Nigeria's National Drug Law Enforcement Decree 48 of 1949, which in s10(a) defines the substances which cannot on pain of penalty be imported, manufactured, produced, processed planted or grown as 'the drugs popularly known as cocaine, LSD, heroine or any other similar drugs'.

When it comes to identifying the substance(s) involved in a particular case before the Criminal Chamber, practical issues will abound. Scientific analysis

[31] Protocol Amending the Single Convention on Narcotic Drugs, 1961, Geneva, 25 March 1972, 976 UNTS 3; in force 8 August 1975.

[32] Vienna, 21 February 1971, 1019 UNTS 175; in force 16 August 1976.

[33] It should ideally read 'tabled' as the word 'scheduled' was deliberately avoided by the authors of the 1988 Convention to distinguish precursors from drugs.

[34] Loi no 04–18 du Dhou El Kaada 1425 correspondeant au 25 Decembre 2004 relative à la prévention et à la répression de l'usage et du trafic illicites de stupéfiants et de substances psychotrope.

of substances will be necessary to provide expert evidence in court, but can be provided by national drug analysis laboratories located in certain AU members such as the Forensic Science Laboratory of the South African Police Service. The UN Office of Drugs and Crime (the part of the UN Secretariat which administers all the UN's efforts against transnational crime) can also provide guidance in this regard.[35] Many drugs for illicit supply have been adulterated with other substances and while determining the exact amount of the prohibited substance involved is not critical for conviction, if not determined correctly it can raise issues about whether the substance before the court is the same as that originally seized. Moreover, the correct determination of the weight of the drugs may be important on sentence. Given the impossibility of transferring the substance in its entirety to the Criminal Chamber, it would be prudent for subordinate measures to be adopted that presumed that in any prosecution for one of the defined drug trafficking offences that a sample taken from any substance by means of or in respect of which the offence was allegedly committed possesses the same properties as the substance[36] and that a reasonable estimation of the weight of the drugs involved is permissible as evidence in the Criminal Chamber. Provision will also have to be made in subordinate measures for forfeiture, authorised safe-keeping during the chain of custody of the drugs before and prior to trial[37] and supervised destruction of the substances involved thereafter as is required in article 4(2)(c) of the SADC Protocol on Combating Illicit Drug Trafficking[38] and is the practice in AU member states.[39]

5. LAWFUL AND UNLAWFUL ACTIONS REGARDING CONTROLLED DRUGS

Under the conventions, scheduling does not prohibit scheduled drugs; it is the implementation at a national level of the penal provisions of the

[35] See https://www.unodc.org/unodc/en/scientists/index.html.

[36] See, for example, the provision in s18 of South Africa's Drugs and Drug Trafficking Act no 140 of 1992.

[37] See, for example, s74 of Kenya's Narcotic Drugs and Psychotropic Substances Act 1994, which provides for authorised weighing and safe-keeping of samples of evidence. Incidents in some AU member states indicate how important it is to keep control of the substance prior to trial. See for example *Republic v Nana Amma Martin* reported in *Daily Graphic*, 4 December 2011, in which cocaine became washing powder in police custody – cited in Joseph Appiahene-Gyfani, 'Drugs and Drug Control in Ghana' in Anita Kalunta-Crumpton (ed.), *Pan African Issues in Drug Control* (Farnham: Ashgate, 2015), 37 at 52.

[38] Signed 24 August 1996; in force 20 March 1999, available at http://www.sadc.int/files/1213/5340/4708/Protocol_on_Combating_Illicit_Drug_Trafficking_1996_.pdf.pdf.

[39] See, for example, s19(c) of Kenya's Narcotic Drugs and Psychotropic Substances (Control) Act, 1994.

conventions that prohibits certain actions regarding these drugs. The convention obliges states to criminalise: the drug control scheme as laid down in the UN Conventions requires criminalisation at a national level of (i) a certain action such as 'production', (ii) regarding a certain scheduled substance such as heroin, (iii) so long as that action is not for 'medical or scientific purposes'. The latter division between licit and illicit production of a scheduled drug arises from article 4(c) of the Single Convention's general obligation on States parties 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.' Article 3(1) of the 1988 Drug Trafficking Convention recognises this by providing that the various enumerated actions must be 'contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention'. This echoes the definition of the 'illicit traffic' in article 1(1)(1) of the 1961 Convention as 'contrary to the provisions' of that Convention. It implies that the offences only apply to actions for non-medical and non-scientific purposes. Article 28 K (1) does not explicitly recognise that some of the prohibited actions can be undertaken for licit medical and scientific purposes. It thus could be used to convict an individual pharmaceutical company of 'manufacture' of a scheduled substance even if it is for a 'medical purpose' recognised by the territorial state's national law. This would be contrary to the position under the conventions and under the domestic law of AU members.[40] This lacuna in the amended Statute of the Court can easily be remedied by a subordinate measure to the effect that actions recognised as having licit medical, scientific, and law enforcement purposes, in the drug conventions and in national law, do not fall within the scope of any of the offences in article 28K. This could be addressed through the proposed Elements of Crimes.

6. SUPPLY OFFENCES NOT PERSONAL USE OFFENCES

Drug trafficking as defined in article 28 K (1) is made up of a range of supply related offences.[41] Article 28 K (2) provides that '[t]he conduct described in paragraph 1 shall not be included in the scope of this Statute when it is committed by perpetrators for their own personal consumption as defined by national law.' It thus excludes from the jurisdiction of the Criminal Chamber

[40] For example, s7(1) of Mauritius's Dangerous Drugs Act no 41 of 2000 provides that for 'the purposes of medical or scientific research or teaching or the use of the forensic science services, the Permanent Secretary may authorize a person to cultivate, produce, manufacture, acquire, import, use or hold plants, substances and preparations' that have been scheduled.

[41] See Boister, *An Introduction to Transnational Criminal Law*, 2nd edn, 93.

Court 'use' or 'possession for use', avoiding a potential deluge of cases and the controversy surrounding inroads into personal rights.[42] It might be argued by some that article 28K (2) goes too far. An individual accused could feasibly produce methamphetamine for example, for their own use, and under the exception it would not matter how much they produced, their action would not fall within the jurisdiction of the Court. Inferences from the evidence will, however, circumscribe this exception; the greater the volume of production or weight of the drugs involved the more likely the purpose was to supply.

7. THE DRUG SUPPLY OFFENCE

The elements of the drug 'supply' offence in article 28(K)(1)(a) are as follows:

(a) The perpetrator produced, manufactured, extracted, prepared, offered, offered for sale, distributed, sold, delivered on any terms whatsoever, brokered, dispatched, dispatched in transit, transported, imported or exported. This list reproduces the forms of conduct listed in article 3 (2) of the 1988 Drug Trafficking Convention. Any one or more of these forms of conduct will suffice. Each has its own specific meaning, although they may overlap. 'Production' is defined in the 1961 Convention as the agricultural 'separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained'.[43] 'Manufacture' 'means all processes, other than production, by which the drugs may be obtained and includes refining as well as the transformation of drugs into other drugs.'[44] 'Extraction' is the physical or chemical means of separating and collecting substances from mixtures.[45] 'Preparation' means mixing for use.[46] Although undefined, 'offering' involves tendering a drug to a potential consumer for acceptance or refusal, including as a gift. 'Offering for sale' implies offering for purchase. 'Distribution' ensures that drugs move through the chain of supply from producer to consumer, and 'sale' the disposal of drugs for some consideration. The catchall 'delivery on any terms whatsoever' ensures the inclusion of any form of delivery including constructive delivery through, for example, the transfer of keys to a storage facility. In

[42] See Boister, *An Introduction to Transnational Criminal Law*, 2nd edn, 97.
[43] Article 1(1)(t).
[44] Article 1(1)(n) of the 1961 Convention.
[45] *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*, (New York, 1998, UN Doc. E/CN.7/590; UN Publication Sales No.E.98.XI.5), 54.
[46] Article 1(1)(s) of the 1961 Convention.

'brokerage' agents negotiate on behalf of buyer or seller to facilitate the transaction. 'Dispatch' involves the sending of drugs to a specific destination while 'dispatch in transit' involves sending drugs to a destination outside that territory or to one of which the dispatcher or carrier are ignorant. 'Transport' involves the conveying of drugs from one place to another by any mode through any medium with the specific purpose of carrying to a specific place or person.[47] The 'import' and 'export' of drugs is the 'physical transfer of drugs from one State to another State, or from one territory to another territory of the same State.'[48]

In some AU member states these actions are covered by fewer broader terms. Thus s1(1) of Ghana's Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990, only specifically prohibits 'import' and 'export', while section 3(1) specifically prohibits 'manufacture, produce or distribute', and section 6(1) specifically prohibits 'supply'. Kenya's approach is even more concise with the generic term 'trafficking' used in s4 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, but then in a common formula section 2 gives an expansive definition of 'trafficking' that specifies all of the forms spelled out in the drug conventions. In Kenyan practice there has been some dispute about whether it is necessary to specify in the indictment which specific mode of trafficking listed in that definition has been undertaken so long as one of these forms of action is actually undertaken on the evidence.[49] The better view and the practice that should be followed in the Criminal Chamber is that the charge sheet must disclose the specific form of drug 'supply' alleged so as to guide the prosecution in the evidence they must lead to establish the charge and properly inform the accused of the particular conduct alleged against them.[50]

[47] See for example the analogous interpretation of to 'convey' in s2 of Kenya's Narcotic Drugs and Psychotropic Substances Act in *Mbwana v Republic*, Criminal Appeal No. 259 of 2011, [2014] eKLR, where the court held conveying meant transporting or carrying to a place, and that fleeing from pursuing police did not mean an accused was conveying a drug.

[48] Article 1(1)(m) of the 1961 Convention.

[49] See, *Kimani v The Republic*, Criminal Appeal No. 65 of 2012, [2014] eKLR, para 13.

[50] See, *Wanjiku v Republic* (2002) KlLR 825; *Madline Akoth Barasa & Another v Republic* Criminal Appeal No. 193 of 2005, [2007] e KLR where the Court of Appeal held: 'It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substance. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking.'

(b) Drugs (as scheduled under the 1961 and 1971 Conventions).
(c) Intentionally. While article 28(K)(1)(a) is silent as to mens rea, both the 1961 and 1988 Conventions from which it is derived provide that each of the proscribed acts must be 'committed intentionally'.[51] Although most domestic legislation of AU member states does not specify the state of mind applicable to drug offences, the courts apply subjective mens rea to these offences in the absence of an express contrary statutory intention. While it has been held in Kenya that knowledge that someone is engaged in an act of trafficking is not a part of Kenyan law,[52] in other AU member states it is clear that mens rea is an ingredient of the offence and on the general principle *actus non facit reum nisi mens sit rea* the latter position must be the correct interpretation of the amended Statute. Intention suggests a purpose to engage or at least subjective foresight of a high probability of engaging in one of the listed actions with knowledge of the fact that one is supplying a drug;[53] recklessness in the sense of foresight of a possibility and reconciliation to that possibility will not suffice. In practice evidence of mere possession will not be enough to establish an intent to supply without further additional evidence such as the weight of drugs possessed. The South African Constitutional Court has held that 'If an accused is found to have been in possession of a large quantity of dagga, it might, depending on all the circumstances and in the absence of an explanation giving rise to a reasonable doubt, be sufficient circumstantial evidence of dealing. . .'.[54] The jurisprudence from the AU member states on drug-related offences may prove to be a useful source of persuasive authority in the interpretation and application of the Malabo Protocol.

8. THE DRUG CULTIVATION OFFENCE

The elements of the drug 'cultivation' offence in article 28(K)(1)(b) are as follows:

(a) The perpetrator cultivated. According to the 1961 Convention 'cultivation' includes within its scope the unregulated, illicit, prohibited

[51] Article 36(1) and article 3(1) respectively.
[52] See *Ondaba v Republic*, Criminal Appeal 344 of 2010, [2012] eKLR.
[53] See for example, the Namibian Supreme Court in *S v Paulo and Another* (SA/ 85/ 2011) [2012] NASC 26 (30 November 2012) at [28]: '*mens rea* is an essential ingredient of the offence created by s 2(1)*(a)* of the Act in the sense that an accused person cannot be convicted of dealing in any dependence-producing drug unless he or she knows that the substance in which he or she is dealing is a prohibited drug.'
[54] *S v Bulwhana*, *S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CCo at 396G-H.

cultivation of the opium poppy, coca bush or cannabis plant.[55] Precisely what amounts to the action of cultivation is undefined, but it is usually taken to involve some deliberate fostering of the plant through objectively verifiable actions such as watering and weeding rather than simply witting or unwitting possession of property on which plants grow. In South African law, for example, it is taken to mean 'to promote or stimulate the growth of any plant'.[56]

(b) The opium poppy, coca bush or cannabis plant. Following the definitions in the 1961 Convention, "Opium poppy" means the plant of the species Papaver somniferum L.[57] "Coca bush" means the plant of any species of the genus Erythroxylon.[58] "Cannabis plant" means any plant of the genus Cannabis.[59] These are the definitions used in AU members.[60] It follows that no person could be accused under this offence of cultivating cannabis resin or cannabis oil, which are derived from cannabis by 'production', an action within the scope of the supply offence.

(c) Intentionally. While article 28(K)(1)(a) is silent as to mens rea, both the 1961 and 1988 Conventions from which it is derived provide that each of the proscribed acts must be 'committed intentionally'.[61] It is necessary that the accused must have known the identity of the plant that they were cultivating. If they genuinely thought (which seems unlikely) that they were cultivating a tomato plant rather than cannabis they could not, for example, be found guilty. Finally, it has been pointed out in the South African case of *S v Mbatha*[62] that the application of mens rea in this context entails more than just the intention to stimulate the growth of the plant (which is implicit in the act of cultivating) but in addition an ulterior purpose to sell or supply (deal in) the drug. Given that the cultivation offence in article 28(K)(1)(b) is not simply an analogue of possession and is a more serious offence involving participation in one aspect of the supply side of the drug traffic, it would be useful for subordinate measures to be adopted by the Criminal Chamber making it clear that such ulterior purpose is a necessary element of the mens rea for this offence.

[55] Article 1(1)(i) of the 1961 Convention.
[56] *S v Guess* 1976 (4) SA 716 (A) at 717B-C.
[57] Article 1(1)(p) of the 1961 Convention.
[58] Article 1(1)(e) of the 1961 Convention.
[59] Article 1(1)9c) of the 1961 Convention.
[60] See, for example, the identical definitions in s2 of Kenya's Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (cap 245).
[61] Article 36(1) and article 3(1) respectively.
[62] [2012] ZAKZPHC 23, 2012 (2) SACR 551 (KZP), [29].

9. POSSESSION OR PURCHASE FOR TRAFFICKING

The elements of the possession or purchase for trafficking offence in article 28(K)(1)(c) are as follows:

(a) The perpetrator possessed or purchased. Although undefined, purchase usually involves buying the drugs for consideration, while possession (also a condition relevant to many of the forms of supply discussed above) involves both a physical element (*detentio*) of the drugs, and a mental element (*animus possidendi*), awareness that they are in one's physical control.[63]

The limits of the physical element are difficult to draw. A typical approach is that followed in Seychelles law where it may be established through a continuous act that involves either physical custody or the exercise of control.[64] To put it another way, possession may be actual in the sense that the accused has it in their personal possession or constructive in the sense they knowingly have it in another place, room or conveyance, or in the possession of another person for their or another's benefit.[65] Seychelles' jurisprudence suggests that control should be exclusive before one can be found to be in possession of the drug.[66] But more expansive approaches are taken. In Sierra Leone, for example, proof of the finding of a drug within the immediate vicinity of the accused or on an animal, vehicle, vessel or aircraft that the accused was at the time in charge of or that he accompanied it leads to a presumption that the accused is in possession.[67] It would not be advisable for the Criminal Chamber to take such a rigid position in this regard but to consider the evidence as a whole in deciding whether the accused enjoys effective control or not.

The mental element is complicated because it doubles in function as both an element of the actus reus and of the mens rea. While article 28(K)(1)(a) is silent as to mens rea, both the 1961 and 1988 Conventions provide that each of the proscribed acts must be 'committed intentionally'.[68] The key issue is whether the accused must know they

[63] This is a fairly standard approach – see, for example, the Namibian High Court in *S v Paulo and Another* (CC 10/2009) [2010] NAHC 34 (31 May 2010) at [11]; approved on appeal in *S v Paulo and Another* (SA/ 85/ 2011) [2012] NASC 26 (30 November 2012) at [28].

[64] *Livette Assary v Republic* SCA Criminal Appeal 18/10.

[65] See, for example, s4 of the Kenyan Penal Code.

[66] *Darrel Choisy v The Republic* SCA 11/09 cited with approval in *R v Renaud* [2015] SCSC 491.

[67] Under s52 of Sierra Leone's National Drugs Control Act 2008.

[68] Article 36(1) and article 3(1) respectively.

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are in possession of a substance or in addition, know that it is prohibited or even further, know the identity and qualities of that substance. Practice differs. Under Seychelles law the court must be satisfied that the accused had knowledge of the drug they possessed.[69] In Namibia the accused need not be fully aware of the name and nature of drug concerned; animus is satisfied by knowledge of the existence of the thing itself and not its qualities.[70] This permits in principle a mistake of fact of a basic kind to negate a charge (for example, the accused thought cannabis seeds were tomato seeds) but not of a more refined kind (the accused thought it was pure cocaine not cocaine adulterated with washing powder). This is an approach the Criminal Chamber would be advised to take. A common question is how much knowledge is required to establish possession of drugs found within some conveyance that the accused owns or controls or in which they were being carried. A similar issue arises regarding possession of drugs found within a dwelling that the accused owns or controls, lives in or was present in. As Botswana's Court of Appeal has pointed out, in a case involving the discovery of 7894 mandrax tablets secreted in compartments in the boot of a car, '[u]sing innocent people to transport habit-forming drugs is something which, no doubt, is not unknown in the underworld of drugs, but a plea by the driver of a vehicle caught in possession of drugs that he was unaware that they were there is also not unknown.'[71] The practice in some AU members tends to depend on the degree of knowledge that the accused has of the presence of the drugs within the conveyance or dwelling, rather than their degree of control they have over the vehicle. Kenyan law insists that a passenger in a vehicle is not in possession of any drugs found therein unless they enter the vehicle with the full knowledge it is being used to convey drugs.[72] In other AU members control is the issue. In Namibian law, possession of the motor vehicle leads to a strong inference that he or she is in possession of its contents, an inference that place an evidential burden on the accused to raise real doubt that they had no reason to suspect that its contents were illicit.[73] One way of avoiding this problem is to adopt a presumption (rebuttable

[69] *Livette Assary v Republic* SCA Criminal Appeal 18/10.

[70] See, for example, the Namibian High Court in *S v Paulo and Another* (CC 10/2009) [2010] NAHC 34 (31 May 2010) at [13].

[71] *Makoni v the State* (Criminal Appeal No 11/94) [1994] BWCA 19 (14 July 1994).

[72] *Gathara v Republic* [2005] 2 KLR 58.

[73] See, for example, the Namibian High Court in *S v Paulo and Another* (CC 10/2009) [2010] NAHC 34 (31 May 2010) at [14] (the case involved cocaine secreted in the spare-wheel).

or irrebuttable) that the accused is aware that they are in possession of the drugs found in their possession, something common in domestic legislation.[74] A more principled way of alleviating some of the burden on the prosecution is to take the view that once detentio is proved the necessary animus is presumed unless the accused can meet an evidential burden that raises some doubt about their awareness thus shifting the burden onto the prosecution to adduce evidence sufficient to establish beyond reasonable doubt that the mistake was not honest.

(b) Drugs (as scheduled under the 1961 and 1971 Conventions).

(c) With a view to production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation. The implication is that 'possession' or 'purchase' must be for the ulterior purpose of use in the chain of supply, not for personal use. Although offences of this type are common among AU members,[75] such an ulterior purpose may be difficult to prove and for this reason the UN's Official Commentary on the 1961 Convention suggests that states provide for a 'legal presumption that any quantity exceeding a specified small amount is intended for distribution.'[76] Presumptions of this kind are common in post-1961 domestic drug legislation but are vulnerable to constitutional challenges for breaching the presumption of innocence.[77] The Statute does not provide for such a presumption, and it would be more principled to allow proof of evidence such as large quantities of drugs found in the accused's possession as well as other circumstantial

[74] See, for example, s11(2) of Botswana's Habit Forming Drugs Act which provides: 'Any person who is upon or in charge of or who accompanies any vehicle, aircraft or animal, in or upon which there is any habit-forming drug or drug mentioned in section 2 or every plant or portion of a plant from which any such drug can be extracted, derived, produced or manufactured shall, until the contrary is proved, be deemed for the purposes of this Act to be the possessor of such drug, plant or portion of a plant.'

[75] See, for example, s23(2) of Liberia's Public Health Law (5 L.C.L. Rev., title 33) which reads: 'Possession with intent to sell. Any person who possesses or has in his control a narcotic drug with intent to sell such drug, except on written prescription of a physician, dentist, or veterinarian or otherwise in accordance with this chapter, shall be guilty of a felony in the first degree.'

[76] *Commentary on the Single Convention on Narcotic Drugs, 1961* (New York, 1973) UN Publication Sales No. E.73.XI.1, 113.

[77] For example, see *S v Bhulwana* [1995] ZACC 11 where the South African Constitutional Court held that a reverse onus provision in the Drugs and Drug Trafficking Act 1992 in terms of which any person found in possession of more than 115 gm of dagga (cannabis) would be presumed to be dealing in dagga, was unconstitutional because it violated the presumption of innocence.

evidence to serve to shift an evidential burden onto the accused that they did not have such an ulterior purpose.

10. PRECURSOR OFFENCE

The elements of the 'precursor' offence in article 28(K)(1)(d) are as follows:

(a) The perpetrator manufactured, transported or distributed. 'Manufacture' of precursors involves all the processes by which these substances may be obtained including refinement and transformation, 'transport' means the conveying of precursors from one place to another by any mode or medium, and 'distribution' the movement of the substance through the chain of supply from producer to consumer. The practice in the AU in this regard is patchy. South Africa, for example, only penalises the manufacture or supply of a scheduled precursor substance[78] while regulating the import and export of these substances in the normal way.[79]
(b) Precursors (as defined in article 12 of the 1988 Drug Trafficking Convention and Tabled in Tables I or II).
(c) Intentionally. While article 28(K)(1)(a) is silent as to mens rea, both the 1961 and 1988 Conventions from which it is derived provide that each of the proscribed acts must be 'committed intentionally'.[80]
(d) Knowing that they are to be used in or for the illicit production or manufacture of drugs. These offences must be carried out with specific knowledge of the illicit purpose to which these things are to be put in order to avoid extending their scope to innocent suppliers. Establishing knowledge – to know something as a fact – may be difficult and some States have lowered this threshold to suspicion.[81]

11. PARTY LIABILITY AND INCHOATE OFFENCES

Article 28N expands the modes of responsibility for these offences to 'any person who':

i. Incites, instigates, organises, 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;

[78] s3 of the Drugs and Drug Trafficking Act no 140 of 1992.
[79] Under s6 of the International Trade Administration Act no 71 of 2002.
[80] Article 36(1) and article 3(1) respectively.
[81] s3 of South Africa's Drugs and Drug Trafficking Act no 140 of 1992.

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.

Article 28N covers all of the inchoate and participatory actions provided for in the 1961 Convention and in the 1988 Convention and adds some of its own. The 1961 Convention obliges parties to criminalise 'participation in, conspiracy to commit and attempts to commit' its offences as well as, 'preparatory acts and financial operations' in connection with its offences (although this obligation is subject to any 'constitutional limitations' of the States parties, which indicates that some States parties would not be able to take it up through constitutional incompatibility).[82] The 1988 Convention obliges parties to criminalise the 'organization, management and financing' of the supply offences but without constitutional limitation.[83] Its obligations to criminalise 'public' incitement (through the media),[84] conspiracy and inchoate forms of article 3(1) offences[85] are, however, also subject to the constitutional limitation, as is criminalisation of 'participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any' article 3(1) offence.[86] One difficulty may be that inchoate offences such as conspiracy (an agreement to commit an offence) are common in common law AU members[87] but not in civil law AU members where it may be unknown. It is unclear what the implication of this is for domestic jurisdictions, in civil law states, which would have the first responsibility to prosecute the crimes under the complementarity principle and the failure of which is required before the Criminal Chamber will have jurisdiction over the matter.

12. PUNISHMENT FOR DRUG TRAFFICKING OFFENCES

The amended Statute provides no guidance for the punishment of the offences defined in article 28K. The penal provisions in the drug conventions

[82] Article 36(2)(a)(ii) (inserted by the 1972 Protocol).
[83] Article 3(1)(a)(v).
[84] 1988 *Commentary*, 74.
[85] Article 3(1)(c)(iii) and (iv).
[86] Article 3(1)(c)(iv).
[87] See for example, section 28(a) read with section 5, section 2 and section 26 (1) (a) of the Seychelles Misuse of Drugs Act. The elements are discussed in *Celestine v R* [2015] SCCA 33.

suggest proportionality is an overriding concern although the 1988 Convention emphasises that punishment should be at the severe end of the scale. Article 36(1) of the 1961 Convention provides (i) that all the forms of drug-related conduct enumerated in article 36(1) shall be 'punishable offences' and (ii) 'serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.' The 1971 Convention also adopts this dual punishment regime. Article 3(4)(a) of the 1988 Convention introduces a stronger normative element which can be interpreted as pointing to more severe penalties. It requires that parties must ensure that article 3(1) offences are punished by penalties that consider their 'grave nature', using punishments 'such as' 'imprisonment or other forms of deprivation of liberty', 'pecuniary sanctions' and 'confiscation'. The 1988 Convention also provides a non-exhaustive list of aggravating factors,[88] which may characterise an article 3 (1) offence as 'particularly serious', and which parties must permit their courts to take into account. These include the involvement of an organised criminal group in the offence, the involvement of the offender in other international organised criminal activities, the involvement of the offender in other illegal activities facilitated by the offence, the use of violence or arms by the offender, the holding of public office by the offender, use of minors, commission of the offence in a prison, educational facility, social service facility, and previous convictions. The punitive tendency is sustained at a regional level. For example, article 4(2)(b) of the SADC Protocol provides that domestic legislation in SADC States shall provide for 'maximum custodial sentencing which will serve both as punishment and deterrent and would include provision for rehabilitation.'

Statutory schemes for the punishment of these offences among AU members vary widely, but imprisonment is common and potential punishments heavy. Some employ statutory minima,[89] some statutory maxima,[90] some a range between a minimum and a maximum,[91] and in rare instances penalties are stipulated.[92] The tariff range frequently extends to heavy

[88] Article 3(5).

[89] For example, import and export is liable in terms of s1(1) of Ghana's Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990 'to imprisonment for a term not less than ten years'.

[90] For example, s9 of Zambia's Narcotic Drugs and Psychotropic Substances Act 1993 sets a maximum penalty of ten years imprisonment for cultivation;.

[91] Article 17 of Algeria's 2005 drugs law provides for a range of punishments for supply offences from 10 to 20 years and 5 million to 50 million dinars; s29(1) of the Seychelles Misuse of Drugs Act employs a *minimum sentence of 16 years for a first offence and maximum of 50 years and a fine of SR 500,000 if convicted for a Class B drug*

[92] For example, for Kenya's cultivation offence in s6 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (cap 245) the punishment is stipulated as a quarter of a million

punishments including life.[93] The imposition of fines may be in addition[94] or in the alternative to imprisonment but they are often relative to the value of local currencies and standard of living in local economies and do not provide an Africa-wide frame of reference.[95] Some AU members apply the death penalty for drug trafficking.[96] Although the drug conventions are silent in this regard, human rights bodies have criticised executions for drug offences as violations of international law[97] and the UNODC Executive Director has noted that the weight of opinion is that these offences do not reach the threshold of most serious crimes.[98] Employment of aggravating factors is common and they may include previous convictions,[99] holding public office, membership of a criminal organisation, resort to the use of violence or weapons, involvement of health personnel[100] or even membership of a group organised extraterritorially for the purpose of committing the crime.[101]

Practice in domestic courts differs widely. Considering factors like the volume of the substance involved (on the theory that greater quantity means

shillings or three times the market value of the prohibited planet or a maximum of twenty years or both fine and imprisonment. It has been held in Kenya that the court's do not enjoy a discretion in imposing the maximum sentence – see, *Kimani v Republic*, Criminal Appeal No. 65 of 2012, [2014] eKLR, para 8, 22, following *Kingsley Chukwu -v Republic*, Criminal Appeal No. 259 of 2007.

93 See, for example, s4(a) of Kenya's Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (cap 245).

94 See, for example, s33 of Mauritius's Dangerous Drugs Act no 41 of 2000, which provides for a maximum penalty of a fine of 500,000 rupees and imprisonment not exceeding 10 years for the precursor offence.

95 See, for example, the minimum penalty of 25,000 kwacha (just under 5 USD) for the cultivation offence in s9 of Zambia's Narcotic Drugs and Psychotropic Substances Act 1993.

96 Egypt's Narcotics Law No. 182 of 1960, art 40. See, for example, David Williams and Vanessa Allen, 'Egypt Sentences UK Pensioner to death for drug smuggling: Oxford graduate, 74, guilty over £3 million cannabis haul', *Mailonline*, 3 June 2013, http://www.dailymail.co.uk/news/article-2335211/Egypt-sentences-UK-pensioner-Charles-Raymond-Ferndale-death-drug-smuggling.html. Most death sentences are in practice commuted to life.

97 *Concluding Observations of the United Nations Human Rights Committee*, UN Doc CCPR/CO/84/THA, 8 July 2005, para 14, and *Report of the United Nations Human Rights Committee*, UN Doc A/50/40, 3 October 1995, para 449.

98 UNODC, *Drug Control, Crime Prevention and Criminal Justice: A Human Rights Perspective, Note by the Executive Director*, UN Doc E/CN.7/2010/CRP.6*–E/CN.15/2010/CRP.1, 3 March 2010, paras 25 and 26.

99 Under s 8(2) of Ghana's Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990 two previous trafficking convictions mandates life imprisonment.

100 See, for example, s105 of Cameroon's Law on Narcotics 1997, which provides that penalties are doubled (from a maximum of 20 years for supply in terms of s51).

101 s156(2) of the Criminal Law Codification and Reform Act, Cap 9:23, Zimbabwe.

greater profit deserves greater punishment[102]) and the harmful potential of the particular class of drugs (revealed by its scheduling), supply is usually punished by periods of imprisonment, or fines, or combinations of the two. Courts have, however, emphasised that in drugs cases volume and type of drug are not the only factors to be considered and that other individuating factors must be taken into account when exercising the inherent sentencing discretion of the courts.[103] Punishment of the organisers of the traffic is clearly the target, something colourfully illustrated in the judgment of the Swaziland Supreme Court in *R v Iddi and Others*:[104]

> [35] The above dictum is authority for the proposition that the big kahunas who lead the networks described in (d) above should receive substantial custodial sentences. It is a notorious fact that these faceless bosses who head, control and direct wholesale distribution networks are rarely, if ever caught and brought to book by prosecuting authorities. The small fry, such as these three appellants, are the expendable couriers and mules, defined in the Concise Oxford Dictionary as a courier for illegal drugs, who knowingly, wittingly and willingly, undertake to transport illegal drugs in a number of ingenious ways across international frontiers.

In the final analysis, however, the Criminal Chamber enjoys a complete discretion to make the punishment fit the crime. It would be practical to support the articulation in a subordinate instrument of punishment maxima and aggravating factors, together with detailed guidance emphasising the importance of individuating factors and the overall goal of suppression of the organisation of the traffic. It should be noted, however, that many of these aggravating factors and punishments are apt for the punishment of individuals, but inappropriate to the punishment of corporate entities which is provided for in the Protocol under article 46C. Of course the imposition of penalties on corporate officers who engage in these offences is possible; the more taxing task will be develop a jurisprudence which makes it possible to impose

[102] J. Fleetwood, 'Five Kilos: Penalties and Practise in the International Cocaine Trade' 51 *British Journal of Criminology* (2011), 375, 380. See, for example, the statutory maximum of ten years which was applied at trial for the possession and trafficking of drugs in *Okrasi et al. v Republic of Liberia* [2009] LRSC 34 (23 July 2009) where the accused were arrested in Liberian territorial waters by the French Navy while crewing the MV Blue Atlantic on which 2.4 tons of cocaine was discovered.

[103] See, for example, the discussion in the Malawian High Court in *S v Patel* (Criminal Appeal No. 81 of 2007, [2007] MWHC 40.

[104] [2010] SZSC 37 (27 May 2010).

appropriate financial penalties on these entities themselves or to be more adventurous and order the structural reform of these entities.

Finally, as part of the penalty process the Criminal Chamber will have to exercise the powers of confiscation provided under article 43A(5). Supporting provision will have to be made in subordinate instruments for effective measures for ordering AU members to trace, freeze, and seize the proceeds of crime and to request non-African States to do so.

13. TREATMENT AND REHABILITATION OF DRUG TRAFFICKERS WHO ARE THEMSELVES USERS

On occasion alleged traffickers will also be users and will require treatment and rehabilitation during trial and on disposition. While the amended Statute provides no guidance for the treatment of suspects, accused persons and convicts who are themselves drug dependant, the drug conventions provide guidance in this regard. In terms of article 36(1)(b) of the 1961 Convention (inserted by article 14 of the 1972 Protocol) parties have the discretion to implement measures such as treatment, education, and rehabilitation as alternatives to conviction and punishment or in addition to conviction and punishment, no matter how serious the offence, when the offender is an abuser. Article 3(4)(c) of the 1988 Convention allows parties 'in appropriate cases of a minor nature' to provide as an alternative to punishment measures such as treatment and aftercare for drug users engaged in article 3(1) drug supply offences. Article 4(2)(b) of the SADC Protocol requires provision for rehabilitation. AU members have made provision at a legislative level for these services.[105] These provisions suggest that the Criminal Chamber should ensure that it is in a position to provide accused persons and convicts through the agency of AU members a variety of therapeutic programmes to enable the amelioration of their dependence and their 'social reintegration'.[106] This should be either in addition to punishment or as an alternative (in those rare cases where relatively minor offenders such as drug couriers who are also users are before the court because they have been implicated in a major case).

14. PRACTICAL CHALLENGES IN PROSECUTING DRUG TRAFFICKING OFFENCES

Positive complementarity with AU members regarding the drug trafficking offences is likely to be hampered by the uneven development of anti-drug

[105] See chapter 2 of Algeria's Drug Law of 2005.
[106] 1988 *Commentary*, 88–9.

trafficking legislation across the continent. Many African states retained colonial era cannabis laws at independence because of the low incidence of trafficking of other drugs. While some states have updated their laws others have not.

Operationalizing these offences will also face particular challenges. Regarding formal legal assistance, Article 46 L (1) of the Protocol provides for a general duty of States Parties to co-operate with the Court in the investigation of the crimes defined by the Protocol which thus includes drug trafficking and cultivation. Article 46L (2) provides for a standard list of specific forms of cooperation that can be sought from States Parties including identification of suspects and production of evidence. Importantly it includes an obligation to provide 'any other type of assistance' not prohibited by the law of the requested State. The mini-MLAT in article 7 of the 1988 Drug Trafficking Convention spells out in detail conditions for refusal, and the procedure to be adopted not mentioned in article 46L(2). In practice this has been overtaken at a multilateral level regarding cooperation against drug trafficking by the more complex provisions for assistance in article 18 of the UN Convention against Transnational Organised Crime.[107] At a more practical level, the Criminal Chamber's investigative and enforcement capacity will depend in part on the specialist drug units of AU member state police forces such as the National Drugs Enforcement Agency (NDEA) in the Seychelles. The Protocol does not provide for the kinds of law enforcement cooperation schemes now common in the large crime control conventions. They provide for police cooperation in the form for example, of direct exchange of information. Article 9(1)(a) of the 1988 Drug Trafficking Convention, for example, obliges parties to 'establish channels of communication between competent agencies' regarding article 3(1) drug trafficking offences. These systems are heavily conditioned by the interest of States. Their success is aligned to the enthusiasm (or lack thereof) regarding the particular transnational crime. The development of trust between different police forces is the other key condition to their success. In order to enjoy success the officials of the African court are going to have to insert themselves into this 'transnational subculture of policing'[108] while negotiating effectively with the interests of the large powers such as the United States that police drugs

[107] The United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209, in force 29 September 2003.

[108] See Ben Bowling and James Sheptycki, 'Global Policing and Transnational Rule with Law' (2015) 6(1) *Transnational Legal Theory* 141, 152.

globally. Moreover, national police forces in African States have problems of their own: inadequate resourcing, training, weak law enforcement structures, shortage of detection and forensic capabilities, and corruption have, for example, all been identified by the ECOWAS Regional Action Plan as problems.[109] Evidence in some cases implicates officials in drug trafficking in certain African countries and prosecutors before the Criminal Chamber may find themselves working in a hostile environment where cooperation from local officials is not forthcoming.[110] The Criminal Chamber will also have to rely on the legality within the domestic law of the AU members of specialist policing tactics like controlled delivery and undercover operations, surveillance, joint investigation teams, all of which are provided for in the UN Drug Conventions[111] and in some AU members.[112] AU members have on occasion had difficulties in engaging in international cooperation in drug trafficking cases where much of the enforcement action has been undertaken by foreign law enforcement,[113] but they are becoming more adept at transnational policing of drug trafficking and the Criminal Chamber should be able to tap that expertise.[114] Protection of human rights during enforcement must also be guaranteed. The UN's Commission on Narcotic Drugs notes that enforcement of drug offences must respect:

[109] Thematic Areas 1–3.

[110] See for example, Joseph Appiahene-Gyfani, 'Drugs and Drug Control in Ghana' in Anita Kalunta-Crumpton (ed.), *Pan African Issues in Drug Control* (Farnham: Ashgate, 2015), p. 37 at pp. 50–2 who cites various examples implicating officials in major drug trafficking operations in Ghana. See also Peter Gastrow, *Termites at Work: Transnational Organized Crime and State Erosion in Kenya* (2011), http://www.ipinst.org/images/pdfs/ipi_epub-kenya-toc.pdf, p. 3 who alleges Kenyan police collusion with foreign drug traffickers.

[111] See Leroy, 'Drug Trafficking, 238–9; controlled delivery is provided for specifically in article 4 (2)(i) of the SADC Protocol.

[112] See, for example, s34 of Sierrra Leone's National Drugs Control Act 2008.

[113] In *Okrasi et al v Republic of Liberia* [2009] LRSC 34 (23 July 2009) where the accused were arrested in Liberian territorial waters by the French Navy while crewing the MV Blue Atlantic on which 2.4 tons of cocaine was discovered. The conviction was reversed on appeal by the Supreme Court and the case sent for retrial because none of the prosecutions witnesses had been eyewitnesses to the discovery of the cocaine on board the Blue Atlantic but has simply recounted the version of events relayed to them by the French Naval officers, which account was dismissed as hearsay as the French officers were not present to give the evidence in court (pp. 26–30).

[114] See for example *JN alias GU*, UNODC Case No, NGAx003, Nigeria, UNODC case law database http://www.unodc.org/cld/case-law-doc/drugcrimetype/nga/2009/jn_alias_gu.html? and *Criminal Case No. 1365 of 2004*, UNODC No.Kenx002, Kenya, UNODC case law database http://www.unodc.org/cld/case-law-doc/drugcrimetype/ken/criminal_case_no_1365_of_2004.html?

> a range of rights, including the right to health, to the protection of the child, to private and family life, to non-discrimination, to the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, and the right not to be subjected to arbitrary arrest or detention.[115]

Many of these challenges could be addressed by provision at the AU level for a law enforcement cooperation scheme such as that envisaged in article 6 of the SADC Protocol and a more detailed scheme of legal assistance using the provisions in the UN Convention against Transnational Organised Crime as a guide, because they are not specific to any particular offence.

15. CHANGES IN GLOBAL DRUG CONTROL

The final challenge for the Criminal Chamber is adapting to changes in international drug control itself. Drug laws have been subject to constitutional challenges at a national level although unsuccessfully,[116] and there is growing pressure to reform the UN Drug Conventions,[117] although it is uncertain how much support for reform there is in Africa itself. If, however, a substance was rescheduled or de-scheduled that would not require any further amendment of the amended Statute as the Criminal Chamber's jurisdiction expands and contracts in material terms depending on what substances are scheduled in the existing schedules under the drug conventions.

16. CONCLUSION

The inclusion of drug trafficking and drug cultivation within the jurisdiction of the African court's criminal chamber is an entirely novel development; these offences are not within the jurisdiction of any other international tribunal. This development is designed to respond to the dramatic increase in drug trafficking in parts of the continent, which presents a serious challenge for the AU and its member states. Developing the relationship between the court's jurisdiction over this crime and the international drug control system based on the UN drug conventions will lead the African court into uncharted territory. The crimes in article 28(1) are not, however, conceptually

[115] CND, *Drug Control, Crime Prevention and Criminal Justice: A Human Rights Perspective*, 3 March 2010, UN Doc E/CN.7/2010/CRP.6–E/CN.15/2010/CRP.1, 2010, 8.

[116] *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002).

[117] See Leroy, 'Drug Trafficking', 244–6.

challenging. Their elements are well known and understood in national jurisdictions throughout Africa. The Court faces two major difficulties: first, to ensure that only serious drug trafficking and serious drug cultivation offences are taken up into the jurisdiction of the court, and second, to articulate effectively with the existing specialist law enforcement procedures and institutions directed towards drug law enforcement. The challenge will be not to be overcome by trivial offences while at the same time being ineffective against the truly serious offences.