



MALABO PROTOCOL

LEGAL AND INSTITUTIONAL IMPLICATIONS OF THE MERGED
AND EXPANDED AFRICAN COURT

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GLOSSARY

ACJHR	African Court of Justice and Human Rights
AU	African Union
CSOs	Civil Society Organizations
ECHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
NGOs	Non-Governmental Organizations
OAU	Organization of African Unity
OTP	Office of the Prosecutor
PAIPO	Pan-African Intellectual Property Organization
PALU	Pan African Lawyers Union
PSC	Peace and Security Council
SCSL	Special Court for Sierra Leone
STC	Specialized Technical Committee

1. INTRODUCTION

In June 2014, the African Union (AU) Assembly of Heads of State and Government meeting in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereafter: Malabo Protocol) and called on AU member states to sign and ratify it.¹ The Malabo Protocol is a crucial legal instrument. The Protocol extends the jurisdiction of the yet to be established African Court of Justice and Human Rights (ACJHR) to crimes under international law and transnational crimes.

The original plan for the ACJHR was a court with two sections - a general affairs section and a human rights section. The Malabo Protocol introduces a third section: the international criminal law section. Thus, if the Malabo Protocol comes into force, the ACJHR will have jurisdiction to try the following 14 crimes: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression. In essence, the international criminal law section of the ACJHR will serve as an African regional criminal court, operating in a manner akin to the International Criminal Court (ICC) but within a narrowly defined geographical scope, and over a massively expanded list of crimes.

The adoption of the Malabo Protocol is apparently a step in the right direction. The stipulated principles and values underlying the Protocol are praiseworthy. They include: respect for human rights and sanctity of life; condemnation, rejection and fighting of impunity; strengthening of AU's commitment to promote sustained peace, security and stability; and prevention of serious and massive violations of human rights.² The regional criminal court can potentially play a vastly positive role on a continent persistently afflicted by the scourge of conflict and impunity for crimes under international law and other serious violations and abuses of human rights. In recent, as well as in ongoing conflicts, tens of thousands of civilians have lost their lives and untold numbers have been maimed and displaced from their homes. Emerging from these conflicts are disturbing and horrific accounts of killings, torture, rape, mutilation of bodies, recruitment of child soldiers, and wanton destruction of property.

In essence, blatant violation of international human rights and humanitarian law is a common feature of conflicts on the continent. Armed groups and government forces alike are responsible for the abuses and violations. For instance, in north-east Nigeria, there is strong evidence to suggest that crimes against humanity and war crimes have been committed both by the armed group Boko Haram and by Nigerian security forces.³ In Cameroon, Boko Haram has committed crimes under international law that may amount to war crimes.⁴ Cameroonian security forces deployed to fight Boko Haram have also committed serious crimes under international law. In South Sudan, the AU Commission of Inquiry established in March 2014 to investigate human rights violations and abuses committed in the conflict that erupted in the country in

¹ Decision on the Draft Legal Instruments, Assembly/AU/Dec.529(XXIII).

² Malabo Protocol, Preamble, paragraphs 9, 10, 11, 12, and 16.

³ Amnesty International, 'Our job is to shoot, slaughter and kill': Boko Haram's reign of terror in north-east Nigeria (Index: AFR 44/1360/2015), April 2015; Amnesty International, Stars on their shoulders, blood on their hands: War crimes committed by the Nigerian military (Index: AFR 44/1657/2015), June 2015.

⁴ Amnesty International, Human rights under fire: Attacks and violations in Cameroon's struggle with Boko Haram (Index: AFR 17/1991/2015), September 2015.

December 2013, found that there are reasonable grounds to believe that war crimes such as murder, rape, and torture have been committed in the conflict that has plagued the country since December 2013.⁵

Across the continent, victims' cry for justice is loud and clear.⁶ Yet, impunity is a common denominator in Africa's conflicts, with those suspected of criminal responsibility for crimes under international law rarely held to account. All too often national governments are unwilling or unable to conduct prompt, independent, impartial, and effective investigations into allegations of crimes under international law, and ultimately to bring all those suspected of criminal responsibility to justice in fair trials before ordinary civilian courts and without recourse to death penalty. Thus, a regional criminal court, as envisaged under the Malabo Protocol, has the potential to fill the accountability gap evident at domestic levels.

However, some actors have expressed serious concerns about the motivation behind the proposal to establish the criminal chamber of the ACJHR. Some commentators argue that the proposal is an attempt by the AU to shield African heads of state and senior state officials from being held to account when there is reasonable grounds to believe that they are criminally responsible for crimes under international law.⁷ It is also argued that the proposal is an effort to score political points with the ICC rather than address the need for justice and accountability for crimes under international law. Beyond the motivation behind the adoption of the Malabo Protocol, Amnesty International has concerns about some of the legal standards contained in the Protocol and about the capacity of the Court to deliver on its expanded mandate. The AU's decision to include criminal jurisdiction within the remit of the ACJHR could have far reaching legal and institutional implications and Amnesty International believes that a discussion of these implications is imperative and that it is one in which civil society organisations (CSOs) should have a strong voice.

As an attempt to engage with this discussion, this policy brief examines some of these implications by identifying how the expanded jurisdiction may affect the enjoyment of human rights on the continent. The policy brief looks at how the expanded jurisdiction will affect relevant stakeholders, including victims of gross violations of human rights, the AU, and CSOs. It is hoped that this publication will generate frank and open discussion amongst the relevant stakeholders on the implications of the Malabo Protocol and that CSOs will find it useful in their engagement with governments. AU member states should also carefully study and take into account the issues raised in this policy brief, together with the recommendations, as they consider whether or not to ratify the Malabo Protocol.

Given multiple instruments adopted at different stages in lead up to the Malabo Protocol, the content of the Protocol is presented in a confusing manner and it is not immediately apparent how these proposals relate to the existing human rights architecture on the continent. Therefore, the policy brief attempts to explain these issues. In addition, to ease understanding of the Malabo Protocol, Annex I draws together the provisions of the 2008 Protocol on the Statute of the African Court of Justice and Human Rights with the 2014 Malabo Protocol.

This brief builds on previous Amnesty International's public statements on the expansion of the jurisdiction of the ACJHR.⁸ It draws upon an analysis of the provisions of the relevant legal instruments adopted by the AU, notably the Malabo Protocol, the Protocol on the Statute of the African Court of Justice and Human Rights, and the Protocol on the Establishment of the African Court on Human and Peoples' Rights. It considers academic literature and documents and reports from key international, regional and national actors, including decisions adopted by the AU. It also draws upon comments and insights from individuals representing these various sectors.

⁵ Final report of the African Union Commission of Inquiry on South Sudan available at www.peaceau.org/uploads/auiciss.final.report.pdf (Last accessed on 19 November 2015).

⁶ See for example Amnesty International, *Crying for justice: Victims' perspectives on justice for the post-election violence in Kenya* (Index: AFR 32/001/2014), July 2014.

⁷ See for example 'Immunity before the African Court of Justice and Human and Peoples' Rights – The potential outlier' available at www.justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/ (Last accessed on 4 January 2016); G Abraham 'Africa's evolving continental court structures: At the crossroads? SAIIA Occasional Paper 209, January 2015, available at www.saiia.org.za/occasional-papers/africas-evolving-continental-court-structures-at-the-crossroads (Last accessed 4 January 2015); 'Protecting the powerful: The African Union's response to allegations of human rights violations' available at <http://cjiicl.org.uk/2015/02/02/protecting-powerful-african-unions-response-allegations-human-rights-violations/> (Last accessed 4 January 2015).

⁸ Amnesty International, *Open letter to the heads of state and government of the African Union*, Ref: AFR 01/012/2014; Amnesty International, *African Union: Establishment of independent African Court on Human and Peoples' Rights must be top priority*, available at www.amnesty.org.au/news/comments/943/ (Last accessed 7 January 2016); Amnesty International, *International Criminal Court: The contribution Africa can make to the review conference*, AFR 01/017/2009, October 2009.

2. BACKGROUND: THE ROAD TO MALABO

The adoption of the Malabo Protocol in June 2014 was a culmination of a protracted and complex process. The formal process of expanding the jurisdiction of the ACJHR to cover crimes under international law as well as transnational crimes began in February 2009. However, long before February 2009, the idea had been mooted and debated in different contexts and fora. The Malabo Protocol is therefore a product of developments within the continent dating to as far back as the 1980s, as well as of external developments that precipitated the resolve of the AU to seriously consider the idea of a regional criminal court.

HISTORICAL ANTECEDENTS: 1980s - 2008

The proposal to establish a court on the African continent to try crimes under international law have not just arisen recently. This was first suggested in the early 1980s during the drafting of the *African Charter on Human and Peoples' Rights* (hereafter: African Charter).⁹ In particular, Guinea proposed that an African human rights court should be established to try violations of human rights as well as crimes under international law.¹⁰ At this stage it was however felt 'premature' to establish an African human rights court. Instead, the African Commission on Human and Peoples' Rights (hereafter: African Commission), an 11-member quasi-judicial treaty body, was established. The possibility for a court was however left open, as the idea was thought to be 'a good and useful one which could be introduced in future by means of an additional protocol to the Charter'.¹¹

Discussions around the possibility of establishing an African criminal court resurfaced in July 2004 when the question of election of judges to the African Court on Human and Peoples' Rights (Hereafter: African Human Rights Court) came before the AU Assembly. By this time, two important institutional developments had occurred within the AU. Firstly, about a year earlier, the AU had adopted the *Protocol of the Court of Justice of the African Union*, laying down the legal framework for the operationalization of the African Court of Justice as 'the principal judicial organ of the Union'.¹² Secondly, in January of the same year (2004), the *Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights* had come into force, paving way for the election of judges. The primary role envisaged for the African Human Rights Court was and is to complement the protective mandate of the African Commission, by hearing cases and issuing binding judgments on human rights violations.

⁹ OAU CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986.

¹⁰ Meeting of ministers, 7-19 January 1981 cited in F Ouguergouz, *La Charte Africaine des Droits de l'Homme et des Peuples*, Presses Universitaires de France, Paris, 1993, at 72.

¹¹ Draft African Charter on Human and Peoples' Rights, prepared for the Meeting of Experts in Dakar, Senegal, 28 November – 8 December 1979, OAU/CAB/LEG/67/1, introduction, para 4; reprinted in C. Heyns (ed), *Human Rights Law in Africa 1999*, Kluwer Law International, at p.65.

¹² Protocol of the Court of Justice of the African Union, Article 2(2).

The election of judges to the African Human Rights Court did not however take place in July 2004 because too few candidates had been nominated. Instead, the discussion at the AU Assembly took a different and unexpected twist. The then chairperson of the Assembly, Nigerian President Olusegun Obasanjo, proposed that the African Court of Justice and the African Human Rights Court should be merged into one court. In his remarks, he hinted at the possibility of conferring the proposed merged court with criminal jurisdiction. He stated: 'Why shouldn't the Court of Justice take along with it the Court on Human and Peoples' Rights so that we have a Court of Justice which will have a division, if you like, for border issues, a division for human rights issues, *a division for cross-border criminal issues* or whatever'.¹³ Following that, the AU Assembly took the decision to merge the African Court of Justice with the African Human Rights Court.¹⁴ This decision essentially reversed an earlier position taken by the AU Executive Council. In July 2003 the AU Executive Council had considered the question of the merger and decided that 'the African Court of Human and Peoples' Rights shall remain a separate and distinct institution from the Court of Justice of the African Union'.¹⁵

In January 2006, the AU Assembly established a committee of jurists to advise the AU on the modalities of bringing former Chadian President Hissene Habre to justice.¹⁶ This committee prepared a report in which it reflected on not only how to specifically deal with the Hissene Habre Case, but it also discussed how the AU should in future deal with crimes under international law. In this regard, the committee recommended that the proposed merged court should be empowered to try crimes under international law.¹⁷ The committee further recommended that the expanded court should:

*be allowed to operate as an independent institution free from all forms of pressure, so that it can be impartial, and seen to be impartial. There should be a rapid response mechanism within the Court to ensure that Africa can act with dispatch in situations of gross violations and so give teeth to the notion of "total rejection of impunity". There should be an ad hoc monitoring mechanism to ensure that the independence and impartiality of the institutions would exist both in theory and in fact. Such monitoring would affirm the credibility of the regional institutions and so offer credible regional options.*¹⁸

Meanwhile many stakeholders were already concerned that the merger of jurisdictions would have a negative impact on the human rights role of the Court. For example, the African Commission mandated its Bureau to meet the leadership of the AU to call on them to reconsider the decision to merge the African Court of Justice with the African Human Rights Court.¹⁹ In May 2005, during its 37th ordinary session, the African Commission adopted a resolution in which it expressed deep concern that the July 2004 decision of the AU Assembly would have a negative impact on the establishment of an effective African Human Rights Court.²⁰ Amnesty International raised a similar concern in August 2005, and urged the AU Assembly to "ensure that the fundamental principles, which necessitated the adoption of the African Human Rights Court and the African Charter, are not undermined" by the decision to merge the two courts.²¹

Nonetheless, the merger initiative did go on as planned. In July 2008, the AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights. Slightly more than a year before, in January 2007, the AU Assembly had adopted the African Charter on Democracy, Elections and Good Governance. The Charter hinted at the future creation of an African regional criminal court. Article 25(5) of

¹³ Report on the Decision of the Assembly of the Union to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Executive Council, Sixth Ordinary Session, 24-28 January 2005, Abuja, Nigeria, EX.CL/162, pp. 1-2.

¹⁴ Decision on the seats of the organs of the African Union, Assembly/AU/Dec.45(III). See also Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/Dec.83(V).

¹⁵ Decision on the Draft Protocol of the Court of Justice, Executive Council, EX/CL/59(III).

¹⁶ Decision on the Hissene Habre Case and the African Union, Assembly/AU/Dec.103 (VI)). After long and protracted negotiations, the AU and Senegal signed on 22 August 2012 the Agreement on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System. The Extraordinary Chambers were inaugurated on 8 February 2013. Hissene Habre is currently standing trial before the Extraordinary Chambers for crimes against humanity, torture and war crimes. For an overview of the Hissene Habre Case see 'The case of Hissene Habre before the Extraordinary African Chambers in Senegal: Questions and Answers' available at www.hrw.org/news/2015/08/31/qa-case-hissene-habre-extraordinary-african-chambers-senegal#23 (Last accessed on 5 January 2016).

¹⁷ Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, paras. 35 and 39. The Report is available at www.hrw.org/legacy/justice/habre/CEJA_Report0506.pdf (Last accessed on 5 January 2016).

¹⁸ Ibid, paras. 40-42.

¹⁹ Final Communiqué of the 36th ordinary session of the African Commission on Human and Peoples' Rights, para 16, available at www.achpr.org/files/sessions/36th/info/communiqué/achpr36_fincom_2004_eng.pdf (Last accessed 7 January 2016).

²⁰ ACHPR/Res.76(XXXVII)05, Resolution on the Establishment of an Effective African Court on Human and Peoples' Rights, adopted in Banjul, Gambia, 11 May 2005, available at www.achpr.org/sessions/37th/resolutions/76/ (Last accessed on 7 January 2005).

²¹ Amnesty International, African Union: Establishment of independent African Court on Human and Peoples' Rights must be top priority', available at www.amnesty.org.au/news/comments/943/ (Last accessed 7 January 2016)

the Charter provides that '[p]erpetrators of unconstitutional change of government *may also be tried before the competent court of the Union*'. It did not state which court that would be.

ACCELERATION TOWARDS A REGIONAL CRIMINAL COURT: 2009-2014

The proposal to extend the mandate of the ACJHR to include a criminal jurisdiction would probably be still-born if it were not for specific events that motivated the AU to more seriously consider it. These are: the indictment of or arrest warrants issued by certain European states against senior African state officials under charges of crimes under international law;²² the indictment and issuance of an ICC arrest warrant against President Al-Bashir of Sudan;²³ and the indictment and trial before the ICC of President Uhuru Kenyatta of Kenya, and his deputy, William Ruto.²⁴ For the AU, these events signified, on the one hand, the abuse of the principle of universal jurisdiction by the concerned European states,²⁵ and on the other, the biased and unfair targeting of African states by the ICC.²⁶ More importantly, the events galvanised AU's resolve to establish an African regional criminal court to basically serve as a substitute and operate parallel to the ICC.

In February 2009, the AU Assembly requested the AU Commission in consultation with the African Commission and the African Court of Human and Peoples' Rights, 'to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010'.²⁷ Pursuant to this decision, the AU Commission contracted the secretariat of the Pan African Lawyers Union (PALU) to study and provide recommendations on a legal instrument which would amend the Protocol on the ACJHR.

PALU submitted its reports to the AU Commission in June and August 2010. Annexed to PALU's June 2010 report was a first draft of the Protocol. Validation workshops, coordinated by the Pan-African Parliament and involving representatives of the AU organs and Regional Economic Communities (RECs), were then held in South Africa in August and November 2010 to discuss the draft prepared by PALU. In November 2011,

²² In 2007, a French judge indicted a number of Rwandan state and military officials for their alleged roles in the 1994 genocide. This led to, *inter alia*, the November 2008 arrest in Germany of Rose Kabuye, the Chief of Protocol of Rwandan President Paul Kagame. In February 2008, a Spanish judge similarly issued international arrest warrants against 40 senior Rwandan state offices for their alleged involvement in the 1994 genocide. For a detailed list of indictments issued by European courts against senior African state officials see The African Union-European Union Expert Report on the Principle of Universal Jurisdiction, Council of European Union, Brussels, 16 April 2009, 8672/1/09. REV 1, available at www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf (Last accessed 5 January 2016).

²³ The ICC issued the first warrant of arrest against Sudanese President Omar Hassan Ahmad Al Bashir on 4 March 2009. It issued a second warrant of arrest against him on 12 July 2010. Al Bashir is alleged to have committed as an indirect co-perpetrator acts amounting to crimes against humanity, war crimes, and genocide, in the Darfur region of Sudan. The situation in the Darfur was referred to the ICC by the UN Security Council on 31 March 2005. The ICC made the decision to open investigations on 6 June 2005.

²⁴ The ICC issued its authorization to the Prosecutor to open investigations into the situation in Kenya on 31 March 2010. This led to the indictment of six Kenyans for their alleged role in the 2007/2008 post election violence. Eventually, charges were opened against three of the initially indicted individuals: Muigai Uhuru Kenyatta, the current President of Kenya; William Samoei Ruto, the current Deputy President of Kenya; and Joshua arap Sang, a radio journalist. On 13 March 2015, the ICC withdrew charges against Kenyatta on the basis of an application by the Prosecutor. Kenyatta had been charged with the crimes against humanity of murder, deportation or forcible transfer, rape, persecution, and other inhumane acts. The trial of William Ruto and Joshua arap Sang is pending before the ICC. Ruto and Sang are charged with the crimes against humanity of murder, forcible transfer, and persecution.

²⁵ To resolve their differences concerning the interpretation and application of the principle of universal jurisdiction, the AU and the European Union (EU) established a joint expert group to address the matter. The AU-EU expert group considered the matter and issued its report in April 2009 in which it supported an earlier decision by the AU asking the AU Commission, in consultation with other relevant organs, to examine the implications of granting criminal jurisdiction to the ACJHR. See Decision on the abuse of the principle of universal jurisdiction, Assembly/AU/Dec.243 (XIII), Rev. 1; Decision on the abuse of the principle of universal jurisdiction, Assembly/AU/Dec.271 (XIV); Decision on the abuse of the principle of universal jurisdiction, Assembly/AU/Dec.335 (XVI); Decision on the abuse of the principles of universal jurisdiction, Assembly AU/Dec.420 (XIX);

²⁶ Decision on the progress report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.296 (XV); Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, Assembly/AU/Dec.221 (XII), 2009; Solemn Declaration of the Assembly of the Union on Sudan, Assembly/AU/Decl.3 (XVI), Jan 2011, para 5. See also re Libya, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366 (XVII); Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245 (XIII), Rev.1; Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366 (XVII); Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Assembly/AU/Dc.482 (XXI).

²⁷ Decision on the implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction, Decision Assembly/AU/Dec. 213(XII), 4February 2009. See also Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366 (XVII), para 8.

meetings of government experts took place in Addis Ababa, Ethiopia. The meetings considered the Draft Protocol.

From 7-11 May 2012, a final meeting of government legal experts was convened to review the November 2011 draft. Prior to this meeting, a total of 47 African CSOs and international organisations with a presence in Africa wrote a joint open letter to ministers of justice and attorneys general of African state parties to the Rome Statute asking them to carefully study and address a number of issues of concern.²⁸ Among the concerns raised in the letter included that the proposed expansion of the jurisdiction of the ACJHR would not only undermine the human rights mandate of the African Human Rights Court but would also slow down the fight against impunity on the continent. The meeting of government experts was immediately followed by a meeting of African ministers of justice and attorneys general who considered and endorsed the Draft Protocol, albeit without reaching an agreement on the definition of the crime of unconstitutional change of government.²⁹ There is no indication that the meeting of government legal experts or that of ministers of justice and attorneys general took into account the aforementioned and other concerns raised by CSOs. As such, the endorsement of the Draft Protocol was greeted with criticism.³⁰ The drafting process was 'rushed and very complex',³¹ lacked transparency, and full participation from the range of actors and stakeholders.³²

During the 19th ordinary session of the AU Assembly held in July 2012, the Draft Protocol was tabled for adoption. However, the Assembly did not adopt the Draft. Instead, it requested the AU Commission in collaboration with the African Human Rights Court to: (1) prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the ACJHR; and (2) propose a definition of the crime of unconstitutional change of government.³³ The AU Commission convened a meeting in December 2012 in Arusha, Tanzania, to consider these two issues. At the meeting, the question as to whether "popular uprising" would constitute a crime of unconstitutional change of government emerged to be the most contentious and was debated at length. In the end the meeting resolved to revise a subparagraph of the definition of the crime of unconstitutional change of government to read as follows: "Where the Peace and Security Council of the African Union determines that the change of government through popular uprising is not an unconstitutional change of government, the Court shall not be seized of the matter".³⁴ On the question of financial implications, the meeting adopted with necessary changes a report presented by the consultant, PALU.³⁵ This report on the financial implications of expanding the jurisdiction of the ACJHR to cover international crimes, indicated that the human resources required to operationalize the new Court would be "marginal".³⁶ The report estimated that at a minimum, the new Court would require a staff component of 211 at a cost of USD 4,422,530.³⁷ The AU Executive Council appear not to have been fully satisfied by the recommendations of the Arusha Meeting. Thus, in January 2013, it requested the AU Commission to conduct 'a more thorough reflection, in collaboration with the AU's Peace and Security

²⁸ Joint Letter to the Justice Ministers and Attorneys General of the African State Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights, available at www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-state-parties (Last accessed on 06 January 2016).

²⁹ See The Report, The Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General on Legal Matters, Min/Legal/Rpt, available at www.peaceau.org/uploads/ex-cl-731-xxi-e.pdf (Last accessed on 6 January 2016). See also 'Opening Statement by H.E. Mr. Erastus Mwencha, Deputy Chairperson of the African Union Commission, at the First Session of the Specialized Technical Committee on Justice and Legal Affairs, 15 May 2014, Addis Ababa, Ethiopia, available at www.au.int/en/sites/default/files/newsevents/workingdocuments/13148-wd-dcp-speech.pdf (Last accessed 6 January 2016).

³⁰ See for example M. du Plessis, 'A new regional international criminal court for Africa?' 2 SACJ (2012) 286; F Viljoen 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol', *AfricLaw*, 23 May 2012, <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/> (Last accessed 5 January 2016); Institute for Security Studies, Implications of the AU decision to give the African Court jurisdiction over international crimes', Paper No. 235, June 2012, available at www.issafrica.org/uploads/Papers235-AfricaCourt.pdf (accessed on 4 January 2016).

³¹ M. du Plessis, 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes', 27 August 2012, EJIL Talk, <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>

³² M. du Plessis, 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes', 27 August 2012, EJIL Talk, <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>

³³ Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/Dec.427(XIX), para 2.

³⁴ Report on the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implications, AfCHPR/LEGAL/Doc.3, para. 12.

³⁵ Ibid, para. 16.

³⁶ Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, EX.CL/773(XXII) Annex 2 Rev., para. 4.

³⁷ Ibid, Appendix 1.

Council (PSC), on the issue of popular uprising in all its dimensions'.³⁸ It also requested the AU Commission to submit yet another report on the structural and financial implications of expanding the jurisdiction of the ACJHR to try international crimes.³⁹

In October 2013, Kenya, with the support and backing of the AU,⁴⁰ requested the UN Security Council to defer the proceedings against the President and his Deputy at the ICC for a period of one year.⁴¹ The UN Security Council refused to even consider the request. The AU Assembly was 'deeply disappointed'.⁴² It asked the AU Commission to move with speed and conclude the process of extending the jurisdiction of the ACJHR.⁴³

On 15 and 16 May 2014, the First AU Ministerial Meeting of the Specialized Technical Committee (STC) on Justice and Legal Affairs met in Addis Ababa, Ethiopia, to consider the 2012 Draft Protocol.⁴⁴ The key objective of the meeting was to resolve the question of the definition of the crime of unconstitutional change of government which, as mentioned above, had been left pending since 2012.⁴⁵ Another objective, as spelt out by the AU's Legal Counsel at the beginning of the meeting, was to consider issues relating to immunities of heads of state and consequently insert a new provision on this subject into the Protocol.⁴⁶ Thus, a key decision made during that meeting, and one that has become the most controversial aspect of the Malabo Protocol, was to grant immunity from the criminal jurisdiction of the ACJHR not only to heads of state and government but also to an undefined category of senior state officials. The 2012 Draft Protocol had, in accordance with international law, not provided for immunity for state officials including heads of state and ministers of foreign affairs.

Despite criticism of the revisions introduced by the STC from a wide cross-section of stakeholders,⁴⁷ particularly on the question of immunities, the AU Assembly meeting for its 23rd ordinary session in Malabo, Equatorial Guinea, adopted the Malabo Protocol.⁴⁸ The amended Statute of the African Court of Justice and Human Rights (Amended ACJHR Statute) was annexed to the Malabo Protocol.

The Malabo Protocol will come into force 30 days after the deposit of instruments of ratification by 15 member states. In January 2015, the AU Assembly proposed the ratification of the Malabo Protocol be fast-tracked.⁴⁹ As at the time of publication of this policy brief, five countries (Kenya, Benin, Congo Brazzaville, Guinea-Bissau and Mauritania) had signed the Protocol, with Kenya pledging USD 1 million to assist in the establishment of the ACJHR.

³⁸ Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/Dec.766 (XXII) para 2.

³⁹ Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Doc.PRC/Rpt(XXV), EX.CL/Dec.766 (XXII) para 3.

⁴⁰ See for example Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013).

⁴¹ See Identical Letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2013/624, available at www.securitycouncilreport.org/atf/cf/%B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf (Last accessed on 6 January 2016).

⁴² Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.493(XXII) para 6.

⁴³ Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.493(XXII) para 13.

⁴⁴ 'Press Release: African Union hosts Meeting of Ministers of Justice and Attorneys General', available at www.au.int/en/sites/default/files/newsevents/pressrelease/13148-pr-pr-102_-_african_union_hosts_meeting_of_ministers_of_justice_andattorneys_general.pdf (Last accessed on 6 January 2015).

⁴⁵ Opening statement by Prof. Vincent O. Nmeielle, Legal Counsel and Director for Legal Affairs of the African Union Commission', 1st Session of the Specialized Technical Committee on Justice and Legal Affairs (Government Legal Experts), available at www.au.int/en/sites/default/files/newsevents/workingdocuments/13148-wd-lc-opening_statement-stc_meeting-experts-may_2014_0.pdf (Last accessed 6 January 2015).

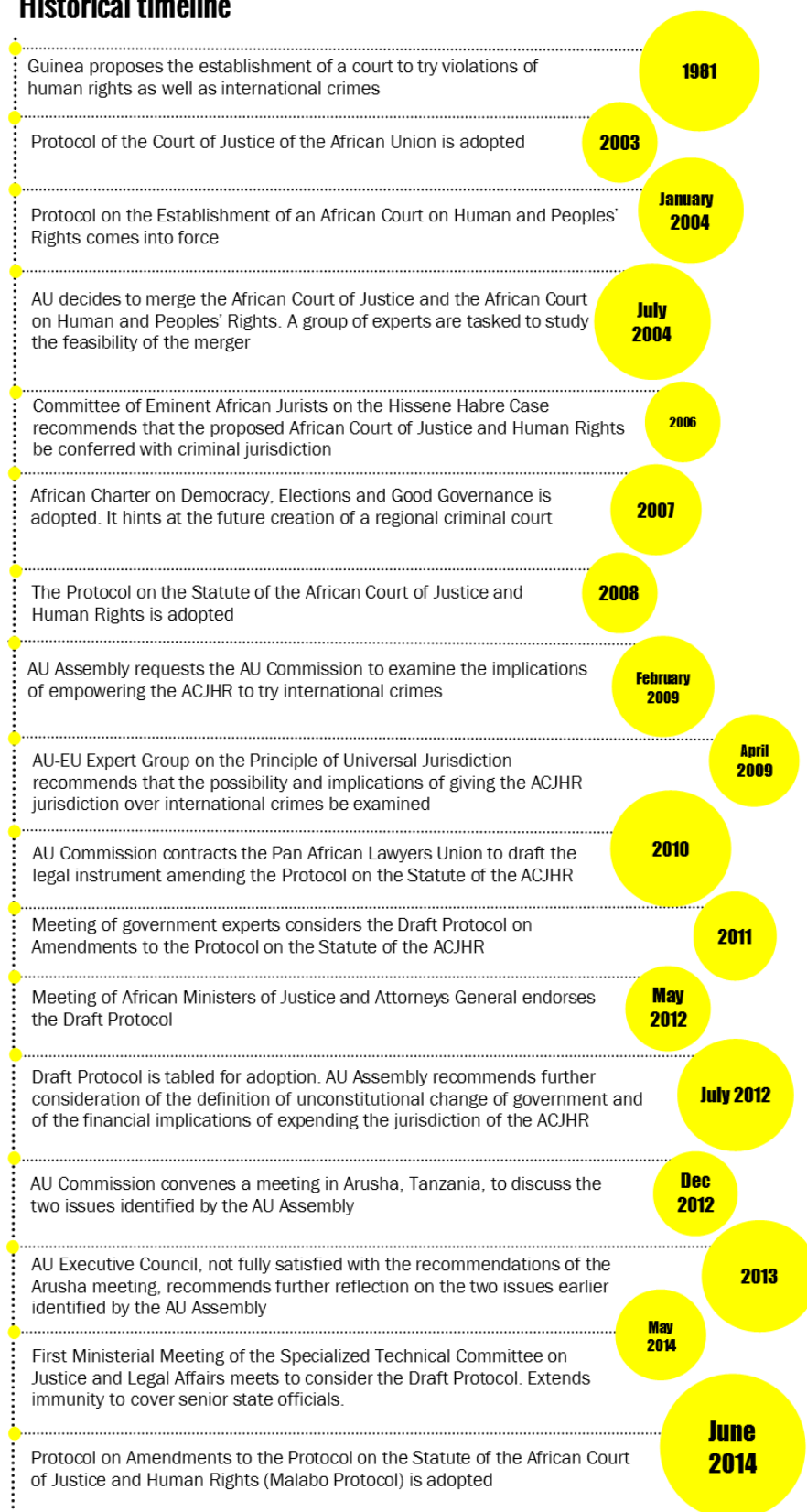
⁴⁶ Ibid.

⁴⁷ See, for example, Amnesty International, Open letter to the heads of state and government of the African Union, Ref: AFR 01/012/2014; Human Rights Watch 'Statement regarding immunity for sitting officials before the expanded African Court of Justice and Human Rights' available at www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and (Last accessed on 4 January 2016)

⁴⁸ Decision on the Draft Legal Instruments, Assembly/AU/Dec.529 (XXIII).

⁴⁹ Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court, Assembly/AU/Dec.547 (XXIV), para 15 and 17(b).

Background to the adoption of the Malabo Protocol: Historical timeline



3. SUBSTANTIVE PROVISIONS

This chapter provides a broad overview of the salient features of the Malabo Protocol. It does not offer a commentary on each and every provision of the Protocol. Instead, the analysis falls on a few selected provisions that are deemed relevant to understanding the broader legal and institutional implications of the Malabo Protocol. In particular, the following issues are addressed: the Protocol's sources of inspiration; the list and definition of crimes; applicable international law instruments; nomination, appointment and allocation of judges; institutional structure; and the ACJHR's relationship with the ICC.

A full comprehension of the Malabo Protocol requires awareness and understanding of a number of inter-related instruments, in particular:

- Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights;
- Protocol of the Court of Justice of the African Union; and
- Protocol on the Statute of the African Court of Justice and Human Rights.

In this regard, and in the absence of an official consolidated document, the Malabo Protocol should be read in conjunction with the above-mentioned three Protocols.

A SNAPSHOT OF THE RELEVANT AU LEGAL INSTRUMENTS

Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights

This Protocol establishes the African Court on Human and Peoples' Rights (African Human Rights Court). The Protocol was adopted on 10 June 1998 and entered into force on 25 January 2004. A total of 27 African states have ratified the Protocol. The African Human Rights Court is at present the only operational continental judicial body in Africa. Its primary role is to complement the protective mandate of the African Commission on Human and Peoples' Rights (African Commission) by issuing binding judgments relating to human rights violations. The inaugural judges of the Court took the oath of office in July 2006. According to the latest statistics by the Court, it has received a total of 59 cases. Of these, 21 have been finalised, 4 have been transferred to the African Commission, while 29 are still pending. The Court has also received nine applications for advisory opinion. It has finalised five of these while three are still pending. One application for advisory opinion was withdrawn.⁵⁰

⁵⁰ See <http://en.african-court.org/> (Last accessed 15 January 2016).

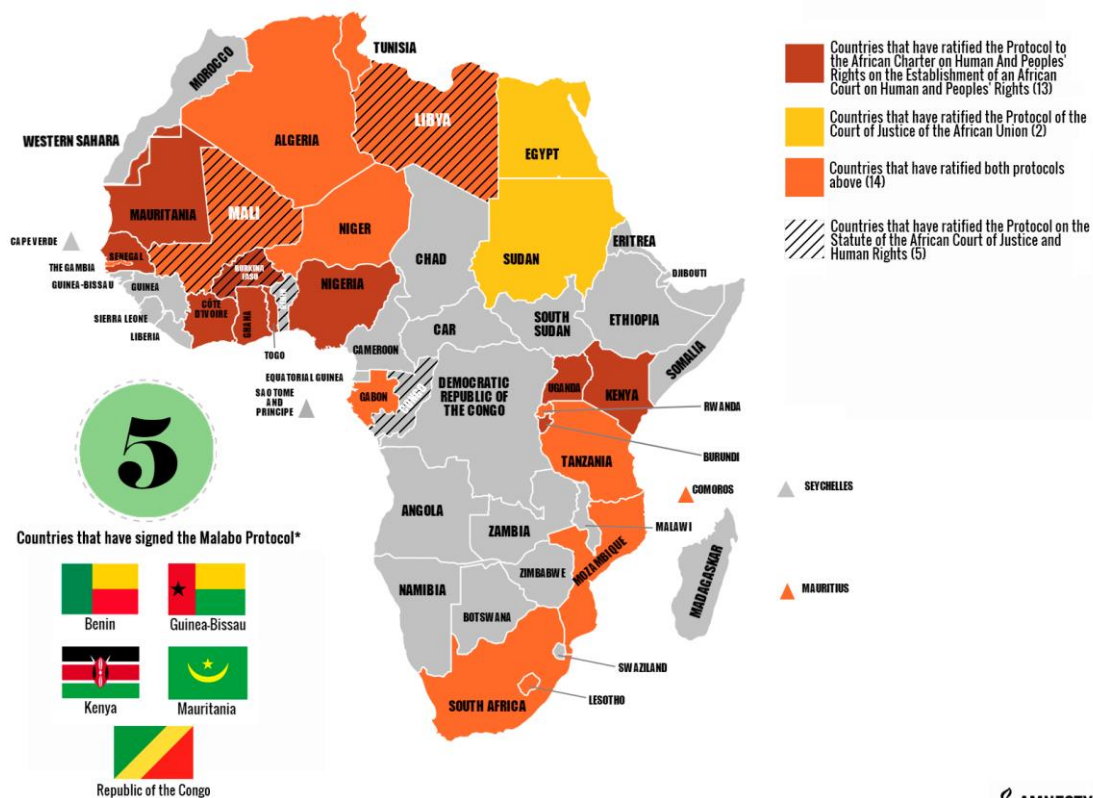
Protocol of the Court of Justice of the African Union

This Protocol establishes the African Court of Justice. It was adopted on 11 July 2003 and entered into force on 11 February 2009. Only 16 states have ratified the Protocol. As the principal judicial organ of the AU, the Court has jurisdiction over all disputes and applications relating to the AU Constitutive Act and other treaties and subsidiary legal instruments adopted within the framework of the AU. This Court exists on paper only. It has not been operationalized.

Protocol on the Statute of the African Court of Justice and Human Rights

This Protocol establishes the African Court of Justice and Human Rights. It was adopted on 1 July 2008. It requires 15 ratifications to enter into force. Only five states have ratified the Protocol and it has therefore not entered into force. The objective of the Protocol is to merge the African Human Rights Court and the African Court of Justice into a single court. If or when it is operationalized, this Court will replace both the African Human Rights Court and the African Court of Justice. The Malabo Protocol seeks to extend the jurisdiction of this Court to cover crimes under international law and transnational crimes.

Ratification of relevant legal instruments



* States that have signed the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol)

AMNESTY INTERNATIONAL

SOURCES OF INSPIRATION

There is a clear attempt in the Malabo Protocol to draw upon lessons from other international courts and tribunals through incorporation of provisions from their respective statutes. The provisions relating to crimes under international law, namely crimes against humanity, war crimes, genocide and aggression, have been lifted, in some cases word for word, from the provisions of the Rome Statute.⁵¹ On some occasions,

⁵¹ See Articles 28B, 28C, and 28D of the Amended ACJHR Statute vi-a-vis articles 6, 7 and 8 of the Rome Statute.

provisions are also drawn from the instruments relating to the International Criminal Tribunal for Rwanda (ICTR) and the Special Tribunal for Lebanon.⁵² In addition, some of the provisions have been taken with necessary changes from the Statute of the International Court of Justice (ICJ).⁵³

Incorporating provisions of other treaties, in some cases wholesale, into the Malabo Protocol may be helpful in ensuring consistency in approach between the ACJHR and other international courts. It also means that there is an attempt to bring examples of best practice from the international legal system. However, there are some concerns with the approach adopted. There are many occasions where the provisions are copied but then certain parts omitted. For instance, Article 46A of the Amended ACJHR Statute on the rights of accused is borrowed from Article 67 of the Rome Statute. However, it leaves out several important safeguards to the right of the accused, including the requirement that the accused should be able to communicate with counsel in confidence. Similarly, although the Amended ACJHR Statute provides that the accused shall not be compelled to testify against himself or herself or to confess guilt,⁵⁴ it does not expressly indicate, as the Rome Statute does,⁵⁵ that the accused is entitled to the right to remain silent, without such silence being a consideration in the determination of guilt or innocence. There does not appear to be any clear pattern or consistency in approach as to why certain provisions were included and others were not, why some were omitted, and why some were included but changes were made.

Perhaps more importantly, just because the provisions of these international instruments are incorporated into the Malabo Protocol does not mean that the ACJHR will necessarily build upon their experience. The jurisprudence of the ICC for example is limited at present and it is not clear how much assistance this will therefore provide to the ACJHR in interpreting the Malabo Protocol. The procedures before the ICC, ICJ and other courts are inevitably specific to those particular institutions and the extent to which they can be adopted wholesale by the ACJHR, particularly since it will have a much broader jurisdiction, is questionable.

Although it has extensively borrowed from the statutes of other international courts, the Malabo Protocol does not seem to have drawn lessons from the domestic procedures, practices and experience that have taken place in a number of African countries around international justice. The incorporation of the Rome Statute provisions into the Malabo Protocol may appear to bring examples of good practice into the African system but may also bring some challenges. As the experience of the Special Court in Sierra Leone has shown, transplanting an international criminal justice system and its specific perspectives, may fail to take into account local cultural traditions and norms (such as beliefs, differing perspectives on what makes a credible witness or testimony), that may impact on the ability of the ACJHR to carry out its criminal jurisdiction effectively.⁵⁶

THE LIST AND DEFINITION OF CRIMES

The Malabo Protocol contains an extensive and ambitious list of crimes. In particular, the ACJHR will have jurisdiction to try 14 different crimes: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.⁵⁷ Some of these crimes, such as genocide, crimes against humanity and war crimes, are already well established in international criminal law, while other crimes, such as mercenarism, terrorism, corruption, money laundering, and trafficking on hazardous wastes are already defined in existing AU treaties.⁵⁸ The list also contains crimes over which the ICC and other international

⁵² For instance, Article 22C(1) and (2) of the Amended ACJHR Statute on the defence office closely reflect those of Article 13 of the Statute of the Special Tribunal for the Lebanon. Similarly, Articles 46B(3) and (4) of the Amended ACJHR Statute mirror Article 6(3) and (4) of the Statute of the ICTR.

⁵³ Compare for instance Article 31 of the Amended ACJHR Statute on applicable law with Article 38 of the Statute of the International Court of Justice.

⁵⁴ Amended ACJHR Statute, Article 46A(4)(g).

⁵⁵ Rome Statute, Article 67(1)(g).

⁵⁶ T. Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone*, Cambridge University Press, 2009.

⁵⁷ Amended ACJHR Statute, Article 28A.

⁵⁸ These treaties are: Convention for the Elimination of Mercenarism in Africa, adopted 3 July 1977 and entered into force 22 April 1985; OAU/AU Convention on the Prevention and Combating of Terrorism, adopted 1 July 1899 and entered into force December 2002; AU Convention on Preventing and Combating Corruption, adopted 1 July 2003 and entered into force 5 August 2006; and the Bamako Convention on the Ban of the Import into Africa and the control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted 30 January 1991 and entered into force 22 April 1998.

courts have no jurisdiction. In addition to the extensive list of crimes, the Malabo Protocol also leaves open the possibility of new crimes to be added.⁵⁹

Arguably, the list covers areas or crimes which have particular relevance to the African continent. However, some crimes included under the jurisdiction of the ACJHR are yet to be well articulated and established in international law, prominent among these is the crime of unconstitutional change of government. Unconstitutional change of government is a phenomenon that is considered as “one of the essential causes of insecurity, instability and violent conflict in Africa”.⁶⁰ But as stated above, the definition of the crime of unconstitutional change of government was contentious throughout the drafting process. At the centre of this controversy was whether to include popular uprising as a form of unconstitutional change of government. The concern of including popular uprising as constituting a crime of unconstitutional change of government was that this would result in criminalizing protest. In the end the issue of “popular uprising” was deleted from the definition adopted in the Malabo Protocol. Despite this positive amendment, such phenomenon has not been widely prosecuted as a crime at the international level and it remains to be seen what effect the criminalisation of this crime within the Malabo Protocol will have regionally.

It is noteworthy that conflict and crimes committed in this context (such as genocide, crimes against humanity, and war crimes) have intractable connections to most, if not all, of the transnational or organised crimes listed in the Malabo Protocol. For instance, according to the United Nations Office on Drugs and Crime (UNODC), the long-standing conflict in Somalia is an important driving factor of maritime piracy along the coast of Somalia and the smuggling of migrants from the country to Yemen and Saudi Arabia.⁶¹ The intersections between African conflicts and illicit exploitation of natural resources, mainly minerals, is also well documented.⁶² Illicit exploitation of natural resources was a defining characteristic of the conflicts in Angola, Sierra Leone and Liberia, and remains a dominant feature of the ongoing conflicts in the Democratic Republic of Congo (DRC) and Central African Republic (CAR). In September 2015, Amnesty International published a report demonstrating how the diamond industry in the Central African Republic (CAR) is financing armed groups in the country.⁶³ Corruption and trafficking in persons are also crimes that affect the enjoyment of human rights across the continent.

Apart from specific concerns about the inclusion of vague and overly broad crimes like terrorism explained below in this paper, Amnesty International welcomes efforts by the AU to suppress transnational and organised crimes that negatively impact the enjoyment of human rights on the continent. Amnesty International also notes that in doing so, the AU must ensure full fair trial rights and must ensure that the substantive criminal laws applied do not violate other rights, such as the right to equality and freedom from discrimination. However, many of these crimes have not been widely prosecuted at the international level and it is still to be seen what effect criminalisation of these acts within the Malabo Protocol will have regionally and on the rights of the accused.

On the other hand, the definitions of the three core international crimes in the Malabo Protocol seem to conform to the internationally agreed definitions of the crimes.

The definition of genocide in the Malabo Protocol is slightly more progressive and reflective of recent jurisprudence than the definition in the Rome Statute. Under Article 28B(f) of the Amended ACJHR Statute ‘acts of rape or any other form of sexual violence’ committed with intent to destroy, in whole or in part, a national, racial or religious group, as such, constitutes genocide. A similar provision is not available in the Rome Statute. However, following the *Akayesu* decision at the ICTR,⁶⁴ it is commonly accepted that rape is a tool of war, which can be committed as an act of genocide. The clear inclusion of rape as an act of genocide within the Malabo Protocol points towards a more progressive and an up-to-date document reflecting more recent jurisprudence and definitions of genocide.

⁵⁹ Amended ACJHR Statute, article 28(A) (2).

⁶⁰ African Charter on Democracy, Elections and Governance, Preamble, para. 6.

⁶¹ UNODC, Transnational organized crime in Eastern Africa: A threat assessment, September 2013, available at www.unodc.org/documents/data-and-analysis/Studies/TOC_East_Africa_2013.pdf (Last accessed on 6 January 2015).

⁶² See for example International Alert, The role of the exploitation of natural resources in fuelling and prolonging crises in the Eastern DRC, 2009, available at www.international-alert.org/sites/default/files/publications/Natural_Resources_Jan_10.pdf (Last accessed on 7 January 2015).

⁶³ Amnesty International, Chains of abuse: The global diamond supply chain and the case of the Central African Republic, September 2015, Index: AFR 19/2494/2015.

⁶⁴ *Prosecutor v. Akayesu*, Judgment Case No. ICTR-96-4-A.

DEFINITION OF GENOCIDE IN THE AMENDED ACJHR STATUTE

For the purposes of this Statute, 'genocide' means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group;
- (f) Acts of rape or any other form of sexual violence

Regarding crimes against humanity, the definition in the Malabo Protocol incorporates the Rome Statute definition, including the definition of 'attack directed against any civilian population' which positively incorporates the expanded contextual element of 'pursuant to or in furtherance of a State or organisational policy.'⁶⁵ This has been interpreted by the ICC in the Kenya cases as expanding the actors who may commit crimes against humanity to include, for example, criminal gangs. One key definitional difference in the Malabo Protocol definition is the inclusion of the term 'enterprise' included as a contextual element of crimes against humanity alongside 'attack'. The Malabo Protocol does not provide a definition of the term 'enterprise' and as such it is unclear what would constitute an 'enterprise' against a civilian population.

The definition of war crimes in the Malabo Protocol explicitly mentions the First Additional Protocol and adds six more acts to the list included in the Rome Statute constituting violations of the laws and customs applicable in international armed conflict, namely; unjustifiably delaying the repatriation of prisoners of war or civilians, wilfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination, making non-defended localities and demilitarized zones the object of attack, slavery and deportation to slave labour, collective punishments and despoliation of the wounded, sick, shipwrecked or dead.⁶⁶ Whereas the Rome Statute only lists 12 acts constituting violations in armed conflicts not of an international character, the Malabo Protocol lists 22 acts,⁶⁷ and includes the use of nuclear weapons or other weapons of mass destruction.⁶⁸

While the definitions of the three core international crimes largely conform to the internationally agreed definitions, those of some of the other crimes in the jurisdiction of the ACJHR are controversial and concerning. Amnesty International is particularly concerned about the definition of terrorism as adopted in Article 28G of the Amended ACJHR Statute.⁶⁹

There is no agreed definition of terrorism under international law. Definition of terrorism in regional instruments vary greatly, and Amnesty International has frequently criticized these definitions for being vague and overly broad, thus undermining the principle of legality. Amnesty International's research demonstrates that many governments across the world invoke broad definitions of terrorism in order to repress political opposition, target human rights defenders, and harass and intimidate "suspect" religious and/or ethnic groups, and clamp down on legitimate exercise freedom of expression, association, assembly and other human rights. The definition in the Malabo Protocol may be used for similar purposes as it is overly broad. This challenge is compounded by the fact that Article 28G(A) partly defines the crime in question by referring to an open-ended list of offences contained in a series of international, regional and domestic legal frameworks, including where such offences are themselves ill or vaguely defined, thus adding to the confusion and likely overbroad nature of the crime and its arbitrary application. This raises serious concerns as to compliance with the principle of legality, a core general principle of law, enshrined, *inter alia*, in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which requires laws to be clear and accessible and for their application in practice to be sufficiently foreseeable.

⁶⁵ Amended ACJHR Statute, Article 28(c).

⁶⁶ Amended ACJHR Statute, Article 28D(b), paras iv, xxviii, xxix, xxx, xxxi, xxxii, xxxiii.

⁶⁷ Amended ACJHR Statute, Article 28D(e), paras i- xxi.

⁶⁸ Amended ACJHR Statute, Article 28D(g).

⁶⁹ Amended ACJHR Statute, Article 28G.

With regard to criminalization, the principle of legality requires that the law must classify and describe offences in precise and unambiguous language that narrowly defines the punishable behaviour.⁷⁰ In addition, any ancillary offence contained in the Amended ACJHR Statute should have been strictly limited to acts which are closely connected to the perpetration of the principle offence as sufficiently delimited. In this regard, Article 28G(B) prevents individuals to ascertain with sufficient certainty which conduct could constitute a criminal offence. As such, it raises significant concerns, including with regard to the principle of legality, and paves the way for arbitrary application in practice.

APPLICABLE INTERNATIONAL LAW INSTRUMENTS

The ACJHR will have the mandate to interpret and apply a wide range of regional and international law instruments. This can be seen as innovative and providing a comprehensive approach which will not limit the ACJHR to a prescribed list of treaties or documents. In particular, the ACJHR will have the mandate to interpret and apply the AU Constitutive Act together with 'other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity'.⁷¹ It will also apply the African Charter and its Protocol on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, and 'any other legal instrument relating to human rights ratified by the States Parties concerned'.⁷² This is not dissimilar to the mandate of the African Human Rights Court which can adjudicate over all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocol establishing the Court, and 'any other relevant human rights instrument ratified by the States concerned'.⁷³ In fact the African Human Rights Court has incorporated these additional instruments in its judgements, finding violations of, for example, the International Covenant on Civil and Political Rights (ICCPR), albeit usually in conjunction with a finding of a violation of a specific provision of the African Charter.⁷⁴

In addition to its jurisdiction over a wide range of regional and international law instruments, the ACJHR will have jurisdiction over:

- any question of international law;
- all acts, decisions, regulations and directives of the organs of the African Union;
- all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the African Union and which confer jurisdiction on the Court;
- the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union'.

However, whilst the use of treaties and international legal instruments by the ACJHR as sources of applicable law and interpretative guides may be appropriate, the ACJHR, and specifically the International Criminal Law Section, will also need to develop - as a matter of priority - its applicable core legal instruments, including a core 'Elements of Crimes' document and its Rules of Procedure and Evidence.⁷⁵ Such documents are principle sources of applicable law, along with the Statute of the Court. Having such documents in place would minimise the need for the Court to rely on 'secondary' sources of international law and therefore encourage legal certainty.

⁷⁰ See, *inter alia*, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. E/CN.4/2006/98 of 28 December 2005, para. 46. ; Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/28/28 of 19 December 2014, para. 28.

⁷¹ Amended ACJHR Statute, Article 28(a) and (b).

⁷² Amended ACJHR Statute, Article 28(c).

⁷³ African Human Rights Court Protocol, Article 3(1).

⁷⁴ See for example, African Court on Human and Peoples' Rights, *Beneficiaries of Late Nibert Zongo and Others v. Burkina Faso*, Application No. 013/2011, Judgment, available at <http://en.african-court.org/images/Cases/Judgment/Nibert%20Zongo%20Judgment-%20English.pdf> (Last accessed 7 January 2015).

⁷⁵ For example, Article 21 Rome Statute provides for the hierarchy of applicable law at the ICC, where the Court must first apply its core legal instruments, and subsequently, where appropriate, applicable treaties, principles of international law and finally national laws of legal systems of the world including, the national laws of states.

NOMINATION, APPOINTMENT AND ALLOCATION OF JUDGES

The ACJHR will be composed of 16 judges who are nationals of state parties to the Malabo Protocol,⁷⁶ and elected “from among persons of high moral character, who possesses the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law”.⁷⁷ The judges shall be elected by the AU Executive Council and appointed by the Assembly.⁷⁸ The Assembly is required to ensure that there is equitable representation of the regions and the principal legal traditions of the continent in the composition of the Court.⁷⁹ The Assembly is also required to ensure equitable gender representation in the Court.⁸⁰

For the purpose of election, each state party to the Malabo Protocol may nominate up to two candidates.⁸¹ State parties shall also choose the section of the Court which they wish their nominees to be placed if they are elected.⁸² At the point of election, the names of potential judges will be placed in three lists reflecting their specific competence and experience.⁸³ The first list will contain the names of candidates with competence in international law, the second will contain the names of candidates with competence in international human rights law and international humanitarian law, and the third list will contain the names of candidates with competence in international criminal law.⁸⁴ Judges will thus be elected to the Court on the basis of their strength and competence in one of the three broad areas covered in the jurisdiction of the Court.

State parties will play a critical role in shaping the composition of the Court. If and when the Malabo Protocol comes into force, and in order to ensure that the AU Executive Council has the broadest possible pool of qualified candidates, it will be essential that each state party nominates the maximum number of candidates allowed under the Amended ACJHR Statute. This would provide a real choice and facilitate the nomination of only the most qualified candidates. More importantly, state parties should nominate, and the Executive Council should elect, candidates who will undertake their duties impartially and consciously. This should disqualify candidates holding government positions. Relevant stakeholders have in the past raised concerns about the lack of independence of individuals elected to the African Commission, citing the position these individuals hold in their respective governments.⁸⁵

The procedure for allocating judges to the various sections of the Court is spelled out in two separate provisions of the Amended ACJHR Statute, in Articles 16(3) and 22(3) on the one hand, and Article 6(2) on the other. Amnesty International is concerned that there is an apparent conflict between these provisions. Article 16(3) provides that the ‘allocation of judges to the respective Sections and Chambers shall be determined by the Court in its Rules’. Furthermore, Article 22(3) provides that the ‘President and Vice President shall, in consultation with the Members of the Court and as provided for in the Rules of Court, assign Judges to the Sections’. This may help in ensuring both capacity and independence of those appointed but may need to be matched with an overall appointment mechanism that ensures political independence of the process.

However, Articles 16(3) and 22(3) do not quite tie in with Article 6(2). As described above, Article 6(2) provides that it is the Chairperson of the AU Commission who will separate out the lists of candidates into the different Sections prior to their actual election. This implies that in practice the determination of which judges will sit in the various sections will be determined not by the Court but by the AU. This contradiction will need to be decided at some point and a procedure adopted that ensures both the appointment of

⁷⁶ Amended ACJHR Statute, Article 3(1).

⁷⁷ Amended ACJHR Statute, Article 4.

⁷⁸ Amended ACJHR Statute, Article 7(1).

⁷⁹ Amended ACJHR Statute, Article 7(4).

⁸⁰ Amended ACJHR Statute, Article 3(4).

⁸¹ Amended ACJHR Statute, Article 5(2).

⁸² Amended ACJHR Statute, Article 6(2).

⁸³ Amended ACJHR Statute, Article 6(1).

⁸⁴ Amended ACJHR Statute, Article 6(1).

⁸⁵F Viljoen ‘Promising profiles: An interview with the four new members of the African Commission on Human and Peoples’ rights’ (2006) 6 *African Human Rights Law Journal* 243.

competent judges for the various sections and the minimisation of political interference by the AU in the administration of the ACJHR.

As stated earlier, it will be crucial to ensure that those judges who are appointed are both independent and competent and free from political interference. The judges will be the most visible representatives of the Court. The effectiveness and efficiency of the Court will, to a large extent, depend on the personal and professional capacities of the judges, their skills and experience as well as their commitment and integrity.

The Rome Statute system provides for a model which could potentially be developed and strengthened by the AU to ensure that the most qualified candidates are elected as part of a merit-based election process. Article 36(4) of the Rome Statute provides for the establishment of an “Advisory Committee on Nominations” to independently review judicial candidates at every ICC judicial election. The Advisory Committee is composed of 9 members who have ‘vast experience in relevant areas of international justice’⁸⁶ and competence and experience in criminal or international law. Members of the Committee serve in their personal capacity and do not take instructions from any government. In practice this advisory committee meets prior to any ICC judicial election and undertakes interviews and a detailed assessment of judicial candidates based on the criteria for elections as an ICC judge in Article 36 of the Rome Statute. Although the Advisory Committee’s findings are in no way binding on states parties, practice has shown that states parties do follow the recommendations of the Committee and although the Committee has not – as yet – found ICC judicial candidates to be explicitly ‘unqualified’ for judicial election, the Committee has provided appraisals which enable states to ascertain which candidates are more suited than others. Such an independent mechanism, perhaps with a strengthened and more explicit mandate for assessing judicial candidates as qualified or not qualified, could be adopted for the ACJHR and this would go some way to ensuring that suitable and qualified candidates are elected.

INSTITUTIONAL STRUCTURE

At the heart of the Malabo Protocol is the proposal to restructure the AU’s judicial institutional architecture. In terms of the Protocol, the Court shall be composed of four organs: the Presidency; the Office of the Prosecutor (OTP); the Registry; and the Defence Office. The Amended ACJHR Statute further provides that the Court shall have three sections: a General Affairs Section; a Human and Peoples’ Rights Section; and an International Criminal Law Section.

The bureau of the Court will be composed of the President and the Vice President who will be elected by the full Court to serve for a period of two years with the possibility of being re-elected once.⁸⁷ The two perform their functions on a full-time basis and will be required to reside at the seat of the Court.⁸⁸ The rest of the judges will perform their functions on a part-time basis,⁸⁹ with the AU Assembly reserving the right to determine when all the judges of the Court will serve on a full-time basis.⁹⁰

The OTP will be an independent organ of the Court,⁹¹ composed of a Prosecutor and two Deputy Prosecutors elected by the AU Assembly.⁹² It will be responsible for the investigation and prosecution of the crimes listed in the Protocol.⁹³ The Prosecutor will serve for a single term of seven years while his/her Deputies may serve up to two terms of four years each.⁹⁴ The Prosecutor will have the powers to appoint the staff of the OTP subject to staff rules and regulations laid down by the AU.⁹⁵ The remuneration and conditions of service of the Prosecutor and the Deputies will be determined by the AU Assembly on the recommendation of the Court made through the Executive Council.⁹⁶

⁸⁶ Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, ICC-ASP/10/36

⁸⁷ Amended ACJHR Statute, Article 22(1) and (2).

⁸⁸ Amended ACJHR Statute, Article 22(5).

⁸⁹ Amended ACJHR Statute, Article 8(4).

⁹⁰ Amended ACJHR Statute, Article 8(5).

⁹¹ Malabo Protocol, Article 2; Amended ACJHR Statute, Article 22(6).

⁹² Amended ACJHR Statute, Article 22A(1) and (2).

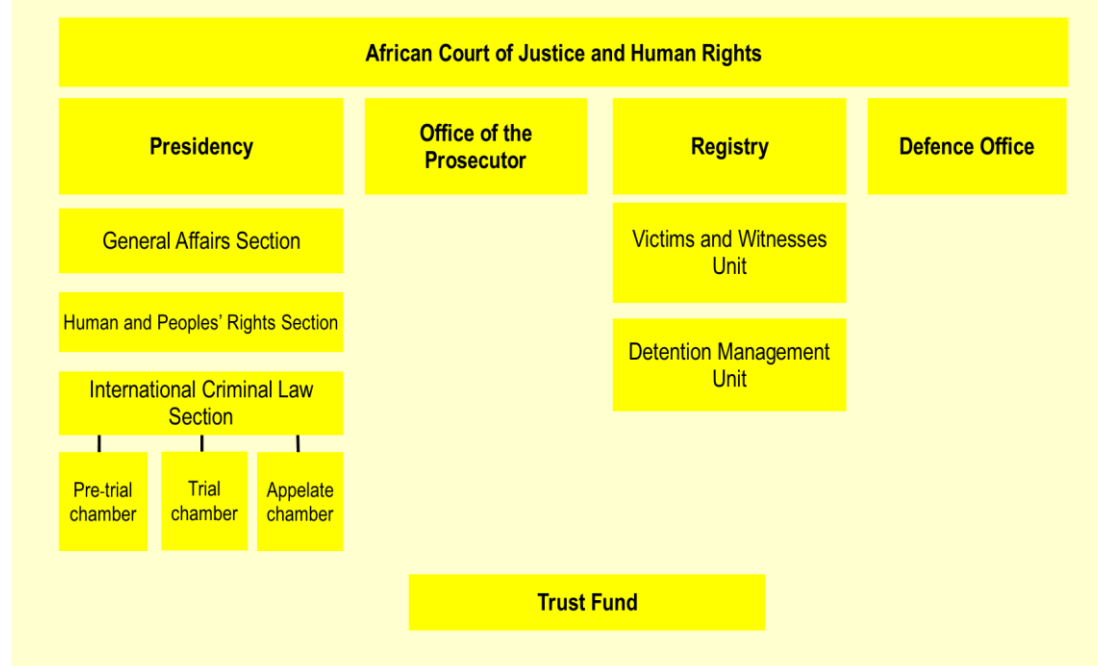
⁹³ Amended ACJHR Statute, Article 22A(6).

⁹⁴ Amended ACJHR Statute, Article 22A(3) and (4).

⁹⁵ Amended ACJHR Statute, Article 22A(9).

⁹⁶ Amended ACJHR Statute, Article 22A(10).

Structure of the African Court of Justice and Human Rights



The Registry will be comprised of a Registrar and three Assistant Registrars,⁹⁷ appointed by the Court,⁹⁸ and assisted by such other staff as may be necessary for the effective and efficient performance of the functions of the Registry.⁹⁹ Like the Prosecutor, the Registrar will serve for a single and non-renewable term of seven years.¹⁰⁰ The Assistants may serve for a possible two terms of four years each.¹⁰¹ The Amended Statute further provides for the establishment by the Registrar of a Victims and Witnesses Unit.¹⁰² This Unit will be responsible for providing protective measures and security arrangements, counselling, and other appropriate assistance to witnesses and victims who will appear before the Court. The Statute specifically provides that the staff of the Victims and Witnesses Unit shall include experts in the management of trauma. Presumably, such experts will include those with expertise in trauma relating to crimes of sexual violence.¹⁰³ The Registrar will also establish within the Registry a Detention Management Unit which will be charged with managing conditions of detention of suspects and accused persons.¹⁰⁴

The Defence Office will be responsible for protecting the rights of the suspects and accused persons and providing support and assistance to any defence counsel appearing before the Court.¹⁰⁵ The relevant provision of the Amended ACJHR Statute reflect those in Article 13 of the Statute of the Special Tribunal for the Lebanon. The provision in the Amended ACJHR Statute is however more extensive. The post of Principal Defender will have an 'equal status' with that of the Prosecutor 'in respect of rights of audience and negotiations *inter partes*'.¹⁰⁶ Making the defence office an independent organ of the ACJHR is a positive development and essential for the equality of arms.¹⁰⁷ Within the ICC, the Office of the Public Counsel for the Defence' is not an independent organ of the court; it is located within the Registry.

The Amended ACJHR Statute also provides that the AU Assembly will establish within the jurisdiction of the Court 'a Trust Fund for legal aid and assistance and for the benefit of victims of crimes or human rights

⁹⁷ Amended ACJHR Statute, Article 22B(1).

⁹⁸ Amended ACJHR Statute, Article 22B(2).

⁹⁹ Amended ACJHR Statute, Article 22B(7).

¹⁰⁰ Amended ACJHR Statute, Article 22B(3).

¹⁰¹ Amended ACJHR Statute, Article 22B(4).

¹⁰² Amended ACJHR Statute, Article 22B(9)(a).

¹⁰³ See Rome Statute, Article 43(6).

¹⁰⁴ Amended ACJHR Statute, Article 22B(9)(b).

¹⁰⁵ Amended ACJHR Statute, Article 22C(1) and (2).

¹⁰⁶ Amended ACJHR Statute, Article 22C(7).

¹⁰⁷ JT Tunistra, 'Defending the Defenders: The Role of Defence Counsel in International Criminal Trials', 8 JICJ (2010) 463-486.

violations and their families'.¹⁰⁸ A trust fund which may be used for the benefit of victims has a clear precursor in the case of the ICC's Trust Fund for Victims, which can be used principally to provide reparations to victims of international crimes. The management and maintenance of such a fund at the ICC has required a full time secretariat. In relation to the use of a trust fund for legal aid, whilst the use of a trust fund – presumably to be funded voluntarily - may serve to provide some resources for the benefit of the defence, it must be recalled that the right to a paid defence and equality of arms are fundamental aspects to a fair trial. It is unclear whether or not a trust fund for legal aid at the ACJHR would be able to serve this purpose. Furthermore, the use of the fund, at once for legal aid as well as for the benefit of victims, raises questions of how the funds would be held and disbursed, serving as they do very different and possibly conflicting purposes.

RELATIONSHIP WITH THE ICC

The International Criminal Section of the ACJHR and the ICC will exercise the same subject matter jurisdiction, at least in relation to Rome Statute crimes committed in states which have ratified both the Malabo Protocol and the Rome Statute. However, given the immediate political circumstances that accelerated the proposal to establish the ACJHR, the Malabo Protocol makes reference neither to the Rome Statute nor the ICC. The Protocol fails to clarify how the two courts will function together in terms of, for instance, cooperation and surrender of suspects. The Protocol envisages a complementarity relationship between the ACJHR, on the one hand, and national courts and courts of the regional economic communities, on the other hand.¹⁰⁹ Unfortunately, the Protocol does not foresee a similar relationship with the ICC despite the fact that it is obvious that such a relationship would be necessary and desirable.

However, the Malabo Protocol, as it currently stands, does not in any way override the obligations undertaken by states that have ratified the Rome Statute. The obligations of these states to cooperate with the ICC will continue regardless of the Malabo Protocol and regardless of the establishment of a criminal section of the ACJHR. The determination of the admissibility of a case before the ICC will continue to be made by the ICC irrespective of whether an ICC member state ratifies the Malabo Protocol. This relationship will hopefully develop over time, but currently there is no legal reason that the ICC would defer to the ACJHR unless it were legitimately acting to bring those suspected of Rome Statute crimes to justice. In addition, the fact that the Malabo Protocol grants immunity to a large category of persons who have no immunity under the Rome Statute mean that the ACJHR's jurisdiction would not affect the admissibility question before the ICC in all cases involving such suspects.

In a 'Draft Decision on Africa's Relationship with the International Criminal Court (ICC)' emanating from the Extraordinary AU Session of 12 October 2013, it was stated that the AU: "PROPOSES that African States Parties to the Rome Statute introduce amendments to the Rome Statute to recognize African regional Judicial Mechanisms dealing with international crimes in accordance with the principles of complementarity."¹¹⁰ However, this language was changed in the final resolution of that AU session, which decided that 'African States Parties propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute'¹¹¹ To date, the only country that has acted on this AU decision is Kenya, which proposed an amendment to Preambular Paragraph 10 of the Rome Statute on 7 November 2013, to read: "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions."¹¹² At the time of writing, this amendment had yet to be formally considered outside of the Assembly's working group on amendments. However, certain practitioners have suggested 'that this would in principle be workable if [the Malabo Protocol] creating the ACJHR also recognized, just as states parties do, that while the ICC will defer to genuine national (or regional) proceedings, this is contingent on the ACJHR's acceptance of the binding nature of ICC complementarity

¹⁰⁸ Amended ACJHR Statute, Article 46M.

¹⁰⁹ Amended ACJHR Statute, Article 46(H).

¹¹⁰ Draft Decision on Africa's Relationship with the International Criminal Court (ICC), 12 October 2013, para. 9(viii).

¹¹¹ Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1(Oct.2013), at para 10(vi)

¹¹² See, Report of the Working Group on Amendments, ICC-ASP/13/31, 7 December 2014, at page 17

judgments on forum allocation.’¹¹³ Indeed, Amnesty International believes that this legal position is self-evident from the Rome Statute and cannot be changed by the Malabo Protocol.

In terms of cooperation between the ICC and the International Criminal Section of the ACJHR, the Rome Statute provides for cooperation between the ICC and ‘regional organizations’¹¹⁴ and it is therefore – at least in theory – possible for the Prosecutor or the Court to seek information or cooperation from the ACJHR. Article 46L(3) of the Amended ACJHR Statute also permits the ACJHR to ‘seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose’. Hopefully, the ACJHR will invoke this provision to establish a working relationship with the ICC. However, the feasibility of establishing such a relationship is likely to be dependent on the broader relationship between the AU and the ICC. At present, the relationship seems to be at its lowest. In 2010, the AU rejected a proposal by the ICC to open a liaison office in Addis Ababa, Ethiopia.¹¹⁵ More importantly, the AU has consistently called on its members not cooperate with the ICC.

¹¹³ The ICC at a Crossroads: The Challenges of Kenya, Darfur, Libya and Islamic State’
https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/ICC%20at%20a%20Crossroads%20Meeting%20Summary%20FINAL%2014%20April%202014.pdf

¹¹⁴ Rome Statute Articles 54(3)(c) and 87(6)

¹¹⁵ Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.296 (XV), para. 8.

4. LEGAL AND INSTITUTIONAL IMPLICATIONS

The AU's decision to include criminal jurisdiction within the remit of the ACJHR has far reaching legal and institutional implications. Four issues are examined in this Chapter: the capacity of the court to deliver on its mandate; implications for African member states to the Rome Statute; implications for the AU; implications for the African Human Rights Court; and implications for individuals and civil society organisations.

THE CAPACITY OF THE COURT TO DELIVER ON ITS MANDATE

Amnesty International is concerned that the proposal to expand the jurisdiction of the ACJHR to cover international crimes is an overly ambitious one. Serious doubts exist as to whether the court envisaged in the Malabo Protocol will have the capacity to deliver on its mandate. Firstly, the jurisdiction of the court will be so wide such that it would be considerably difficult for the court to effectively and efficiently discharge its mandate. Secondly, tied to the question of the wide breadth of jurisdiction will be the difficulty of finding judges, prosecutors, investigators and defence counsel with expertise and competence on all matters covered by the court's jurisdiction. Thirdly, it is doubtful whether the International Criminal Law Section of the Court will have the requisite number of judges to preside over the various stages of a case. Fourthly and finally, the court's ability to serve as a deterrence to perpetration of international crimes on the continent will be undermined by the immunity clause.

Breadth of jurisdiction: An overloaded court

One of the most obvious implications of expanding the jurisdiction of the ACJHR to cover crimes under international law (and other transnational and organised crimes) is that it will overload the Court and thus undermine its capacity to deliver on its mandate. This will be the first regional or international court to have such an expansive jurisdiction. As outlined earlier, the court will have jurisdiction over general matters of international law, violations of human rights, and crimes under international law. Further, the Malabo Protocol as read with the Amended ACJHR Statute expands the criminal jurisdiction of the Court beyond the core crimes criminalised by the Rome Statute. In addition, it will have the mandate to interpret and apply a long list of regional and international treaties and instruments.

The ability of any court to handle such a wide range of issues is of concern. As such, it is unrealistic to imagine that the Court will effectively deliver on all these fronts, especially, as explained below, if it

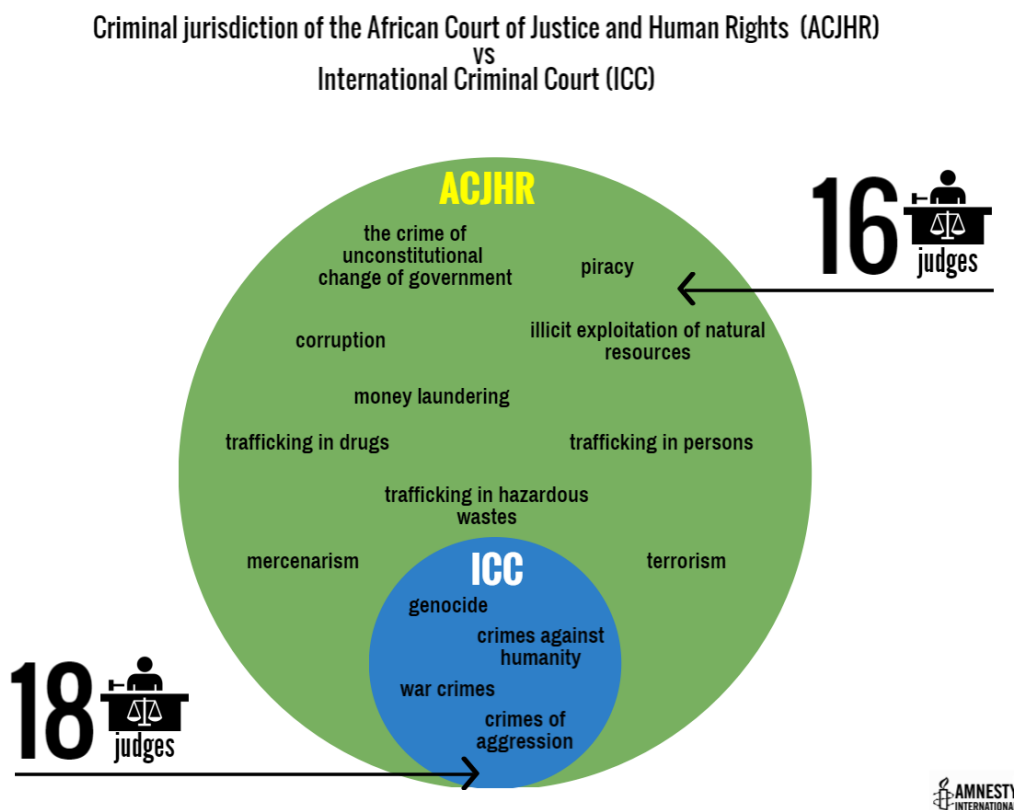
considered that the court will have a total of 16 judges, with only five judges dedicated to the General Affairs Section, another five to the Human Rights Section, and the last six to the International Criminal Law Section. These numbers are undoubtedly insufficient for the proper functioning of the court.

Comparison could be made to the ICC, which at present conducts investigations into three core international crimes, rather than the much expanded list of crimes provided for in the Amended ACJHR Statute. However, despite its narrower jurisdictional scope, the ICC still has huge needs in terms of expertise, resources and capacity. For example, the ICC has four organs, each with a number of sub-divisions (for example the office of the Prosecutor has three sub-divisions), and the Registry which has numerous supporting offices and sections, undertaking all of the support functions for the OTP, as well as those functions relevant to witness protection, outreach and communications, victims and defence representation, amongst many more. All of this takes place with vast human and financial resources. Despite this, the ICC in 2016 will likely still only carry out four or five active investigations and conduct hearings into four cases.¹¹⁶ A lot of thought will need to be given therefore to the expertise, resources and capacity required by the ACJHR to meet the requirements of its much increased jurisdictional scope and to meet the demands that such an increased jurisdictional scope will place upon it.

Expertise of judges and investigators

Article 22(4) of the Amended ACJHR Statute envisages that there are situations in which the judges of the ACJHR will sit as a Full Court. These situations are not specified, and will have to be clarified in the Court's Rules of Procedure. However, given that the judges of the Court will be appointed on the basis of their expertise in only one of the three thematic areas covered in the jurisdiction of the Court, it seems that the judges of the Court will in certain instances sit to adjudicate over issues that they have little or no expertise.

Additional problems will arise for the judges attached to the International Crimes Section. Only six judges with competence in international criminal law will be appointed to the International Criminal Law Section of the Court. In reality, it will be an uphill task to find a blend of judges with competence and experience in all the 14 crimes covered under the criminal jurisdiction of the court. Some of the crimes falling under the



¹¹⁶ Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10, available at https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf at p. 8

jurisdiction of the court require specialised knowledge not only on the part of the judges but also on the part of investigators. It would appear that huge resources will have to be dedicated to the training of the judges and investigators on areas that require specialised knowledge and competence.

The number of judges

As already stated, the proposed number of judges is insufficient for the proper functioning of the Court. In particular, the Court will not have enough judges to manage the various sections of the Court. This point is well illustrated by comparing the composition of existing regional and international courts with that of the proposed Court. The African Human Rights Court has 11 judges although its mandate is narrow and limited to human rights issues only. It deals neither with matters of general international law nor international crimes. Ironically, the Malabo Protocol proposes to reduce the number of judges who will sit in the Human Rights Section of the Court to five. As will be discussed below, this may have an adverse effect on the court's ability to effectively deal with human rights cases.

The international crimes section will perhaps be the most affected by the shortage of judges. This raises questions around the capacity of the Court to deliver justice with any form of relative speed. The experience of the ICC shows that for a case to proceed from the pre-trial to the appellate stage, a total of eleven judges are required: three judges are required for the pre-trial chamber, three for the trial chamber, and five for the appellate chamber. However, in order to deal with the Court's workload, the ICC has eighteen judges. Of these, the five appellate judges can only be assigned to the Appeal's Chamber, with the other judges being assigned to pre-trial and trial chambers. Judges in the pre-trial and trial chambers can be temporarily attached to the other, provided that a pre-trial judge cannot serve on the same proceeding at the trial phase. Unfortunately, even with its eighteen judges, the ICC has to deal regularly with issues of cross-contamination of judges, many of whom do not stay in the same division throughout their nine-year term. Cross-contamination of judges occurs when judges sit in a division of a particular case, having already sat in another division at a different phase of the trial. Therefore, with only six judges dedicated to the International Crimes Section of the ACJHR, it is clear that there will be insufficient judges to cover a trial through to appeal. It appears that the Amended ACJHR Statute envisages that judges will sit in more than one stage of a trial. It provides that the pre-trial chamber shall be duly constituted by one judge, the trial chamber by three judges, and the appellate chamber by five judges.¹¹⁷ Yet, the International Criminal Section has six judges only. As described above this will have obvious risks in terms of cross-contamination of the trial chambers and may cast doubt on the fairness of the trial process. Furthermore, with one-third of the judges compared to the ICC, and with the much increased scope of work for the International Crimes Section, it seems likely that the number of judges will be insufficient to meet the demands which may be placed upon Section.

Effect of the immunity clause

The immunity clause is considered to be the most controversial provision in the Amended ACJHR Statute. The relevant provision reads as follows:¹¹⁸

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

This provision was approved despite the fact that during discussions delegations at the Ministerial Meeting raised concerns regarding its conformity with international law, domestic laws of Member States and jurisprudence.¹¹⁹ Delegations also underlined the challenges inherent in widening immunities, the lack of a precise definition of senior state official and the difficulty in providing an exhaustive list of persons who should be included in the category of senior state officials.¹²⁰

Under general customary international law serving Heads of State and Government and Senior State Officials enjoy immunity from criminal jurisdiction of a third state. However, there are exceptions to this general rule

¹¹⁷ Amended ACJHR Statute, Article 21(3), (4) and (5).

¹¹⁸ Amended ACJHR Statute, Article 46A *bis*.

¹¹⁹ The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, Malabo, Equatorial Guinea, 20-24 June 2014, EX.CL/846 (XXV), para 25.

¹²⁰ *Ibid*.

including that Heads of State and Government and Senior State Officials do not necessarily enjoy immunity from criminal proceedings initiated before international criminal courts such as the ACJHR. In this regard, article 27(1) of the Rome Statute) provides that:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Article 27(2) further provides that:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Other international criminal or hybrid courts have not provided immunity for heads of state or senior officials and this is reflected in their Statutes. The Special Court for Sierra Leone, in relation to Charles Taylor, for example, held that '[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court'.¹²¹

In addition, the practice of the ACJHR will also deviate from the established practice of international criminal courts including the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR.

The immunity clause will have serious implications for the fight against impunity for international crimes in Africa and for the legitimacy and credibility of the ACJHR. The clause will effectively prevent the investigation and prosecution of serving Heads of State and Government who use their position or authority to order, plan, finance or otherwise mastermind crimes against humanity, war crimes or acts of genocide. Experience has shown that on the African continent, as elsewhere, it is those in positions of power who typically abuse their authority and state resources to commit international crimes. The immunity clause essentially promotes and strengthens the culture of impunity that is already entrenched in most African countries. It rolls back the gains that have already been realised in the fight against impunity in some African countries.

It is also instructive that the immunity clause is at odds with and incompatible with the objectives and organising principles of the AU. A key objective of the AU is the promotion and protection of human rights as contained in the African Charter and other human rights instruments. Article 4(h) of the AU Constitutive Act grants the AU the right to intervene if war crimes, crimes against humanity and acts of genocide are being committed in a members states. Article 4(m) requires the AU to respect human rights while article 4(o) requires it to ensure the sanctity of human life and to reject impunity. The immunity clause undermines these objectives and principles.

For the ACJHR, the immunity clause will pose serious risks to its integrity, legitimacy and credibility. The court will lack the capacity to address the scourge of war crimes, crimes against humanity and genocide that have afflicted the continent for decades now. As such, and contrary to what is stated in the preamble of the Malabo Protocol, the court will neither "complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples' rights" nor will it ensure accountability for these violations wherever they occur. Ultimately, the court will struggle to enjoy or harness the confidence and support of the African population and especially of the victims of gross violations of human rights.

IMPLICATIONS FOR MEMBER STATES TO THE ROME STATUTE

The establishment of an African Court with criminal jurisdiction may cause difficulties for states who are also party to the Rome Statute. Of the 54 member states comprising the AU, 34 are also state parties to the ICC.

¹²¹ Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Appeals Chamber, Decision on Immunity from Jurisdiction (31 May 2004), at para. 52. See also Extraordinary chambers in Cambodia: 'The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment', Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004 (NS/RKM/1004/006).

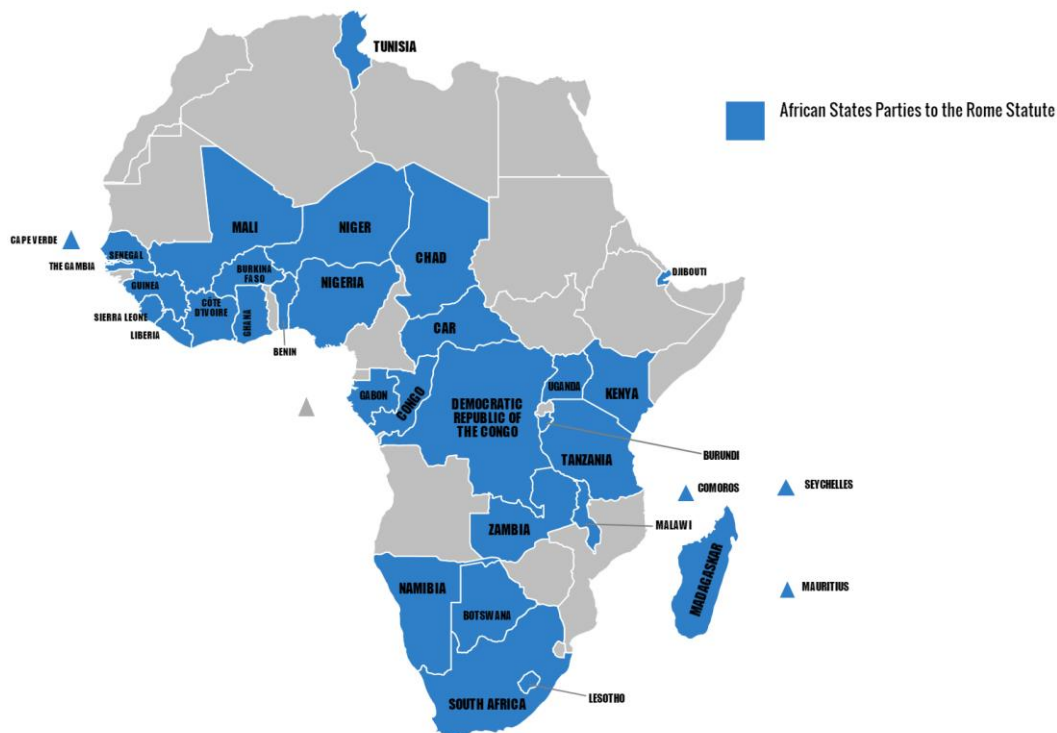
Therefore, the expansion of the jurisdiction of ACJHR to cover international crimes will likely have a number of consequences on those AU member states which would be at once have obligations towards the ACJHR and the ICC.

It is noteworthy that the Malabo Protocol contains no provisions detailing the ACJHR's relationship with the ICC, or at least how member states must deal with competing obligations which may arise in relation to the ACJHR. The Rome Statute does have certain provisions, regarding competing obligations, as they relate to cooperation with the ICC, contained in Articles 90 and 98. However, Article 90, which deals with competing requests for the surrender of a person from another state, does not provide for how a state party should deal with a competing request for surrender from another international court. Article 97 of the Rome Statute also provides for a consultation procedure which a state party must undertake if it identifies problems which may impede the execution of a cooperation request. Both the ICC and the ACJHR are creations of treaties and as such, neither has *prima facie* primacy over the other. However, it is clear that with the creation of the International Criminal Law Section within the ACJHR, those states which are party to both treaties will encounter the issues of overlapping jurisdictions and competing obligations owed to both the ACJHR and the ICC. In this scenario, the lack of discussion in the more recent Malabo Protocol on competing obligations is striking.

Overlapping jurisdiction and competing obligations

It is clear that, in relation to jurisdiction and particularly the crimes which they will prosecute, the ICC and the ACJHR overlap on a number of crimes. This may lead to competing and overlapping obligations on member states, for example, in the event that the ACJHR and the ICC indict the same person and order his or her surrender. This may lead to state parties to both the Rome Statute and the Malabo Protocol having to choose which obligation they would fulfil and which they would breach. It is not defined within the Malabo Protocol as to which obligation will take priority and states parties to both instruments may find themselves in difficult legal situations if both courts hold that they have jurisdiction over a particular case. The issue of

African States Parties to the Rome Statute



competing obligations would likely arise in relation to competing indictments, but may also arise conceivably in relation to a number of other areas including in relation to competing cooperation requests. This may, for example, be in cases where both the ICC and ACJHR request specific assistance or documents.

Domestic implementing legislation

Under the Rome Statute system, and due to the principle of complementarity, state parties to the ICC are under a duty to enact domestic implementing legislation. This legislation should domesticate the Rome Statute crimes as well as provide for procedures of cooperating with the ICC.¹²² The Malabo Protocol also provides that it is complementary to national jurisdictions,¹²³ and as such, those states party to the Protocol will also have to ensure that their domestic legislation is in line with the Protocol. It follows that the process of amending, updating or indeed adding further provisions into domestic legislation to incorporate the Malabo Protocol legislative requirements will need to be considered by states party to both the ICC and the ACJHR.

This may present a number of difficulties to those ICC states parties which have or are in the process of domesticating the Rome Statute. For example, as detailed earlier, the Malabo Protocol contains some variations in the definitions of Rome Statute crimes as well as a number of crimes which are not included in the Rome Statute. This may require a substantial amount of drafting and legislative work within current Rome Statute member states to bring domestic laws in line with the statutes of both the ICC and the ACJHR. This may even prove impossible if states are unable to domestically legislate definitional differences found in the Malabo protocol and Rome Statute systems. For example, the Kenyan International Crimes Act 2008 incorporates directly in its domestic implementing legislation the definitions of genocide, crimes against humanity and war Crimes found in the Rome Statute.¹²⁴ Furthermore, states parties to the ICC are required to enact domestic legislation ensuring cooperation requests, including for arrest and surrender, are properly executed by state parties. A number of African states parties' domestic legislation provides for specific ICC related cooperation, this will also have to be adapted in order to accommodate also cooperation requests of the ACJHR.

Double financial burden

On a more pragmatic level, member states of both the Rome Statute and the ACJHR will have to contribute financially to both the ICC and the ACJHR, which may prove a heavy financial burden.

IMPLICATIONS FOR THE AU

The ACJHR is a treaty body established within the framework of the AU. In this regard, the AU Assembly will be responsible for a number of activities related to the operationalization and functioning of the Court, including: appointment of the Judges, the Prosecutor, and Deputy Prosecutors of the Court; determining when all the judges of the Court will perform their functions on a full-time basis;¹²⁵ determining the salaries and conditions of service of the judges, and members and staff of the OTP and the Registry;¹²⁶ inserting, if necessary, additional crimes into the jurisdiction of the Court;¹²⁷ establishing the Trust Fund;¹²⁸ receiving the annual activity reports of the Court;¹²⁹ and monitoring state compliance with the judgments of the Court.¹³⁰

For the AU, the most obvious implication of the decision to expand the jurisdiction of the ACJHR relates to its financial ability to effectively operationalize and sustain the Court. As highlighted above, on two separate occasions during the process of drafting the Malabo Protocol, the AU Commission was requested to prepare

¹²² Rome Statute, Article 88.

¹²³ Amended ACJHR Statute, Article 46H.

¹²⁴ See, Kenya International Crimes Act 2008 available at https://www.issafrica.org/anicj/uploads/Kenya_International_Crimes_Act_2008.pdf

¹²⁵ Amended ACJHR Statute, Article 8(5).

¹²⁶ Amended ACJHR Statute, Article 22A(10) and 22B(10).

¹²⁷ Amended ACJHR Statute, Article 28A(2).

¹²⁸ Amended ACJHR Statute, Article 46M.

¹²⁹ Amended ACJHR Statute, Article 57.

¹³⁰ Amended ACJHR Statute, Article 46(4) and (5).

a study on the financial and structural implications of expanding the jurisdiction of the ACJHR¹³¹ It is therefore apparent that even the AU itself is concerned about the financial implications of operationalizing the ACJHR. Indeed, a key reason for the earlier decision to merge the African Human Rights Court and the African Court of Justice was the realization by the AU that it would not have the requisite resources to service two separate courts on the continent.

More recently, in January 2015 at its 26th Ordinary Session, the AU Executive Council while emphasising the need to “expeditiously operationalize” the ACJHR also underscored the “need to ensure predictable and sustainable funding”.¹³² The AU Executive also decided to establish a “Special Fund” and to convene a resource mobilization conference to raise funds that will enable the operations of the ACJHR to be initiated and sustained.¹³³ These twin efforts may possibly raise the resources to start off the operations of the Court, but it is doubtful whether they are sustainable sources of funding. The ideal source of funding for the Court should be the state parties themselves and/or the AU. Yet, the AU has traditionally struggled to adequately finance the operations of its own institutions, including human rights treaty bodies.

The African Commission and the African Court have continually raised concerns about the meagre resources allocated to them by the AU. Since its establishment, the African Commission has suffered from a perennial lack of resources. For about two decades, the budget of the African Commission was subsumed under that of the Political Affairs Department of the AU Commission. In July 2007, the Executive Council directed the African Commission to begin presenting and defending its own budget before the Permanent Representatives’ Committee (PRC).¹³⁴ Thus, from 2008 when the African Commission began to do this, its budgetary allocation from the AU has improved. In 2008, the African Commission received USD 6 million, marking a significant boost from the USD 1.2 million it had received in 2007.¹³⁵ The Commission’s budget had increased to USD 7.9 million by 2011,¹³⁶ but this dropped to USD 6.3 million in 2014.¹³⁷ The USD 6.3 million allocated to the African Commission in 2014 did not include funds for program activities.¹³⁸ Similarly, the AU did not allocate any funds for program activities in its 2015 budget allocation to the Commission.¹³⁹ This means that for 2014 and 2015, the African Commission relied fully on donor funding to execute its program activities.¹⁴⁰ As observed by the Commission in its 37th Activity Report “such a situation cannot be right”.¹⁴¹

Although the African Human Rights Court is better resourced than the African Commission, the funding it ordinarily receives matches neither the task it is entrusted nor its resource requirements. The 2014 budget of the African Human Rights Court was just under USD 9 million, which is comprised of USD 6.6 million from state contributions and USD 2.2 million from partner funds.¹⁴² The funding it receives pales in comparison to the funding allocated to other regional human rights court, especially the European Court of Human Rights (ECHR). In 2014, the budget of the ECHR stood at 67,650,400 Euros.¹⁴³ In the same year, the ECHR received additional voluntary funding of more than 2,000,000 Euros from member states.¹⁴⁴

In 2003, the AU Ministerial Conference on Human Rights in Africa acknowledged that the continent’s human rights institutions are not adequately funded or resourced.¹⁴⁵ The Conference called upon the AU policy organs to establish a voluntary human rights fund which would be used to provide additional finances

¹³¹ Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/Dec.427(XIX), para 2; Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/Dec.766 (XXII) para 2.

¹³² Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC), EX.CL/Dec.868(XXVI), para xii.

¹³³ Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC), EX.CL/Dec.868(XXVI), para xiv(b).

¹³⁴ Decision on the 21st Activity Report of the African Commission on Human and Peoples’ Rights, EX-CL/Dec.344 (X), para. 2(iv).

¹³⁵ 23rd Activity Report of the African Commission on Human and Peoples’ Rights, para. 113; 24th Activity Report of the African Commission on Human and Peoples’ Rights, para. 246.

¹³⁶ Combined 32nd and 33rd Activity Report of the African Commission on Human and Peoples’ Rights, EX.CL/782(XXII) Rev. 2, para. 58.

¹³⁷ 37th Activity Report of the African Commission on Human and Peoples’ Rights, para. 48.

¹³⁸ Ibid, para. 49.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Annual report of the African Court on Human and Peoples’ Rights, 2013.

¹⁴³ European Court of Human Rights, Annual Report 2014, p. 14, available at http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf (Last accessed on 9 January 2016).

¹⁴⁴ Ibid.

¹⁴⁵ Declaration of the 1st African Union (AU) Ministerial Conference on Human Rights in Africa, 8 May 2003, (Kigali Declaration), para. 23.

to the human rights institutions.¹⁴⁶ This recommendations was not acted upon until November 2006 when, on the prompting of the African Commission,¹⁴⁷ the Executive Council adopted a decision in which it requested the AU Commission to “put in place the necessary modalities and structures for the effective operationalization of the Voluntary Contributions Fund for African Human Rights institutions”.¹⁴⁸ Amnesty International is not aware of any actions taken to implement this decision.

The chronic underfunding of the regional human rights institutions reflects a wider problem within the AU. The AU is heavily dependent on donors to finance the bulk of its budget. It is currently able to finance under 30 percent of its annual operational and programmes budget. For 2015, the AU had an estimated total budget of USD 522 million, with 25.1 percent of this assessed from member states and 71.7 percent secured from and/or solicited from partners.¹⁴⁹ The AU Assembly has in the past acknowledged the “dire financial situation of the AU” and expressed concern over “the growing reliance on partner funds to finance the continental integration and development agenda”.¹⁵⁰ This situation is as a result of a number of factors. AU Member states are often late in the submission of their assessed contributions. It is estimated that in 2009 and 2010 member states arrears amounted to USD 40 and USD 43 million respectively.¹⁵¹ According to the High Level Panel constituted to explore alternative sources of financing the AU:

*Another problem is the continued dependence of the Union on five countries (Algeria, Egypt, Libya, Nigeria, and South Africa) for financing the bulk of its activities. The five countries each account for 13.272% of the Union Budget. That is, around 66.36% of the total Union budget comes from only five countries. The implication of the heavy dependence on a few countries is that failure to honour their commitments by any one of the countries could mean a serious financial trouble for the Union.*¹⁵²

In spite of its dire financial situation, a fact which it is acutely aware of, the AU continues to establish more institutions, in effect adding onto itself extra financial burden. In addition to the ACJHR, there are plans to establish an International Constitutional Court which will serve as an “advisory and jurisdictional body responsible for ensuring the respect and promotion of democratic principles, human rights and the rule of law”.¹⁵³ Plans are also underway to establish several other institutions in the coming years, including the Pan-African Intellectual Property Organization (PAIPO),¹⁵⁴ and the African Observatory on Science, Technology and Innovation.¹⁵⁵

From the discussion above, it is apparent that without the assistance of donors, the AU will not be able to adequately finance the operations of the ACJHR. Yet, some donors who have traditionally financed the AU may be reluctant to finance the Court given the inclusion of the immunity clause in the Malabo Protocol and other concerns they may have. Indeed, the European Union, has been very clear on this issue. At the November 2015 African Judicial Dialogue, the EU representative stated that:¹⁵⁶

Regarding the matter of an expanded African Court, I can reconfirm that the EU is not in a position to support the Malabo Protocol creating the additional Criminal Chamber as it includes the provision of immunity for sitting Heads of State and Senior state officials and lacks complementary with the ICC.

It is difficult at this nascent point to accurately predict the future budget and expenditure of the ACJHR. However, given the broad mandate of the Court there is no doubt that the operationalization and functioning of the Court will require vast resources. The functioning of the International Crimes Section will particularly demand significant financial and human resources. Unlike the General Affairs Section and the Human Rights Section, the International Crimes Section has different and additional resource requirements. As already envisaged in the Malabo Protocol, the International Crimes Section will be supported by a number of other organs and units, including the OTP, Defence Office, Victims and Witnesses Unit, and the Detention

¹⁴⁶ Ibid.

¹⁴⁷ See Resolution on the Establishment of a Voluntary Contribution Fund for the African Human Rights System, adopted at the 40th Ordinary Session of the African Commission on Human and Peoples' Rights, November 2006.

¹⁴⁸ Decision on the 21st Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.344 (X), para. 2(vi).

¹⁴⁹ Decision on the Budget of the African Union for the 2015 Financial Year, EX-CL/Dec.813 (XXV), para. 2(i).

¹⁵⁰ Decision on Alternative Sources of Financing the African Union, Assembly/AU/Dec.364 (XVII), paras. 3 and 4.

¹⁵¹ Progress Report for the High Level Panel on Alternative Sources of Financing the African Union, Assembly/AU/18 (XIX).

¹⁵² Progress Report of the High Level Panel on Alternative Sources of Financing the African Union, Assembly/AU/18 (XIX).

¹⁵³ Decision on the Establishment of an “International Constitutional Court”, Assembly/AU/Dec.458 (XX).

¹⁵⁴ Decision on the Creation of the Pan-African Intellectual Property Organization (PAIPO), Assembly/AU/Dec.453 (XX).

¹⁵⁵ Decision on the Creation of the African Observatory on Science, Technology and Innovation in the Republic of Equatorial Guinea, Assembly/AU/Dec.452(XX).

¹⁵⁶ ‘EU Statement at the African Judicial Dialogue, 6 November 2015, Arusha, Tanzania’ available at http://eeas.uropa.eu/delegations/african_union/documents/press_corner/eu-statement-judicial-dialogue-06-11-2015_en.pdf (accessed on 13 January 2016).

Management Unit. These organs and units will not only require staffing, but more importantly, they will also require dedicated facilities. For example, the Court is expected to maintain a detention facility and a safe house, and to bear the associated costs of keeping indictees in the detention facility and witnesses in the safe house. In addition, the ACJHR will have to be partly responsible for litigation costs before it, in keeping with the practice of international criminal courts.

The 2012 AU Commission report on the financial and structural implications of extending the jurisdiction of the ACJHR to cover international crimes estimated that at the outset the OTP will require four legal officers and two investigators.¹⁵⁷ As stated earlier, the AU Commission also projected that the entire Court would require a total of 211 staff members, including the judges, prosecutors, registrars, and defence counsels.¹⁵⁸ If the staffing levels of the ICC and other hybrid or ad hoc criminal tribunals are considered, it becomes apparent that the AU Commission grossly underestimated the funding and staffing needs of the international criminal division.

The projected staffing level of the ICC at the end of 2015 comprises 1309 total staff, including 786 established posts and 317 general temporary assistance staff.¹⁵⁹ The proposed staffing level of the ICC OTP for 2016 stands at 218 permanent staff.¹⁶⁰ In terms of the ICC Office of Public Counsel for the Defence (not a full organ of the ICC)¹⁶¹, the proposed staffing level for 2016 was 5 staff and a budget of 660,000 euros¹⁶². The ICC's Victims and Witnesses Section has a proposed staffing level in 2016 of 63 established posts and a proposed budget of 11.59 million euros.¹⁶³ In 2016, the proposed legal aid budget for the Principal Defender's Office stands at 4.8 million euros.¹⁶⁴ At the Special Court for Sierra Leone (SCSL), at its height, the Principal Defender's Office had a staff of 9, with a budget in 2007 of 4.8 million euros.¹⁶⁵

In a nutshell, the experience of the ICC and international *ad hoc* and hybrid criminal tribunals shows that hundreds of millions of dollars are required on an annual basis for the effective and smooth running of an international criminal court. The SCSL spent on average around USD 30 million per year while the ICTR reached an overall spend of nearly USD 1 billion. Since 2002 until 2016, the ICC has received approximately 1.33 billion euros in budget appropriations.¹⁶⁶ The ICC's budget for 2016 amounts to 139 million euros, with this figure (in line with the current trend) likely to increase year on year as the Court looks to reach its basic and subsequently optimal capacity. It is estimated that it will cost approximately 8 million Euros to try Hissene Habre in the Extraordinary African Chambers in Senegal. The 2012 AU Commission report on the financial and structural implications of extending the jurisdiction of the ACJHR to cover international crimes observed that the cost of trying Hissene Habre would be "the most appropriate comparative costing" for estimating the financial needs of the ACJHR.¹⁶⁷ The report further noted that "some of the envisaged trials that would not involve former Heads of State could cost significantly cheaper".¹⁶⁸

It will be important also that the ACJHR's independence and ability to fulfil its mandate is not compromised through its budget appropriation and the process through which its budget is allocated. This will require a transparent budgeting process which will enable the principals of the ACJHR to propose a budget that they

¹⁵⁷ Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, Appendix 1.

¹⁵⁸ Ibid.

¹⁵⁹ Report of the Committee on Budget and Finance on the work of its twenty fourth session, ICC-ASP/14/5 available at https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-5-ENG.pdf at p.33

¹⁶⁰ Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10 available at https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf at p.41

¹⁶¹ The Rome Statute does not provide for a defence 'organ'. However, pursuant to Regulation 77 of the ICC Regulations of the Court, the Registrar has established an 'Office of Public Counsel for Defence' which 'represents and protects the rights of the defence' amongst a number of functions. See Regulation 77(4) ICC Regulations of the Court

¹⁶² Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10 available at https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf at p. 129

¹⁶³ Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10, available at https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf (Last accessed 15 January 2016).

¹⁶⁴ Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10 available at https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf at p. 127

Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10 available at https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf at p.150

¹⁶⁵ 5th Annual Report of the Special Court for Sierra Leone, available at <http://www.rscsl.org/Documents/AnRpt5.pdf> at p. 44

¹⁶⁶ Based on budget appropriations provided in annual budget resolutions adopted by the ICC Assembly of States Parties, which provide as follows: 2002-2003: €30 893 500, 2004: € 53 071 846, 2005: € 66 784 200, 2006: € 80 417 200, 2007: € 88 871 800, 2008: € 90 382 100, 2009: €101 229 900, 2010: €103 623 300, 2011: €103 607 900, 2012: €108 800 000, 2013: €115 120 300, 2014: €121 656 200, 2015: € 130 665 600, 2016: €139 590 600. Total: €1.334.714.446

¹⁶⁷ Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, EX.CL/773(XII) Annex 2 Rev., para. 12.

¹⁶⁸ Ibid, para. 13.

require to meet the demands placed upon the Court. Looking at the ICC experience, the budgeting process is an annual one, with the principals of the Court requesting the budget they require around six months before states parties decide to adopt the Court's budget for the next year. This budget proposal includes, where possible known budgetary assumptions for the following year. Following the proposal of a budget, an independent expert body (the Committee on Budget and Finance) made up of 12 budgetary experts who are elected by states parties, reviews the budget requested by the Court and makes a report with recommendations to the Assembly of states parties thereon. States parties then decide on the budgetary appropriation at their Annual Assembly session. Such a reasonably transparent budgetary process does ensure a level of independence in the Court's operations, although it would be preferable for a long term budget process to be developed to allow the Court to reach its optimum capacity and prevent political interference during annual budget negotiations. The other crucial budgeting instrument at the ICC is the 'contingency fund' which the Court can access in the event of any unforeseen expenditures, such as those related to new or unforeseen investigations. This fund is meant to ensure that the Court can meet its demand and is also important to ensure that the Court has a measure of independence in reacting to new developments. It will be crucial that the ACJHR adopts a transparent budget process and contingency mechanism to meet unforeseen demands and unforeseen developments it will encounter.

IMPLICATIONS FOR THE AFRICAN HUMAN RIGHTS COURT

The Malabo Protocol and the decision to expand the jurisdiction of the ACJHR to cover international crimes will definitely impact on the operations and future of the African Human Rights Court.

Firstly, and as mentioned earlier, the Amended ACJHR Statute reduces the number of judges who will be responsible for human rights issues at the ACJHR. The Human Rights Court has 11 judges at present. The Human Rights Section of the ACJHR will have only five judges with specific expertise in human rights. This will significantly and adversely impact the capacity of the Human Rights Section to expeditiously adjudicate human rights cases.

Secondly, Although the Preamble to the Malabo Protocol notes "the steady growth of the African Court on Human and Peoples' Rights and the contribution it has made in protecting human and peoples' rights",¹⁶⁹ the Protocol does not provide for the transfer of judges and the registrar of the African Human Rights Court to the ACJHR. The Protocol provides that the terms and appointment of the current judges and registrar of the African Human Rights Court will terminate on the coming into force of the Malabo Protocol, although they will remain in office until the new judges are sworn in.¹⁷⁰ The Protocol also provides that the staff of the African Human Rights Court will be absorbed into the ACJHR but only for the remainder of their subsisting contracts.¹⁷¹ This runs the risk of losing the institutional history, experience and expertise of the judges in the new Court and does not allow for continuity. It will be important to allow for some continuity because the, new Court will be required to pick up the cases pending before the African Human Rights Court.¹⁷²

Thirdly, the Malabo Protocol may delay, or actually prevent, any new ratification of the African Human Rights Court Statute. A total of 27 African states have not ratified the African Protocol on the Establishment of an African Court on Human and Peoples' Rights.¹⁷³ With the expansion of the jurisdiction of the ACJHR to cover international crimes, those states which would have considered ratifying the African Human Rights Court Statute may reconsider their position. During the 2012 Meeting of Ministers of Justice and Attorneys General, state representatives proposed that "States should be allowed to choose which instrument or section of the Court to belong to",¹⁷⁴ an indication that some states were not willing to be party to a Court with an expanded jurisdiction covering international crimes. This proposal was not taken on board as the Legal Counsel explained that allowing states to pick which section of the Court to belong to was not advisable

¹⁶⁹ Malabo Protocol, Preamble, para. 6.

¹⁷⁰ Malabo Protocol, Article 4 and 7(1).

¹⁷¹ Malabo Protocol, Article 7(2).

¹⁷² Malabo Protocol, Article 6.

¹⁷³ For the list of countries that have ratified the African Human Rights Court Protocol see http://www.au.int/en/sites/default/files/treaties/7778-sl-achpr_1.pdf (Last accessed on 7 January 2016).

¹⁷⁴ Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, 14 and 15 May 2012, Addis Ababa, Ethiopia, Min/Legal/Rpt., para. 17(iv).

and would result in “many technical and practical difficulties based on the proposed number and deployment of judges within the Court”.¹⁷⁵ Thus, in the end, the Malabo Protocol provides states with “an all-or-nothing option”.¹⁷⁶ As a commentator observed when the first draft of the Amended ACJHR Protocol and Statute was adopted in 2012: “When it is faced with an all-or-nothing choice, a state that would be attuned to the protection of human rights or its obligations under the ICC Statute, may decide not to ratify the Amending Court Protocol at all, due to its reticence to accept a court that deals with international criminal justice issues”.¹⁷⁷

On a positive note, the Malabo Protocol provides that the seat of the ACJHR would be the seat of the existing African Human Rights Court (Arusha, Tanzania).¹⁷⁸ This has the advantage of increasing the ability for the African Human Rights Court to leave a legacy in terms of human rights, as documentation will be available to the ACJHR. This is important because the potential exists that the legacy of the African Human Rights Court and any experience it has attained will be lost in the process of transition to a Court with a broader mandate.

IMPLICATIONS FOR INDIVIDUALS AND CIVIL SOCIETY ORGANISATIONS

The expansion of the mandate of the ACJHR to include international crimes has impacted negatively on the ability of individuals and CSOs to access the ACJHR. Presently, the African Human Rights Court “may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the [African] Commission, and individuals to institute cases directly before it”, and if the state against which the case is lodged has made a declaration allowing NGOs and individuals to file cases against it.¹⁷⁹ This provision has been criticised for its restrictive approach to limiting cases from NGOs and individuals, and which in part explains the rather limited docket so far of the African Human Rights Court.

The Amended ACJHR Statute is even more restrictive. It allows only “African individuals or African Non-governmental organisations with observer status with the African Union or its organs or institutions” to cases or applications before the ACJHR.¹⁸⁰ ‘African NGOs’ are defined in the Protocol as ‘Non-governmental Organizations at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council’.¹⁸¹ Whether international NGOs would fall within this definition is debatable and concerning. ‘African individuals’ are not defined in the preamble. In addition to potentially preventing foreign nationals and NGOs from accessing the Court, this personal jurisdiction or standing issue also risks having implications on the material jurisdiction of the Court in cases raising extra-territorial obligations and violations questions.

The Amended ACJHR Statute further limits the range of actors who may request an advisory opinion from the ACJHR. At present, in addition to state parties and AU organs and institutions, ‘any African organization recognized by the OAU’ may request an advisory opinion from the African Human Rights Court. ‘Any African organization recognised by the OAU’ has been interpreted to include NGOs with observer status with the African Commission and several such NGOs have requested for an advisory opinion from the African Human Rights Court. Article 53 of the Amended ACJHR Statute provides that:

The Court may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions or any other organ of the Union as may be authorized by the Assembly.

In essence, only AU organs and institutions will be allowed to seek for an advisory opinion under the Malabo Protocol. NGOs have lost the access they enjoyed before the African Human Rights Court.

¹⁷⁵ Ibid, para. 18(ii).

¹⁷⁶ F Viljoen “AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol”, available at <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/> (Last accessed on 7 January 2016).

¹⁷⁷ Ibid.

¹⁷⁸ Amended ACJHR Statute, Article 25.

¹⁷⁹ Protocol on the Establishment of the African Court on Human and Peoples’ Rights, Articles 5 and 34(6).

¹⁸⁰ Amended ACJHR Statute, Article 30(f).

¹⁸¹ Malabo Protocol, Article 1.

5. CONCLUSIONS AND RECOMMENDATIONS

Amnesty International welcomes all efforts to bring an end to impunity for crimes under international law and believes that CSOs should engage with the Malabo Protocol with this spirit. However, there are a number of concerns arising from the expansion of the jurisdiction of the ACJHR to include crimes under international law and transnational crimes that should be prioritised by the AU to ensure an effective court. Citizens and CSOs from across the continent should engage with the AU to ensure that the ACJHR is the most effective possible court and that if it is granted criminal jurisdiction that it has the strongest possible statute and institutional support to ensure that it is effective in bringing suspects to fair trials.

The proposed expansion of the jurisdiction of the ACJHR will have significant legal and institutional implications for a range of actors involved in issues of international justice in Africa. With a jurisdiction covering three areas of international law, it is doubtful whether the ACJHR as envisaged under the Malabo Protocol with 16 judges will have the capacity to effectively and efficiently deliver on its mandate. It is also unclear whether the AU will have the requisite resources to operationalize and sustain an efficient ACJHR. The AU must carefully reflect on how it would ensure that the operations of the Court do not stall on account of lack of financial and human resources. The immunity clause included in the Malabo Protocol violates international consensus and practice by providing immunities to heads of states and government and by going further even and providing immunity to “senior state officials.” The immunity clause stands to bring the whole statute into disrepute as it will be portrayed (and may indeed have been intended) as a way to protect senior politicians from accountability for their crimes.

In addition, the Malabo Protocol may have a deleterious effect on the human rights jurisdiction of the Court. For example the Malabo Protocol may delay, or actually prevent, any new ratification of the African Human Rights Court Statute. In the Malabo Protocol and the Amended ACJHR Statute, AU member states have also introduced amendments that will likely restrict the ability of international NGOs with a presence in Africa from accessing the ACJHR.

TO MEMBER STATES OF THE AFRICAN UNION

- Carefully study and take note of the implications and concerns outlined in this policy brief when considering whether or not to sign or ratify the Malabo Protocol;
- Amend Article 46A *bis* of the Amended ACJHR Statute on immunities to ensure it complies with international standards. In particular, the immunities granted to AU heads of state and other senior officials should be repealed and replaced by a provision indicating that official capacity of a person shall not bar the ACJHR from exercising its jurisdiction over such a person;
- Enter reservations to Article 46A *bis* in the event that the provision is not amended to comply with international standards;

- Amend Article 28G on terrorism to ensure it conforms with the principle of legality, which requires laws to be clear and accessible and for their application in practice to be sufficiently foreseeable;
- Amend Article 30(f) of the ACJHR Statute which limits the range of civil society organisations which can access the ACJHR to African individuals or African NGOs;
- For those AU member states who have not done so, ratify the Protocol on the Establishment of an African Court on Human and Peoples' Rights. At the time of ratifying the Protocol, they should make a declaration, pursuant to Article 34(6) of the Protocol, accepting the competence of the African Court on Human and Peoples' Rights to receive petitions from individuals and NGOs. State parties to the Protocol who have not made the declaration should do so at the earliest opportunity;
- Establish a "Committee on Nominations", if and when the Malabo Protocol comes into force, to independently review and interview judicial candidates at every ACJHR judicial election. The Committee should be composed of an odd number of individuals with vast experience in the three areas covered under the jurisdiction of the ACJHR. The members of this Committee should serve in their personal capacity;
- Adopt a transparent budgeting appropriation and allocation process for the ACJHR to ensure its independence and ability to fulfil its mandate is not compromised.

TO THE AFRICAN UNION LEGAL COUNSEL

- Recommend to the AU Executive Council and Assembly the amendment of Articles 28G, 46A *bis*, 30(f) of the Amended ACJHR Statute;
- Prepare and issue a formal document reflecting and consolidating all the amendments introduced by the Malabo Protocol and the Amended ACJHR Statute; and
- Conduct an independent review of the legal and institutional implications of the Malabo Protocol and advise the AU member states accordingly.

TO CIVIL SOCIETY ORGANISATIONS

- Advocate for the repeal of Articles 28G, 30(f) and 46A *bis* of the Amended ACJHR Statute;
- Develop national sensitisation campaigns around the proposed ACJHR with an expanded jurisdiction as well as around the African Court on Human and Peoples' Rights;
- Continue to work to strengthen the African Court on Human and Peoples' Rights by submitting cases to the Court in order to build up its body of jurisprudence, and campaigning for the universal ratification of the Protocol on the Establishment of an African Court on Human and Peoples' Rights.

ANNEX I

PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS (AS AMENDED BY THE MALABO PROTOCOL)

UNOFFICIAL VERSION*

CHAPTER I GENERAL PROVISIONS

Article 1 Definitions

In this Protocol:

- “**Assembly**” means the Assembly of Heads of State and Government of the African Union;
- “**Chairperson**” means the Chairperson of the Assembly;
- “**Charter**” means the African Charter on Human and Peoples’ Rights;
- “**Commission**” means the Commission of the African Union;
- “**Court**” means the African Court of Justice and Human and Peoples’ Rights;
- “**Member State**” means a Member State of the Union;
- “**President**” means the President of the Court;
- “**Protocol**” means the Protocol on the Statute of the African Court of Justice and Human Rights;
- “**Single Court**” has the same meaning as the Court;
- “**Statute**” means the present Statute;
- “**Union**” means the African Union established by the Constitutive Act of the African Union;
- “**Vice President**” means the Vice President of the Court.

Article 2 Organs of the Court

The Court shall be composed of the following organs:

1. The Presidency;
2. The Office of the Prosecutor;
3. The Registry;
4. The Defence Office.

Article 3 Jurisdiction of the Court

1. The Court is vested with an original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the Statute annexed hereto.
2. The Court has jurisdiction to hear such other matters or appeals as may be referred to it in any other agreements that the Member States or the Regional Economic Communities or other international organizations recognized by the African Union may conclude among themselves, or with the Union.

Article 4 Relationship between the Court and the African Commission on Human and Peoples’ Rights

The Court shall, in accordance with the Charter and this Protocol, complement the protective mandate of the African Commission on Human and Peoples’ Rights.

* The Preamble to the Protocol has been omitted. The Amended Protocol does not have Article 24. This was deleted but was not replaced with a new provision. The renumbering of the subsequent provisions of the Protocol was not provided.

CHAPTER II TRANSITIONAL PROVISIONS

Article 4

Term of Office of the Judges of the African Court on Human and Peoples' Rights

1. Upon the coming into force of the Protocol on the Statute of the African Court of Justice and Human Rights, the terms and appointment of the Judges of the African Court on Human and Peoples' Rights shall terminate.
2. Without prejudice to paragraph 1, the Judges of the African Court on Human and Peoples' Rights shall remain in office until the judges of the African Court of Justice and Human and Peoples' Rights are sworn in.

Article 6

Pending Cases

At the entry into force of this Protocol, where any matter affecting any State had already been commenced before either the African Court on Human and Peoples' Rights or the African Court of Justice and Human Rights, if in force, such a matter shall be continued before the relevant Section of the African Court of Justice and Human and Peoples' Rights, pursuant to such Rules as may be made by the Court.

Article 6*bis*

Temporary Jurisdiction

At the entry into force of this Protocol, until a Member State ratifies it, any jurisdiction which has hitherto been accepted by such Member State with respect to either the African Court on Human and Peoples' Rights or the African Court of Justice and Human Rights shall be exercisable by this Court.

Article 7

Registry of the Court

1. The Registrar of the African Court on Human and Peoples' Rights shall remain in office until the appointment of a new Registrar for the African Court of Justice and Human and Peoples' Rights.
2. The staff of the African Court on Human and Peoples' Rights shall be absorbed into the Registry of the African Court of Justice and Human and Peoples' Rights, for the remainder of their subsisting contracts of employment.

CHAPTER III FINAL PROVISIONS

Article 8

Nomenclature

In the Protocol and the Statute wherever it occurs "African Court of Justice and Human Rights" is deleted and replaced with "African Court of Justice and Human and Peoples' Rights."

Article 9

Signature, Ratification and Accession

1. This Protocol and the Statute annexed to it shall be open for signature, ratification or accession by Member States, in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession to this Protocol and the Statute annexed to it shall be deposited with the Chairperson of the Commission.
3. Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30 (f).

Article 10

Depository Authority

1. This Protocol and the Statute annexed to it, drawn up in four (4) original texts in the Arabic, English, French and Portuguese languages, all four (4) texts being equally authentic, shall be deposited with the Chairperson of the Commission, who shall transmit a certified true copy to the Government of each Member State.

2. The Chairperson of the Commission, shall notify all Member States of the dates of deposit of the instruments of ratification or accession, and shall, upon the entry into force of this Protocol, register the same with the Secretariat of the United Nations.

Article 11
Entry into force

1. This Protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of instruments of ratification by fifteen (15) Member States.
2. For each Member State which shall accede to it subsequently, this Protocol and Annexed Statute shall enter into force on the date on which the instruments of ratification or accession are deposited.
3. The Chairperson of the Commission shall notify all Member States of the entry into force of this Protocol.

Article 12
Amendments

1. This Protocol and the Statute annexed to it may be amended if a State Party to the Protocol makes a written request to that effect to the Chairperson of the Commission. The Assembly may adopt, by simple majority, the draft amendment after all the States parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment.
2. The Court shall also be entitled to propose such amendments to the present Protocol or the Statute annexed to it as it may deem necessary, through the Chairperson of the Commission.
3. The amendments shall come into force for each State Party which has accepted it thirty (30) days after the Chairperson of the Commission has received notice of the acceptance.

ANNEX

STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS (AS AMENDED)

CHAPTER I GENERAL PROVISIONS

Article 1 Definitions

In this Statute:

“**African Charter**” means the African Charter on Human and Peoples’ Rights;

“**African Commission**” means the African Commission on Human and Peoples’ Rights;

“**African Committee of Experts**” means the African Committee of Experts on the Rights and Welfare of the Child;

“**African Intergovernmental Organisations**” means an organisation that has been established with the aim of ensuring socio-economic integration, and to which some Member States have ceded certain competences to act on their behalf, as well as other sub-regional, regional or inter-African Organisations;

“**African Non-Governmental Organizations**” means Non-Governmental Organizations at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council;

“**Agent**” means a person mandated in writing to represent a party in a case before the Court;

“**Assembly**” means the Assembly of Heads of State and Government of the Union;

“**Chairperson**” means the Chairperson of the Commission;

“**Chamber(s)**” means a Chamber established in accordance with Article 19 of the Statute.

“**Child**” means any person under eighteen years of age;

“**Constitutive Act**” means the Constitutive Act of the African Union;

“**Commission**”: means the Commission of the Union;

“**Court**” means the African Court of Justice and Human and Peoples Rights;

“**Executive Council**” means the Executive Council of Ministers of the Union;

“**Full Court**” means the three Sections of the Court sitting together in plenary;

“**Human Rights Section**” means the Human and Peoples’ Rights Section of the Court;

“**Judge**” means a judge of the Court;

“**Member State**” means a Member State of the Union;

“**National Human Rights Institutions**” means public institutions established by a state to promote and protect human rights;

“**Person**” means a natural or legal person;

“**President**” means the President of the Court unless otherwise specified;

“**Protocol**” means the Protocol to the Statute of the African Court of Justice and Human Rights;

“**Registrar**” means the person appointed as such in accordance with Article 22 (4) of the Statute;

“**Rules**” means the Rules of the Court;

“**Section**” means the General Affairs or Human and Peoples’ Rights or International Criminal Law Section of the Court;

“**Senior Judge**” means the person defined as such in the Rules of Court;

“**States Parties**” means Member States, which have ratified or acceded to this Protocol;

“**Statute**” means the Statute of the African Court of Justice and Human and Peoples Rights;

“**Union**” means the African Union established by the Constitutive Act;

“**Vice President**” means the Vice President of the Court.

Article 2 Functions of the Court

1. The African Court of Justice and Human Rights shall be the main judicial organ of the African Union.
2. The Court shall be constituted and function in accordance with the provisions of the present Statute.

CHAPTER II ORGANIZATION OF THE COURT

Article 3 Composition

1. The Court shall consist of sixteen (16) Judges who are nationals of States Parties. Upon recommendation of the Court, the Assembly, may, review the number of Judges.
2. The Court shall not, at any one time, have more than one judge from a single Member State.
3. Each geographical region of the Continent, as determined by the Decisions of the Assembly shall, where possible, be represented by three (3) Judges except the Western Region which shall have four (4) Judges.
4. The Assembly shall ensure that there is equitable gender representation in the Court.

Article 4 **Qualifications of Judges**

The Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law.

Article 5 **Presentation of Candidates**

1. As soon as the Protocol to this Statute enters into force, the Chairperson of the Commission shall invite each State Party to submit, in writing, within a period of ninety (90) days, candidatures to the post of judge of the Court.
2. Each State Party may present up to two (2) candidates and shall take into account equitable gender representation in the nomination process.

Article 6 **List of candidates**

1. For the purpose of election, the Chairperson of the Commission shall establish three (3) alphabetical lists of candidates presented as follows:
 - i List A containing the names of candidates having recognized competence and experience in International law;
 - ii List B containing the names of candidates having recognized competence and experience in international human rights law and international humanitarian law; and
 - iii List C containing the names of candidates having recognized competence and experience in international criminal law.
2. States Parties that nominate candidates possessing the competences required on the three (3) lists shall choose the list on which their candidates may be placed.
3. At the first election, five (5) judges each shall be elected from amongst the candidates on lists A and B, and six (6) judges shall be elected from amongst the candidates of list C respectively.
4. The Chairperson of the Commission shall communicate the three lists to Member States, at least thirty (30) days before the Ordinary Session of the Assembly or of the Council during which the elections shall take place

Article 7 **Election of judges**

1. The Judges shall be elected by the Executive Council, and appointed by the Assembly.
2. They shall be elected through secret ballot by a two-thirds majority of Member States with voting rights, from among the candidates provided for in Article 6 of this Statute.
3. Candidates who obtain the two-thirds majority and the highest number of votes shall be elected. However, if several rounds of election are required, the candidates with the least number of votes shall withdraw.
4. The Assembly shall ensure that in the Court as a whole there is equitable representation of the regions and the principal legal traditions of the Continent.
5. In the election of the Judges, the Assembly shall ensure that there is equitable gender representation.

Article 8 **Term of Office**

1. The Judges shall be elected for a single, non-renewable term of nine (9) years. The terms of office of five (5) of the judges elected at the first election shall end after three (3) years, and the terms of another five (5) of the judges shall end after six (6) years.

2. The Judges whose term of office shall end after the initial periods of three (3) and six (6) years shall be determined by lot drawn by the Chairperson of the Assembly or the Executive Council, immediately after the first election.
3. A Judge elected to replace another whose term of office has not expired shall complete the term of office of his or her predecessor.
4. All the Judges, except the President and the Vice President, shall perform their functions on a part-time basis.
5. The Assembly shall, on the recommendation of the Court, decide the time when all the Judges of the Court shall perform their functions on a full time basis.

Article 9 **Resignation, Suspension and Removal from Office**

1. A Judge may resign his/her position in writing addressed to the President for transmission to the Chairperson of the Assembly through the Chairperson of the Commission.
2. A Judge shall not be suspended or removed from office save, where, on the recommendation of two-thirds majority of the other members, he/she no longer meets the requisite conditions to be a Judge.
3. The President shall communicate the recommendation for the suspension or removal of a Judge to the Chairperson of the Assembly through the Chairperson of the Commission.
4. Such a recommendation of the Court shall become final upon its adoption by the Assembly.

Article 10 **Vacancies**

1. A vacancy shall arise in the Court under the following circumstances:
 - a. Death;
 - b. Resignation;
 - c. Removal from office.
2. In the case of death or resignation of a Judge, the President shall immediately inform the Chairperson of the Assembly through the Chairperson of the Commission in writing, who shall declare the seat vacant.
3. The same procedure and consideration for the election of a Judge shall also be followed in filling the vacancies.

Article 11 **Solemn Declaration**

1. After the first election, the Judges shall, at the first session of the Court and in the presence of the Chairperson of the Assembly, make a Solemn Declaration as follows:
 "I ... do solemnly swear (or affirm or declare) that I shall faithfully exercise the duties of my office as Judge of the African Court of Justice and Human Rights of the African Union impartially and conscientiously, without fear or favour, affection or ill will and that I will preserve the integrity of the Court.
2. The Chairperson of the Assembly or his/her duly authorized representative shall administer the Solemn Declaration.
3. Subsequently, the Solemn Declaration shall be made before the President of the Court.

Article 12 **Independence**

1. The independence of the judges shall be fully ensured in accordance with international law.
2. The Court shall act impartially, fairly and justly.
3. In performance of the judicial functions and duties, the Court and its Judges shall not be subject to the direction or control of any person or body.

Article 13 **Conflict of Interest**

1. Functions of a Judge are incompatible with all other activities, which might infringe on the need for independence or impartiality of the judicial profession. In case of doubt, the Court shall decide.
2. A Judge shall not exercise the function of agent, or counsel, or lawyer in any case before the Court.

Article 14 **Conditions Governing the Participation of Members in the Settlement of a Specific Case**

1. Where a particular judge feels he/she has a conflicting interest in a particular case, he/she shall so declare. In any event, he/she shall not participate in the settlement of a case for which he/she was previously involved as agent, counsel or lawyer of one of the parties, or as a member of a national or international Court or Tribunal, or a Commission of enquiry or in any other capacity.
2. If the President considers that a Judge should not participate in a particular case, he/she shall notify the judge concerned. Such notification from the President shall, after agreement by the Court, exclude that Judge from participating in that particular case.
3. A Judge of the nationality of a State Party to a case before the full Court or one of its Sections shall not have the right to sit on the case.
4. Where there is doubt on these points, the Court shall decide.

Article 15 **Privileges and Immunities**

1. The Judges shall enjoy, from the time of their election and throughout their term of office, the full privileges and immunities extended to diplomatic agents in accordance with international law.
2. The Judges shall be immune from legal proceedings for any act or omission committed in the discharge of their judicial functions.
3. The Judges shall continue, after they have ceased to hold office, to enjoy immunity in respect of acts performed by them when engaged in their official capacity.

Article 16 **Structure of the Court**

1. The Court shall have three (3) Sections: a General Affairs Section, a Human and Peoples' Rights Section and an International Criminal Law Section.
2. The International Criminal Law Section of the Court shall have three (3) Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.
3. The allocation of Judges to the respective Sections and Chambers shall be determined by the Court in its Rules.

Article 17 **Assignment of matters to Sections of the Court**

1. The General Affairs Section shall be competent to hear all cases submitted under Article 28 of the Statute except those assigned to the Human and Peoples' Rights Section and the International Criminal Law Section as specified in this Article.
2. The Human and Peoples' Rights Section shall be competent to hear all cases relating to human and peoples' rights.
3. The International Criminal Law Section shall be competent to hear all cases relating to the crimes specified in this Statute."

Article 18 **Revision and Appeals**

1. In the case of the General Affairs Section and the Human and People's Rights Section, a revision of a judgement shall be made in terms of the provisions of Article 48.
2. In the case of the International Criminal Law Section, a decision of the Pre-Trial Chamber or the Trial Chamber may be appealed against by the Prosecutor or the accused, on the following grounds:
 - a) A procedural error;
 - b) An error of law;
 - c) An error of fact.
3. An appeal may be made against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction.
4. The Appellate Chamber may affirm, reverse or revise the decision appealed against. The decision of the Appellate Chamber shall be final."

Article 19 **Chambers of the Court**

1. The General Affairs Section, Human and Peoples' Rights Section or International Criminal Law Section may, at any time, constitute one or more Chambers in accordance with the Rules of Court.
2. A Judgment given by any Chamber shall be considered as rendered by the Court."

Article 19 Bis **Powers and Functions of the Chambers of the International Criminal Law Section**

1. The Pre-Trial Chamber shall exercise the functions provided for in Article 46F of this Statute.
2. In addition, the Pre-Trial Chamber may also at the request of the Prosecutor issue such orders and warrants as may be required for an investigation or prosecution.
3. The Pre-Trial Chamber may issue such orders as may be required to provide for the protection and privacy of witnesses and victims, the presentation of evidence and the protection of arrested persons.
4. The Trial Chamber shall conduct trials of accused persons in accordance with this Statute and the Rules of Court.
5. The Trial Chamber shall receive and conduct appeals from the Pre-Trial Chamber in accordance with Article 18 of this Statute.
6. The Appeals Chamber shall receive and conduct appeals from the Trial Chamber in accordance with Article 18 of this Statute.”

Article 20 Sessions

1. The Court shall hold ordinary and extraordinary sessions.
2. The Court shall decide each year on the periods of its ordinary sessions.
3. Extraordinary sessions shall be convened by the President or at the request of the majority of the Judges.

Article 21 Quorum

1. The General Affairs Section of the Court shall be duly constituted by three (3) judges.
2. The Human and Peoples’ Rights Section of the Court shall be duly constituted by three (3) judges.
3. The Pre-Trial Chamber of the International Criminal Law Section of the Court shall be duly constituted by one (1) judge.
4. The Trial Chamber of the International Criminal Law Section of the Court shall be duly constituted by three (3) judges.
5. The Appellate Chamber of the International Criminal Law Section of the Court shall be duly constituted by five (5) judges.

Article 22 Presidency and Vice-Presidency

1. At its first ordinary session after the election of the Judges, the Full Court shall elect a President and a Vice President of the Court.
2. The President and Vice President shall serve for a period of two (2) years, and may be re-elected once.
3. The President and Vice President shall, in consultation with the Members of the Court and as provided for in the Rules of Court, assign Judges to the Sections.
4. The President shall preside over all sessions of the Full Court. In the event of the President being unable to sit during a session, the session shall be presided over by the Vice President.
5. The President and Vice President shall reside at the seat of the Court.”

Article 22A The Office of the Prosecutor

1. The Office of the Prosecutor shall comprise a Prosecutor and two Deputy Prosecutors.
2. The Prosecutor and Deputy Prosecutors shall be elected by the Assembly from amongst candidates who shall be nationals of States Parties nominated by States Parties.
3. The Prosecutor shall serve for a single, non-renewable term of seven (7) years.
4. The Deputy Prosecutors shall serve for a term of four (4) years, renewable once.
5. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the conduct of investigations, trial and prosecution of criminal cases.
6. The Office of the Prosecutor shall be responsible for the investigation and prosecution of the crimes specified in this Statute and shall act independently as a separate organ of the Court and shall not seek or receive instructions from any State Party or any other source.
7. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses and collect evidence, including the power to conduct on-site investigations.
8. The Prosecutor shall be assisted by such other staff as may be required to perform the functions of the Office of the Prosecutor effectively and efficiently.
9. The staff of the Office of the Prosecutor shall be appointed by the Prosecutor in accordance with the Staff Rules and Regulations of the African Union.
10. The remuneration and conditions of service of the Prosecutor and Deputy Prosecutors shall be determined by the Assembly on the recommendation of the Court made through the Executive Council.”

Article 22B

The Registry

1. The Registry shall comprise of a Registrar and three Assistant Registrars.
2. The Court shall appoint the Registrar and Assistant Registrars, in accordance with the Staff Rules and Regulations of the African Union.
3. The Registrar shall serve for a single, non-renewable term of seven years.
4. The Assistant Registrars shall serve for a term of four (4) years, renewable once.
5. The Registry shall be headed by a Registrar who, under the direction of the President, shall be responsible for the non-judicial aspects and servicing of the Court. The Registrar shall be the principal administrative and accounting officer of the Court, and shall ensure that proper books of accounts are kept in accordance with the financial rules and regulations of the African Union.
6. The Registrar and Assistant Registrars shall be persons of high moral character, be highly competent in and have extensive practical managerial experience.
7. The Registry shall be assisted by such other staff as may be necessary for the effective and efficient performance of the functions of the Registry.
8. The staff of the Registry shall be appointed by the Court in accordance with the Staff Rules and Regulations of the African Union.
9. The Registrar shall set up, within the Registry:
 - a) A Victims and Witnesses Unit, which shall provide, in consultation with the Court and the Office of the Prosecutor, as appropriate, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in the management of trauma.
 - b) A Detention Management Unit, which shall manage the conditions of detention of suspects and accused persons.
10. The salaries and conditions of service of the Registrar, Assistant Registrars and other staff of the Registry shall be determined by the Assembly on the proposal of the Court, through the Executive Council.

Article 22C

The Defence Office

1. The Court shall establish, maintain and develop a Defence Office for the purpose of ensuring the rights of suspects and accused and any other person entitled to legal assistance.
2. The Defence Office, which may also include one or more public defenders, shall act independently as a separate organ of the Court. It shall be responsible for protecting the rights of the defence, providing support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Chamber in respect of specific issues.
3. The Defence Office shall ensure that there are adequate facilities to defence counsel and persons entitled to legal assistance in the preparation of a case, and shall provide any additional assistance ordered by a Judge or Chamber.
4. The Defence Office shall be headed by a Principal Defender, who shall be appointed by the Assembly, and shall be a person of high moral character and possess the highest level of professional competence and extensive experience in the defence of criminal cases. He shall be admitted to the practice of law in a recognised jurisdiction and shall have practised criminal law before a national or international criminal court for a minimum of ten years.
5. The Principal Defender shall, in order to ensure that the fair trial rights of suspects and accused are protected, adopt such regulations and practice directions as may be necessary to effectively carry out the functions of the Defence Office.
6. The Principal Defender shall be assisted by such other staff as maybe required to perform the functions of the Defence Office effectively and efficiently. The staff of the Defence Office shall be appointed by the Principal Defender in accordance with the Staff Rules and Regulations of the African Union.
7. The Principal Defender shall, for all purposes connected with pre-trial, trial and appellate proceedings, enjoy equal status with the Prosecutor in respect of rights of audience and negotiations *inter partes*.
8. At the request of a Judge or Chamber, the Registry, Defence or where the interests of justice so require, *proprio motu*, the Principal Defender or a person designated by him shall have rights of audience in relation to matters of general interest to defence teams, the fairness of the proceedings or the rights of a suspect or accused.

Article 23

Remuneration of Judges

1. The President and the Vice-President shall receive an annual salary and other benefits.
2. The other Judges shall receive a sitting allowance for each day on which he/she exercises his/her functions.
3. These salaries, allowances and compensation shall be determined by the Assembly, on the proposal of the Executive Council. They may not be decreased during the term of office of the Judges.

4. Regulations adopted by the Assembly on the proposal of the Executive Council shall determine the conditions under which retirement pensions shall be given to the Judges as well as the conditions under which their travel expenses shall be paid.
5. The above-mentioned salaries, allowances and compensation shall be free from all taxation.

Article 25
Seat and Seal of the Court

1. The Seat of the Court shall be same as the Seat of the African Court on Human and Peoples' Rights. However, the Court may sit in any other Member State, if circumstances warrant, and with the consent of the Member State concerned. The Assembly may change the seat of the Court after due consultations with the Court.
2. The Court shall have a seal bearing the inscription "The African Court of Justice and Human Rights"

Article 26
Budget

1. The Court shall prepare its draft annual budget and shall submit it to the Assembly through the Executive Council.
2. The budget of the Court shall be borne by the African Union.
3. The Court shall be accountable for the execution of its budget and shall submit report thereon to the Executive Council in conformity with the Financial Rules and Regulations of the African Union.

Article 27
Rules of Court

1. The Court shall adopt rules for carrying out its functions and the implementation of the present Statute. In particular, it shall lay down its own Rules.
2. In elaborating its Rules, the Court shall bear in mind the complementarity it maintains with the African Commission and the African Committee of Experts.

CHAPTER III
COMPETENCE OF THE COURT

Article 28
Jurisdiction of the Court

The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:

- a) the interpretation and application of the Constitutive Act;
- b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;
- c) the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;
- d) The crimes contained in this Statute, subject to a right of appeal.
- e) any question of international law;
- f) all acts, decisions, regulations and directives of the organs of the Union;
- g) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;
- h) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
- i) the nature or extent of the reparation to be made for the breach of an international obligation.

Article 28A
International Criminal Jurisdiction of the Court

1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder:
 - 1) Genocide
 - 2) Crimes Against Humanity
 - 3) War Crimes
 - 4) The Crime of Unconstitutional Change of Government;

- 5) Piracy
 - 6) Terrorism
 - 7) Mercenarism
 - 8) Corruption
 - 9) Money Laundering
 - 10) Trafficking in Persons
 - 11) Trafficking in Drugs
 - 12) Trafficking in Hazardous Wastes
 - 13) Illicit Exploitation of Natural Resources
 - 14) The Crime of Aggression
2. The Assembly may extend upon the consensus of States Parties the jurisdiction of the Court to incorporate additional crimes to reflect developments in international law.
 3. The crimes within the Jurisdiction of the Court shall not be subject to any statute of limitations.

Article 28B Genocide

For the purposes of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group;
- f) Acts of rape or any other form of sexual violence.

Article 28C Crimes Against Humanity

1. For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack or enterprise directed against any civilian population, with knowledge of the attack or enterprise:
 - a) Murder;
 - b) Extermination;
 - c) Enslavement;
 - d) Deportation or forcible transfer of population;
 - e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - f) Torture, cruel, inhuman and degrading treatment or punishment;
 - g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;
 - i) Enforced disappearance of persons;
 - j) The crime of apartheid;
 - k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.
2. For the purpose of paragraph 1:
 - a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

- e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Article 28D War Crimes

For the purposes of this Statute, 'war crimes' means any of the offences listed, in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.

- a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - i) Wilful killing;
 - ii) Torture or inhuman treatment, including biological experiments;
 - iii) Wilfully causing great suffering, or serious injury to body or health;
 - iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - vii) Unlawful deportation or transfer or unlawful confinement;
 - viii) Taking of hostages.
- b) Grave breaches of the First Additional Protocol to the Geneva Conventions of 8 June 1977 and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - v) Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated;
 - vi) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - vii) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - viii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - ix) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

- x) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - xi) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - xii) Killing or wounding treacherously individuals belonging to the hostile nation or army;
 - xiii) Declaring that no quarter will be given;
 - xiv) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
 - xv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
 - xvi) Compelling the nationals of the hostile party to take part in the operations of war directed against their own State, even if they were in the belligerent's service before the commencement of the war;
 - xvii) Pillaging a town or place, even when taken by assault;
 - xviii) Employing poison or poisoned weapons;
 - xix) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - xx) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - xxi) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict
 - xxii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - xxiii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - xxiv) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - xxv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - xxvi) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - xxvii) Conscripting or enlisting children under the age of eighteen years into the national armed forces or using them to participate actively in hostilities;
 - xxviii) Unjustifiably delaying the repatriation of prisoners of war or civilians;
 - xxix) Wilfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.
 - xxx) Making non-defended localities and demilitarised zones the object of attack;
 - xxxi) Slavery and deportation to slave labour;
 - xxxii) Collective punishments;
 - xxxiii) Despoliation of the wounded, sick, shipwrecked or dead;
- c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - iii) Taking of hostages;
 - iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- d) Paragraph c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

- iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - v) Pillaging a town or place, even when taken by assault;
 - vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - vii) Conscripting or enlisting children under the age of eighteen years into armed forces or groups or using them to participate actively in hostilities;
 - viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - ix) Killing or wounding treacherously a combatant adversary;
 - x) Declaring that no quarter will be given;
 - xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
 - xiii) Employing poison or poisoned weapons;
 - xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - xvi) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies;
 - xvii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - xviii) Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage;
 - xix) Making non-defended localities and demilitarised zones the object of attack;
 - xx) Slavery;
 - xxi) Collective punishments;
 - xxii) Despoliation of the wounded, sick, shipwrecked or dead.
- f) Paragraph e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
- g) Using nuclear weapons or other weapons of mass destruction

Article 28E **The Crime of Unconstitutional Change of Government**

1. For the purposes of this Statute, 'unconstitutional change of government' means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:
 - a) A putsch or coup d'état against a democratically elected government;
 - b) An intervention by mercenaries to replace a democratically elected government;
 - c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
 - d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
 - e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;

- f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.
2. For purposes of this Statute, “democratically elected government” has the same meaning as contained in AU instruments.

Article 28F Piracy

Piracy consists of any of the following acts:

- a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private boat, ship or a private aircraft, and directed:
 - i on the high seas, against another boat, ship or aircraft, or against persons or property on board such boat, ship or aircraft;
 - ii against a boat, ship, aircraft, persons or property in a place outside the jurisdiction of any State
- b) any act of voluntary participation in the operation of a boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft;
- c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 28G Terrorism

For the purposes of this Statute, ‘terrorism’ means any of the following acts:

- A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
 - 1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
 - 2. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
 - 3. create general insurrection in a State.
- B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to (3).
- C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.
- D. The acts covered by international Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.
- E. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.

Article 28H Mercenarism

For the purposes of this Statute:

- a) A mercenary is any person who:
 - i Is specially recruited locally or abroad in order to fight in an armed conflict;
 - ii Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;
 - iii Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - iv Is not a member of the armed forces of a party to the conflict; and
 - v Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
- b) A mercenary is also any person who, in any other situation:
 - i Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - 1. Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;
 - 2. Assisting a government to maintain power;

- 3. Assisting a group of persons to obtain power; or
- 4. Undermining the territorial integrity of a State;
- ii Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;
- iii Is neither a national nor a resident of the State against which such an act is directed;
- iv Has not been sent by a State on official duty; and
- v Is not a member of the armed forces of the State on whose territory the act is undertaken.
- c) Any person who recruits, uses, finances or trains mercenaries, as defined in paragraph (1) (a) or (b) above commits an offence.
- d) A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence.

Article 28I Corruption

1. For the purposes of this Statute, the following shall be deemed to be acts of corruption if they are of a serious nature affecting the stability of a state, region or the Union:
 - a) The solicitation or acceptance, directly or indirectly, by a public official, his/her family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
 - b) The offering or granting, directly or indirectly, to a public official, his/her family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
 - c) Any act or omission in the discharge of his or her duties by a public official, his/her family member or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
 - d) The diversion by a public official, his/her family member or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;
 - e) The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;
 - f) The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;
 - g) Illicit enrichment;
 - h) The use or concealment of proceeds derived from any of the acts referred to in this Article.
2. For the purposes of this Statute "Illicit enrichment" means the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.

Article 28I Bis Money Laundering

1. For the purposes of this Statute, 'Money Laundering' means: any act of –
 - i) Conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action.
 - ii) Concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences;
 - iii) Acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences
 - iv) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.
2. Nothing in this article shall be interpreted as prejudicing the power of the Court to make a determination as to the seriousness of any act or offence.

Article 28J
Trafficking in persons

For the purposes of this Statute:

1. "Trafficking in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2. Exploitation shall include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
3. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (1) of this article shall be irrelevant where any of the means set forth in subparagraph (1) have been used;
4. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (1) of this article;

Article 28K
Trafficking in drugs

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
 - d) of the activities listed in (a);
 - e) 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.

Article 28L
Trafficking in Hazardous Wastes

1. For the purposes of this Statute, any import or failure to re-import, transboundary movement, or export of hazardous wastes proscribed by the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted in Bamako, Mali, in January 1991 shall constitute the offence of trafficking in hazardous waste.
2. The following substances shall be "hazardous wastes" for the purpose of this statute:
 - a) Wastes that belong to any category contained in Annex I of the
 - b) Bamako Convention;
 - c) Wastes that are not covered under paragraph (a) above but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the State of export, import or transit;
 - d) Wastes which possess any of the characteristics contained in Annex
 - e) II of the Bamako Convention;
 - f) Hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the State of manufacture, for human health or environmental reasons.
3. Wastes which, as a result of being radioactive, are subject to any international control systems, including international instruments, applying specifically to radioactive materials are included in the scope of this Convention.
4. Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, shall not fall within the scope of this Convention.

5. For the purposes of this Article, “failure to re-import” shall have the same meaning assigned to it in the Bamako Convention.
6. The export of hazardous waste into a Member State for the purpose of rendering it safe shall not constitute an offence under this Article.

Article 28L Bis **Illicit Exploitation of Natural Resources**

For the purpose of this Statute, “Illicit exploitation of natural resources” means any of the following acts if they are of a serious nature affecting the stability of a state, region or the Union:

- a) Concluding an agreement to exploit resources, in violation of the principle of peoples’ sovereignty over their natural resources;
- b) Concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned;
- c) Concluding an agreement to exploit natural resources through corrupt practices;
- d) Concluding an agreement to exploit natural resources that is clearly one-sided;
- e) Exploiting natural resources without any agreement with the State concerned;
- f) Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and
- g) Violating the norms and standards established by the relevant natural resource certification mechanism.

Article 28M **Crime of Aggression**

- A. For the purpose of this Statute, “Crime of Aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state or organization, whether connected to the state or not of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union and with regard to the territorial integrity and human security of the population of a State Party.”
- B. The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organizations of States, or non-State actor(s) or by any foreign entity:
 - a) The use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations.
 - b) The invasion or attack by armed forces against the territory of a State, or military occupation however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of a State or part thereof.
 - c) The bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.
 - d) The blockade of the ports, coasts or airspace of a State by the armed forces of another State.
 - e) The attack by the armed forces of a State on the land, sea or air forces, or marine and fleets of another State.
 - f) The use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the African Union NonAggression and Common Defence Pact or any extension of their presence in such territory beyond the termination of the agreement.
 - g) The action of a State in allowing its territory, which it has placed at the disposal of another State to be used by another State for perpetrating an act of aggression against a third State.
 - h) The sending or materially supporting by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 28N **Modes of Responsibility**

An offence is committed by any person who, in relation to any of the crimes or offences provided for in this Statute:

- i. Incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute;
- ii. Aids or abets the commission of any of the offences set forth in the present Statute;
- iii. Is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences set forth in the present Statute;
- iv. Attempts to commit any of the offences set forth in the present Statute.

Article 29 **Entities Eligible to Submit Cases to the Court**

1. The following entities shall be entitled to submit cases to the Court on any issue or dispute provided for in Article 28:
 - a) State Parties to the present Protocol;
 - b) The Assembly, the Peace and Security Council, the Parliament and other organs of the Union authorized by the Assembly;
 - c) A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union;
 - d) The Office of the Prosecutor.
2. The Court shall not be open to States, which are not members of the Union. The Court shall also have no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol.

Article 30 **Other Entities Eligible to Submit Cases to the Court**

The following entities shall also be entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned:

- a) State Parties to the present Protocol;
- b) the African Commission on Human and Peoples' Rights;
- c) the African Committee of Experts on the Rights and Welfare of the Child;
- d) African Intergovernmental Organizations accredited to the Union or its organs;
- e) African National Human Rights Institutions;
- f) African individuals or African Non-Governmental Organizations with Observer Status with the African Union or its organs or institutions, but only with regard to a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a State Party which has not made a Declaration in accordance with Article 9(3) of this Protocol .

Article 31 **Applicable Law**

1. In carrying out its functions, the Court shall have regard to:
 - a) The Constitutive Act;
 - b) International treaties, whether general or particular, ratified by the contesting States;
 - c) International custom, as evidence of a general practice accepted as law;
 - d) The general principles of law recognized universally or by African States;
 - e) Subject to the provisions of paragraph 1, of Article 46 of the present Statute, judicial decisions and writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the Union, as subsidiary means for the determination of the rules of law;
 - f) Any other law relevant to the determination of the case.
2. This Article shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

CHAPTER IV **PROCEDURE**

Article 32 **Official Languages**

The official and working languages of the Court shall be those of the Union.

Article 33 **Institution of Proceedings before the General Affairs Section**

1. Cases brought before the Court by virtue of Article 29 of the present Statute shall be submitted by written application addressed to the Registrar. The subject of the dispute, the applicable law and basis of jurisdiction shall be indicated.
2. The Registrar shall forthwith give notice of the application to the Parties concerned.
3. The Registrar shall also notify, through the Chairperson of the Commission, all Member States and, if necessary, the organs of the Union whose decisions are in dispute.

Article 34 **Institution of Proceedings before the Human Rights Section**

1. Cases brought before the Court relating to an alleged violation of a human or peoples' right shall be submitted by a written application to the Registrar. The application shall indicate the right (s) alleged to have been violated, and, insofar as it is possible, the provision or provisions of the African Charter on Human and Peoples' Rights, the Charter on the Rights and Welfare of the Child, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa or any other relevant human rights instrument, ratified by the State concerned, on which it is based.
2. The Registrar shall forthwith give notice of the application to all parties concerned, as well as the Chairperson of the Commission.

Article 34A
Institution of Proceedings before the International Criminal Law Section

1. Subject to the provisions of Articles 22A and 29, cases brought before the International Criminal Law Section of the Court shall be brought by or in the name of the Prosecutor.
2. The Registrar shall forthwith give notice of the case to all parties concerned, as well as the Chairperson of the Commission.

Article 34B
Institution of Proceedings before the Appellate Chamber

The Court shall define the procedures for appeals in its Rules.

Article 35
Provisional Measures

1. The Court shall have the power, on its own motion or on application by the parties, to indicate, if it considers that circumstances so require any provisional measures which ought to be taken to preserve the respective rights of the parties.
2. Pending the final decision, notice of the provisional measures shall forthwith be given to the parties and the Chairperson of the Commission, who shall inform the Assembly.

Article 36
Representation of Parties

1. The States, parties to a case, shall be represented by agents.
2. They may, if necessary, have the assistance of counsel or advocates before the Court.
3. The organs of the Union entitled to appear before the Court shall be represented by the Chairperson of the Commission or his /her representative.
4. The African Commission, the African Committee of Experts, African InterGovernmental Organizations accredited to the Union or its organs and African National Human Rights Institutions entitled to appear before the Court shall be represented by any person they choose for that purpose.
5. Individuals and Non-Governmental Organizations accredited to the Union or its organs may be represented or assisted by a person of their choice.
6. A person accused under the international criminal jurisdiction of this Court shall have the right to represent himself or herself in person or through an agent.
7. The agents and other representatives of parties before the Court, their counsel or advocates, witnesses, and any other persons whose presence is required at the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties or the smooth functioning of the Court.

Article 37
Communications and Notices

1. Communications and notices addressed to agents or counsel of parties to a case shall be considered as addressed to the parties.
2. For the service of all communications or notices upon persons other than the agents, counsel or advocates of parties concerned, the Court shall direct its request to the government of the State upon whose territory the communication or notice has to be served.
3. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 38
Procedure Before the Court

The procedures before the Court shall be laid out in the Rules of Court, taking into account the complementarity between the Court and other treaty bodies of the Union.

Article 39 Public Hearing

The hearing shall be public, unless the Court, on its own motion or upon application by the parties, decides that the session shall be closed.

Article 40 Record of Proceedings

1. A record of proceedings shall be made at each hearing and shall be signed by the Registrar and the presiding Judge of the session.
2. This record alone shall be authentic.

Article 41 Default Judgment

1. Whenever one of the parties does not appear before the Court, or fails to defend the case against it, the Court shall proceed to consider the case and to give its judgment.
2. The Court shall before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 28, 29 and 30 of the present Statute, but also that the claim is well founded in fact and law, and that the other party had due notice.
3. An objection by the party concerned may be lodged against the judgment within ninety (90) days of it being notified of the default judgment. Unless there is a decision to the contrary by the Court, the objection shall not have effect of staying the enforcement of the default judgment.

Article 42 Majority Required for Decision of the Court

1. Without prejudice to the provisions of Article 50(4) of the present Statute, the decisions of the Court shall be decided by a majority of the Judges present.
2. In the event of an equality of votes, the presiding Judge shall have a casting vote.

Article 43 Judgments and Decisions

1. The Court shall render its judgment within ninety (90) days of having completed its deliberations.
2. All judgments shall state the reasons on which they are based.
3. The judgment shall contain the names of the Judges who have taken part in the decision.
4. The judgment shall be signed by all the Judges and certified by the Presiding Judge and the Registrar. It shall be read in open session, due notice having been given to the agents.
5. The Parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States and the Commission.
6. The Executive Council shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.

Article 43A Sentences and Penalties under the International Criminal Jurisdiction of the Court

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

Article 44 Dissenting Opinion

If the judgment does not represent in whole or in part the unanimous opinion of the Judges, any Judge shall be entitled to deliver a separate or dissenting opinion.

Article 45
Compensation and Reparations to Victims

1. Without prejudice to the provisions of paragraph (i) of Article 28, the Court shall establish in the Rules of Court principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss or injury to, or in respect of, victims and will state the principles on which it is acting.
2. With respect to its international criminal jurisdiction, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
3. Before making an order the Court may invite and take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.”

Article 46
Binding Force and Execution of Judgments

1. The decision of the Court shall be binding on the parties.
2. Subject to the provisions of Article 18 (as amended) and paragraph 3 of Article 41 of the Statute, the judgment of the Court is final.
3. The parties shall comply with the judgment made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.
4. Where a party has failed to comply with a judgment, the Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment.
5. The Assembly may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act.

**CHAPTER IVA: PROVISIONS SPECIFIC TO THE INTERNATIONAL
CRIMINAL JURISDICTION OF THE COURT**

Article 46A
Rights of Accused

1. All accused shall be equal before the Court.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proven guilty according to the provisions of this Statute.
4. In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
 - a) To be informed promptly and in detail in a language that he or she understands of the nature and cause of the charge against him or her;
 - b) To have adequate time and facilities for the preparation of his or her defence and to communicate freely with counsel of his or her own choosing;
 - c) To be tried without undue delay;
 - d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
 - f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Court;
 - g) Not to be compelled to testify against himself or herself or to confess guilt.
 - h) To have the judgment pronounced publicly
 - i) To be informed of his /her right to appeal.

Article 46A bis
Immunities

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

Article 46B
Individual Criminal Responsibility

1. A person who commits an offence under this Statute shall be held individually responsible for the crime.
2. Subject to the provisions of Article 46A*bis* of this Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in article 28A of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to the order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Court determines that justice so requires.

Article 46C
Corporate Criminal Liability

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

Article 46D
Exclusion of Jurisdiction over Persons under the age of eighteen

The Court shall have no jurisdiction over any person who was under the age of eighteen (18) years at the time of the alleged commission of a crime.

Article 46E
Temporal Jurisdiction

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Protocol and Statute.
2. If a State becomes a Party to this Protocol and Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Protocol and Statute for that State.

Article 46E bis
Preconditions to the exercise of Jurisdiction

1. A State which becomes a Party to this Protocol and Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 28A.
2. The Court may exercise its jurisdiction if one or more of the following conditions apply:
 - a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.
 - b) The State of which the person accused of the crime is a national.
 - c) When the victim of the crime is a national of that State.
 - d) Extraterritorial acts by non-nationals which threaten a vital interest of that State.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise

Article 46F
Exercise of Jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 28A in accordance with the provisions of this Statute if:

1. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party;
2. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Assembly of Heads of State and Government of the African Union or the Peace and Security Council of the African Union.

3. The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 46G.

Article 46G **The Prosecutor**

1. The Office of the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Office of the Prosecutor shall analyze the seriousness of information received. For this purpose, he or she may seek additional information from States, organs of the African Union or United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony.
3. If the Office of the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, it shall submit to a Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of the Court.
4. If the Pre-Trial Chamber, upon examination of the request and supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Office of the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Office of the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, it shall inform those who provided the information. This shall not preclude the Office of the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 46H **Complementary Jurisdiction**

1. The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.
2. The Court shall determine that a case is inadmissible where:
 - a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;
 - b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute;
 - c) The person concerned has already been tried for conduct which is the subject of the complaint;
 - d) The case is not of sufficient gravity to justify further action by the Court.
3. In order to determine that a State is unwilling to investigate or prosecute in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
 - a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
 - b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
4. In order to determine that a State is unable to investigate or prosecute in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 46I *Non bis in idem*

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. Except in exceptional circumstances, no person who has been tried by another court for conduct proscribed under Article 28A of this Statute shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court:
 - a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
 - b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Court shall take into account the extent to which any penalty imposed by another Court on the same person for the same act has already been served.

Article 46J
Enforcement of Sentences

1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
2. Such imprisonment shall be as provided for in a prior agreement between the Court and a receiving State and in accordance with the criteria as set out in the Rules of Court.

Article 46J bis
Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court without prejudice to the rights of bona fide third parties, and in accordance with the procedure provided for in their national law.
2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. The Court shall determine in its Rules how real or movable property obtained by a State as a result of its enforcement of a judgment or order may be dealt with.

Article 46K
Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Court accordingly. There shall only be pardon or commutation of sentence if the Court so decides on the basis of the interests of justice and the general principles of law.

Article 46L
Co-operation and Judicial Assistance

1. States Parties shall co-operate with the Court in the investigation and prosecution of persons accused of committing the crimes defined by this Statute.
2. States Parties shall comply without undue delay with any request for assistance or an order issued by the Court, including but not limited to:
 - a) The identification and location of persons;
 - b) The taking of testimony and the production of evidence;
 - c) The service of documents;
 - d) The arrest, detention or extradition of persons;
 - e) The surrender or the transfer of the accused to the Court.”
 - f) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.
 - g) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the court.
3. The Court shall be entitled to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose.

Article 46M
Trust Fund

1. The Assembly shall, by a Decision, establish, within the jurisdiction of the Court, a Trust Fund for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly.

Article 47
Interpretation

In the event of any dispute as to the meaning or scope of a judgment, the Court shall construe it upon the request of any party.

Article 48 **Revision**

1. An application for revision of a judgment may be made to the Court only when it is based upon discovery of a new fact of such nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, provided that such ignorance was not due to negligence.
2. The proceedings for revision shall be opened by a ruling of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the revision admissible on this ground.
3. The Court may require prior compliance with the terms of the judgment before it admits proceedings in revision.
4. The application for revision shall be made within six (6) months of the discovery of the new fact.
5. No application may be made after the lapse of ten (10) years from the date of the judgment.

Article 49 **Intervention**

1. Should a Member State or organ of the Union consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. It shall be for the Court to decide upon this request.
2. If a Member State or organ of the Union should exercise the option offered under paragraph 1 of the present Article, the interpretation contained in the decision shall be equally binding upon it.
3. In the interest of the effective administration of justice, the Court may invite any Member State that is not a party to the case, any organ of the Union or any person concerned other than the claimant, to present written observations or take part in hearings.

Article 50 **Intervention in a Case Concerning the Interpretation of the Constitutive Act**

1. Whenever the question of interpretation of the Constitutive Act arises, in a case in which Member States other than the parties to the dispute have expressed an interest, the Registrar shall notify all such States and organs of the Union forthwith.
2. Every State Party and organ of the Union so notified has the right to intervene in the proceedings.
3. The decisions of the Court concerning the interpretation and application of the Constitutive Act shall be binding on Member States and organs of the Union, notwithstanding the provisions of paragraph 1, of Article 46 of this Statute.
4. Any decision made by virtue of this Article shall be made by a qualified majority of at least two (2) votes and in the presence of at least two-thirds of the Judges.

Article 51 **Intervention in a Case concerning the Interpretation of Other Treaties**

1. Whenever the question is that of interpretation of other treaties ratified by Member States other than the parties to a dispute, the Registrar shall notify all such States and the organs of the Union forthwith.
2. Every State Party and organ of the Union so notified has the right to intervene in the proceedings, and if it exercises this right, the interpretation given by the judgment shall be equally binding upon it.
3. This Article shall not be applicable to cases relating to alleged violations of a human or peoples' right, submitted by virtue of Articles 29 or 30 of the present Statute.

Article 52 **Costs**

1. Unless otherwise decided by the Court, each party shall bear its own costs.
2. Should it be required in the interest of justice, free legal aid may be provided for the person presenting an individual communication, under conditions to be set out in the Rules of Court.

CHAPTER V **ADVISORY OPINION**

Article 53 **Request for Advisory Opinion**

1. The Court may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions or any other organ of the Union as may be authorized by the Assembly.
2. A request for an advisory opinion shall be in writing and shall contain an exact statement of the question upon which the opinion is required and shall be accompanied by all relevant documents.
3. A request for an advisory opinion must not be related to a pending application before the African Commission or the African Committee of Experts.

Article 54 **Service of Notice**

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all States or organs entitled to appear before the Court by virtue of Article 30 of the present Statute.
2. The Registrar shall also, by means of a special and direct communication, notify any State entitled to appear before the Court or any Intergovernmental Organization considered by the Court, or should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.
3. Should any such State entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such State may express the desire to submit a written statement or to be heard, and the Court shall decide.
4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other States or organizations in the form, to the extent, and within the time limits which the Court, or should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due course communicate any such written statements to States and organizations having submitted similar statements.

Article 55 **Delivery of Advisory Opinion**

The Court shall deliver its advisory opinion in open court, notice having been given to the Chairperson of the Commission and Member States, and other International Organizations directly concerned.

Article 56 **Application by Analogy of the Provisions of the Statute Applicable to Contentious Cases**

In the exercise of its advisory functions, the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

CHAPTER VI **REPORT TO THE ASSEMBLY**

Article 57 **Annual Activity Report**

The Court shall submit to the Assembly an annual report on its work during the previous year. The report shall specify, in particular, the pending and concluded investigations, prosecutions and decisions and the cases in which a party has not complied with the judgment, sentence, order or penalty of the Court.

CHAPTER VII **PROCEDURE FOR AMENDMENTS**

Article 58 **Proposed Amendments from a State Party**

1. The present Statute may be amended if a State Party makes a written request to that effect to the Chairperson of the Commission, who shall transmit same to Member States within thirty (30) days of receipt thereof.
2. The Assembly may adopt by a simple majority, the proposed amendment after the Court has given its opinion on it.

Article 59

Proposed Amendments from the Court

The Court may propose such amendments to the present Statute as it may deem necessary, to the Assembly through written communication to the Chairperson of the Commission, for consideration in conformity with the provisions of Article 58 of the present Statute.

Article 60

Entry into Force of Amendments

The amendment shall enter into force for every State, which has accepted it in conformity with its Constitutional laws thirty (30) days after the Chairperson of the Commission is notified of this acceptance.

ANNEX II

Table of ratification and signature of relevant legal instruments

	PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS			PROTOCOL OF THE COURT OF JUSTICE OF THE AFRICAN UNION		PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS		PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS	ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)	
	Signed (52)	Ratified (27)	Made a declaration allowing individuals or NGOs direct access to the Court	Signed (44)	Ratified (16)	Signed (30)	Ratified (5)	Signed (4)	Signed (47)	Ratified (34)
Algeria	+	+	-	+	+	+	-	-	+	-
Angola	+	-	-	+	-	+	-	-	+	-
Benin	+	-	-	+	-	+	+	+	+	+
Botswana	+	-	-	-	-	-	-	-	+	+
Burkina Faso	+	+	+	+	-	+	+	-	+	+
Burundi	+	+	-	+	-	-	-	-	+	+
Cape Verde	-	-	-	-	-	-	-	-	+	+
Cameroon	+	-	-	+	-	-	-	-	+	-
Central African Republic	+	-	-	+	-	-	-	-	+	+
Chad	+	-	-	+	-	+	-	-	+	+
Comoros	+	+	-	+	+	-	-	-	+	+
Congo, Republic of the	+	+	-	+	-	+	+	-	+	+
Congo, Democratic Republic of the	+	-	-	+	-	+	-	-	+	+
Cote d'Ivoire	+	+	+	+	-	+	-	-	+	+
Djibouti	+	-	-	+	-	-	-	-	+	+
Egypt	+	-	-	+	+	-	-	-	+	-
Equatorial Guinea	+	-	-	+	-	-	-	-	-	-
Eritrea	-	-	-	-	-	-	-	-	+	-
Ethiopia	+	-	-	+	-	-	-	-	-	-
Gabon	+	+	-	-	+	+	-	-	+	+
Gambia	+	+	-	+	+	+	-	-	+	+
Ghana	+	+	+	+	-	+	-	-	+	+
Guinea	+	-	-	+	-	+	-	-	+	+
Guinea-Bissau	+	-	-	+	-	+	-	+	+	-
Kenya	+	+	-	+	-	-	-	+	+	+
Lesotho	+	+	-	+	+	+	-	-	+	+
Liberia	+	-	-	+	-	+	-	-	+	+
Libya	+	+	-	+	+	+	+	-	+	-

	PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS			PROTOCOL OF THE COURT OF JUSTICE OF THE AFRICAN UNION		PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS		PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS	ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)	
	Signed (52)	Ratified (27)	Made a declaration allowing individuals or NGOs direct access to the Court	Signed (44)	Ratified (16)	Signed (30)	Ratified (5)	Signed (4)	Signed (47)	Ratified (34)
Madagascar	+	-	-	+	-	+	-	-	+	+
Malawi	+	+	+	-	-	-	-	-	+	+
Mali	+	+	+	+	+	+	+	-	+	+
Mauritania	+	+	-	-	-	-	-	+	-	-
Mauritius	+	+	-	+	+	-	-	-	+	+
Mozambique	+	+	-	+	+	+	-	-	+	-
Namibia	+	-	-	+	-	-	-	-	+	+
Niger	+	+	-	+	+	+	-	-	+	+
Nigeria	+	+	-	+	-	+	-	-	+	+
Rwanda	+	+	+	+	+	-	-	-	-	-
Sahrawi Arab Democratic Republic	+	+	-	-	-	+	-	-	+	-
Sao Tome and Principe	+	-	-	+	-	+	-	-	+	-
Senegal	+	+	-	+	-	+	-	-	+	+
Seychelles	+	-	-	-	-	-	-	-	+	+
Sierra Leone	+	-	-	+	-	+	-	-	+	+
Somalia	+	-	-	+	-	-	-	-	-	-
South Africa	+	+	-	+	+	-	-	-	+	+
South Sudan	+	-	-	+	-	+	-	-	+	-
Sudan	+	-	-	-	+	-	-	-	+	-
Swaziland	+	-	-	+	-	-	-	-	-	-
Tanzania	+	+	+	+	+	+	-	-	+	+
Togo	+	+	-	+	-	+	-	-	-	-
Tunisia	+	+	-	-	+	+	-	-	+	+
Uganda	+	+	-	+	-	-	-	-	+	+
Zambia	+	-	-	+	-	+	-	-	+	+
Zimbabwe	+	-	-	+	-	-	-	-	+	-

**AMNESTY INTERNATIONAL
IS A GLOBAL MOVEMENT
FOR HUMAN RIGHTS.
WHEN INJUSTICE
HAPPENS TO ONE
PERSON, IT MATTERS TO
US ALL.**

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MALABO PROTOCOL

LEGAL AND INSTITUTIONAL IMPLICATIONS OF THE MERGED AND EXPANDED AFRICAN COURT

In June 2014, the African Union (AU) adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (Malabo Protocol). The Protocol extends the jurisdiction of the yet-to-be established African Court of Justice and Human Rights (ACJHR) to crimes under international law and transnational crimes. The Court will have jurisdiction to try 14 different crimes, including genocide, crimes against humanity, and war crimes. The ACJHR, as envisaged in the Malabo Protocol, can play a vastly positive role in a continent persistently afflicted by the scourge of conflict and impunity for crimes under international law.

However, there are a number of concerns and implications arising from the proposal to expand the jurisdiction of the ACJHR. With an expanded jurisdiction, it is doubtful whether the Court with 16 judges will have the capacity to effectively and efficiently deliver on its mandate. It is also unclear whether the AU will have the requisite resources to sustain an efficient ACJHR. The immunity clause included in the Malabo Protocol violates international consensus and practice by providing immunities to heads of states and senior state officials.

The report calls on AU member states to amend specific provisions of the Malabo Protocol. It also calls on civil society organisation and citizens to engage with their governments and the AU to address these concerns and to ensure that the ACJHR, if and when it is established, becomes the most effective possible regional court.