

## Status of the African Court

### Background on the African Court

As its name suggests, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (also known as the “Malabo Protocol”) is not a stand-alone treaty. Rather, it amends an earlier protocol (the “Merger Protocol”), which itself was intended to replace two earlier treaties and the supra-national courts they established. In order to understand the relationships between these various protocols and courts, the following paragraphs describe the history of each of these bodies and their relationship to one another.

- ***The African Court of Human and Peoples’ Rights***

The existing African Court of Human and Peoples’ Rights was established in 2004.<sup>1</sup> The first judges of the Court were elected two years later, and the Court became fully operational in 2008, upon adoption of its interim Rules of Court.<sup>2</sup> The Court, which sits in Arusha, Tanzania,<sup>3</sup> has jurisdiction only over the interpretation and application of the African Charter on Human and Peoples’ Rights and other human rights instruments ratified by the State concerned.<sup>4</sup> As of May 2018, 30 African States have ratified the protocol and are members of the Court.<sup>5</sup> The Court has received over 140 cases to date, of which it had finalized decisions in 48.<sup>6</sup>

- ***The African Court of Justice (ACJ)***

A second court, the African Court of Justice (ACJ), was envisioned in the Constitutive Act of the African Union<sup>7</sup> as the principal judicial organ of the AU.<sup>8</sup> The ACJ was to be the body with jurisdiction over general international law disputes, including interpretation of the Constitutive Act and other AU treaties, breaches of obligations to

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<sup>1</sup> The protocol establishing the court was adopted in 1998, and achieved the necessary 15 ratifications to enter into force in 2004. OAU, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (June 10, 1998), <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and->

<sup>2</sup> African Court on Human and Peoples’ Rights, Welcome to the African Court, <http://www.african-court.org/en/index.php/12-homepage/1-welcome-to-the-african-court>.

<sup>3</sup> *Id.*

<sup>4</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, *supra* note 1, art. 3(1).

<sup>5</sup> An additional 22 States have signed the protocol but not yet ratified it. AU, List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, <https://au.int/sites/default/files/treaties/7778-sl-protocol-to-the-african-charter-on-human-and-peoplesrights-on-the-estab.pdf>.

<sup>6</sup> African Court on Human and Peoples’ Rights, Contentious Matters, Finalised Cases (listing 48 finalized cases as of May 8, 2018), <http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases>; African Court on Human and Peoples’ Rights, Contentious Matters, Pending Cases (listing 96 cases pending as of May 8, 2018), <http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#pending-cases>.

<sup>7</sup> See AU, Constitutive Act of the African Union, art. 5(1)(d) (July 11, 2000), <https://au.int/en/constitutive-act>.

<sup>8</sup> AU, Protocol of the Court of Justice of the African Union, art. 2(2) (July 1, 2003) [hereinafter Protocol of the ACJ], <https://au.int/en/treaties/protocol-court-justice-african-union>.

the AU or States Parties, and any other question of international law.<sup>9</sup> A protocol establishing the ACJ was adopted in 2003, and 18 African States subsequently ratified the protocol,<sup>10</sup> with the effect that the protocol has thus entered into force.<sup>11</sup> The ACJ was never established, however, because it was superseded by a decision to merge the ACJ with the African Court on Human and Peoples' Rights, as described in the next paragraph.

- ***The African Court of Justice and Human Rights (the “Merged Court”)***

In 2008, the African Union adopted a protocol to merge the African Court of Human and Peoples' Rights and the ACJ (the “Merger Protocol”),<sup>12</sup> in large part due to concerns about the cost required to maintain two separate judicial institutions.<sup>13</sup> This court, named the African Court of Justice and Human Rights (the “Merged Court”), would have had two jurisdictional chambers: (1) a general affairs section with jurisdiction essentially equivalent to that of the ACJ, and (2) a human rights section with jurisdiction essentially equivalent to the current African Court.<sup>14</sup> The African Court of Justice and Human Rights has never been established, as its protocol has received only six ratifications to date and thus has not yet entered into force.<sup>15</sup>

- ***The African Court of Justice and Human and Peoples' Rights***

Within months of the adoption of the Merger Protocol, however, the AU's Assembly of Heads of State and Government asked the AU Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, to examine the implications of empowering the Court with jurisdiction to adjudicate international crimes.<sup>16</sup> In 2010, the AU Commission asked

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<sup>9</sup> *Id.* arts. 19, 38-39.

<sup>10</sup> AU, List of countries which have signed, ratified/acceded to the Protocol of the Court of Justice of the African Union, [https://au.int/sites/default/files/treaties/7784-sl-protocol\\_of\\_the\\_court\\_of\\_justice\\_of\\_the\\_african\\_union\\_1.pdf](https://au.int/sites/default/files/treaties/7784-sl-protocol_of_the_court_of_justice_of_the_african_union_1.pdf).

<sup>11</sup> Protocol of the ACJ, *supra* note 8, art. 60 (requiring 15 ratifications to enter into force).

<sup>12</sup> AU, Protocol on the Statute of the African Court of Justice and Human Rights, art. 29 (July 1, 2008) [hereinafter Merger Protocol], <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>.

<sup>13</sup> Morris Kiwinda Mbondenyi, *Institutional Mainstreaming and Rationalisation*, in MANISULI SSENIONJO, THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM 422, 442-43 (2012); Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 28 BROOKLYN JOURNAL OF INTERNATIONAL LAW 811, 859-63 (2003).

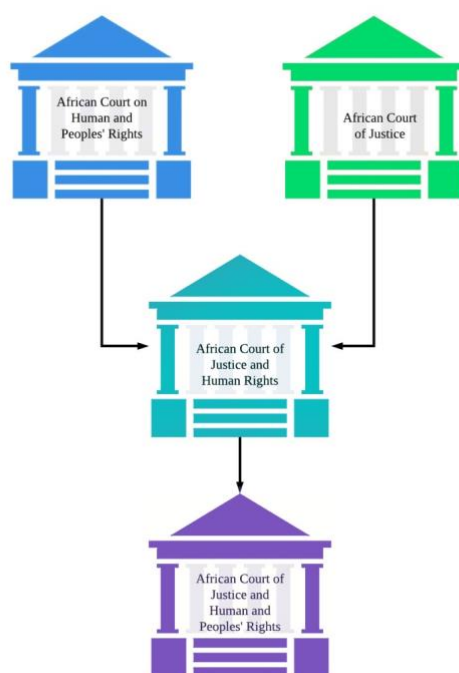
<sup>14</sup> Merger Protocol, *supra* note 12, arts. 16, 28.

<sup>15</sup> AU, List of countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights, [https://au.int/sites/default/files/treaties/7792-sl-protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_3.pdf](https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_3.pdf).

<sup>16</sup> AU, Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.213 (Feb. 1-3, 2009).

the Pan African Lawyers Union (PALU) to prepare a draft protocol for this purpose.<sup>17</sup> Over the next five years, the draft was subject to a series of reviews and discussions.<sup>18</sup>

Ultimately, in 2014, the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (also known as the “Malabo Protocol” because it was adopted in Malabo, Equatorial Guinea).<sup>19</sup> This protocol amends the Merger Protocol to add a third jurisdictional chamber – the international criminal law chamber<sup>20</sup> – and makes a variety of other substantive changes to improve the court.<sup>21</sup> It also renames the Court as the African Court of Justice and Human and Peoples’ Rights.<sup>22</sup> As of June 2018, only 11 countries have signed the protocol and none have ratified it.<sup>23</sup>



<sup>17</sup> Don Deya, *Is the African Court worth the wait*, OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA (Mar. 6, 2012), [http://www.osisa.org/sites/default/files/is\\_the\\_african\\_court\\_worth\\_the\\_wait\\_-\\_don\\_deya.pdf](http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-_don_deya.pdf).

<sup>18</sup> *Id.*; Pacifique Manirakiza, *The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa*, in VINCENT O. NHEMIELLE, *AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 375, 379 (2012).

<sup>19</sup> AU, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 27, 2014) [hereinafter Malabo Protocol], <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

<sup>20</sup> *Id.*, annex art. 6 (replacing art. 16).

<sup>21</sup> These substantive changes are addressed in the subsequent sub-sections of section IV of this report.

<sup>22</sup> Malabo Protocol, *supra* note 19, art. 8.

<sup>23</sup> AU, List of countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, [https://au.int/sites/default/files/treaties/7804-sl-protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_5.pdf](https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf).

ACRI has identified 17 countries most likely to ratify the Malabo Protocol because they have already signed the Malabo Protocol; have ratified the Merger Protocol or a high number of AU treaties; and/or have expressed support for the African Court, the Malabo Protocol, or international justice in Africa. The list was also created with sub-regional representation in mind. Those countries are:

*East Africa*

- The Republic of Kenya
- The Republic of Rwanda
- The Republic of Uganda

*West Africa*

- The Republic of Burkina Faso
- The Republic of Ghana
- The Republic of Guinea-Bissau
- Republic of Sierra Leone

*Central Africa*

- The Republic of Burundi
- The Republic of Chad
- The Republic of the Congo
- The Democratic Republic of São Tomé and Príncipe

*North Africa*

- Democratic and People's Republic of Algeria
- The Islamic Republic of Mauritania
- The Republic of Tunisia

*Southern Africa*

- The Republic of Botswana
- Kingdom of Lesotho