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The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights

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1. INTRODUCTION

While the African Court on Human and Peoples' Rights has been operating for over a decade from Arusha, Tanzania, parallel discussions have been ongoing on the development of, firstly, an African Court of Justice with a general international jurisdiction, and then, subsequently on merging this latter Court with the existing court and adding an international criminal law element to its work.

Although the Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights (1998 Protocol) was adopted in 1998 and had the necessary number of 15 ratifications for it to come into force in January 2004, it took until November 2006 before the African Court on Human and Peoples' Rights (ACHPR Court) was to become operational. One of the reasons for this delay was due to a recognition by States that with the advent of the AU a new judicial body was also envisaged by the Constitutive Act. The African Court of Justice (ACJ), provided for in Articles 5 and 18 of the Constitutive Act, was to be the 'principal judicial organ of the African Union' with jurisdiction over not only the Constitutive Act but also 'the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union; any question of international law; all acts, decisions, regulations and directives of the organs of the Union; and all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer

This chapter draws on a consultancy that the author conducted for Amnesty International in 2015 on the Malabo Protocol. These findings were used in a report that has now been published, see: Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, 22 January 2016, Index number: AFR 01/3063/2016.

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jurisdiction on the Court'.[1] There was a concern that it would not be financially viable for the AU to administer two courts, this ACJ and the ACHPR Court. Proposals therefore started for the creation of a protocol to merge the two courts and a decision was taken that in the meantime the ACHPR Court should become operational.[2]

In parallel, discussions were also taking place on the continent on whether an African regional court should try Hissene Habré,[3] in part the response of African States to what they viewed to be a 'blatant abuse of the principle of universal jurisdiction'[4] to indict African leaders before the ICC and European courts for international crimes, and the perceived African bias by the International Criminal Court towards Africa.[5]

Combined with the desire to merge the ACHPR Court with the ACJ, and brought to a head with the indictment by the ICC of presidents and senior government officials including Al-Bashir of Sudan and Uhuru Kenyatta who would subsequently become President of Kenya,[6] the AU adopted in June 2014 the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the 'Malabo Protocol'). This created an African Court of Justice and Human and Peoples' Rights (ACtJHPR) setting out the details of its composition, jurisdiction and other issues in a Statute annexed to the Protocol (Statute of the ACtJHPR).[7]

[1] Protocol of the Court of Justice of the African Union, July 2003, Articles 2(2) and 19.

[2] Decision EX.CL/Dec.165 (VI) of 2005.

[3] Report of the Committee of Eminent African Jurists on the case of Hissene Habré, 2 July 2006, §§ 22–6.

[4] Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.243 (XIII), Rev.1, § 4. See also Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.271 (XIV), Feb 2010; Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.335 (XVI).

[5] See e.g. 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). M. du Plessis, T. Maluwa and A O'Reilly, *Africa and the International Criminal Court*, Chatham House, International Law 2013/01, July 2013.

[6] See 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; 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). See also N.J. Udombana, '"Can These Dry Bones Live?": In Search of a Lasting Therapy for AU and ICC Toxic Relationship', 1(1) *African Journal of International Criminal Justice* (2014) 57–76.

[7] Although the Malabo Protocol is entitled a Protocol 'on the African Court of Justice and Human Rights', it was decided, recognising the title of the ACHPR Court, that this new court

Most of the attention and discussion on the Malabo Protocol has centred around the ACtJHPR's criminal jurisdiction and concerns, for example, with the immunity clause which provided that '[n]o 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'.[8] The human rights jurisdiction of the proposed Court has been less visible. This chapter will, firstly, provide an overview of the current ACHPR Court before moving on to consider the human rights jurisdiction of the proposed Court in the Malabo Protocol's Statute of the ACtJHPR. It will conclude with some practical suggestions as to how to take the issues forward.

2. THE HUMAN RIGHTS JURISDICTION OF THE ACHPR COURT AND ITS LIMITATIONS

As of November 2018, the ACHPR Court's website refers to 165 applications from individuals, 12 from NGOs and 3 from the African Commission, for its contentious jurisdiction that have been submitted to it since its inception. These are against States, the AU, Pan-African Parliament, the African Commission on Human and Peoples' Rights, and Mozambique Airlines. Of these, the Court found in a significant number of these cases that it lacked jurisdiction including for want of an Article 34(6) declaration by the State party,[9] by

should be entitled 'the African Court of Justice and Human and Peoples' Rights'. Furthermore, the Malabo Protocol itself has a number of broader provisions but the Statute of the ACtJHPR is contained in an Annex to the Protocol. This will be referred to throughout this chapter as 'Statute of the ACtJHPR'.

[8] Article 46A *bis*, Statute of the African Court of Justice and Human Rights, Annex, Malabo Protocol.

[9] *Ernest Francis Mtingwi v Republic of Malawi*, Application 001/2013, Decision of 15 March 2013; *Delta International Investments SA, MR, AGL de Lange and Mrs M de Lange v Republic of South Africa*, Application 002/2012, Decision of 30th March 2012; *Emmanuel Joseph Uko and others v Republic of South Africa*, Application 004/2012, Decision of 30th March 2012; *Amir Adam Timan v Republic of Sudan*; *Baghdadi Ali Mahmoudi v Republic of Tunisia*, Application 005/2012, Decision of 30th March 2012; *Femi Falana v* AU, Application 001/2011, Judgment of 26th June 2012; *Soufiane Ababou v People's Democratic Republic of Algeria*, Application 002/2011, Decision of 16th June 2011; *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, Application 005/2011, Decision of 16th June 2011; *Association Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d'Ivoire*, Application 006/2011, Decision of 16th June 2011; *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria*, Application 008/2011, Decision of 23rd September 2011; *National Convention of Teachers' Trade Union v Republic of Gabon*, Application 012/2011, Decision of 15th December 2011; *Michelot Yogogombaye v Republic of Senegal*, Application 001/2008, Judgment of 15th December 2009.

which they submit themselves to adjudication in communications filed by individuals and NGOs, because the individual or organization did not have standing,[10] or because the State had not ratified the Protocol,[11] or where it was brought against another actor, not a State.[12] It has held a number to be inadmissible,[13] and struck out others for the failure of the applicant to pursue the case.[14] For some where it has found no jurisdiction it has transferred cases to the African Commission.[15] It has decided on the merits, finding violations,[16] and ruled on provisional measures in several.[17] Other cases are pending. Public hearings have been held in several cases.[18] The Court's advisory jurisdiction has been requested on thirteen occasions.[19] This is a light docket

[10] *National Convention of Teachers' Trade Union v Republic of Gabon*, Application 012/2011, Decision of 15th December 2011.

[11] *Youssef Ababou v Kingdom of Morocco*, Application 007/2011, Decision of 2nd September 2011.

[12] E.g. against the Pan-African Parliament: *Efoua Mbozo'o Samuel v Pan African Parliament*, Application 010/2011, Decision of 30th September 2011; or the African Union itself: *Atabong Denis Atemnkeng v African Union*, Application 014/2011, Judgment of 15th March 2013.

[13] *E.g. Peter Joseph Chacha v United Republic of Tanzania*, Application 003/2012, Judgment of 28th March 2014; *Urban Mkandawire v Republic of Malawi*, Application 003/2011, Judgment of 21st June 2013.

[14] *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahariya*, Application 004/2011, Order of 15th March 2013.

[15] *Soufiane Ababou v People's Democratic Republic of Algeria*, Application 002/2011, Decision of 16th June 2011; *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, Application 005/2011, Decision of 16th June 2011; *Association Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d'Ivoire*, Application 006/2011, Decision of 16th June 2011; *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria*, Application 008/2011, Decision of 23rd September 2011.

[16] *Tanganyika Law Society and Legal and Human Rights Centre, and Reverend Christopher R Mtikila v Republic of Tanzania*, Applications 009 and 011/2011, Judgment of 14th June 2013; *The Beneficiaries of the Late Norbert Zongo and others v Burkina Faso*, Application 013/2011, Judgment of 28th March 2014; *Lohé Issa Konaté v Burkina Faso*, Application 004/2013, Judgment of 5th December 2014; *Alex Thomas v Tanzania*, Application 005/2013, Judgment of 20th November 2015.

[17] *African Commission on Human and Peoples' Rights v Libya*, Application 002/2013, Order of Provisional Measures, 15th March 2013; *Lohé Issa Konaté v Burkina Faso*, Application 004/2013, Order of Provisional Measures, 4th October 2013.

[18] E.g. *Wilfred Onyango Nganyi and others v Republic of Tanzania*, 006/2013; *Mohamed Abubakari v Tanzania*, 007/2014.

[19] *Republic of Mali*, 001/2011; *Advocate Marcel Ceccaldi on behalf of the Great Socialist People's Libyan Arab Jamahariya*, 002/2011; *Socio Economic Rights and Accountability Project*, 001/2012; *Pan African Lawyers Association and Southern African Litigation Center*, 002/2012; *Socio Economic Rights and Accountability Project*, 001/2013; *African Committee of Experts on the Rights and Welfare of the Child*, 002/2013; *Coalition on the International Criminal Court and others*, 001/2014; *RADDHO*, 002/2014; *Coalition on International Criminal Court, LTD/GTE*, 001/2015; *Centre for Human Rights University of Pretoria and Coalition of African Lesbians (CAL)*, 002/2015; *Centre for Human Rights, Federation of Women Lawyers in Kenya, Women's*

for the principal human rights judicial body in Africa and the Court itself has recognized the low ratification and declaration rate of States, which 'if such a situation were allowed to continue, the entire system of judicial protection of human rights at the continental level, which the Court symbolizes, would be adversely affected'.[20]

Article 3 of the ACHPR Court Protocol provides:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

An advisory jurisdiction is provided in Article 4 of the 1998 Protocol and the eleven member ACHPR Court has the capacity to reach an amicable settlement between the parties,[21] adopt provisional measures[22] and to interpret its judgments which are binding.[23]

There are several issues that have been the subject of some discussion with respect to the jurisdiction of the ACHPR Court. These relate principally to issues of standing in contentious and advisory cases, but also its broad jurisdiction.

3. THE ISSUE OF STANDING IN CONTENTIOUS CASES

One of the main criticisms that has been directed towards the ACHPR Court Protocol was that it did not permit individuals or NGOs (the mainstay of the African Commission's casework) to submit cases directly to the Court unless the State, in addition to ratifying the Protocol, also made a declaration under Article 34(6) of the Protocol to provide the Court with the jurisdiction to do so. For those eight States who have made this declaration,[24] jurisdiction on this

Legal Centre, Women Advocates Research and Documentation Centre, Zimbabwe Women Lawyers Association, 001/2016. Request No 002/2016 – Request for Advisory Opinion Association Africaine de Defense des Droits de l'Homme.

[20] Report of the African Court on Human and Peoples' Rights, January 2012, EX.CL/718 (XX), § 89.

[21] Article 9 1998 Protocol.

[22] Article 27(2) 1998 Protocol.

[23] Article 28, 1998 Protocol. See also Rule 26 of the Rules of Court.

[24] These are: Benin, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania. In March 2016 Rwanda notified the Court that it had deposited an instrument of withdrawal of its Article 34(6) declaration at the African Union Commission on 29 February 2016. In a case

basis is straightforward.[25] While there are an increasing number of cases that the Court has been able to deal with, many in relation to the host State Tanzania, Article 34(6) has inevitably limited the overall volume of cases the Court has and is likely to receive. As a result the issue of standing has been the focus of much of the debate on the African Court since its inception.[26] As the only other actors that Article 5 permits to submit cases to the Court are the African Commission, States and African intergovernmental organizations, and given States are unlikely to use an inter-State communication procedure, in reality this meant that the Court was, certainly in these early years, always going to be largely dependent on the African Commission for its workflow. The relationship with the Commission is complex, as will be discussed below, and it is not surprising that this was never going to be a fruitful source of the African Court's caseload. Parallels can inevitably be drawn with the early years of the Inter-American Court.[27]

Many of the early cases before the ACHPR Court have related to standing, specifically who can bring the case, and those where there has been a misunderstanding of the Court's jurisdiction with respect to who the case can be brought against. Therefore, a considerable number of the cases before the Court, alleging violations of a variety of rights, have not succeeded because they are brought by individuals or NGOs against States which have not made a declaration under Article 34(6) of the Protocol.[28] There has been

pending before the Court against Rwanda, *Ingabire Victoire Umuhoza v Republic of Rwanda*, Application 003/2014, the Court ordered that the parties should make written submissions on the effect of this withdrawal. The Court ruled in June 2016 that while Rwanda was entitled to withdraw its declaration, a one year notice period would apply and the Court still had jurisdiction to determine the matters in the case before it, Ruling on Jurisdiction, 3 June 2016. It subsequently adopted its judgment on 24 November 2017.

[25] *Urban Mkandawire v Republic of Malawi* Application 003/2011, Judgment, § 35.

[26] E.g. D. Juma, 'Access to the African Court on Human and Peoples' Rights. A Case of the Poacher Turned Gamekeeper', 4 *Essex Human Rights Law Review* (2007) 1–21; M. Ssenyonjo, 'Direct access to the African Court on Human and Peoples' Rights by Individuals and Non-governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008–2012', 2(1) *International Human Rights Law Review* (2013) 17–56.

[27] See e.g. D. Padilla, 'An African Human Rights Court: Reflections from the Perspective of the Inter-American System', 2(2) *AHRLJ* (2002) 185–194.

[28] e.g. *Delta International Investments SA, MR AGL de Lange and Mrs M De Lange v Republic of South Africa*, which alleged violations of torture and rights to dignity, property, information, privacy and discrimination where the Court held that as South Africa had not yet made a declaration under Article 34(6) of the Protocol 'it is evident that the Court manifestly lacks jurisdiction to receive the Application submitted' and therefore struck it off the list, Application 002/2012, Decision of 30th March 2012, §§ 9 and 10.

some rather innovative, albeit unsuccessful, attempts by some entrepreneurial lawyers to test the Court's approach to the limitations of Article 5.[29]

A few cases have tested the jurisdiction *ratione personae* with respect to the respondent, bringing cases against the AU organs;[30] and against a State which was not party to the AU Constitutive Act neither the Protocol.[31]

4. LIMITS OF THE ADVISORY JURISDICTION

The ACHPR's Court's advisory jurisdiction[32] is provided in Article 4 of the 1998 Protocol:

1. At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.
2. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting decision.

Only one State (Mali) has requested an opinion,[33] and concerns as to whether the African Commission on Human and Peoples' Rights and the African Committee on the Rights and Welfare of the Child are organs of the AU for the purposes of Article 4 are no longer an issue.[34] What is more

[29] See *In the Matter of Femi Falana v The African Union*, Application 001/2011, Judgment of 26th June 2012, and Dissenting Opinions of Justices Akuffo, Ngoepe and Thompson. Also *Atabong Denis Atemnkeng v AU* Application 014/2011, Judgment; *Michelot Yogogombaye v Republic of Senegal*, Application 001/2008, Judgment, 15th December 2009.

[30] E.g. Pan-African Parliament, *Efoua Mbozo'o Samuel v The Pan African Parliament*, Application 010/2011, Decision of 30th Sep 2011.

[31] *Youseff Ababou v Kingdom of Morocco*, Application 007/2011, Decision 2 September 2011, § 12.

[32] AP van der Mei, 'The Advisory Jurisdiction of the African Court on Human and Peoples' Rights', 5 *African Human Rights Law Journal* (2005) 27–46, at 32–7.

[33] *Demande d'Avis Consultatif*, 001/2011. In Application 002/2001, *Request for Advisory Opinion by Advocate Marcel Ceccaldi on behalf of the Great Socialist Peoples' Libyan Arab Jamahiriya*, the application was rejected because the author failed to prove he was acting on behalf of the State, Order of 30 March 2012.

[34] Article 5, Constitutive Act lists its organs as the Assembly, the Executive Council, the Pan-African Parliament, the African Court of Justice, the AU Commission, the Permanent Representatives Committee, the Specialized Technical Committees, the Economic, Social and Cultural Council and the Financial Institutions, It does also State that 'other organs that the Assembly may decide to establish'. In *the Matter of Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African*

interesting is the ability of NGOs to assert that they are 'African organisations recognised by the [AU]' for the purposes of Article 4 of the Protocol. In a series of Opinions adopted in 2017 the African Court closed this avenue for NGOs who had attempted to argue that as they had observer status before the African Commission on Human and Peoples' Rights and that this Commission was an organ of the AU, they were hence 'recognised' by the AU. The African Court disagreed.[35]

5. THE BREADTH OF THE JURISDICTION

The ACHPR Court has jurisdiction not only to rule on the interpretation and application of the African Charter on Human and Peoples' Rights (hereinafter 'African Charter') and the Protocol establishing the Court, but also 'any other relevant human rights instruments ratified by the States concerned'.[36] It is not uncommon for international and regional courts to draw upon each others' jurisprudence and this is an approach that has been adopted similarly by the ACHPR Court in numerous cases.[37] However, Article 3 of the 1998 Protocol enables the ACHPR Court to go further to find not only violations of the African Charter but also, for example, violations of the International Covenant on Civil and Political Rights and ECOWAS Treaty.[38] In this regard it was willing to rule on violations of the ICCPR, even where the State has not ratified the Optional Protocol permitting the Human Rights Committee jurisdiction to examine individual complaints;[39] and having found a violation of a particular right in the African Charter has then gone on automatically to conclude that this was also a violation of the right in the ICCPR given that the latter 'guarantees in the same manner' the right in the African Charter.[40]

The ACHPR Court's interpretation of *ratione loci*[41] and *temporis* have been relatively uncontroversial. However, while it has found jurisdiction where

Court on Human and Peoples' Rights, 5 December 2014, the ACHPR Court held that the African Committee on the Rights and Welfare of the Child was an organ of the AU.

[35] See Request For Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP) No, 001/2013, Advisory Opinion, 26 May 2017.

[36] Article 3 Protocol Establishing the African Court on Human and Peoples' Rights.

[37] In *Tanganyika Law Society and the Legal and Human Rights Centre v United Republic of Tanzania and Reverend Christopher R Mtikila v United Republic of Tanzania*, 009/2011 and 011/2011, § 107.3.

[38] *Matter of the Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and Le Mouvement Burkinabé des Droits de l'Homme et des Peuples*, Application 013/2011. See also *Lohé Issa Konaté v Burkina Faso*, §§ 36–37.

[39] *Matter of the Beneficiaries of the Late Norbert Zongo*, ibid., § 48.

[40] Ibid., § 170.

[41] *Lohé Issa Konaté v Burkina Faso*, § 41.

there is a continuing violation,[42] overall it has not been consistent in terms of the relevant date which is taken to determine its jurisdiction. It has on some occasions held that the relevant date was the date of ratification of the Charter, even if the violations took place before the Protocol came into force: 'by the time of the alleged violation, the Respondent had already ratified the Charter and was therefore bound by it. The Charter was operational and there was therefore already a duty on the Respondent at the time of the alleged violation to protect those rights'.[43] In contrast, it noted in other cases that there were a number of relevant dates: 'those of the entry into force, with regard to the respondent State, of the Charter (21 October 1986), the Protocol (25 January 2004), and the Covenant (4 April 1999) as well as the optional declaration accepting the jurisdiction of the Court to hear applications from individuals or non-governmental organizations (25 January 2004)'.[44] It went on to find that given that the violation of the right to freedom of expression took place 'on 10 May 2013 or well after the Respondent State had become Party to the Charter and the Covenant, and had made the declaration accepting the Court's jurisdiction to receive applications from individuals or non-governmental organizations (NGOs). Consequently, the Court finds that it has the *ratione temporis* jurisdiction to hear the allegation of violation of the right to freedom of expression'.[45]

6. THE MALABO PROTOCOL AND HUMAN RIGHTS

The Malabo Protocol needs to be understood as a reflection of its political and legal history. Building upon the desire initially to merge the ACHPR Court with the ACJ, its articles inevitably, in part, are influenced by not only the Protocol Establishing the African Court on Human and Peoples' Rights but also the Protocol on the Statute of the ACJ. The subsequent wish to extend the jurisdiction to including international crimes resulted in the drafters not only using these instruments and the ICJ Statute, for example, but also drawing heavily on the provisions of the Rome Statute, and the Statutes of the ICTR

[42] *Matter of the Beneficiaries of the Late Norbert Zongo*, supra note 38; *Urban Mkandawire v Republic of Malawi*, Application 003/2011, Joint dissenting opinion of Judges Gerard Niyungeko and El Hadji Guisse, § 9.

[43] *Consolidated Matter of Tanganyika Law Society and the Legal and Human Rights Centre v United Republic of Tanzania* and *Reverend Christopher R Mtikila v United Republic of Tanzania* Applications 009/2011 and 011/2011, § 84.

[44] *Lohé Issa Konaté v Burkina Faso*, Judgment, § 38.

[45] Ibid., § 40.

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and ICTY. On the one hand this is positive: it reflects a willingness to learn from the existing courts and build upon examples of good practice. Indeed, there is evidence of incorporation of examples of good practice certainly in the criminal jurisdiction of the proposed Court.[46]

But the human rights provisions largely reflect the ACHPR Protocol with some tweaks that do not necessarily suggest a coherence in the approach of the drafters to draw or build upon the experience of the ACHPR Court. This is not to say that the Malabo Protocol does not include some positive elements which should be commended, such as providing the new Court with more autonomy in determining its own budget than existing Court;[47] or consolidating the requirement for gender representation on the bench.[48] However, it is difficult to see overall that there is a consistent or strategic approach to increasing or enhancing the strength of the proposed Court's human rights jurisdiction.

7. TOO BROAD A JURISDICTION?

Article 28 of the Statute of the ACtJHPR provides:

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;

[46] E.g. with the inclusion of a Defence Office on an equal status with the Office of the Prosecutor (Article 2, Malabo Protocol) and a Victims and Witnesses Unit (Article 22B(9)(a), Statute of the ACtJHPR).

[47] Statute of the ACtJHPR, Article 26.

[48] Article 3 of the Statute of the ACtJHPR provides that the 'Assembly shall ensure that there is equitable gender representation in the Court. This goes further than the 1998 Protocol which only requires that 'due consideration shall be given to adequate gender representation in the nomination process', and Article 14(3) that the representation shall only be 'adequate' not 'equitable'.

(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.

This therefore includes not only human and peoples' rights but also international law and international criminal law. Many have criticized this breadth noting this is 'unprecedented under international law'.[49] There are a number of issues that arise for its human rights jurisdiction.

Firstly, it is argued that by combining the three different jurisdictions into one Court the human rights mandate will be diluted. As has been evidenced in part by the discussions leading up to the adoption of the Malabo Protocol, many are concerned that criminal matters will be more visible, and human and peoples' rights will be sidelined. Furthermore, it is argued that combining a court which is to determine not only State responsibility but also individual criminal responsibility, is unworkable,[50] not least because of the different standards of evidence that apply and the likelihood that the latter will take significantly more resources.[51]

Secondly, there are also concerns that the legacy of the current ACtHPR and any experience it has acquired will be lost. Suggestions that there be a separate court for criminal trials,[52] or that States should be given the option of accepting only jurisdiction on general affairs, human rights or criminal matters,[53] were refused.

Finally, it is also argued that if States have to ratify a protocol providing a Court with the jurisdiction to try international crimes as well as human rights, they may refuse to ratify at all (whereas they may have ratified courts with distinct jurisdictions).[54]

[49] F. Viljoen, 'AU Assembly should consider human rights implications before adopting the Amended merged African Court Protocol', 2012, AfricLaw, available online at http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/, § a.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid., § b.

8. STRUCTURE OF THE COURT AND NUMBER OF JUDGES

The way in which the proposed ACtJHPR is structured raises a question as to whether there are sufficient numbers of judges able to deal with the human rights cases and a lack of clarity as to how this will be managed. The new court is to be composed of 16 judges.[55] Article 16 of the Statute of the ACtJHPR provides that there will be three sections for the new Court: general, human and peoples' rights and international criminal law. Article 16(3) States that the 'allocation of judges to the respective Sections and Chambers shall be determined by the Court in its Rules'. Furthermore, 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'.[56] This would appear to be appropriate. However, there is inconsistency with Article 6 which provides that it is the Chairperson of the AU Commission which will separate out the lists of candidates into the different Sections prior to their actual election.[57] This implies that in practice the determination of which judges will sit in which Sections is determined not by the Court but by the AU. Although this may have been a formulation borrowed from the ICC, it raises certain challenges and will require careful consideration when judges are nominated.

Article 17 provides for the process for assignment of matters to Sections of the Court. Here the General Affairs Section appears to act as the default

[55] Article 3(1) Statute of the ACtJHPR.

[56] Article 22(3) Statute of the ACtJHPR.

[57] Article 6 Statute of the ACtJHPR reads: 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.

Section for the Court, in that 'all cases . . . except those assigned to the Human and Peoples' Rights Section and International Criminal Law Section' will fall within its mandate. Given that similarly, the Human and Peoples' Rights Section is competent to hear 'all cases relating to human and peoples' rights' and the International Criminal Law Section is similarly competent to hear 'all cases relating to the crimes specified in this Statute', this is a broad approach and does not address the issue of where there is an overlap or where cases involve one or more elements of international law, human and peoples' rights and international crimes.

9. TREATIES WITHIN THE COURT'S JURISDICTION

As noted above Article 28 of the Statute of the ACtJHPR provides a broad range of instruments upon which the ACtJHPR may be required to rule. In some respects this reflects the mandate of the current ACHPR Court as set out in Article 3 of the 1998 Protocol. Besides the concern, dealt with above, of combining a criminal and human rights jurisdiction, and leaving aside the debate around the breadth of the list of crimes provided for in the Statute of the ACtJHPR, and the possibility, as outlined in its Article 28(2)(A), for further crimes to be added,[58] Article 28 also refers to 'other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity', as well as the ACHPR, ACRWC, Protocol on the Rights of Women in Africa, 'or any other legal instrument relating to human rights, ratified by the States Parties concerned' will be under its jurisdiction, in addition to the other documents referred to in sub-sections (e)-(i).[59] On the one hand, some have noted that this breadth is extensive and unworkable.[60] On the other, however, international courts such as the ICJ have shown themselves able to rule on an extensive range of international and indeed international human rights issues. The ACHPR Court itself does not appear to have been daunted by the potential for it to rule on other treaties beyond the African Charter and where it has been required to do so, has taken a pragmatic approach. It may be, therefore, that these provisions will in practice provide litigants with greater scope and the Court with greater freedom.

[58] A. Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects', 60 *Netherlands International Law Review* (2013) 27–50, p.36.

[59] See also Article 31 of the Statute of the ACtJHPR.

[60] M. Du Plessis, 'Implications of the AU Decision to give the African Court jurisdiction over international crimes', ISS Paper 235, June 2012, p.6.

10. STANDING

Judges of the current ACHPR Court have shown sympathy with the idea that individuals and NGOs should be able to access the Court directly,[61] but on the whole they have not considered that this is within the power of the Court to change given the restrictions of Articles 5 and 34(6). Rather they have viewed this as being an issue for the Member States to determine.[62]

With respect to individuals and NGOs, the opportunity that the Malabo Protocol may have provided to increase access of individuals and NGOs directly to the Court proved unsuccessful. Articles 29 and 30 of the Statute of the ACtJHPR provide:

> **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:

[61] Separate Opinion of Judge Fatsah Ouguergouz in *Femi Falana*, § 37: 'same as Mr Falana, I am in favour of the automatic access to the Court by individuals and non-governmental organizations'.

[62] Ibid.

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(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.

To be welcomed is that whereas the 1998 Protocol does not permit the African Committee on the Rights and Welfare of the Child nor NHRIs to submit cases to the Court, they are able to do so before the new ACtJHPR.

Unfortunately, however, limiting standing to 'African individuals or African Non-governmental organizations' which are defined in Article 1 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', raises questions about the potential for further restrictions on NGOs accessing the court. Whether international NGOs would fall within this definition is debatable. 'African individuals' are not defined in the preamble.

Similarly, Article 53 of the Statute of the ACtJHPR is more prescriptive than Article 4 of the 1998 Protocol with respect to the Court's advisory jurisdiction. Article 53 reads:

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.

This appears to limit requests for advisory opinions only to organs of the AU and closes the door on NGOs and others having this capacity.

11. REMEDIES

The ACHPR Court has a broad remit under Article 27(1) to 'make appropriate orders to remedy the violation including the payment of fair compensation or reparation'. Indeed, Article 27(1) requires that the Court 'shall' do so if a violation is found. Rule 63 of the Rules of Court provides that such an order can be part of the same decision finding the violation or 'if circumstances so require, by a separate decision'.

The ACHPR Court in its practice so far has been prepared to order a range of remedies and reparations from guarantees of non-repetition;[63] damages, both material and moral[64]; costs and compensation[65]; and publication and dissemination of the ACHPR's judgment.[66] These orders have been made in some cases in the judgment itself,[67] and in others in a separate ruling on reparations.[68] In general it has held that 'any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation', citing ICJ case law and that this is a principle of customary international law, and as provided for in Article 27(1) of the Protocol.[69] Applicants have to provide the necessary evidence to support their claims.[70]

Article 45 of the Statute of the ACtJHPR does not make reference to the possibility of separate rulings on reparations.

12. MONITORING AND EXECUTION OF JUDGMENTS

Article 43 of the Statute of the ACtHPR largely reflects Article 28 of the 1998 Protocol for the current ACHPR Court. Article 43 reads:

[63] *Ruling on Reparations on Application 011/2011, Rev Christopher R Mtikila v United Republic of Tanzania*, § 43.

[64] *Judgment on Reparations. In the Matter of Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabé Human and Peoples' Rights Movement v Burkina Faso*, Application 013/2011, 5 June 2015, § 26.

[65] *Ruling on Reparations on Application 011/2011, Rev Christopher R Mtikila v United Republic of Tanzania*, § 29.

[66] Ibid., § 44.

[67] E.g. *Alex Thomas v Republic of Tanzania*, see e.g. § 159.

[68] E.g. *Ruling on Reparations on Application 011/2011, Rev Christopher R Mtikila v United Republic of Tanzania*.

[69] Ibid., § 27.

[70] *Tanganyika Law Society and the Legal and Human Rights Centre v United Republic of Tanzania and Reverend Christopher R Mtikila v United Republic of Tanzania*, 009/2011 and 011/2011, § 124.

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.

Furthermore, Article 46 reads:
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.

The ACHPR Court is still grappling with the exact nature of its role with respect to monitoring and execution of its judgments. Article 31 of the 1998 Protocol provides: 'the Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgement'. In fact the current Court has also adopted other reports in the case of Libya identifying its failure to comply with an order for provisional measures.[71] The ACHPR Court has also suggested that it should be able to

[71] Interim Report of the African Court on Human and Peoples' Rights notifying the Executive Council of Non-Compliance by a State, in accordance with Article 31 of the Protocol, available online at: www.african-court.org/en/images/documents/Reports/AFCHPR_Interim_Report__Non_compliance_by_a_State__-_Libya.pdf

report not just once a year (which had become the practice) but to 'each regular session of the Assembly' as required under Article 31.[72]

13. LEGAL AID

Article 10(2) of the current ACHPR 1998 Protocol provides that 'free legal representation may be provided where the interests of justice so require'. No such provision is provided for in the Statute of the ACtJHPR. Although there is reference to the possibility of legal assistance being funded from the Trust Fund[73] in relation to 'victims of human rights violations or their families', the new Statute does not appear to reflect fully the work that the ACHPR Court has done on this issue.[74] On the other hand, the provisions provided a Defence Office in the criminal jurisdiction of the Court gives effect to the right to counsel for individual defendants in the criminal cases. It maybe, in that context and in light of the current protocol, the legal aid policy would still be maintained to increase the scope of possible human rights cases.

Practical and other challenges arising from its merging of human rights with other jurisdiction and how to address them.

As can be seen from the examples provided above, the Malabo Protocol may make some welcome amendments with respect to the human rights jurisdiction of the proposed Court which reflect the experience of the existing ACHPR Court, but in other respects the changes are more troubling. The question is what can now be done to work with the Malabo Protocol.

It is worth stressing that the Malabo Protocol is likely to take several years to come into force, even if the 15 States required[75] are willing to ratify it

[72] Activity Report of the African Court for the Year 2013, 10. The Court is currently in the process of considering a detailed methodology for how it will monitor implementation of its judgments and how it will share that task with the AU organs. See R. Murray, D. Long, V. Ayeni and A. Some, 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights', 1 *African Human Rights Yearbook* (2017) 150–166.

[73] Article 46M, Statute of the ACtHPR. A draft Statute on the Establishment of the Legal Aid Fund of the African Court on Human and Peoples' Rights

[74] The 2013 Report of the African Court notes that the Court adopted a Legal Assistance Policy at its 27th session in order to 'facilitate indigent applicants to be able to effectively litigate applications before the Court', and called for applications for those lawyers able to be on a Roster to assist such applicants. Further consultancy was being carried out to develop a Legal Assistance Fund, Activity Report to the African Court for the year 2013, EX.CL/825 (XXIV), §§ 35–8. See Legal Aid Policy for the African Court on Human and Peoples' Rights, 2014–2015, available online at: http://en.african-court.org/index.php/component/k2/item/27-legal-aid-policy-2014–2015.

[75] Article 11 Malabo Protocol.

quickly. As of November 2018 there are only 11 signatories and no ratifications. There is considerable confusion, given the existence of not only the Malabo Protocol but also previous Protocols as well as the ACHPR Court 1998 Protocol that it is by no means clear for States which instrument they should be ratifying. In addition, the potential clash between compliance with the Rome Statute obligations and with the provisions of the Malabo Protocol around immunities in particular, as well as the steer given by the AU not to cooperate with the ICC may have prompted reluctance on some States to ratify.[76] This confusion, lack of clarity and timeframe can be exploited to ensure that if and when the Malabo Protocol does come into force, its human rights jurisdiction is stronger than currently reflected in its provisions.

14. CONSOLIDATING AND STRENGTHENING THE EXISTING ACHPR COURT

The ACHPR Court has continued to function during these negotiations and it will continue to function until the Malabo Protocol comes into force. A weak human rights court with a limited jurisprudence behind it and which has had little opportunity to explore the breadth of its mandate is less likely to leave much of a mark on the continent. If this time can be used to bolster the legacy of the ACHPR Court, some of the concerns with the human rights jurisdiction of the proposed ACtJHPR may become obsolete.

There are various ways this could be developed. Firstly, this could be through continuing strategic and other litigation on substantive rights, particularly those which the African Commission on Human and Peoples' Rights has not also yet had the opportunity to consider. In addition, increasing use of the ACHPR Court's advisory jurisdiction by AU organs, the African Commission and African Committee on the Rights and Welfare of the Child should be encouraged.

There is of course the issue of whether States should be encouraged to ratify the 1998 Protocol. At the very least the 22 that have already ratified but not made an Article 34(6) declaration should be encouraged to do so in order to

[76] See e.g. Decision on the International Criminal Court, Assembly/AU/Dec.590(XXVI), January 2016, 'Commends the Republic of South Africa for complying with the Decisions of the Assembly on non-cooperation with the arrest and surrender of President Omar Al Bashir of The Sudan' and 'The imperative need for all African States Parties to the Rome Statute of the ICC to continue to ensure that they adhere and articulate common agreed positions in line with their obligations under the Constitutive Act of the African Union'.

ensure access by individuals and NGOs and thereby increase the likelihood of a fuller docket of the Court.[77]

Furthermore, the relationship between the ACHPR Court and the African Commission on Human and Peoples' Rights is fundamental to the future of the human rights courts on the continent. Article 2 of the 1998 Protocol provides for the ACHPR Court to complement the protective mandate of the African Commission. As noted above the African Commission is among one of the bodies entitled to submit a case directly to the ACHPR Court under Article 5 of the 1998 Protocol. Article 6 enables the Court to request the opinion of the African Commission when the former is deciding issues of admissibility and gives it the option of transferring cases to the Commission.[78] The 1998 Protocol and the Rules of the Court reflect the fact that the functioning of the ACHPR Court is intrinsically linked to that of the African Commission.

Besides simple matters such as the ACHPR Court requesting the African Commission's clarification on whether the NGO has observer status before the Commission,[79] and whether the case is still pending before the Commission or has been withdrawn,[80] more importantly, the African Commission retains the power to submit cases to the Court directly through Article 5. Rule 118 of the Commission's Rules of Procedure set out three situations in which cases may be submitted to the ACHPR: in the event of a failure to comply with its recommendations; failure to comply with its provisional measures; or if the situation is considered to be one of serious or massive violations. Although it has used this opportunity on very few occasions[81] and has, it is argued, not necessarily thought through fully the implications of these cases before the Court, this issue is unlikely to go away before the proposed Court. Any clarity that can therefore be obtained at this stage in working through the instances where the African Commission will submit cases to the ACHPR Court can only be of assistance for any future court.

[77] Indeed, the AU Human Rights Strategy includes among one of its indicators 'four Member States make a declaration allowing individuals CSOs direct access to the Courts', Department of Political Affairs, African Union Commission, Human Rights Strategy for Africa, 2012–2016, 3.2.

[78] Article 6(3).

[79] E.g. *National Convention of Teachers Trade Union v Republic of Gabon*; *Association Juristes d'Afrique Pour La Bonne Gouvernance v Republique de Cote d'Ivoire*

[80] As required by Rule 29(6) of the Rules of Court, see *Urban Mkandawire v Republic of Malawi*, Application 003/2011, Judgment, § 33.

[81] *Matter of African Commission on Human and Peoples' Rights v Republic of Kenya*, Application 006/2012. *In the matter of African Commission on Human and Peoples' Rights v The Great Socialist Libyan People's Arab Jamahiriya*, Application 004/2011.

Conversely, there are numerous cases where the ACHPR Court has referred cases to the African Commission.[82] The grounds for doing so are not particularly clearly explained but raise a number of issues and the inconsistency and lack of clarity in the approach of the Court in this regard has been identified by one judge, Judge Fatsah Ouguergouz, who has issued numerous dissenting opinions repeating his concern with the way in which the Court has handled this issue.[83]

The opportunity now to further articulate the criteria on which the ACHPR Court will refer cases to the African Commission should not be missed. As Ouguergouz notes, consideration of whether referral is done on the basis, for example, of alerting the Commission to a situation of serious or massive violations and thereby acting as a form of 'early warning system' for the African Commission, goes to the heart of what role both the ACHPR Court and the African Commission play in the African human rights system as a whole.[84]

Similar considerations are also relevant to the relationship with the African Committee on the Rights and Welfare of the Child. Although the Malabo Protocol mentions this Committee only briefly, there is reference in Article 27 of the Statute of the ACtJHPR to the need for the Court to bear in mind its relationship of complementarity not only with the African Commission on Human and Peoples; Rights but also this Committee in the elaboration of its Rules.

Further work needs to be done on how the ACtHPR's judgments will be monitored in terms of their implementation by States. The roles of the Assembly, Executive Council and other AU organs in this regard need to be transparent and considered. Further engagement with the Court and AU bodies on this issue will be of relevance to any new Court.

Finally, it is not at all clear that the current ACHPR Court is yet particularly well known. The confusion at its inception between it and the ACJ has continued and been exacerbated by the extended criminal jurisdiction and finally the Malabo Protocol itself. Arguably, only those with an intimate knowledge of the AU and these developments fully understood the context and which Court was actually operational. It is not clear that much has changed 10 years on, despite valiant efforts by organisations such as the

[82] E.g. *Ekollo Moundi Alexandre v Republic of Cameroon and Republic of Nigeria*, Application 008/2011. *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*; *Association Juristes d'Afrique Pour La Bonne Gouvernance v. Republique de Cote d'Ivoire*.

[83] See in particular *Ekollo Moundi Alexandre v Republic of Cameroon and Republic of Nigeria*, Application 008/2011.

[84] Ibid., Dissenting Opinion of Judge Ouguergouz, §§ 29–30.

Coalition for an African Court to increase the number of ratifications and declarations under Article 34(6).

15. STRENGTHENING THE HUMAN RIGHTS MACHINERY AND BODIES ON THE CONTINENT

Through its Human Rights Strategy the AU commits itself to enhancing:

> Coordination and collaboration among AU and RECs organs and institutions and Member States;
>
> Strengthen the capacity of AU and RECs institutions with a human rights mandate; Accelerate ratification of human rights instruments;
>
> Ensure effective implementation of human rights instruments and decisions;
>
> Increase promotion and popularization of African human rights norms.[85]

This is to be achieved through, among other things, 'strengthened capacity of institutions at continental, regional and national Levels'.[86]

Besides the ACHPR Court, it is also important that sight is not lost of the African Commission, not least because regardless of what will happen to the Court, the Commission's mandate is unaffected. In addition, there are a range of other organs and bodies in the AU which have a role in human rights. This includes not just, for example, the Peace and Security Council or Pan-African Parliament, but also the African Peer Review Mechanism and ECOSOCC.

The opportunities missed, when the OAU transformed into the AU, for the development of a coherent overall strategy for engagement between the AU human rights bodies and instruments, could be taken up now. This could include revisiting the AU's Human Rights Strategy and specifically to 'consolidate and review co-ordination, complementarities and subsidiarity gaps and overlaps in the African human rights system, as well as reform of affected instruments in the human rights framework for policy decision and action to be taken'.[87] Continued regularly engagement between the relevant organs could also be accompanied by mapping out respective roles and relationships. It is imperative that the AU organs respect the independence of both the African Commission and the African Court and do not continue along the path they appear to be treading with the adoption in July 2018 of a decision

[85] Human Rights Strategy for Africa, AU Commission, § 24.
[86] Human Rights Strategy for Africa, AU Commission, § 29(b).
[87] Human Rights Strategy for Africa, AU Commission, Summary of Outputs, 1B.

calling into question decisions of the Commission and signaling a shift towards greater interference by the AU political organs in their work.[88]

Lastly, one should not forget some fundamental principles underlying the establishment of any new or expanded court. These include not only a focus on the rights of victims, whether from an international criminal or human rights law perspective, but also the importance of an independent, robust and experienced bench.

Building on work that the AU has already done to improve the pool of candidates for judges on the ACHPR Court and clarifying criteria for appointment it is hoped has dissuaded States from nominating and electing individuals who hold positions which will be incompatible with being a member of the judiciary. If these policies and procedures can be made more robust with respect to the existing ACHPR Court as well as the African Commission and African Committee of Experts on the Rights and Welfare of the Child, it is hoped by the time the Malabo Protocol comes into force they will be well established in practice.

16. CONCLUSION

Practically taking these issues forward with respect to the human rights jurisdiction requires not only working with the existing ACHPR Court, but also engagement with the AU, other bodies at the regional as well as the sub-regional and national levels. One of the challenges is that this requires consideration not just of human rights but also international law and international criminal law, and therefore necessitates conversations with and among a range of what are often seen as different groups of organizations and sectors.

Amending the provisions of the Malabo Protocol, on the face of it, does not appear to be too onerous a procedure, requiring either that the Court itself proposes amendments, or a State party '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'.[89] In practice this is likely to be extremely difficult and

[88] 'Decision on the Report of the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR), EX.CL/Dec.1015 (XXXIII); and Decision on the Activity Report of the African Court on Human and Peoples' Rights (AfCHPR), EX,CL/Dec.1013 (XXXIII).

[89] Article 12, Malabo Protocol.

there may be little appetite now for further amendments. In addition, opening up the text of the Protocol also opens the possibility that the result may be less favourable than the current provisions.

The drafters of the Malabo Protocol were willing to draw upon examples of good practice in other international and regional courts. States and civil society organizations can take advantage of this positive approach and use the occasion to develop softer tools, including first drafts of Rules of the Court, practice directions, guidelines, polices and memoranda of understanding. This may also provide further opportunities for the experience of the ACHPR Court to be incorporated into documents for the new court. Furthermore, referring to examples from the domestic courts in Africa, something the drafters of the Malabo Protocol did not appear to do, should also be considered.

Many hope that the Malabo Protocol, for its many flaws, might slip into obscurity and never come into force. At the very least, even if it is in the shadow of the highly ambitious establishment of a regional court, there is now a chance for some consolidation and strengthening of what the continent already has. It would be a shame if this opportunity were not taken.