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Civil Society Perspectives on the Criminal Chamber of the African Court of Justice and Human Rights

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Abstract

In June 2014, African Heads of States and Governments adopted the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights in Malabo, Equatorial Guinea. The Malabo Protocol seeks to expand the jurisdiction of the African Court to international and transnational crimes. This development raises fundamental issues of jurisdiction, capacity, political will and regional complementarity in the fight against impunity in the African continent. The paper interrogates the role of Civil Society Organisations in the adoption and possible operationalisation of the Court in support of the efforts of the African Union to end human rights abuses and commission of international and transnational crimes within the continent.

Keywords: Malabo Protocol, African Court, Criminal Chamber, International and Transnational Crimes, African Union.

1 Introduction

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) was adopted in Malabo, Equatorial Guinea, on 27 June 2014 during the 23rd Ordinary Session of the African Union Assembly of Heads of States and Governments.[1] The Malabo Protocol seeks to expand the jurisdiction of the African Court of Justice and Human Rights to cover international and transnational crimes. Although the Protocol on the Statute of the African Court of Justice and Human Rights was adopted on 1 July 2008, it is yet to enter into force at the time of writing as only seven states have

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1 Decision on the Draft Legal Instruments, Assembly/AU/Dec.529 (XXIII). The provisions of the amended Statute of the African Court of Justice and Human Rights will be discussed subsequently as Amended ACJHR Statute.

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ratified the treaty.[2] The sole purpose of the treaty is to merge the African Court on Human and Peoples' Rights[3] and the African Court of Justice established by the Constitutive Act of the African Union.[4] The Malabo Protocol is seen as a groundbreaking legal institution in the proposition to merge both civil and criminal law jurisdictions in a single court.[5] It has attracted both commendation and criticisms from scholars and policymakers.

Interestingly, civil society organizations (CSOs) played important roles in the conception, review and adoption of the Malabo Protocol. The story of human rights development in Africa cannot be effectively discussed without acknowledging the contributions of CSOs in Africa in different areas of activism. The Constitutive Act of the African Union provides for the participation of CSOs in the activities of the Union through the Economic, Social and Cultural Council (ECOSOCC).[6] This has been a rallying point for CSO activism in the continent in relation to African Union (AU)-related activities.

This is best exemplified by the relationship between the African Commission on Human and Peoples' Rights and CSOs through the Public Sessions of the African Commission, which enables CSOs to interact and make important contributions to the activities of the continental body.[7] The African Charter on Human and Peoples' Rights, adopted in 1981, was greeted with less optimism owing to the type of African leaders that endorsed its establishment.[8] Thirty-eight years later, the African Commission charged with the responsibility to promote and protect human rights in the continent is adjudged to have fared well despite its failings and challenges as a human rights body.[9]

In August 2012 CSOs gathered in Nairobi, Kenya, under the auspices of Centre for Citizens' Participation on the African Union (CCP-AU) to review the relationship between CSOs in Africa and the relationship with the AU and its bodies.

2 *See* the Status of ratification of the Protocol on the Statute of the African Court of Justice and Human Rights as at 6 February 2019, available at: https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf (last accessed 16 March 2019). Fifteen States Parties are expected to ratify the Protocol before it can enter into force.

3 *See* Arts. 1 and 2 of the Protocol on the Statute of the African Court of Justice and Human Rights, 2008.

4 The Protocol of the Court of Justice of the African Union adopted on 1 July 2003 and entered into force on 11 February 2009.

5 A. Abass, 'Historical and Political Background to the Malabo Protocol' *in* G. Werle & M. Vormbaum (Ed.), *The African Criminal Court: A Commentary of the Malabo Protocol*, The Hague, T.M.C Asser Press, 2017, p. 14. *See also* A. Abass 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', *European Journal of International Law*, Vol. 24, 2013, pp. 933-946.

6 *See* Art. 22 of the Constitutive Act of the African Union 2000.

7 Art. 30 of the African Charter on Human and Peoples' Rights provides that 'An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.'

8 C. Odinkalu 'Three Decades On, the Protection of Human Rights in Africa Comes of Age?' 31 May 2017, available online at: http://blogs.lse.ac.uk/africaatlse/2017/05/31/three-decades-on-the-protection-of-human-rights-in-africa-comes-of-age/(last accessed 16 March 2019).

9 *Ibid*.

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Participants noted several contributions made by CSOs to the agenda and activities of the AU organs and institutions.[10] It was equally agreed that for CSOs to make a meaningful impact, there was a need for synergy among CSOs and a clear understanding of the mandates of the AU organs and institutions and how to deal with them in any impactful way.

The adoption and entry into force of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights was spearheaded by CSOs based in the continent.[11] It is argued that the adoption of the Malabo Protocol benefitted immensely from contributions from CSOs in Africa despite the differences in opinion on the viability of the project.

It is on record that the drafting history, revisions and amendments that followed the criminal chambers benefitted from the memorandum of understanding between Pan-Africa Lawyers Union (PALU) and the AU. As a result of this unique relationship, PALU was officially saddled with the responsibility of developing a draft for the Malabo Protocol. It was also tasked by the continental body to look at the cost implication of having a criminal chamber in relation to the cost of running the African Court of Justice and Human Rights with the added responsibility of a criminal chamber.

PALU convened different meetings to engage different CSOs and other stakeholders on the viability of the criminal chamber. The development had its own risks in the sense that consultations were initially limited to those PALU could afford to engage. Several Africa-based CSOs were not involved in the consultation process, thereby limiting important comments and inputs that would have greatly improved the contents of the draft statute that was finally adopted by the Heads of State and Government. Despite these challenges, the adoption of the Malabo Protocol is seen as a step in the right direction, and the principles and values of the Malabo Protocol are praiseworthy.[12]

This article examines key institutions of the Malabo Protocol and discusses how CSOs can effectively engage with the institution. It further highlights roles CSOs can assume to ensure that the Court meets the aspirations of Africans looking for justice from its institutions. The article is divided into six sections. The second section traces the historical origins of the Criminal Chamber of the African Court. The third section looks at the Merger Protocol and the Criminal Chamber and their relationship with the already existing African Court on Human and Peoples' Rights. The fourth section discusses the key institutions established by

10 The organs of the AU include the following: The Assembly of the Union; The Executive Council; The Pan-African Parliament; Judicial and Human Rights Institutions; The African Union Commission; The Permanent Representatives Committee; The Specialized Technical Committees; The Peace & Security Council; The Financial Institutions; The Economic, Social & Cultural Council; Legal Organs. *See* Centre for Citizens' Participation on the African Union 'Report of the Dialogue on Civil Society Organisations Working with and/or on the African Union Organs and Institutions' 22-24 August 2012, Nairobi, Kenya.

11 *See* the activities of the Coalition for the Effective African Court on Human and Peoples' Rights, available at: www.africancourtcoalition.org/(last accessed 16 March 2019).

12 Amnesty International 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court', 2016, p. 5.

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the Malabo Protocol, including the judiciary and the office of the Prosecutor. The fifth section evaluates the role of CSOs in the ratification and operationalization of the Malabo Protocol and implications for the African human rights system. Section 6 is the conclusion, which articulates the arguments made in the article. Although this article focuses on the role of CSOs, it is important to lay a foundation for the evolution of the Criminal Chamber of the African Court of Justice and Human Rights.

2 Historical Origins of the Criminal Chamber of the African Court

The idea of a criminal chamber for Africa is not new. It is also a disservice to the founding fathers of the Organisation of African Unity (OAU), now African Union, to argue that the reason for the establishment of the Criminal Chambers of the African Court is solely to subvert the International Criminal Court (ICC). There are merits in some of the discussions, but these clearly miss the point. The ICC, as an international organization, cannot and will not dictate to the AU how it should carry out its responsibilities. In fact, as has been argued by different stakeholders on this issue, the current face-off between the ICC and the AU is due to several factors. For example, a major source of concern is the lack of clear understanding of the roles of different international organizations in the maintenance of international peace and security. In addition, the involvement of the United Nations Security Council in decision making involving parties that are members and non-members of the ICC treaty is a clear source of friction.[13]

These unholy alliances were bound to have ripple effects, and Africa, with her conflicts, instabilities, treaty ratifications and support for the ICC, became a 'guinea pig in the ICC laboratory'.[14] In addition, CSOs like the Coalition for the International Criminal Court (CICC), Amnesty International (AI), Human Rights Watch (HRW), Federation for Human Rights (FIDH), Parliamentarians for Global Action (PGA), among others, placed a high premium on their advocacy activities in Africa to ensure a wider ratification and domestic implementation of the Rome Statute. These efforts were supported mainly by member states of the European Union and the different donors from the global west.

The groundwork for these developments was not achieved overnight. Political leaders and CSOs played important roles in ensuring that Africa was represented at the Court. The contestations between the AU and the ICC have been dis-

13 *See, e.g.,* Art. 16 of the Rome Statute, which allows the United Nations Security Council to refer non-States Parties to the Rome Statute to the International Criminal Court.

14 C. Igwe 'The ICC's Favourite Customer: Africa and International Criminal law', *The Comparative and International Law Journal of Southern Africa*, Vol. 41, 2008, pp. 294-323.

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cussed by several scholars, and the debate continues.[15] However, what is clear is that the AU has chosen to look closely at its existing legal framework to use it to fight impunity in the continent. It is a commendable effort, though some scholars see these efforts as a smokescreen and an opportunity to circumvent international justice.[16]

However, the reality is that working at full capacity, the ICC is able to indict only a few individuals. The bulk of investigation and prosecution of international crimes will remain at the national level, which is a fulcrum of the principle of complementarity of the Rome Statute. That is why the move within the AU to have accountability structures should be supported. It will also aid in reducing the impunity gap that currently exists with the shortcomings of the ICC. The main argument that this article sets forth is that the human rights movement in Africa has benefitted immensely from CSO intervention, and the Malabo Protocol is not an exception. Therefore, the operationalization of the proposed African Court of Justice on Human and Rights should be high on the agenda of CSOs in the continent.

3 Between the Merger Protocol and the Criminal Chamber

The Malabo Protocol is aimed at extending the jurisdiction of the African Court of Justice on Human and Peoples' Rights to adjudicate over international crimes committed in Africa. While the decision has its supporters, there are those who feel that the process did not benefit from wider consultations on the viability of the project.[17]

It will be recalled that the African Charter on Human and Peoples' Rights was adopted in 1981 in The Gambia.[18] The African Charter established the African Commission on Human and Peoples' Rights, which adjudicates on human rights and states' responsibility in the continent. One problem that has militated

15 N. Dyani 'Is the International Criminal Court Targeting Africa?: Reflections on the Enforcement of International Criminal Law in Africa' in V. Nmehielle (ed.) *Africa and the Future of International Criminal Justice*, The Hague: Eleven International Publishing, 2012, p. 185; H. Richardson 'African Grievances and the International Criminal Court: Issues of African Equity under International Criminal Law' in V. Nmehielle (ed.) *Africa and the Future of International Criminal Justice*,The Hague: Eleven International Publishing, 2012 p.83; A. Ogunfolu and M. Assim 'Africa and the International Criminal Court', Vol. 18, 2012, *East African Journal of Peace & Human Rights pp.* 115-116

16 C. Murungi & J. Biegon. *Prosecuting International Crimes in Africa* (2011) Pretoria: Pretoria University Law Press p.1068.

17 Frans Viljoen 'AU Assembly Should Consider Human Rights Implications Before Adopting the Amending Merged African Court Protocol' AfricaLaw, 23 May 2012, available online at: http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/(last accessed 16 March 2019); Amnesty International 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court', January 2016, AFR 01/3063/2016, 24 (Amnesty International, Malabo Protocol).

18 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

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against the effective operation of the African Commission is the advisory nature of its decisions and lack of enforcement.[19] This limitation and pressures from CSOs led to the adoption of the Protocol on the African Charter on Human and Peoples' Rights, establishing the African Court to complement the efforts of the African Commission in the promotion and protection of human rights in the continent.[20]

When the OAU was transformed into the AU, the Constitutive Act of the AU envisaged the establishment of a Court of Justice as one of its principal organs.[21] The African Court of Justice was different and distinct from the African Court on Human and Peoples' Rights established by the African Charter Protocol.[22] In other words, to prevent the emergence of two continental courts at the same time, the AU adopted a merger protocol that fused the two courts into one judicial entity.[23]

A scholar, Chacha Murungu, has argued that the idea of establishing the criminal chamber of the proposed merger court is a result of the indictment and prosecution of African state officials either by the domestic courts of some European states, especially France, the United Kingdom, Spain and Belgium, or by the ICC.[24] This raises the question of whether there is a genuine concern by the AU to fight impunity in the continent. The answer to this question is mixed. The Constitutive Act of the AU condemns acts of impunity in the continent and warrants AU member states to ensure that individuals who bear responsibility for these crimes are held accountable.[25] Clearly, these are not the only factors that necessitated the decision.

However, Donald Deya, a staff of PALU and one of the key technocrats engaged by the AU to draft the Malabo Protocol, has argued that the establishment of a criminal chamber in the African Court of Justice and Human Rights to prosecute international crimes is a long-term project and will not likely offer relief to those indicted or currently being investigated by the ICC.[26] This is a cor-

19 G. Wachira & A. Ayinla, 'Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy', *African Human Rights Law Journal*, Vol. 6, 2006, p. 465 at 467. G. Wachira, 'African Court on Human and Peoples' Rights: Ten Years on and Still No Justice', *Minority Rights International Report*, 2008, p. 11.

20 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III). *See also* N. Udombana 'Toward the African Court on Human and Peoples' Rights: Better Late Than Never', *Yale Human Rights and Development Law Journal*, Vol. 45, 2000, p. 45 at 46.

21 Art. 18 of the Constitutive Act of the AU adopted in 2000 at the Lome Summit (Togo), entered into force in 2001 to operationalize the AU but not the African Court of Justice.

22 The Court is based in Arusha, Tanzania, and continues to operate in the interim.

23 The African Court of Justice was merged with the African Court of Human and Peoples' Rights to become The African Court of Justice and Human Rights. The two courts were merged during the African Union Summit of Heads of State and Government on 1 July 2008 in Sharm El Sheikh, Arab Republic of Egypt.

24 C.B. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', *Journal of International Criminal Justice*, Vol. 9, 2011, p. 1067 at 1068.

25 Art 4(h) Constitutive Act of the African Union.

26 D. Deya 'Is the African Court Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes', 6 March 2012.

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rect assessment of the situation. However, if the intention of the AU in setting up a criminal chamber within the African Court is to shield those who have been indicted by the ICC, it may be a motivating factor to ensure that the protocol enters into force within the shortest time possible. At the time of writing, only nine African countries have signed the Malabo Protocol.[27]

Even if the court becomes operational, it will not immediately assume the roles and responsibilities of another international criminal justice institution like the ICC. This is because there is no complementarity agreement between the ICC and the AU. Therefore, meeting the jurisdictional threshold set forth in the Rome Statute under the principle of complementarity has to be decided by the judges of the ICC when the issue comes up before them, if that will ever happen. Assuming for the sake of argument that the African Court enters into force, there is also the legal problem of transferring cases to the new institution as these activities will not be enough for the ICC to suspend its activities. The ICC does not envisage a regional court in terms of complementarity procedures. However, there is also nothing in the Rome Statute that discourages the setting up of regional accountability mechanisms to fight impunity in the continent. And this is where the role of CSOs is clearly cut out for them. The next section discusses key institutions in the Malabo Protocol.

4 Key Institutions of the Malabo Protocol

Before a discussion on the role of CSOs can be undertaken, it is important to discuss key institutions established by the Malabo Protocol. This is to ensure that CSOs are able to easily identify key institutions of the Court and how to effectively engage them. Another reason for this discussion is to show possible flaws in the proposed institution and discuss ways through which these can be remedied to ensure that a strong institution emerges at the end of the day.

The Malabo Protocol provides for four organs of the Court, namely the presidency, office of the prosecutor, the registrar and the defence office.[28] Therefore, the proposed African Court of Justice and Human Rights (ACJHR) is vested with original and appellate jurisdiction, including international criminal jurisdiction. In addition, 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.[29]

This is a very expansive jurisdiction because the Court will have jurisdiction over the issues covered by the Malabo Protocol, including human rights issues, and

27 These include Benin; Chad; Congo; Ghana; Guinea Bissau; Kenya; Mauritania; São Tomé and Principe; Sierra Leone.

28 Art. 2 of the Amended ACJHR Statute.

29 Art. 3 of the Amended ACJHR Statute.

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international criminal jurisdiction over individuals that may have committed crimes within the jurisdiction of the Court. In addition, the jurisdiction of the Court will also cover interstate relationship agreements between regional economic communities. The Court is expected to complement the protective mandate of the African Commission on Human and Peoples' Rights.[30] The Commission is also one of the institutions with direct access to the Court. The role of the Court is not in doubt. The plan is to make it the main judicial organ of the AU through a phased-out process by which the functioning African Court on Human and Peoples' Rights will be replaced by the ACJHR with its expanded jurisdiction.[31]

This development is important for CSOs to effectively engage with the Court. A key question for CSOs is why the African Court on Human and Peoples' Rights should cease to exist once the Malabo Protocol is fully operational. This raises different issues regarding the merger protocol and the status of the already existing African Court established by treaty. In addition, an understanding of the legal framework of the Court will go a long way in ensuring that CSOs positively impact the building of this judicial institution through different methods of association and intervention discussed in this article.

4.1 The Judicial Arm of the Court

The Malabo Protocol provides that the Court shall have three sections: a General Affairs Section, a Human and Peoples' Rights Section and an International Criminal Law Section.[32] The International Criminal Law Section of the Court shall have three chambers, to wit a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber. However, the allocation of judges to the respective sections and chambers shall be determined by the Court in its rules.[33] The Malabo Protocol also provides for the possibility of the expansion of the current chambers of the Court beyond the three already identified.[34] The Court is expected to be made up of 16 judges who are nationals of the States Parties to the Malabo Protocol. This means that being a member of the AU does not qualify one to become a judge. The country of origin of the candidate must have ratified the Protocol to be eligible for election.

Compared with the ICC, the African Court will be glaringly understaffed.[35] This is because the ICC currently has 18 judges and deals only with core crimes like genocide, war crimes and crimes against humanity and aggression.[36] However, the Court envisaged under the Malabo Protocol has a list of crimes that

30 Art. 4 of the Amended ACJHR Statute.
31 *See* Art. 2 of the Amended ACJHR Statute.
32 Art. 16 of the Amended ACJHR Statute.
33 *Ibid.*
34 Art 19 of the Amended ACJHR Statute.
35 *See* Amnesty International, Malabo Protocol, 26.
36 See Art 5 of the Rome Statute.

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combines international, transnational and even domestic crimes.[37] In addition, there is the possibility of expanding the jurisdiction of the crimes under the jurisdiction of the court. The number of judges of the Court of Justice is not static, and the Assembly of Heads of States and Governments can decide to increase the number.[38] This possible increase will also have financial implications for the court. Appointment of judges is expected to take into consideration each geographical zone of the continent while ensuring equitable gender representation in the Court.[39]

The Court will 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 jurisconsults of recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law.[40] One striking thing about the nomination of potential judges is that States Parties are allowed to nominate up to two candidates and shall take into account equitable gender representation in the nomination process.[41] This means that states are at liberty to nominate male and female candidates for election. States are expected to choose the areas of competence for their candidates in areas of international law, international humanitarian and human rights law and international criminal law.[42] These provisions allow for CSO participation at the national level to ensure that states planning to nominate candidates follow the procedures laid down and adhere strictly to the requirements for the nomination of potential judges to the Court. Therefore, a key role for CSOs is to ensure the nomination of qualified candidates by States Parties to the statute.

According to the Malabo Protocol, the judges of the African Court will be elected by the Executive Council of the AU and appointed by the Assembly of Heads of States and Government.[43] The judges will be elected through secret ballot by a two-thirds majority of member states with voting rights, from among the qualified candidates presented by States Parties to the Protocol. During the elections, 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. Furthermore, the Assembly of Heads of States and Government shall ensure that in the Court as a whole there is equitable representation of the regions and the principal legal traditions in Africa and the equitable gender representation. However, one curious issue

37 Art. 28A provides that the court shall have power to try persons for the crimes of 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.

38 Art. 3 of the Amended ACJHR Statute.

39 *Ibid*.

40 Art. 4 of the Amended ACJHR Statute.

41 Art. 5 of the Amended ACJHR Statute.

42 Art. 6 of the Amended ACJHR Statute.

43 Art. 7 of the Amended ACJHR Statute.

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here is that election is conducted by the Executive Council and appointment undertaken by the Assembly of Heads of States and Governments.

This is clearly a shared responsibility between the two organs of the AU. It is not clear in the Statute why the responsibility to ensure equitable representation of legal traditions and gender is the exclusive responsibility of the Assembly of Heads of States and Government neglecting a crucial organ that is saddled with the responsibility of conducting the election that will produce the judges to be appointed. This is where the activism of CSOs will be needed. It will be important to inform Executive Council to recognize the importance of ensuring equitable representations of legal traditions in Africa and the gender component of the Court.

Regarding the terms of office of the judges, they will 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.[44] When compared with other international regional or criminal courts, the Statute provides for the independence of the judges. The Statute states that the independence of the judges shall be fully ensured in accordance with international law. In addition, the Court shall act impartially, fairly and justly. In the 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.[45]

It is important that CSOs at the national level create opportunities to ensure that those nominated by States Parties meet minimum standards of judicial qualification. This means that public debates can be organized for potential candidates. CSOs can request that the process of nomination of candidates is made open and that all who are qualified to apply will go through a fair and transparent screening process to identify highly qualified candidates for possible appointment.

4.2 Office of the Prosecutor

The Malabo Protocol provides for the office of a Prosecutor and two Deputy Prosecutors.[46] The Protocol provides that the Prosecutor and Deputy Prosecutors shall be elected by the Assembly of Heads of States and Governments from among candidates who shall be nationals of States Parties nominated by States Parties. In addition, the Prosecutor shall serve for a single, non-renewable term of seven (7) years while the Deputy Prosecutors shall serve for a term of 4 years, renewable once. 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.

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

44 Art. 8 of the Amended ACJHR Statute.
45 Art. 12 of the Amended ACJHR Statute.
46 Art. 22A of the Amended ACJHR Statute.

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State Party or any other source. The Protocol provides that the Prosecutor shall have the power to question suspects, victims and witnesses and collect evidence, including the power to conduct on-site investigations.

Although the Statute does not mention the International Criminal Court, it is clear that some of the provisions of the Malabo Protocol benefitted from provisions of the Rome Statute in relation to the office of the ICC Prosecutor. This is because the office of the Malabo Protocol Prosecutor can be compared with that of the ICC Prosecutor established under Article 42 of the ICC Statute. The ICC Prosecutor is elected by secret ballot and needs an absolute majority of State Parties to the Rome treaty.[47] Although the Rome Statute that established the ICC provides limited information on the procedure for nominating and electing the Prosecutor, the State Parties have adopted a procedure for the nomination of judges, the Prosecutor and the Deputy Prosecutors of the Court.[48]

These Procedures attempt to ensure that the person appointed as Prosecutor is independent in law and practice. For example, they state that nominations for the Prosecutor should be made by several State Parties.[49] In addition, they urge State Parties to make every effort to elect the Prosecutor by consensus.[50] If consensus does not emerge, then the candidates have to be put up for election. The absolute majority required for election was intended to ensure that the Prosecutor garners widespread support from states. Such level of support would militate against partiality on the part of the Prosecutor. In addition to these requirements, candidates for the office of the Prosecutor are expected to be persons of high moral character and competence and to have extensive practical experience in the prosecution or trial of criminal cases.[51]

The ICC Prosecutor enjoys a relatively secure tenure compared with the African Court Prosecutor. The ICC Prosecutor is appointed to an uninterrupted single term of 9 years.[52] This is 2 years more than the Prosecutor of the African Court. During this period, the Prosecutor is expected not to engage in any activity that is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence.[53] Furthermore, the Prosecutor is prohibited from engaging in any other occupation of a professional nature while in office.[54] If there is any likelihood of conflict of interest, the Prosecutor may request to be excused from a particular situation or case.[55]

47 Art. 42 (4) of the Rome Statute. The Assembly of States Parties of the Rome Statute consists of all States that have ratified the treaty. Though non-state parties can participate in the meetings, they do not have a right to vote.

48 *See* the Resolution on the Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court, ICC-ASP/3/Res.6, adopted at the 6th plenary meeting, on 10 September 2004, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-3-Res.6-CONSOLIDATED-ENG.pdf (last accessed 16 March 2019).

49 *Ibid*. at Para. 29.

50 Para. 33 of the Resolution on the Procedure for the nomination and election.

51 Art. 42 (3) of the Rome Statute

52 Art. 42 (4) of the Rome Statute.

53 Art. 42 (5) of the Rome Statute.

54 *Ibid*.

55 Art. 42 (6) of the Rome Statute.

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The ICC Prosecutor can be removed from office on two grounds only. The first is when the Prosecutor is found to have committed 'serious misconduct' or a 'serious breach' of his or her duties under the Statute, as provided for in the Rules of Procedure and Evidence or displays inability in exercising the functions required by the Statute.[56] The second is when the Prosecutor is unable to exercise the functions required by the Rome Statute.[57]

A serious misconduct is conduct that is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court.[58] Serious breach of duty occurs where a person has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties.[59] Inability to exercise the functions of the office can be due to sickness or any other factor that could militate against the effective functioning of the Prosecutor.

The security of tenure of the ICC Prosecutor is guaranteed not only by the prescription of grounds of removal but also by a specific procedure by which such removal can happen. Article 46 (2) of the Rome Statute provides that a decision to remove the Prosecutor from office is made by the ASP through a secret ballot by an absolute majority of States Parties to the Rome Statute.[60] This means that the Prosecutor can be removed for gross misconduct only during the annual sessions of the ASP, unless a special session is convened for that purpose.[61] Where the Prosecutor has committed misconduct of less serious nature, he or she shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.[62]

The Prosecutor of the ICC also enjoys a longer tenure of 9 years compared with the prosecutors of the Special Court for Sierra Leone and the Special Tribunal for Lebanon appointed into office by the UN Secretary-General for three renewable years, and the prosecutors of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda, who enjoy 4-year renewable terms.

This expansive discussion on the Prosecutor of the proposed African Court and prosecutors of other international criminal courts is necessary. The Prosecutor is usually the face of the Court, and therefore the potential candidate has to be chosen with care. CSOs have played important roles in ensuring that the prosecutors of international courts are men and women who meet the minimum qual-

56 Art. 46 (1) (a) of the Rome Statute.
57 Art. 46 (1) (b) of the Rome Statute.
58 Rule 24 (1) of the Rules of Procedure and Evidence.
59 Rule 24 (2) of the Rules of Procedure and Evidence.
60 Art. 46 (2) (b) of the Rome Statute.
61 Annual Sessions of the ASP meeting are alternated between The Hague, Netherlands and the United Nations Headquarters in New York. *See* Art. 112 (6) of the Rome Statute; S. Rama Rao, 'Assembly of States Parties', *in* O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., (2008) C.H. Beck, Hart and Nomos: Munchen; Baden-Baden and Portland, 2008, pp. 1687-1697 at 1695.
62 Art. 47 of the Rome Statute.

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ifications for the positions. In addition, CSOs scrutinize those nominated for appointments and ensure that the provisions of the law are followed strictly. Even after appointment, CSOs have developed ways of ensuring that prosecutors act within the boundaries of their authority. Therefore, it is important to emphasize that early engagement with the office of the Prosecutor of the Malabo Protocol is needed. This is to ensure that the person who eventually occupies the post is able to deliver effectively.

5 The Role of CSOs in the Adoption and Operationalization of the Malabo Protocol

The operationalization of the Malabo Protocol will require sustained activism and support of CSOs. This is because the entry into force of the Malabo Protocol, election of the Judges and prosecutors of the African Court on Human and Peoples' Rights will require more than the intervention of the Executive Committee and Heads of States and Government of the AU. In addition, submission of cases to the Court, request for advisory opinions, submission of amicus briefs, ensuring that the rights of victims and accused persons are guaranteed will need a lot of advocacy to achieve. The next section discusses ideas that CSOs will use to effectively engage with the proposed African Court of Justice on Human and Peoples' Rights. It also builds on earlier identified needs on how CSOs can engage the AU, its organs and institutions.[63]

5.1 Ratification and Entry into Force of the Malabo Protocol

A key campaign that CSOs in Africa will need to embark upon is to ensure the ratification and entry into force of the Malabo Protocol. It is argued that an effective court with such a mandate should enjoy the support of all the members of the AU to ensure acceptance and commitment to justice and individual criminal responsibility as envisaged in the Malabo Protocol. For the Court to become operationalized, 15 members of the AU will need to ratify it.[64] The experiences of other legal institutions show that attaining that status may not be an easy task and will clearly require the support and advocacy of CSOs. A limiting factor is the process of ratification of international treaties applicable in different African countries. While some operate the monist system of treaty incorporation, others apply the dualist system. A few examples will be provided here to give an insight into how

63 *See* the Communiqué 'Understanding the Malabo Protocol: The Potential, The Pitfalls and Way Forward for International Justice in Africa Conference' Southern Sun Hotel Pretoria, South Africa, 7-8 November 2016, available online at: http://www.hrforumzim.org/wp-content/uploads/2016/11/Malabo-Protocol-Communique.pdf (last accessed 16 March 2019); *see also* Centre for Citizens' Participation on the African Union 'Dialogue on Civil Society Organisations Working with and/or on the African Union (AU) Organs & Institutions', 22-24 August 2012, Nairobi, Kenya, available online at: http://ccpau.org/wp-content/uploads/2012/08/Civil-Society-at-the-AU-what-impact-August-2012-Report1.pdf (last accessed 16 March 2019).

64 As at March 2019, eleven African countries have signed the Malabo Protocol, and none is yet to ratify it.

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advocacy activities can be planned by CSOs for the ratification of the Malabo Protocol.

In South Africa, a mixed procedure is used for treaties. Before 1994, the relationship between international and domestic law was left to the courts to decide.[65] South Africa followed the dualist approach to the incorporation of international instruments as treaties were negotiated, signed, ratified and acceded to by the executive. Only those treaties incorporated by Act of Parliament became part of the South African law; thus treaty-making fell exclusively within the competence of the executive.[66] The Interim Constitution of 1993 introduced a major change in the approach of South African law to international treaties. Ironically, it is with respect to treaties that the final Constitution presents the most significant change from the Interim constitutional position in so far as public international law is concerned.[67]

Under the Interim Constitution of 1993, the executive retained the power to negotiate and sign treaties while the National Assembly and Senate were required to agree to the ratification of and accession to treaties.[68] The Constitution also provided that treaties ratified by resolutions of the two houses of Parliament became part of municipal law, provided Parliament expressively provided for it.[69] According to Dugard:

> [t]he clear purpose of the Interim Constitution was to facilitate the incorporation of the treaties into municipal law. The drafters of the Interim Constitution however failed to take account of the bureaucratic mind. Government departments required to scrutinize treaties before they were submitted to Parliament refused to present treaties to parliament for ratification until they were completely satisfied that there would be no conflict between provisions of the treaty and domestic law. The result was that few treaties were presented to Parliament expeditiously. The Parliamentary procedure for dealing with treaties further delayed ratification. Consequently, few treaties ratified by Parliament were incorporated into municipal law.[70]

Because of the problems encountered in the Interim Constitution, the drafters of the 1996 Constitution elected to return to the pre-1993 position relating to incorporation of treaties, without abandoning the need for parliamentary ratification of treaties.[71] Three principal methods are employed by the legislature to transform treaties into municipal law under the 1996 Constitution. In the first

65 J. Dugard, 'International Law and the "Final" Constitution', *South African Journal on Human Rights*, Vol. 11, 1995, p. 241.

66 J. Dugard, *International Law: A South African Perspective*, 2nd ed., Cape Town, Juta & Co, 2000, p. 54.

67 R. Keightley, 'Public International Law and the Final Constitution', *South African Journal of Human Rights*, Vol. 12, 1996, pp. 405-418 at 409.

68 *See* Section 231 (2) of the Interim Constitution, Act 200 of 1993.

69 *See* Section 231 (3) of the Interim Constitution Act 200 of 1993.

70 Dugard, 2000, p. 55.

71 *See* Section 231 of the South African Constitution, Act 108 of 1996.

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instance, the provisions of a treaty may be embodied in the text of an Act of Parliament. Secondly, the treaty may be included as a scheduled to a Statute; thirdly, an enabling Act of Parliament may give the executive power to bring the treaty into effect in municipal law by means of proclamation or notice in the Government gazette.[72]

The African National Congress, which is the ruling political party in South Africa, hopes to prioritize treaties adopted by regional institutions like the AU. However, the policy has not translated into any positive development as the South Africa government is yet to sign or ratify the treaty. South Africa tried to withdraw from the ICC, and the decision was ruled invalid by the South African High Court, which stated that the decision was subject to parliamentary approval.[73] In relation to the failure of the South African government to arrest President Al-Bashir when he visited South Africa, the ICC stated that

> by not arresting Omar Al-Bashir while he was on its territory between 13 and 15 June 2015, South Africa failed to comply with the Court's request for the arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute.[74]

Nigeria operates the dualist approach in the implementation of treaties. Although the executive arm of the Government of Nigeria can sign and ratify a treaty like the Malabo Protocol, its provisions will not have the force of law until a domestic legislation is enacted by the National Parliament. Clearly, the implementation of international treaties in Nigeria is governed by the Constitution. The Nigerian Constitution of 1999 provides that

> [n]o treaty between the Federation and any other country will have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.[75]

On the authority of the *African Reinsurance Corporation v. Abate Fantaye*[76] it would appear that a person may not be able to invoke the jurisdiction of a municipal court to directly enforce the provisions of an international instrument without its

72 Dugard, 2000, p. 57.

73 British Broadcasting Corporation 'South Africa's decision to leave ICC ruled "invalid"', 22 February 2017.

74 Decision under Art. 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09, 6 July 2017, Para. 123; *see also* B. Olugbuo, 'Law and Politics at the International Criminal Court', 25 August 2015, available online at: https://www.opendemocracy.net/openglobalrights/benson-chinedu-olugbuo/law-and-politics-at-international-criminal-court (last accessed 16 March 2019).

75 *See* Section 12 of the Nigerian Constitution of 1999.

76 *African Reinsurance Corporation Case* [1986] 3 NWLR 811at 834.

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incorporation into national law.[77] The African Charter on Human and Peoples' Rights was incorporated into Nigerian law through this process by enacting a municipal law that gave obligation to the rights and responsibilities enshrined in the African Charter.[78] CSOs in Nigeria will need to engage the executive government for the ratification of treaties, as clearly provided in the 1999 Constitution. A second layer of advocacy will involve incorporating the provisions of the Malabo Protocol into municipal law.

In the Democratic Republic of Congo (DRC), a slightly different approach is noticed. The legal system of DRC has been described as monist in nature. According to the International Committee of the Red Cross

> the [DRC] Constitution recognizes the superiority of international law over domestic legal order. International treaties and conventions ratified or approved by the State become the law of the land after their publication in national Gazette and no specific legislation is required to give effect to the treaty at national level.[79]

This means that the DRC Government is responsible for negotiating international treaties and conventions under the authority of the President of the Republic, who ratifies them. Therefore, when a provision of an international treaty or convention is contrary to domestic legislation, ratification or approval requires amendment of the domestic law.[80]

The constitutions of some Francophone African countries similar to that of DRC provide that international treaties apply directly like domestic law.[81] The provision has bolstered the argument that there is no obligation to domesticate international instruments since treaties generally do not require any special requirement for implementation. Since ratification will always precede domestic implementation, it may be necessary to understudy how some CSOs have fared in advocating for the ratification of international treaties. The experiences of the CICC and Coalition for an Effective African Court are discussed below.

77 M. Ladan 'Issues in domestic implementation of the Rome Statute of the International Criminal Court in Nigeria' Paper presented at a Round Table session with Parliamentarians on the Implementation of the Rome Statute in Nigeria organized by the Nigerian Coalition on the International Criminal Court (NCICC), 12 November 2002, National Assembly Complex, Abuja, Nigeria [on file with author].

78 *See* African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap 10 Laws of the Federation 1990, which domesticated the African Charter. *See also Abacha v. Fawehinmi* [2000] 6 NWLR 228, where the Nigerian Supreme Court stated that Cap 10 [African Charter] is a statute with international flavour [...] if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.

See also Ogugu v State (1994) 9 NWLR (Pt.366).

79 International Committee of the Red Cross 'Report of the ICRC-UNESCO Regional Seminar for SADC States and Madagascar on the Implementation of International Humanitarian Law and Cultural Heritage Law' 19-21 June 2001, Pretoria, South Africa at 67.

80 *Ibid.*

81 *See, e.g.,* Art. 190 of the Rwandan Constitution of 2003.

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The CICC carried out a very successful campaign to ensure the adoption, ratification and domestic implementation of the Rome Statute of the ICC. After the adoption of the Rome Statute, in July 1998, most scholars and government representatives believed that it would take another decade or more for the Rome Statute to enter into force. However, the CICC galvanized CSO support through coalitions and networks of like-minded organizations that exerted pressure on different governments around the world. CICC's involvement with the ICC dated back to the negotiation for the adoption of the Rome Statute.[82] The advocacy has continued to strengthen and support the ICC.

With headquarters in New York and The Hague and funding from the European Union and donors from different Western governments, the CICC mobilized CSOs' support, activism and capacity building for national and regional CSOs working on international justice. This advocacy paid off in 2002 when the 60th ratification needed for the entry into force of the Rome Statute was achieved. The success of the global campaign cannot be attributed to the CICC alone as several other organizations participated in the campaigns. However, it is on record that the Coalition played an important role in this regard using its national and regional spread to achieve global ratification of the Rome Statute.

The efforts of the Coalition for an Effective African Court of Justice and Human Rights also helped to ensure the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights. The regional spread and sustained campaign of the Coalition led to the entry into force and operationalization of the African Court in Arusha, Tanzania, in 2004. These models can be replicated for the Malabo Protocol.

Currently, there is no visible CSO Coalition advocating for the ratification and entry into force of the Malabo Protocol. One reason for this is the controversial immunity clause that gives a general impression that African leaders endorse impunity in the continent. It will be recalled that in 2012 47 African CSOs and international organizations with a presence in Africa raised several issues with the draft Malabo Protocol in a joint open letter to ministers of justice and attorneys-general of African States Parties to the Rome Statute of the International Criminal Court regarding the proposed expansion of the jurisdiction of the ACJHR.[83] The immunity clause has also affected donor interest. Several advocacy activities carried out in the continent are donor driven. Therefore, without a Western donor stepping in to fill the gap, it may be difficult for CSOs to effectively carry out advocacy for the ratification of the treaty.

82 Z. Pearson 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law', *Cornell International Law Journal*, Vol. 38, No. 2, 2006, pp. 243-284 at 265. More information on the Coalition for the International Criminal Court is available online at: www.coalitionfortheicc.org/.

83 Amnesty International, Malabo Protocol, 10. *See also* Human Rights Watch 'Joint Letter to the Justice Ministers and Attorneys – General of the African States Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights.'

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In addition, a perusal of the ratification process of different legal instruments of the AU supports the argument that without effective and coordinated CSO advocacy and activism, the entry into force of the Malabo will likely be delayed. For example, the African Charter on Human and Peoples' Rights that established the African Commission on Human and Peoples Rights was adopted in June 1981 and entered into force in October 1986.[84] The Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights was adopted in June 1998 and entered into force in January 2004.[85] The African Charter on the Rights and Welfare of the Child was adopted on 1 July 1990 and entered into force on 29 November 1999.[86] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted on 1 July 2003 and entered into force on 25 November 2005.[87] The Protocol of the Court of Justice of the AU was adopted on 1 July 2003 and entered into force on 11 February 2009.[88] In addition, the African Charter on Democracy, Elections and Governance was adopted on 30 January 2007 and entered into force on 15 February 2012.[89] The delay in the ratification and entry into force of these treaties occurred despite targeted advocacy efforts mounted by CSOs to ensure the operations of these AU institutions.

A counterargument is that AU member states that see the Malabo Protocol as an alternative to the ICC may accelerate the entry into force of the treaty, although it is clear that the African Court will likely not jeopardize current cases and situations before the ICC. For instance, the current government of Kenya, a strong opponent of the ICC, has signed the Malabo Protocol and pledged 1 million USD to support the eventual take-off of the Court.[90] In addition, the AU has proposed that the ratification of the Malabo Protocol should be fast-tracked to ensure early operationalization of the Court.[91] These efforts may galvanize a momentum that will result in ratification and entry into force of the treaty.

5.2 Nomination and Election of Court Officials

Another important function of CSOs relates to the nomination and election of court officials. CSOs will need to play important roles in the nomination of candidates at the national level to ensure that the process of nomination for candidates in the African Court is not used to reward political loyalists. In addition, efforts should be made at the national level to institute a vetting and screening procedure before the names of qualified candidates are submitted for elections.

84 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

85 The status of all AU instruments is available online at African Union 'OAU/AU Treaties, Conventions, Protocols & Charters' https://au.int/en/treaties (last accessed 16 March 2019).

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

90 Amnesty International, Malabo Protocol, 11.

91 Paras. 15 and 17 (b) of the Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court, Assembly/AU/Dec.547 (XXIV) adopted 31 January 2015.

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CSOs are further encouraged to monitor the procedure that will be adopted by organs of the AU in the election process to ensure that qualified candidates are elected and the procedure is not reduced to vote trade-offs between different countries whose candidates are competing for positions.

However, the problem will likely not be limited to the African Court. Experience has shown that there is always a tension during the election of officials of international judicial institutions. Sometimes, national appointments and international elections are reduced to patronage at the expense of experience and quality representation. These problems have been identified in established institutions like the International Court of Justice and the ICC.[92]

In relation to the ICC, CSOs have highlighted the importance of electing judges who are not only qualified but possess the experience, skills and stamina needed for complex and lengthy criminal proceedings.[93] Pursuant to the provisions of the Rome Statute, the Assembly of States Parties of the ICC established the advisory committee on nominations whose responsibility is to evaluate the qualifications of candidates nominated by States Parties for election as judicial officers of the Court and make recommendations to the Assembly of States Parties.[94] Despite this innovative mechanism, the use of vote trading and political expediency in the election of judges of the ICC has not been totally eliminated.

CSOs will have to insist on the use of criteria that are transparent, open and inclusive in the nomination of candidates at the national level. In addition, there may be a need to campaign for the establishment of an advisory committee on the nomination of judicial officers for the African Court. In addition, in relation to the Prosecutor and Deputy Prosecutor, it may be necessary to establish a search committee that will identify candidates nominated by States Parties and recommend potential candidates to the Assembly of Heads of States and Governments for election.

According to the Malabo Protocol, the Registrar and Assistant Registrars of the African Court are to be appointed by the Court on the basis of Staff Rules and Regulations of the AU.[95] In contrast with the ICC, the Register is elected by the judges of the ICC.[96] This is a slightly different provision in relation to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, which provides that 'the Court shall appoint its own Registrar and other staff of the registry from among nationals of Member States of the [AU] according to the Rules of Procedure'.[97] This is

92 R. Mackenzie, K. Malleson, P. Martin & P. Sands, *Selecting International Judges: Principle, Process, and Politics*, Oxford, Oxford University Press, 2010, p. 3.

93 Human Rights Watch 'Letter to Foreign Ministers on the Election of Judges to the International Criminal Court' 26 March 2014, available at: https://www.hrw.org/news/2014/03/26/letter-foreign-ministers-election-judges-international-criminal-court (last accessed 16 March 2019).

94 *See* Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, ICC-ASP/10/36, 30 November, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-36-ENG.pdf (last accessed 16 March 2019).

95 The Staff Rules and Regulations of the African Union.

96 Art. 43 (4) of the Rome Statute.

97 Art. 24 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights.

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because the Rules of Procedure here refer to the Rules of the Court, while the Registrar of the African Court will be appointed on the basis of Staff Rules and Regulations of the AU.

However, the Staff Rules and Regulations is not clear as to how the Registrar and Assistant Registrars will be appointed as it makes provisions for the classification of different officials and staff of the AU.[98] One explanation for this difference is that at the time that the Protocol to the African Charter on Human and Peoples' Rights was adopted, the Staff Rules and Regulations of the AU was not already in force. In addition, subjecting the appointment of the Registrar and Assistant Registrar to the Rule of Procedure of the Court means that the appointment will be deferred pending the adoption of the Rules of Procedure of the Court usually done by the judges. However, appointment by the Court on the basis of the Staff Rules and Regulations may be a faster and more durable means of appointment in a harmonized manner.

5.3 CSOs and Submission of Amicus Briefs

CSOs have made use of different advocacy strategies to be heard by international justice institutions. Amicus briefs have played important roles in advancing the cause of justice within these institutions. The irony at times is that when treaties are adopted, CSOs take the lead in advocating their ratification. However, when they enter into force, there is always a recalibration of access to the institutions as the statutes provide varied nature of accessing them. Most often, CSOs do not have clear access to these courts as they do not belong to the category of persons recognized to appear before them either as litigants or defendants. One way to overcome these challenges is through amicus submissions where non-litigants are allowed to make submissions to the court through briefs that present a position of the law and help to elucidate points of law.

Amicus briefs have been used in different international judicial institutions, including the ICC, the International Criminal Tribunals for Former Yugoslavia and Rwanda (ICTY/R) and the Special Court for Sierra Leone. For example, at the ICC, Rules of Procedure and Evidence provide that,

> at any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.[99]

98 Regulation 4 of the Rules and Regulations of the African Union provides that "In conformity with the general structure of the service adopted by the Assembly and in accordance with the nature of the duties and responsibilities required, officials and staff members shall be classified into the following Groups: 1. Elected Officials (Group I); 2. Professional Staff (Group II); 3. Political and Special Appointees (Group III) 4. General Service Staff (Group IV); 5. Other category (staff members on Short term Contracts, Field Mission, Project and Consultants)".

99 Rule 103 of the Rules of Evidence and Procedure.

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Whenever any submission is made by an amicus, the office of the Prosecutor and defence will have an opportunity to respond to the observations submitted.[100] Different entities, including CSOs, states and even the AU, have used the opportunity to approach the ICC on cases and situations before it.[101]

The Malabo Protocol makes it possible for CSOs to participate as *amicus curiae* or 'friend of the court' at the African Court. This is because the Protocol provides that "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".[102] In this instance, CSOs that are duly registered have a right to submit amicus briefs to the Court and make presentations and they are not bound by the rule that requires a declaration from States Parties. The procedure can be used by CSOs to ensure that important questions of law are brought to the attention of the judges.

5.4 Request for Advisory Opinions

The Malabo Protocol 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 ECOSOCC, the Financial Institutions or any other organ of the Union as may be authorized by the Assembly.[103] In addition, 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.[104] However, a request for an advisory opinion must not be related to a pending application before the African Commission or the African Committee of Experts.[105]

From recent developments on the decision of the African Court on Human and Peoples' Rights, it may be difficult for CSOs to request for advisory opinion from the court.[106] The court recently issued an opinion at the request of Socio-Economic Rights and Accountability Project (SERAP) on 26 May 2017 whether it had the personal jurisdiction to render an advisory opinion on the request before it.[107] In the view of the court, only African NGOs recognized by the AU as international organizations with legal personality are covered by the article and may bring a request for advisory opinion before the court. However, since SERAP does not have observer status before the AU and has not entered into a memorandum

100 *Ibid.*

101 *See, e.g., The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, the African Union's Amicus Curiae Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties, ICC-01/09-01/11-1988, 19 October 2015.

102 Art. 49 of the Amended ACJHR Statute.

103 Art. 53 of the Amended ACJHR Statute.

104 *Ibid.*

105 *Ibid.*

106 *See* Para. 64 of the Decision on the request for advisory opinion by SERAP 001/2013 delivered on 26 May 2017.

107 Request for Advisory Opinion by SERAP, No. 001/2013. The subject matter of the request for advisory opinion bordered on Arts. 2, 19, 21, and 22 of the African Charter on Human and Peoples' Rights.

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of understanding with AU, it is not entitled to bring a request for advisory opinion before the court. For this reason the court declared that it does not have personal jurisdiction to give an opinion on the request made.

This decision has far-reaching implications for NGOs working in the continent because of its restrictive nature. It tries to close the door on CSOs not directly affiliated with the AU but ignores the fact that African NGOs with observer status before the African Commission on Human and Peoples' Rights should be accorded an opportunity to request for advisory opinions. This is because, as SERAP rightly argued, the African Commission is an organ of the AU and, by extension, any right accorded by the Commission should be deemed to have been accorded by the AU. It may be argued that this decision is not binding on the Court to be established by the Malabo Protocol as the judges will be at liberty to interpret the provisions of the statute.

In summary, with the recent decision of the African Court on Human and Peoples' Rights, it may be difficult for CSOs to request for Advisor Opinion from the Court. This is because the African Court held that CSOs not recognized by the Union and without any memorandum of association cannot request for advisory opinion from the African Court, thus limiting access to the continental body.[108] However, organizations like PALU can be used by CSOs to request advisory opinions before the Court since they have a memorandum of understanding with the AU.

5.5 Supporting Proposals for Amendments from State Parties

CSOs can support the move to amend the Statute by States Parties. This is especially the case when there are provisions that will impede the cause of justice. The Malabo Protocol provides that the Statute may be amended if a State Party makes a written request to that effect to the Chairperson of the Commission, who shall transmit the same to member states within 30 days of receiving the notification.[109] A simple majority may be adopted by the Assembly of Heads of State and Government to amend the Statute, but this is possible only after the Court has given its opinion on it. In essence, CSOs with ECOSOC observer status can request for an advisory opinion on the legality of the immunity clause in the Statute, which provides that

> 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.[110]

This provision has been a contentious issue and may well be tested by CSOs before the Court to ascertain its legality.

108 *See* Para. 64 of the Decision on the Request for Advisory Opinion by Social Economic Rights and Accountability Project (SERAP) 001/2013 delivered on 26 May 2017.

109 Art. 58 of the Amended ACJHR Statute.

110 Art. 46A *bis* Amended ACJHR Statute.

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5.6 Supporting the Establishment of a Victims Trust Fund

The support for the operationalization of the Victims Trust Fund by CSOs has both positive and negative implications. This is because, as already discussed, the Malabo Protocol has legislative problems that if not properly addressed will affect the rights of victims of crimes under the Protocol. Despite these obvious challenges, a strong synergy and collaboration between the CSOs will also make for a more positive impact. Article 46M establishes a trust fund for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families. This provision for the Victims Trust Fund is similar to the Trust Fund for Victims established under the Rome Statute.[111]

The Victims Trust Fund provided by the Malabo Protocol in comparison with the Trust Fund for Victims under the ICC is to be created by a decision of the Assembly of Heads of State and Government, unlike the Trust Fund for Victims under the ICC, which was created by the Rome Statute. The implication of creating the Trust Fund for Victims by an enactment is that it takes effect immediately and begins to operate whereas the Victims Trust Fund purported to be created by a decision of the AU Assembly may be delayed or not even operationalized owing to official bottlenecks. In addition, 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. Making the establishment of a trust fund for victims subject to a decision of the AU Assembly makes a key provision of the Court subject to political convenience. This is because the Heads of States and Governments may not consider the issue of trust fund to be a burning issue and may also look at the final implication of such a fund. Therefore, CSOs will need to advocate for the immediate set-up of the fund once the Court is up and running.

Therefore, a clear strategy is needed by CSOs to ensure that the Victims Trust Fund is made operational within the time the Malabo Protocol enters into force and requires coordinated advocacy. The involvement of the CSOs to mount the needed pressure on the AU Assembly to make the key decision timely when the court is set up is therefore a need that cannot be overestimated. The CSOs should engage in all conversations that will lead to the setting up of the Victims Trust Fund within the shortest time possible. It is necessary for CSOs to undertake thorough periodic reviews and provide constructive criticism of the process of selecting the Board of Directors of the proposed Victims Trust Fund when it is eventually set up.

CSOs also have a role in ensuring that the general public and, most importantly, victims are made aware of the movement to create an African court and to set up a Victim Trust Fund and that they are provided with the necessary platforms to contribute to the discussions. The Victims Trust Fund seems to be a major selling point of the Malabo Protocol as it deviates from the usual criminal justice system where the victim is seen only as a witness and not as a party to the proceedings as a matter of right.

111 Art. 79 of the Rome Statute.

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5.7 Ensuring Equality of Arms between Prosecution and Defence Teams

CSOs can ensure the equality of arms between the prosecution and defence teams at the proposed African Court. This is because the Malabo Protocol provides for a principal defender who shall head the defence office.[112] The essence of establishing the office is to ensure the rights of suspects and accused and any other person entitled to legal assistance. The Statute provides that 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 parties.[113] In addition, 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.[114]

Interestingly, the office is an organ of the court, thereby prioritizing the rights of defendants at the court. The principle of equality of arms is expressed in terms of an obligation of the court to ensure that no party is placed at a disadvantage when presenting its case as compared with the opposing party.[115] This involves according equal opportunities to both prosecution and defence teams. CSOs will need to advocate for funding for the office of the principal defender. In addition, they will need to advocate for the rights of accused persons to be respected during trials.

While the concept of equality of arms is not specifically defined or mentioned in the statutes of any international criminal tribunal or in any international human rights treaty, it is widely acknowledged to be a fundamental element of the right to fair trial principle and a scale by which the requisite procedural fairness in any criminal proceeding can be measured.[116] Equality of arms is a basic right in criminal trials and not a dispensable idea to be approached lightly. Through a fact-finding approach, CSOs can embark on a process of periodic monitoring of cases at the African court to ensure that the principle of equality of arms is fully upheld by the court.

CSOs can effectively engage in promoting the principle of equality of arms between the prosecution and defence teams by actively monitoring the African court, their proceedings and operations with a view to possibly publishing reports of cases of inequality of arms in any matter before the African court. This is necessary because of the effect of the equality of arms on the quality of justice delivered.

112 Art. 22C of the Amended ACJHR Statute.

113 *Ibid.*

114 *Ibid.*

115 M. Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*, Vol. 55, Utrecht, University School of Human Rights Research Series, 2012, p. 2.

116 T. Osasona '"Equality of Arms" And Its Effect on the Quality of Justice at the ICC', 10 April 2014, available online at: https://acontrarioicl.com/2014/04/10/equality-of-arms-and-its-effect-on-the-quality-of-justice-at-the-icc/(last accessed 16 March 2019).

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The Malabo Protocol provides that the defence office shall ensure that there are adequate facilities available 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. In addition, it provides for the principal defender to be assisted by such other staff as may be required to perform the functions of the defence office effectively and efficiently. The staff of the defence office is to be appointed by the principal defender in accordance with Staff Rules and Regulations.[117]

6 Conclusion

This article has tried to articulate several perspectives of CSOs in the operationalization of the Malabo Protocol. Despite the challenges posed by the adoption of the Statute, the suspicion that it will be used to circumvent the activities of the ICC, its deterrent effect cannot be ignored despite the immunity clause for political leaders. The article has noted the contribution of CSOs in different human rights developments in the continent and a possible role for CSOs in ensuring that the Malabo Protocol receives maximum support. The road will not be easy and there are bound to be difficulties in ensuring that the Court as envisaged operates effectively. However, the role of the CSOs cannot be underestimated and it is hoped that more CSOs in Africa will develop synergies of ideas on how to support and engage with the proposed court.

This article argues that the issue of establishing a criminal chamber has been on the table of the AU, although there is a persuasive argument that the indictment of different African leaders by the ICC may have galvanized recent interest in setting up the criminal chamber. The article also looked at the implications of having a criminal chamber in a human rights court and its implications. Key institutions established by the Malabo Protocol, including the judicial arm and the office of the Prosecutor, were discussed. The role of CSOs in the operationalization of the Malabo Protocol was discussed in detail, while the challenges and opportunities inherent in the process were noted.

In conclusion, it is important to highlight a key issue that will engage the court going forward. The South African government has shown interest in conducting a critical review of the Malabo Protocol before ratification.[118] This approach is commendable and should be emulated by other African governments contemplating ratification. This offers an opportunity for CSOs and other stakeholders to look closely at the provisions of the Malabo Protocol and its implications for the promotion and protection of human rights in the continent.

117 Art. 22 of the Amended ACJHR Statute.

118 Communiqué 'Understanding the Malabo Protocol: The Potential, the Pitfalls and Way Forward for International Justice in Africa Conference'.

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