



THE MALABO PROTOCOL

A TOOLKIT FOR RATIFICATION



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A PREFACE

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FOREWORD

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**A CHAPTER ON THE HISTORY OF THE MALABO
PROTOCOL**

By Ben Kioko

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Preface

In 2024, the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) turned ten years old. The Malabo Protocol was developed by Africans over many years of consultation to advance the cause of accountability on the continent and to deliver on the promises for justice contained in the AU's Constitutive Act and opened for signature in 2014. Unfortunately, ten years on, the Protocol had only achieved one ratification. Yet, the hunger for justice on the continent had only become the more acute.

In that context, Atrocities Watch Africa and our partners at the Pan-African Lawyers Union (PALU) initiated a campaign calling for ratification of the protocol. Over the last year and a half, we have engaged colleagues in a variety of fora, to raise awareness about the protocol, understand and address reservations and build a base of support for it.

It is, therefore, with great excitement that I present this Toolkit. The document, based on these consultations, provides a critical reference point for activists, policy makers and others seeking to understand the content of the Malabo Protocol as well as what could be done to advance it.

This product would not have been possible without the tenacious efforts of Chidi Odinkalu, Professor of Practice in International Human Rights Law at the Fletcher School of Tufts University, who was the primary author, Dr Sanji Mmasenono Monageng, Former Judge and Vice-President of the International Criminal Court (ICC), Former Chairperson, African Commission on Human and Peoples' Rights, who contributed the foreword; Ben Kioko, Former Legal Counsel and Director of the Central Unified legal service of the AU and Judge/Vice President of the African Court on Human & Peoples' Rights, who contributed the chapter on the history of the protocol, and Olivia Bueno and Noelle Crozier, program staff at Atrocities Watch Africa who shepherded the Toolkit through the contracting, editing, translation and layout processes needed to make it a reality.

We look forward to working with civil society across the continent to put the Toolkit to use in national, regional and continental advocacy campaigns.

Dismas Nkunda

CEO, Atrocities Watch Africa

Foreword

Impunity for serious crimes is a source of both injustice and instability across Africa. In some cases, relying only on external actors and institutions can result in significant gaps in justice and leave victims without access to tangible or effective remedies.

Designed by Africans, for Africa, the Protocol amending the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol), establishes a unique model of complementarity with the International Criminal Court (ICC). This model should address issues that frustrate both national courts and the ICC. By adapting existing continental institutions, the Malabo Protocol also simultaneously promises institutional efficiencies, carefully calibrated to gain legitimacy and trust among African states and citizens.

The Protocol further offers a bold and innovative pathway to address international and transnational crimes that threaten Africans, with a design for justice that is locally led, context-sensitive and more accessible to those who need it most.

By ratifying the Malabo Protocol and ensuring its entry into force, African states can create a system of accountability for international and transnational crimes that fits Africa's realities, delivers real accountability, and responds to the continent's most serious challenges.

There are living examples of cases where Africa has demonstrated both the expertise and political will to prosecute complex crimes successfully, making the ratification of the Malabo Protocol an important step toward strengthening African-led justice and accountability.

This Toolkit provides a practical guide on the steps and processes needed to accelerate ratification by supporting civil society, policymakers, legislators, and legal practitioners in understanding the Protocol's provisions and navigating the path to successful ratification and domestication within national legal systems.

Based on my experience, I am deeply aware that the implementation of the Malabo Protocol will not be without challenges. However, those challenges will not stand the chance of receiving attention, unless and until the Protocol enters into force. There remains therefore, a strong case and need for enough African countries to ratify the Protocol.

This Toolkit is a timely resource that seeks to support efforts to end impunity and protect the rights and dignity of all Africans. It is therefore my pleasure to welcome this handbook, and commend it for the use and attention of all persons interested in a continent that is free of the scourge of impunity for serious and massive violations of human rights and humanitarian law.

Together, we can move from impunity to accountability and put effective solutions at the center of justice. I encourage all stakeholders to engage fully with the guidance provided in this Toolkit, and join efforts to ensure swift ratification and entry into force of the Malabo Protocol.

Dr Sanji Mmasenono Monageng

Former Judge and Vice-President of the International Criminal Court (ICC); Former Chairperson, African Commission on Human and Peoples' Rights

Landmarks in the Negotiating History of the Malabo Protocol

The adoption of the Malabo Protocol represents a critical step in the broader initiative to enhance accountability for international and transnational crimes through the building of a comprehensive architecture for justice in Africa. This commitment was signaled in the transition from the cardinal principle of non-interference enshrined in the OAU Charter to non-indifference as the basis for inter-African relations in Article 4(h) of the Constitutive Act of the African Union in 2000.

In terms of institutional arrangements, the Constitutive Act provided for an African Court of Justice (2003). In 2004,¹ The African Union decided to merge the African Court on Human and Peoples' Rights (1998) with the Court of Justice which was subsequently implemented through the Protocol on the Statute of the African Court of Justice and Human Rights (2008).² Subsequently in February 2009, by Decision Assembly/AU/Dec.213 (XII), on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction,³ The Assembly of the Union kickstarted the process of elaborating a Protocol granting the merged Court with an international crimes' jurisdiction.

As such, the initial conceptualization of the African Court exercising such competence was rooted on the grave concern by African states at the growing judicial adventurism in European states, notably France and Spain, where national authorities were initiating criminal prosecutions against African leaders and citizens for offences that allegedly occurred in Africa, by abusively applying the principle of universal jurisdiction. It was also informed by lessons learnt from the Rwandan Genocide of 1994 and the commitment by African leaders to ensure "never again!"⁴

Resultantly, Decision Assembly/AU/ Dec.199(XI), on the Report of the Commission on the Abuse of Universal Jurisdiction on 1 July 2008 in Sharm El Sheikh, Egypt requested the Chairperson of the AU Commission, inter alia, to urgently arrange a meeting between the AU and the European Union (EU) to discuss the issue of the exercise of universal jurisdiction by European states, with a view to finding a lasting solution to concerns expressed by the African side.⁵ Consequently, the 10th and 11th meetings of the AU-EU Ministerial Troika addressed the issue of universal jurisdiction in the context of the relationship between the AU and EU.⁶ The EU position was that these crimes needed to be prosecuted but that African states were not taking up this responsibility.

The AU-EU Ministerial Troika, in January 2009, decided to set up an advisory Technical

Ad hoc Expert Group, to inform AU-EU discussions on the principle of universal jurisdiction, in particular by assisting in clarifying their respective understandings of the principle, and to prepare a report for the attention of the 12th meeting of the AU-EU Ministerial Troika, which took place in April 2009. The Ad hoc group submitted its report in April 2009.

In its Report, the Technical Ad hoc Expert Group noted the Assembly decision requiring a review of the implications of granting international criminal jurisdiction to the merged Court, but also noted that African statements of concern over the assertion of universal jurisdiction by national courts of EU Member States needed to be backed by a real willingness on the part of African states to prosecute the relevant crimes themselves and that EU Member States had already offered their logistical support for the realization of efforts to this end. It further recommended, *inter alia*, that African States should be encouraged to adopt national legislative and other measures aimed at preventing and punishing war crimes, genocide and crimes against humanity.⁷⁵

The motivation for the Malabo Protocol can also be found in the process of putting former Chadian dictator Hissène Habré on trial for atrocities committed in Chad, when the Assembly considered in 2006 that an African judicial mechanism was the best option, but was not feasible because it would entail amending the Protocol on the African Court and waiting until it entered into force before putting Hissène Habré on trial.⁸⁶ For that reason, the AU Assembly mandated Senegal to try Hissène Habré “on behalf of Africa.” Habré was arrested in 2013, tried in 2015 by the hybrid African Extraordinary Chambers in Senegal and convicted in 2016.

Finally, mention must be made of the fact that the Malabo Protocol was also necessitated by the provision in the African Charter on Democracy Elections and Governance (ACDEG) which requires that perpetrators of unconstitutional changes of government may be put on trial by the Union.⁹⁷ The Malabo Protocol also addresses other critical challenges on the continent such as piracy, serious environmental crimes, corruption, terrorism, and trafficking in persons, drugs and hazardous wastes. Much later, the process gained momentum within the context of concerns that the ICC was targeting Africa as all situations being handled were entirely African.

As adopted in 2014, the Malabo Protocol completes a robust framework for the integrated court by expanding the Court’s jurisdiction to include 14 international and transnational crimes that are of greatest importance to the continent. The Protocol also set up strong procedures and governance to ensure the Court’s effectiveness.

As Legal Counsel to the Organisation of African Unity (OAU)), I midwived the creation of the African Court on Human and Peoples’ Rights and have had the privilege of serving as a Judge and Vice President of the African Court. I also oversaw the negotiation process for the Malabo Protocol as AU Legal Counsel and convened four meetings of

government experts and Ambassadors during which all the articles were negotiated and agreed upon awaiting final approval by ministers of justice. However, subsequently after I had left the AU, new developments in relations between Africa and the ICC led to a review to the article relating to immunities of government officials.

Africa created the framework for justice because it was deemed to be an important instrument for ensuring accountability for atrocity crimes on the continent. Yet, over ten years later, the Malabo Protocol has attracted only one of the 15 ratifications that it needs to bring the treaty into force. The need for justice on the continent has only increased as new war crimes and crimes against humanity are reported in the ongoing conflicts in different parts of the continent. In addition, Africa continues to experience the crimes of unconstitutional changes in government, terrorism and mercenarism, which crimes are prohibited under the Malabo Protocol.

The authors and promoters of this Toolkit are to be congratulated for this important initiative. Now is the time to move forward for the cause of justice by ratifying and operationalising the new court. African solutions to African problems will remain a pipe dream, if the continent does not take the necessary steps to address the scourge of war crimes and other atrocity crimes drawing lessons from the Rwandan genocide and the commitment by African leaders declaring 'never again!'

The words of OAU Secretary General Salim Ahmed Salim at the Africa Regional Conference on Human Rights, held in Tunis, Tunisia in November 1992, ring true today as they did then. He stated:

"For Africa which has suffered horrendous abuses of human rights, Africa which has suffered hundreds of years of all forms of human indignities and atrocities ranging from slavery, colonialism, and racism, must take the challenge of safeguarding and promoting human rights."¹⁰⁸

It is my hope that this Toolkit will expedite the entry into force of the Malabo Protocol as well as the establishment of the African Court of Justice and Human and Peoples' Rights envisaged by it.

Ben Kioko

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Judge/Vice President of the African Court on Human & Peoples' Rights*

Introduction

This manual is an advocacy toolkit to assist all persons and groups working to secure the ratification of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.¹¹

It provides the context and background to the Protocol and explains why the ratification of the Protocol initially stalled.

The manual also justifies why the ratification of the protocol as well as the endowment thereby of the African Court on Human and Peoples' Rights with criminal jurisdiction is considered timely and why ratification at this time matters for accountability for serious or massive violations of international norms in Africa.

It also includes practical tips and suggestions on how to secure ratification in different legal systems on the continent.

Introducing the Malabo Protocol

On 27 June 2014, the Assembly of Heads of State and Government of the African Union (AU) in Malabo, Equatorial Guinea, completed a decade-long process of re-design of the judicial organs of the continental organisation with the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.¹² In homage to the city in which it was adopted, this Protocol is now known as the Malabo Protocol. The Malabo Protocol accomplishes four major things, i.e., it:

1

Establishes an African Court of Justice and Human and Peoples' Rights through the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union;

2

Confers criminal jurisdiction on the newly created African Court of Justice and Human and Peoples' Rights (hereinafter the Court) in addition to its jurisdiction over general matters of regional integration and human and peoples' rights. In effect, the new Court shall consist of three Sections respectively on General Affairs; Human and Peoples' Rights; and International Criminal Law;

3

Prescribes 14 international crimes which shall be within the criminal jurisdiction of the new court;¹³ and also authorizes the Assembly of Heads of State and Government of the AU "upon consensus of the state parties" to extend the jurisdiction of the court to "incorporate additional crimes to reflect developments in international law;"¹⁴

4

Confers on the new court both original and appellate jurisdiction as well as contentious and advisory competence.

The Malabo Protocol is, therefore, the first effort to confer on a regional human rights system jurisdiction to try international crimes. It also represents a unique model of regional complementarity with the International Criminal Court (ICC) in an interdependent international system.

Background to the African Court of Justice and Human and Peoples' Rights

One major misconception about the Malabo Protocol and the decision to create an African Court of Justice on Human and Peoples' Rights endowed with criminal jurisdiction is that it was inspired by African opposition to the International Criminal Court (ICC). In reality, the process that culminated in the Malabo Protocol began well before the onset of perceptions that the relationship between the AU and the ICC soured. As a fact, the Malabo Protocol brings to fruition two strands in the evolution of regional courts and tribunals in Africa and in the scope of their jurisdiction. It is important to understand and underscore how these developments happened.

In June 1998, the member States of the Organization of African Unity (OAU) amended the African Charter on Human and Peoples' Rights to create the African Court on Human and Peoples' Rights in order to "complement the protective mandate of the African Commission on Human and Peoples' Rights."¹⁵ Two years later, in 2000, the same member states agreed to advance regional integration in Africa through the creation of the AU as successor to the OAU. Unlike the OAU, which was established to advance regional co-operation among newly independent African countries in the 1960s, an explicit goal of the AU was "to accelerate the political and economic integration of the continent" while also defending the sovereignty, territorial integrity and independence of African states as well as advancing solidarity between the states and peoples of Africa.¹⁶ In pursuit of this goal of greater regional integration and to adjudicate disputes arising from or connected with it, the Constitutive Act of the AU provided for the creation of a Court of Justice as the judicial organ of the AU. In July 2003, the AU adopted a protocol to create the Court of Justice of the AU.¹⁷

During the negotiation for the Protocol of the Court of Justice of the African Union, initial concerns began to emerge about the challenge of funding these new institutions within the AU. The experts floated the idea of merging the African Court on Human and Peoples' Rights and the Court of Justice of the African Union.¹⁸ As a budget control measure, it was suggested that a human rights chamber should be established in the Court of Justice, but some states objected to this arguing that it would relegate human rights in terms of priority within the Court.¹⁹ Unable to secure a consensus on this point, the Executive Council of the AU decided then that "the African Court on Human and Peoples' Rights shall remain a separate and distinct institution from the Court of Justice of the African Union..."²⁰

However, almost immediately following the adoption of the Protocol of the Court of Justice, in 2004, then Chairperson of the Assembly of Heads of State and Government

of the AU and Nigeria's president, Olusegun Obasanjo, warned of what he described as a "danger of proliferation of organs of the organization and the danger of not having enough funds to do what we should do and just proliferating organs...."²¹ He envisioned a composite court with various divisions addressing different issues of importance to African states.²² In November 2005, the AU formally began negotiation of a new draft single Protocol on the Statute of the African Court of Justice and Human Rights prepared under the guidance of the Algerian Justice Minister and former President of the International Court of Justice, Mohamed Bedjaoui.²³

While this process of negotiating the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the AU was ongoing, the AU separately had to address the advocacy to convene a mechanism to undertake the trial on allegations of criminal responsibility for international crimes of former president of Chad, Hissène Habré. The Committee of Eminent Jurists constituted by the AU to undertake this task recommended that the AU should endow the merged court with criminal jurisdiction. According to their report:

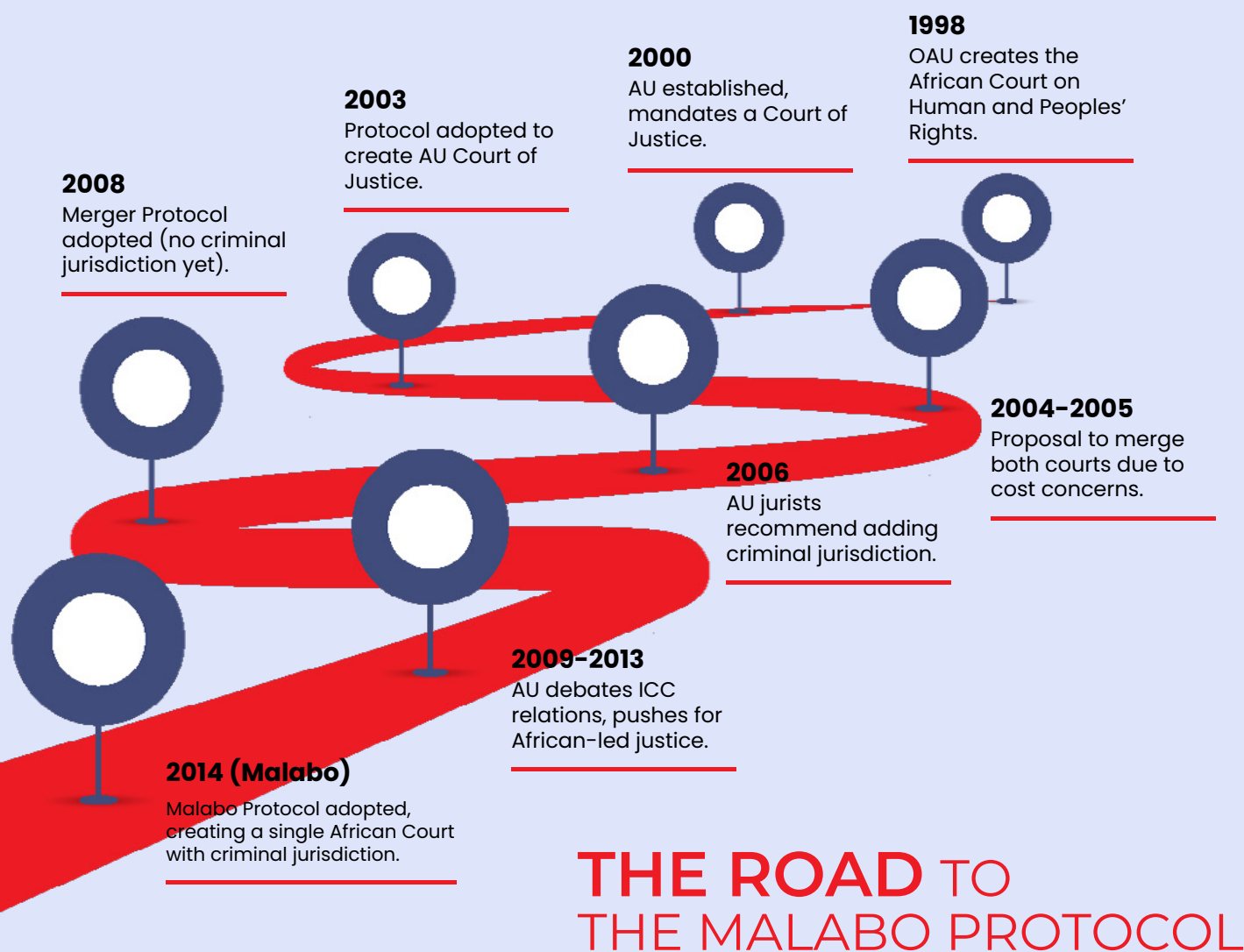


The Committee discussed the prospects for the creation of the African Court of Justice and Human Rights based on the project to merge the African Court of human and People's Rights and the African Court of Justice. The Committee proposes that this new body be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of Convention Against Torture.... The African Court should be granted jurisdiction to try criminal cases. The Committee therefore recommends that the on-going process that should lead to the establishment of a single court at the African Union level should confer criminal jurisdiction on that court.²⁴



Adopted in July 2008, the Protocol on the Statute of the African Court of Justice and Human Rights (commonly referred to as the merger protocol) fell short of fully implementing this recommendation but included a provision granting the member states of the AU the power to extend the jurisdiction of the merged African Court of Justice and Human Rights through "any other agreements that State Parties may conclude among themselves and with the Union, and which confer jurisdiction on the Court."²⁵ One effect of this provision was to grant to the member States of the AU the power to extend, even in an ad-hoc manner, the jurisdiction of the merged court as and when they thought fit.

Around the same time, the ICC, whose statute, like the founding protocol of the African Court on Human and Peoples' Rights, was adopted in 1998, turned its sights on the then president of Sudan, Omar Al Bashir, charging him with responsibility for international crimes in relation to the situation in Darfur. At this time, many African leaders who had invested considerable political capital in delicate negotiations for both for peace in Darfur and the transition to independence of South Sudan were worried about the implications for these processes of the ICC's intervention. At the AU Summit following the adoption of the merger protocol, in February 2009, the Assembly of Heads of State and Government of the AU cautioned that an approval by the ICC of the request for an arrest warrant presented against Omar Al Bashir, "would seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur."²⁶ It had,



prior to this, requested the Commission of the AU to examine the implementation of the principle of Universal Jurisdiction for international crimes.

Following its consideration of the Commission's report the following year, in February 2009, the AU Summit requested the African Commission on Human and Peoples' Rights in collaboration with the African Court on Human and Peoples' Rights, which were both in existence at that point "to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes."²⁷ The perception, already quite strong, that the ICC had become an instrument for targeting African leaders grew after the indictment of others including the then serving president of Kenya and his deputy; the former presidents of Côte d'Ivoire (Laurent Gbagbo) and of Central African Republic (Gen. Francois Bozizé) as well as the former vice-president of the Democratic Republic of the Congo (Jean-Pierre Bemba).

It was against this backdrop that at the end of June 2014, the AU Summit adopted the Malabo Protocol to confer criminal jurisdiction on the African Court. In doing so, it also created a more expansive menu of crimes within the jurisdiction of the court beyond the traditional or core ones of war crimes, crimes against humanity, genocide, and aggression.

Some Definitions

<p>Treaty</p>	<p>This is an international agreement concluded between States in written form and governed by international law. In specific cases, treaties can also be referred to as “convention”; “agreement”; “final act”; “charter”; “covenant”; “pact”; “code” or “protocol”, among others. The rules of international law applicable to treaties are mostly codified in the Vienna Convention on the Law of Treaties of 1969.</p>
<p>Signature</p>	<p>This is an act whereby a State indicates its intention to become a party to a treaty. In principle, the signature precedes the ratification, acceptance, or approval of the treaty. The signature of a treaty does not in itself obligate a state to uphold that treaty, although Article 18 of the Vienna Convention provides that it does obligate the state to refrain from actions that “would defeat the object and purpose of [the] treaty.”</p>
<p>Full powers</p>	<p>This is a document by which the Head of State, Head of Government or Minister for Foreign Affairs authorizes a person, usually an Ambassador, Minister or Counselor to represent it in negotiations for a treaty or protocol and/or to sign a treaty on behalf of the State.</p>
<p>Instrument of ratification, acceptance or adhesion (the term used depends on the procedure of each State)</p>	<p>This is a document by which a State expresses its consent to be bound by a treaty. The instrument of ratification, acceptance or adhesion is issued by the Head of State, Head of Government or Minister for Foreign Affairs and signed accordingly.</p>

Accession	<p>This is the act or instrument whereby a Head of State or Government or Minister for Foreign Affairs conveys on behalf of their country consent to be bound by a treaty that the state has not signed. It has the same legal effect as ratification. Accession is, in general, the instrument by which non-member States of a treaty system indicate their readiness to join.</p>
Procès-verbal	<p>This is a document prepared by the Treaty Office certifying that a State has signed, ratified, accepted, approved, or acceded to, a treaty.</p>
Reservation	<p>Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.⁵¹</p>

When Will the African Court of Justice and Human and Peoples' Rights Become Operational?

The AU will operationalize the African Court of Justice and Human and Peoples' Rights after the entry into force of the Malabo Protocol. The Malabo Protocol shall enter into force 30 days after the deposit of the Instrument of Ratification of the 15th State Party. By the end of the third quarter of 2024, 15 states had signed the Protocol,²⁸ but only Angola had deposited its Instrument of Ratification.²⁹ This means that at least 14 more ratifications are needed before the Court can become operational. The States which ratify early will become the pioneers who will set the tone for how the African Court of Justice and Human and Peoples' Rights will evolve.

Upon entry into force of the Malabo Protocol, the AU will be required to take steps to operationalize the African Court of Justice and Human and Peoples' Rights as the successor to the existing African Court on Human and Peoples' Rights and all cases pending before the present Court will be transferred to Human Rights Section of the new Court. By way of comparison with previous experiences, it took the about two years between 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 in January 2004 and the election of the first judges of the court in January 2006. The judges were subsequently assumed office after subscribing to their oaths of office in July 2006.

For clarity, it is important to distinguish between the signature and ratification of a treaty. It has been explained that:



Most written contracts between private individuals come into force when the contracting parties have signed them. In the past, that has not often been the case for treaties, since it was usually only after the plenipotentiary had returned to his own court that it was possible for his Sovereign to receive a full report, examine the text which the plenipotentiary had negotiated on his behalf, and decide whether in the circumstances then ruling he was willing to consent to be bound by it. Signature therefore tended merely to indicate adoption of the text as authentic, and some further step- variously called ratification, acceptance, or approval - was necessary before a treaty could become binding on the State concerned.³⁰



The African Court of Justice and Human and Peoples' Rights has yet to come into existence because the Malabo Protocol remains well short of the 15 ratifications required to bring it into force. When the Court comes into existence, it will supersede the existing African Court on Human and Peoples' Rights, which will then cease to exist as a separate entity. Pending this, the AU has meanwhile chosen not to operationalize its Court of Justice, the Protocol authorizing which entered into force on 11 February 2009 after it was signed by 45 African States, 19 of whom have also ratified it.³¹ The African Court of Justice was intended to be the principal judicial organ on regional integration matters in Africa, but in order to address concerns of proliferation of institutions within the AU and the continent more generally, the AU decided to integrate it into the re-designed continental judicial organ in the African Court of Justice and Human and Peoples' Rights.

As African States and governments in the African Union consider their respective decisions to sign up to or ratify the Malabo Protocol, it is essential that they understand the key considerations that informed the adoption of the Protocol and the creation of an African Court of Justice and Human and Peoples' Rights. It is also important to appreciate the essential features of the Protocol, to address common misconceptions about it and to understand why it is important that African states take urgent steps to bring the Protocol into effect. To begin with, it is necessary to recall the major landmarks in and rationales for what ultimately became the Malabo Protocol.

Essential Features of the Malabo Court Protocol

The Malabo Court Protocol of 2014 amends and

updates the prior Protocol on the Statute of the African Court of Justice and Human Rights of 2008. To understand the main features of the Court created by the Malabo Protocol, it is necessary to begin from the Court created by the 2008 Protocol. That Protocol proposed a straight merger of the African Court on Human and Peoples' Rights and the AU Court of Justice into a Court comprising 16 Judges (including a President and a Vice-President), two sections and a Registry. Of the two Sections, one was for Human Rights and the other was for General Affairs, which was also to serve as the Administrative Tribunal of the African Union. Each Section was to be composed of eight judges. There was to be no appellate Section or Chamber.

The Malabo Protocol amends and updates the Protocol of 2008 in several significant ways. Among other things it:

1

Re-names the new court as the African Court of Justice and Human and Peoples' Rights.

2

Increases the number of sections from two to three with the addition of an International Criminal Law Section to the General Affairs and Human and Peoples' Rights sections.

3

Establishes a bench of 16 judges to be comprised of five judges elected for their expertise in general international law; five elected for their expertise in international human rights and humanitarian law; and six elected for their expertise in international criminal law.

4

Designates all judges as part-time, except the President and Vice-President (who shall both function on a full-time basis) but empowers the Assembly of Heads of State and Government of the AU (on the recommendation of the judges of the Court), to decide if or when all the judges shall begin to function on full-time basis. The President and Vice-President of the Court shall serve for two years which may be renewed only once.

5

Establishes the maximum tenure of a judge of the new Court to be a single non-renewable term of nine years. However, at the first election of judges, five judges shall be elected for three years and another five for six years only (both sets of judges to be picked by lot to be drawn by the Executive Council).

6

Vests the court with both original and appellate jurisdiction extending to 14 international crimes under the Protocol and to referrals made under treaties of the Regional Economic Communities;

7

Endows the court with four organs: the Presidency, Office of the Prosecutor, Defence Office, and Registry;

8

Empowers the Assembly of Heads of State and Government of the AU to adjust the size of the bench of the Court or the scope of crimes triable by the court;

9

Establishes for the International Criminal Law Section three chambers, namely: a pre-trial chamber, which shall comprise only one judge; a trial chamber of three judges; and an appeal chamber which shall be comprised of five judges;

11

Extends the scope of international crimes in Africa beyond the four main crimes of war crimes, crimes against humanity; genocide and aggression to include 10 additional crimes;³²

12

Extends standing to initiate human rights cases before the Court to African individuals, African NGOs with Observer Status with the AU or any of its organs or institutions in respect of states who make the declaration accepting the right of direct individual petition to the Court;

13

Creates the office of Prosecutor who shall be elected by the Assembly of Heads of State and Government for a single, non-renewable term of seven years; and two deputy prosecutors who shall be elected for four years, renewable only once;

14

Creates the office of Registrar and three Assistant Registrars to be appointed by the Court respectively for seven years non-renewable and for four years renewable once;

15

Provides for the establishment within the Registry of a Victims and Witnesses Unit as well as a Detention Management Unit;

16

Establishes a Defence Office to be headed by the Principal Defender appointed by the Assembly of Heads of State and Government;

17

With reference to the International Criminal Section, it provides guarantees to protect the rights of accused persons to fair trial;

18

Prohibits any charge 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."³³

The Importance of the Malabo Protocol

The Malabo Protocol creates a court to adjudicate disputes concerning regional integration and human and peoples' rights in Africa. That same court will also conduct trials of suspects accused of serious international crimes in Africa. The criminal jurisdiction is the focus of nearly all the attention on the Malabo Protocol. There are significant arguments in support of endowing the African Court of Justice on Human and Peoples' Rights with criminal jurisdiction. Five, in particular, deserve to be highlighted:

1 Political Capital:

The Malabo Protocol provides a unique opportunity for political commitment at the highest levels of Africa's leadership to a continental system governed by clear rules to ensure the protection of the individual as well as to hold perpetrators responsible for serious international crimes. This guarantees that the collective willpower of African states will be available to ensure not just state responsibility in cases concerning human rights or regional trade and integration but also individual responsibility for international crimes which endanger coexistence or collective safety in Africa. This is a far-reaching opportunity whose existence cannot be taken for granted. It provides high-level political capital in support of accountability both for the institutions and organs of the rule of law and also for the outcomes of such processes. It also ensures a legal framework for mechanisms of continental co-operation in support of compliance and enforcement of decisions of the court.

2 Continental Complementarity with the ICC:

The Statute of the ICC recognizes that each country has primary responsibility to bring those suspected of complicity in international crimes to account. Accordingly, the preamble to the Statute declares that the ICC "shall be complementary to national criminal jurisdictions,"³⁴ and the jurisdiction of the ICC is only effectively triggered when a country is "unwilling or unable genuinely to carry out the investigation or prosecution."³⁵ Two related considerations underpin this principle. One is that the state is the first and best place for effective criminal accountability. The second is that the ICC by itself can address only a small fraction of the international crimes deserving of attention or accountability at any given time. Therefore, multiple levels of accountability can coexist

and may be necessary. Although the national level is primary, it may not always be possible to mobilize it in specific cases because the situation may be too fragile or the resources insufficient to deploy it meaningfully. The assertion of the jurisdiction of the ICC in specific cases could also be frustrated by political or diplomatic constraints. For example, some States may be reluctant to submit to the ICC because of the perceptions of double standards. Others may be unwilling to co-operate with the court because they know they enjoy the diplomatic leverage or support of powerful states. These considerations open up the possibility of regional or continental complementarity as a support for national level complementarity. As has been pointed out, “an African regional court has the potential to address both political and legal solutions to deeply historical and political drivers of violence on the African continent.”³⁶ Indeed, the Malabo Protocol envisages in its Article 46L (3), that the Court is empowered to enter into cooperation agreements with other regional or international courts, such as the ICC. This provision was in fact inserted to allow synergy and cooperation between the Court and the ICC in order to avoid duplication.

Additionally, the challenge of aligning international criminal responsibility with international human rights accountability in the new African Court of Justice and Human and Peoples’ Rights offers an exciting new model in the design of international courts and tribunals. The court created by the Malabo Protocol will be the first to offer the possibility of regional complementarity with the ICC. The court created by the Malabo Protocol could, therefore, potentially be a counterweight to generalized imputations of double-standards against international criminal justice. This is not surprising given that an overwhelming majority of the situations and cases concluded or pending at the ICC originate from Africa.

3 Resource Efficiency:

A major concern that animated the process leading to the Malabo Protocol was the need for more efficient management of the resources available to fund or support regional courts and tribunals in Africa. These include but are not limited to financing; human assets for the management of the courts as well the institutional assets in state parties who will be responsible for managing cooperation and liaison arrangements with the judicial organs. In the Court created under the Malabo Protocol, we now have one continental judicial organ within which expertise can be built up on the continent and to which state parties can also give dedicated institutional attention. Additionally, instead of multiple arrangements for the hosting of different judicial organs of the AU in different parts of the continent, there will now exist only one court in one location to which staff, users, advocates, and all interested parties can devote attention. Trials before an

African instance are also likely to be less expensive than those at the ICC. For instance, the entire cost of the trial of Chad's former president, Hissène Habré, by the Extraordinary African Chambers (EAC) in Dakar, Senegal "cost around \$9 million, which is 'twelve times cheaper than a trial at the ICC.'"³⁷

4

Addressing Double Standards in International Criminal Justice:

The Statute of the ICC grants it "jurisdiction over persons for the most serious crimes of international concern."³⁸ However, in its first two decades, the record of the court was mostly overshadowed by "accusations of double standards and hypocrisy,"³⁹ with some critics calling it a barely disguised "court for savages."⁴⁰ Despite recent activity by the court with regard to the situations in Ukraine and Palestine in pursuit of processes of accountability against the President of Russia and the Prime Minister of Israel, among others, no one seriously thinks that either of these two figures is ever likely to face trial in The Hague. The budget of the ICC is also quite constrained. In its first 11 years, the cumulative budget of the court was about one billion dollars.⁴¹ The proposed budget for the entire ICC in 2025, for instance, is €202,613.60 million, an increase of 10% on the 2024 budget.⁴² The limited budget of the ICC also means that it can only realistically focus on a small fraction of the number of people likely at any time to fall within its net.⁴³ The Court must, therefore, make choices and it is quite possible that not all of its criteria for case selection will be applied consistently. In the face of this combination of factors, the perception of an undue focus on Africa by the ICC has been inescapable and the optics for international criminal justice have been far from wholesome. The African Court of Justice and Human and Peoples' Rights is well placed to redress most of these concerns. First, as a regional court, the African Court of Justice and Human and Peoples' Rights is likely to enjoy greater legitimacy among both African peoples and African States than the ICC. Trials at the African Court are much less likely to suffer from the emotional baggage of being seen as having been convened by, or at the instance of, Africa's former colonial rulers. Second, the jurisdiction of the African Court of Justice and Human and Peoples' Rights extends to 14 crimes, 10 more than the four crimes that fall within the jurisdiction of the ICC.⁴⁴ This underscores the fact that the African Court is more closely tailored to the challenges that confront the continent. Therefore, third, the African Court will have the ability to try more suspects than the ICC. The combined effect of all these is that the International Crimes Section of the African Court of Justice and Human and Peoples' Rights, when it becomes active, could be well placed to redress the perception of double standards which have afflicted and done considerable damage to the work of the ICC in Africa.

5

A Continental Jurisdiction for Serious International and Transnational Crimes in Africa:

In addition to the four core international crimes – war crimes, crime against humanity, genocide, and aggression – the Malabo Protocol also places ten additional crimes within the jurisdiction of the African Court. These additional crimes reflect the specific dimensions of the problem of organised international and transnational crime of particular concern to Africa. These crimes include trafficking in human beings, drugs and hazardous substances; grand corruption; indigenous spoliation; money laundering; mercenarism; and piracy. One thing common to all these crimes is that they are more likely than not to involve activities or elements in two or more countries. In order to be effective in bringing perpetrators of these crimes to account, African countries will need to assure that they will offer habitual cooperation to the court created by the Malabo Protocol. Additionally, the Malabo Protocol also confers jurisdiction on the new court to try the crimes of terrorism and also coups (unconstitutional changes in government). Unlike the other eight additional crimes, terrorism and coups are not necessarily crimes of a transnational nature although they do sometimes involve elements or activities that occur in two or more countries. In making these crimes that can be tried by the new African Court of Justice and Human and Peoples' Rights, the Malabo Protocol underscores the non-negotiable character of the continental prohibition of these crimes. These additional crimes are also likely to make the court better attuned than the ICC to addressing international and transnational crimes of greatest concern to African publics.

Are There Any Problems with the Malabo Protocol?

The creation by the Protocol of a continental jurisdiction for international crimes “has inspired considerable controversy.”⁴⁵ The Malabo Protocol is not without criticisms. The most notable are three:

1 It Has Not Been Done Before:

It is, of course, unprecedented to confer criminal jurisdiction of a permanent kind on a regional human rights institution. The Malabo Protocol is the first experiment of this kind but to object to the Court on these grounds would infantilize the continent and deny African states their responsibility to address the continent’s unique problems the best way they can within the framework of international law. The United Nations Charter authorizes “regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.”⁴⁶ No one seriously disputes that ensuring individual accountability for international crimes of the most serious kind is a matter suitable for regional action. It is indeed quite arguable that the processes of accountability convened in the aftermath of the 2nd World War in Nuremberg and Tokyo by the victorious Allied Powers provide ample precedents for such regional action.

2 Africa Lacks the Capacity to Make the Malabo Protocol Work:

It is also suggested that international crimes are too complex to be prosecuted by Africa. Even while the Malabo Protocol was still in the process of negotiation, it was said that the continent was not ready for an international crimes jurisdiction and that the African Court “does not have the funding or infrastructure necessary to successfully prosecute international crimes.”⁴⁷ The implicit suggestion that the only place where accountability can be undertaken for crimes committed in Africa against Africans is outside the continent is patronizing to the point of being offensive. There is nothing in the nature of accountability for international crimes to suggest that Africans are incapable of doing it. Capacity, of course, can always be improved or acquired as the case may

be. It is not to be forgotten that Africans have served in very senior positions in the ICC, including as both president and vice-president; as well as prosecutor and deputy prosecutor. A more serious criticism could be the point about insufficiency of political will to ensure effective accountability for the crimes contemplated in the Malabo Protocol. The African Union as well as most of Africa's regional economic communities have been wanting in recent capacity for effective action in most of the continent's atrocity theatres, such as Eastern Congo, Ethiopia, and Sudan. While the worry about political will could thus be well founded, it is also the case that the Malabo Protocol provides an opportunity for civil society and other concerned advocates to advocate for and compel political action in relevant cases. The trial of former Chadian President, Hissène Habré, demonstrates that the will and capacity exist within the continent to ensure individual criminal accountability for international crimes. That trial also showed that the continent can achieve more in this area with less resources.

2 The Immunity Problem:

The immunity provision in Article 46A Bis of the Malabo Protocol is a main driver of objections to the Malabo Protocol. This provision excludes from the personal jurisdiction of the African Court of Justice and Human Rights from "any serving AU head of state or government...or other senior state officials based on their functions, during their tenure of office." This provision has been described as "an own goal."⁴⁸ There are two parts to this immunity provision in the Malabo Protocol. The provision concerning "other senior state officials" is troubling because it offers no criteria for identifying who may be covered by this or as to who should make the decision. However, there are already international standards that can guide resolution of this question. Besides sovereigns, the only other senior State officials recognised under international law as having immunities are Foreign Ministers and Ambassadors in the countries to which they are accredited. There is no reason why this should be different under the Malabo Protocol.

The separate question about immunities of Heads of State and Government (HOSG) is a little more complex. First, the immunity under the Malabo Protocol is procedural and applies only when the concerned HOSG is in office. The immunity is not substantive, and it does not extend to former Heads of State. In theory, this means that an affected Head of State can stay interminably in office in order to avoid accountability. In other words, this provision theoretically "not only hurts judicial accountability but undermines democratic accountability."⁴⁹ The evidence does not support this conclusion, however. For instance, a former president of Chad was tried under AU auspices and convicted. HHe was jailed until his death in 2021 from COVID-19⁵⁰. Complicity in international crimes can also make political leaders more likely to lose power. The former president of

Sudan, Omar Al Bashir, was overthrown in a popular uprising following his indictment for international crimes by the ICC. Second, the African Court of Justice and Human and Peoples' Rights, like the ICC, will not have its own police. Arrests and enforcement will rely on co-operation by state parties. To use the example of the ICC, the Statute itself contains three contradictory provisions on this question in Articles 27(1), 89(1), and 98(1). According to Article 27(1), official capacity is no defence to criminal responsibility under the statute nor is it grounds for reduction or mitigation of a sentence. However, where the request for cooperation "could require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State", then, under Article 98(1), the statute of the ICC requires the court to "not proceed" with the request. In particular, under Article 89(1), State parties to the Statute of the ICC undertake to comply with requests for arrest and surrender in accordance with "the procedure under their national law." The constitutions of some African countries extend procedural immunities to their presidents or prime ministers while they are in office. Others, like Kenya, don't. There is clearly in the ICC Statute, an implicit immunity for high state officials. The only difference between that and the Malabo Protocol is that the latter is more explicit in acknowledging the practical difficulty of rendering the most senior political officials of States in international law. Indeed, the scope of the implicit immunity in the ICC Statute is potentially wider than what is seen as the more explicit immunity in the Malabo Protocol. Every case of serious atrocity crimes invariably involves multiple actors and the fact that a sitting Head of State may not be available to be prosecuted does not mean that others cannot. It should be clear that a court that cannot prove its effectiveness in bringing to account lower-level perpetrators cannot stand a chance against the assets at the disposal of a HOSG. On the balance, clearly the provision on immunities in the Malabo Protocol is less than ideal but the overall goal of the Protocol to improve accountability for atrocity crimes in Africa should not be held hostage by this single issue of immunities, which can continue to be addressed through practice, precedent and later revisions of the Protocol.

Instrument of Ratification and Memorandum of Ratification

In order to indicate willingness to be bound by the Malabo Protocol, a State must deposit its instrument of ratification with the Commission of the African Union in Addis Ababa. The Instrument of Ratification, as we have seen above, is a formal document under the signature of the Head of State or the Foreign Minister, usually also with the official seal of the State. The constitution in each country governs the process of ratification. In some, such as Angola, the constitution requires the Parliament to authorize the president to execute the Instrument of Ratification. As such, before the president or Head of State signs the Instrument of Ratification, Parliament has to formally vote to authorize him or her to do so. In other countries, such as The Gambia, Nigeria or Zimbabwe, the ratification of treaties is entirely an executive act and does not require prior parliamentary involvement.

Irrespective of the constitutional procedure, the preparation of an Instrument of Ratification is usually preceded by a Memorandum of Ratification. In most countries, this memorandum is prepared by legal advisers in government embodying the outcome of a review of the treaty to be ratified in order to ensure that it is compatible with the constitutional norms and values of the relevant country. The memorandum describes in summary form the instrument or treaty to be ratified, explains its objects and purposes, provides justification for its adoption, and reconciles it with the constitutional norms of the ratifying country. It will also highlight any legal requirements antecedent to ratification in addition to reciting the legal and constitutional authority for the conclusion of the treaty as well as for the exercise of the power to ratify the treaty. In some cases, the memorandum may flag issues of concern and suggest remedies for them. For instance, a Memorandum could flag concerns about compatibility with constitutional norms and recommend ratification with or without reservations.

The Memorandum of Ratification will end with a prayer requesting ratification with or without reservations. If it is ratification without reservations, the Memorandum of Ratification would usually be accompanied by a draft Instrument of Ratification for execution by the sovereign if he or she approves of or consents to the contents of the memorandum. Where the memorandum recommends reservations, it will also append a draft text for that purpose.

What You Can Do to Promote or Advance Ratification of the Malabo Protocol

Although treaty ratification is a sovereign act, advocates, advocacy groups and NGOs can take independent action to advance or promote the ratification of the Malabo Protocol. Ratification advocacy requires a combination of relational, technical, and organizing work.

Three initial steps may be useful:

1

It is essential to establish through contact with the national government in the justice ministry and in the foreign affairs ministry how much awareness there is about the Protocol. It is not uncommon to find that many of the officials in the technical ministries may be lacking in full awareness about the instrument. Advocacy for ratification could easily provide an opportunity to bring them up to date and enhance their technical knowledge about the Malabo Protocol

2

Second, it is always useful to build allies in the relevant portfolio committees of government. These would usually be the Foreign Affairs and Justice committees, respectively.

3

Third, as no single NGO can do it alone, it is important to establish a national advocacy platform or coalition of NGOs on the subject. Such a coalition is usually useful for burden sharing and complementary action.

At the technical level, it is essential to prepare the technical case in support of ratification in the form of a briefing note for the relevant officials of government in both the executive and legislative arms. It is easier to convince officials to take such advocacy serious when they know that their partners in civil society have a mastery of the relevant technical issues. This briefing note can easily be turned into a draft ministerial memorandum if necessary. Such a note will make the case for ratification accompanied by an explication of the legal bases as well.

A ratification campaign will cost some money, but it does not have to be expensive. Most of what it requires is relationship building at the levels of both non-governmental collaborators and official government partners. By organizing themselves into a national coalition, the groups involved in it can share burdens and spread the costs.

In countries where parliamentary consent is needed in order to authorize ratification of the protocol, it pays to cultivate the leadership of the relevant committee(s) of parliament who will lead the hearings on ratification. It is essential for advocacy groups to prepare for such processes with suitable submissions and briefings for the attention of the leadership and members of the committees. In addition to making the case to parliament, such hearings also provide an opportunity for public education and for the mobilization of public attention to the benefits of the protocol.

After parliamentary consent, the Instrument of Ratification will still have to be drawn up by the relevant officials of government (usually in the Ministry of Justice) and executed or signed by the sovereign. Thereafter, it is the responsibility of the Foreign Ministry to ensure that it is officially transmitted to the depository at the African Union Commission in Addis Ababa, Ethiopia. Ratification is not effective or complete until the instrument is deposited as such with the African Union Commission.

Advocacy undertakings do not promise swift outcomes. Reversals are part of the experience. It is necessary, therefore, for groups involved in such undertaking to set realistic goals and expectations and not take success for granted or assume that success will be quick. In some countries, that may indeed occur. But in many countries, success will only occur because the groups involved are persistent and learn to discover momentum and inspiration from temporary reversals.

Model Instrument of Ratification, Acceptance or Approval
(To be signed by the Head of State, Head of Government or Minister for Foreign Affairs)

[Ratification / Acceptance / Approval]

WHEREAS [insert Article of]

the constitution of [insert name of State]

prescribes the procedure governing the ratification of treaties,

WHEREAS the [title of treaty, convention, agreement, etc.]

was [concluded, adopted, opened for signature, etc.]

at [place]on [date],

AND WHEREAS the said [treaty, convention, agreement, etc.]

has been signed on behalf of the Government of [name of State]

on [date],

AND WHEREAS all other lawful procedures prescribed by the constitution for the ratification of the treaty aforesaid have (now) been certified as fulfilled;

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs],

in exercise of the powers conferred on me by [insert article of the]

Constitution, declare that the Government of [name of State],

having considered the above-mentioned [treaty, convention, agreement, etc.]

[ratifies, accepts, approves]

the same and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed this instrument of [ratification, acceptance, approval]

at [place]on [date]

[Signature]

References:

1. See Decision Assembly/AU/Dec.45 (III) Rev.1 on the Seats of the African Union, adopted by the third ordinary session held from 6 to 8 July 2004, in Addis Ababa, Ethiopia, by which the Assembly decided that the Organs of the Union should be located in different regions of Africa on the basis of the principle of geographical distribution; and that “the African Court on Human and Peoples’ Rights and the Court of Justice should be integrated into one Court”;
2. The merger protocol adopted in Sharm El Sheik, Egypt on 1 July 2008
3. Decision Assembly/AU/Dec.213 (XII) was adopted at the Assembly’s 12th Ordinary Session held in Addis Ababa from 1- 3 February 2009. The decision requested the AU Commission, in consultation with the African Commission on Human and Peoples’ Rights, and the African Court on Human and Peoples’ Rights “to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010.” It was adopted after consideration of the Commission’s Progress Report on the Implementation of Decision Assembly/AU/ Dec.199(XI) adopted in Sharm El-Sheikh, Egypt, in July 2008 on the Abuse of the Principle of Universal Jurisdiction.
4. See Report and Recommendations of the International Panel of Eminent Personalities, set up by the OAU in 1998, to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (IPEP) composed of seven eminent African and non-African individuals. The report entitled Rwanda: The Preventable Genocide, was released in July 2000. See <https://research-information.bris.ac.uk/en/publications/report-of-the-oaus-international-panel-to-investigate-the-genocid/>
5. See Paragraph 7 of Decision Assembly/AU/ Dec.199(XI), supra note 1.
6. The AU/EU meetings are held at different levels including Commission to Commission, Troika, Ministerial and Heads of State levels.
75. See <https://data.consilium.europa.eu/doc/document/ST-8672-2009-REV-1/en/pdf>
86. See decision Assembly/AU/ Dec.127(VII) of the 7th Ordinary session of the AU Assembly held from 1 – 2 July 2006 in Banjul, The Gambia
97. Article 25 (5) of ACDEG stipulates that “perpetrators of unconstitutional change of government may also be tried before the competent court of the Union”
108. See <https://www.salimahmedsalim.com/uploads/files/African-Regional-Conference-on-Human-Rights.pdf> for the full statement. The Conference was held in in preparation for the Vienna world Conference on Human Rights (1993)
11. Hereafter also called the “Malabo Protocol.”
12. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the 23rd Ordinary Session of the Assembly of Heads of State and Government of the African Union, 27 June 2014, available at <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>
13. These crimes include: Genocide, crimes against humanity; war crimes; trafficking in persons, in hazardous wastes or in drugs; terrorism; corruption; money laundering; mercenarism; piracy; illicit exploitation of natural resources; unconstitutional changes in government; and aggression.
14. Statute of the African Court of Justice and Human Rights, Article 28A(2)
15. Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights, adopted 10 June 1998; entered into force 25 Jan., 2004, available at <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>
16. Constitutive Act of the African Union, Art., 3, adopted 11 Jul, 2000; entered into force 26 Jul, 2001, available at https://au.int/sites/default/files/treaties/7758-treaty-0021_-_CONSTITUTIVE_ACT_OF_THE_AFRICAN_UNION_E.pdf
17. Protocol of the Court of Justice of the African Union, adopted 1 July 2003, available at <https://au.int/en/treaties/protocol-court-justice-african-union>
18. *Summary of Procedures of the First Meeting of Experts/Judges and the PRC on the Draft protocol of the Court of Justice of the African Union*, 22-24 April 2003, Expt.Judg/Draft/Prot/ACJ/Rpt. (I); *Ministerial Conference on the Draft Protocol of the Court of Justice of the African Union*, 7-8 June 2003, Grand Baie, Mauritius, Min/Draft/Prot/ACJ/Rpt. (I).
19. *Summary of Proceedings of the Second Meeting of Experts/Judges and PRC on the Draft Protocol of the African Court of Justice of the African Union*, 4 – 6 June 2003, Expt.Judg/Draft/Prot/ACJ/Rpt. (II) para 20.
20. Decision on the Draft Protocol of the Court of Justice, Doc. EX/CL/59 (111) / 58 (111), para 2.
21. African Union, *Report on the Decision of the Assembly of the Union to Merge the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union*, EX.CL/162 (VI), para. 3
22. *Id.*
23. EX.CL/211(VIII), Annex II. See African Union, *Summary Report of the Working Group on the Draft Single Legal Instrument Relating to the Merger of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union*, UA/EXP/Fusion.Cours/Rpt(1).
24. African Union, *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, 5-6 (2006)
25. Protocol on the Statute of the African Court of Justice and Human Rights, adopted 1 July 2008, Art. 28(f) available

at <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>

26. 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), para 2; available at https://archives.au.int/bitstream/handle/123456789/1083/Assembly%20AU%20Dec%20221%20%28XII%29%20_E.PDF?sequence=1&isAllowed=y
27. Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, DOC. Assembly/AU/3(XII), para 9, available at [https://archives.au.int/bitstream/handle/123456789/1073/Assembly%20AU%20Dec%20213%20\(XII\)%20_E.PDF?sequence=1&isAllowed=y](https://archives.au.int/bitstream/handle/123456789/1073/Assembly%20AU%20Dec%20213%20(XII)%20_E.PDF?sequence=1&isAllowed=y)
28. The States which have so far signed the Malabo Protocol are: Benin; Chad; Comoros; Congo (Brazzaville); Equatorial Guinea; Ghana; Guinea Bissau; Guinea; Kenya; Mozambique; Mauritania; Sierra Leone; Sao Tome e Principe; Togo; and Uganda.
29. Alan Ngari & Zenaida Machado, "Angola Becomes First Country to Join African Criminal Court", Human Rights Watch, Despatches, 14 June 2024, available at <https://www.hrw.org/news/2024/06/14/angola-becomes-first-country-join-african-criminal-court>
30. Paul Sieghart, *The International Law of Human Rights*, (Oxford, Clarendon Press, 1984), 34
31. The ratification status of the Protocol of the Court of Justice of the African Union is available at <https://au.int/sites/default/files/treaties/36395-sl-PROTOCOL%20OF%20THE%20COURT%20OF%20JUSTICE%20OF%20THE%20AFRICAN%20UNION.pdf>
32. The additional crimes include: Unconstitutional change of government (Coups); Piracy; Terrorism; Mercenarism; Corruption; Money laundering; trafficking in persons; Trafficking in drugs; Trafficking in hazardous wastes; and Illicit exploitation of natural resources.
33. Malabo Protocol, Art. 46A(Bis)
34. Statute of the ICC, Preamble, para 9 available at <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>
35. *Id.*, Art. 17(1)(a)
36. Kamari Clarke, "Accountability and the Expansion of the Jurisdiction of the African Court", *International Criminal Justice Today*, 21 November 2014, available at <https://www.international-criminal-justice-today.org/arguendo/accountability-and-the-expansion-of-the-criminal-jurisdiction-of-the-african-court/>
37. Celeste Hicks, "The Habré Trial: The Future of African Justice?", *African Arguments*, 2 May 2017, available at <https://africanarguments.org/2017/05/habre-trial-future-african-justice/>
38. Statute of the ICC, Art. 1
39. Chidi Anselm Odinkalu & Sharon Nakandha, "Putin Arrest Warrant: International Law and Perceptions of Double Standards", *Opinio Juris*, 27 March, 2023, available at <https://opiniojuris.org/2023/03/27/putin-arrest-warrant-international-law-and-perceptions-of-double-standards/>
40. Geoffrey Roberson, "A Court for Savages", *The Southern Times* (Namibia), 20 Jul, 2012, available at <https://www.derechos.org/nizkor/impu/tpi/cpi.html>
41. "How much money does the ICC need?", *OUPBlog*, 27 Jul., 2015, available at <https://blog.oup.com/2015/07/icc-cost-international-criminal-court/>
42. ICC, Assembly of States Parties, Proposed Programme Budget of the International Criminal Court, ICC-ASP/23/INF.2, 26 Jul., 2024, available at https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-23-INF2-ENG.pdf
43. Stuart Ford, "How Much Money Does the ICC Need?", in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court*, (Oxford, Oxford University Press, 2015), 84
44. See fn. 10 above.
45. Chidi Anselm Odinkalu, "Africa's Immunity Controversy", *Project Syndicate*, 5 Sept., 2014, available at <https://www.project-syndicate.org/commentary/chidi-a--odinkalu-rebuts-criticism-of-the-african-union-s-decision-to-try-international-crimes-at-home>
46. United Nations Charter, Article 52(1).
47. Stephen Lamony, "African Court Not Ready for International Crimes", *African Arguments*, December 12, 2012, available at <https://africanarguments.org/2012/12/african-court-not-ready-for-international-crimes-by-steven-lamony/> For a contrary argument see Chidi Anselm Odinkalu, "Concerning the Criminal Jurisdiction of the African Court: A Response to Stephen Lamony", *African Arguments*, 19 Dec., 2012, available at <https://africanarguments.org/2012/12/concerning-the-criminal-jurisdiction-of-the-african-court-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu/>
48. Monica Mark, "African Leaders Vote Themselves Immunity from New Human Rights Court", *The Guardian*, 3 July 2014, <https://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court>
49. Mark Kersten, "What Gives? African Union Head of State Immunity", *Justice in Conflict Blog*, 7 July 2014, available at <https://justiceinconflict.org/2014/07/07/what-gives-african-union-head-of-state-immunity/>
50. Maclean, Ruth; Camara, Mady «Hissène Habré, Ex-President of Chad Jailed for War Crimes, Dies at 79». *The New York Times*. 24 August 2021.
51. International Law Commission, *Text of the set of draft guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission*, para 1.1, A/65/10, (2010) available at https://legal.un.org/ilc/sessions/62/pdfs/english/guide_to_practice_reservations.pdf



THE MALABO PROTOCOL

A TOOLKIT FOR RATIFICATION