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Civil Society and International Criminal Justice in Africa

Perspectives on the Proposed African Court of Justice and Human Rights

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1. INTRODUCTION

Civil Society Organizations (CSOs) have played and continue to play a critical role in the advancement of the international criminal justice system. One of the hallmark of CSOs influence is the establishment of the International Criminal Court (ICC), regarded by some analysts as a creation of civil society.[1] Through the non-governmental organization (NGO), the Coalition for an International Criminal Court (CICC), CSOs influenced both the content of the Statute (Rome Statute) and the design of the ICC.[2] Following its establishment, CSOs have been actively involved in the implementation of the Rome Statute, and in particular, in bridging the gap between the ICC and local communities,[3] pushing member states

[1] M Glasius, "Global justice meets local civil society: The international Criminal Court's investigations in the Central African Republic" (2008) 33 *Alternatives: Global, Local, Political* 413, 414. See also G. Augustinyova & A. Dumbryte, "The indispensable role of non-governmental organizations in the creation and functioning of the International Criminal Court" (2014) *Czech Yearbook of International Law* 39.

[2] For a detailed analysis of the involvement of CSOs in the Rome Statute negotiations see Z. Pearson "Non-governmental organizations and the International Criminal Court: Changing landscapes of international law" (2006) 2 *Cornell International Law Journal* 243.

[3] As above. See also M. Glasius "What is global justice and who decides? Civil society and victim responses to the International Criminal Court's first investigations" (2009) 31 *Human Rights Quarterly* 496.

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through advocacy and litigation to respect and enforce the Statute,[4] and documenting evidence of international crimes.[5]

Beyond interaction in global and domestic spheres, civil society's engagement on international criminal law and justice is increasingly becoming prominent regionally, especially in Africa, where the African Union (AU) has become a critical actor in the field. In the last few years, the AU Assembly – composed of African heads of state and government – has adopted numerous resolutions and policy decisions on the application of the Rome Statute in Africa as well as on the ICC's intervention in the continent.[6] Perhaps more importantly, and partly in reaction to what the AU and some member states see as an unfair and biased global international criminal justice system,[7] the AU has sought to establish its own regional criminal justice system.

In June 2014, the AU Assembly, meeting in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). The Malabo Protocol extends the jurisdiction of the yet-to-be established African Court of Justice and Human Rights (ACJHR) to cover crimes under international law and transnational crimes. Through the Malabo Protocol, the AU seeks to establish a regional criminal court, operating in a manner akin to the ICC but within a narrowly defined geographical scope. The regional court will have

[4] See, for example, A. Mudukuti "Complementarity and Africa: Tackling International Crimes at the Domestic Level" in E Ankumah (ed) *The International Criminal Court and Africa: One decade* on (2016) 489; N. Mue & J. Gitau "The Justice Vanguard: The Role of Civil Society in Seeking Accountability for Kenya's Post-election Violence" in C de Vos et al. (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015) 198; C. Bjork & J. Goebertus "Complementarity in action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya" (2011) 14 *Yale Human Rights & Development Journal* 205.

[5] See, for example, "Civil society and the International Criminal Court: Local Perspectives on Fact-finding" available at www.ijmonitor.org/2015/11/civil-society-and-the-international-criminal-court-local-perspectives-on-fact-finding/ (last visited on September 26, 2016).

[6] See, for example, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.296(XV); Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of Republic of Sudan, Assembly/AU/Dec.221(XII); Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245(XIII), Rev 1; Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366 (XVII); Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Assembly/AU/Dec.482(XXI).

[7] See generally S. Odero, "Politics of International Criminal Justice, the ICC's Arrest Warrant for Al Bashir and the African Union's Neo-colonial Conspirator Thesis" in C. Murungu and J. Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 145.

jurisdiction over a long list of crimes: genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and aggression. Undoubtedly, the AU's decision to establish a regional criminal court is bound to have far-reaching legal and institutional implications for various stakeholders involved in the pursuit of international criminal justice in Africa, including the AU, states, and civil society.

This chapter examines the scope of possible interaction between civil society and the future regional criminal court (if it will be established at all) and suggests avenues for civil society engagement in addressing these concerns in order to strengthen the court. In order to understand and contextualize this possible interaction, the first half of the chapter traces the level of participation of civil society in the drafting of the Malabo Protocol. The second half of the chapter is devoted to a discussion of two key areas in which civil society organizations will have to engage in order to contribute toward the strengthening of the future court. The first one relates to the challenge of strengthening the human rights mandate of the court, including the issue of restricted access to civil society as a result of successive amendments to the Court Protocol. The second section focuses on issues raised by civil society with respect to legal standards, competing obligations and challenges of domestication that may arise upon operationalization of the Court. Much of the analysis on the legal and institutional implications of the Malabo Protocol discussed in this chapter is based on a report published by Amnesty International in January 2016.[8]

2. CIVIL SOCIETY AND THE DRAFTING OF THE MALABO PROTOCOL: A STORY OF EXCLUSION

Civil society has traditionally played a relatively active role in the development of AU human rights treaties and normative instruments. Two particular examples of civil society involvement in the formulation of human rights treaties in Africa stand out. First, civil society was instrumental in the initiation and formulation of the Protocol on the Establishment of the African Court on Human and Peoples' Rights. In particular, the International Commission of Jurists (ICJ), working in conjunction with other NGOs, produced

[8] Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded Court* (Index: AFR 01/3063/2016), January 2016, available at www.amnesty.org/en/documents/afr01/3063/2016/en/ (last visited October 11, 2016).

the first draft of the Protocol. It is this draft produced by ICJ that formed the basis of a meeting of government experts held in 1995.[9] Second, the Protocol on the Rights of Women in Africa (Maputo Protocol) is regarded as an initiative of civil society. Its origin can be traced back to a 1995 joint meeting between the African Commission on Human and Peoples' Rights (African Commission) and the Women in Law and Development in Africa (WILDAF), a regional NGO. Banda has addressed how input from civil society was received throughout the various stages of drafting of the Maputo Protocol.[10] In recent years, civil society has been engaged in the formulation of the Protocol on the Rights of Older Persons in Africa, Protocol on the Rights of Persons with Disabilities in Africa, AU Draft Transitional Justice Policy Framework, and the four General Comments thus far adopted by of the African Commission.

In what is clearly a retrogression, the process that led to the drafting and adoption of the Malabo Protocol did not include much scope for public debate or civil society consultation. Following the 2009 decision of the AU Assembly, where it requested the AU Commission, in consultation with the African Commission and the African Court of Human and Peoples' Rights (African Human Rights Court), to examine the implications of the ACJHR being empowered to try international crimes, the secretariat of the Pan African Lawyers Union (PALU) was contracted by the AU Commission in 2010 to study and provide recommendations on a legal instrument which would amend the Protocol on the ACJHR. PALU submitted its reports to the AU Commission in June and August 2010. Validation workshops were held in South Africa in August and November 2010 to discuss the draft prepared by PALU, but these discussions involved only representatives of the AU organs and Regional Economic Communities (RECs). There is no recorded evidence of any regional or national consultations with civil society up until the Protocol was adopted by the AU Assembly in 2014. As such, the drafting process has been described as one that lacked transparency and full participation of relevant stakeholders.[11] Given their exclusion in the process of drafting

[9] See Report of the Government Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc OAU/LEG/EXP/AFC/HPR/RPT(I)Rev.1.

[10] F. Banda, "Blazing a Trail: The African Protocol on Women's Rights Come into Force" (2006) 50 *Journal of African Law* 72, 73.

[11] M. du Plessis, "A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes", Blog of the European Journal of International Law, August 27, 2012, available at www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/ (last visited 11 October 2016).

of the Malabo Protocol, civil society had no formal avenues of engagement. They understandably resorted to raising concerns about proposed contents of the Protocol in press releases and open letters. In May 2012, a total of 47 African and international NGOs with a presence in Africa wrote a joint open letter to ministers of justice and attorneys general of African state parties to the Rome Statute asking them to carefully study and address a number of issues of concern arising from the proposal to expand the jurisdiction of the ACJHR to cover crimes under international law as well as transnational crimes.[12] In June 2015, after an immunity clause was introduced into the text that would eventually become the Malabo Protocol, several NGOs issued press statements calling for the immunity clause to be deleted.[13] From the record of the meetings held by government experts and ministers of foreign affairs to consider initial drafts of the Malabo Protocol, there is no indication that concerns raised by civil society were taken into account.

It is important to note that the failure to consult civil society in the drafting of the Malabo Protocol occurred against the background of an increasingly shrinking space for civil society involvement in the activities of the AU. It is particularly instructive that at the June 2014 summit in Malabo, no invitation was extended to civil society to participate in the session. Instead, the AU Assembly commenced a process that would eventually lead to the exclusion of civil society and developments partners in its June/July sessions or summits.[14] In June 2015, the AU Assembly adopted a decision that formalized the exclusion.[15] This decision and the emerging practice raises critical questions about the commitment of the AU to abide by its own objectives and principles as enshrined under the Constitutive Act. The Constitutive Act requires the AU to

[12] Joint Letter to the Justice Ministers and Attorneys General of the African State Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights, May 3, 2012, available at www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties (2012 Joint Open Letter).

[13] See, for example, Amnesty International, *Open letter to the heads of state and government of the African Union: Article 46A Bis of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Index: AFR 01/012/2014), June 20, 2014, available at: www.amnesty.org/en/documents/afr01/012/2014/en/ (last visited October 11, 2016); Human Rights Watch, *Statement regarding immunity for sitting officials before the expanded African Court of Justice and Human Rights*, November 13, 2014, available at www.hrw.org/news/2014/11/13statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and (last visited October 11, 2016).

[14] Decision on the Official Opening of the Ordinary Sessions of the Assembly, Assembly/AU/Dec.542(XXIII).

[15] Decision on Streamlining of the AU Summits and the Working Methods of the African Union, Assembly/AU/Dec.582(XXV).

function in a manner that ensures "participation of the African peoples in the activities of the Union."[16] Moreover, a key objective of the AU is to "promote democratic principles and institutions, popular participation and good governance."[17] The decision to exclude CSOs from the June/July summits is undoubtedly incompatible with these stated principles. It worsens an already worrying situation. As Moyo correctly points out:

> Although the AU and its organs provide for civil society involvement in their activities, very little engagement actually takes place. There is very little that the AU and its organs have done to make contact with citizens and CSOs, except for a few departments like the Gender Directorate. AU institutions set up for civil society participation remain weak, and at times they are unwilling to involve civil society.[18]

Outside of the AU summits, the formal and structured channel for civil society engagement with the AU is the Economic, Social and Cultural Council (ECOSOCC). One of its critical functions is to "promote the participation of African civil society in the implementation of the policies and programmes of the Union."[19] ECOSOCC is composed of 150 CSOs drawn from AU member states and the African diaspora. However, criteria for eligibility as a member of ECOSOCC is restrictive. In particular, in order to qualify for membership in ECOSOCC, a CSO must show that at least 50% of its basic resources are "derived from contributions of the members of the organization."[20] Given that the majority of CSOs in Africa depend on donor funding, only a handful of organizations across the continent meet the "50% requirement." Thus, although the rule was in theory intended to exclude "foreign" or "international organizations", in practice it excludes NGOs founded in and working exclusively in Africa as well.[21] That the AU requires CSOs to meet this criterion is ironic as the AU itself depends on donors, mostly European countries, to fund more than 70% of its budget.[22]

[16] AU Constitutive Act, Article 4(c).
[17] AU Constitutive Act, Article 3(g).
[18] B. Moyo, "Civil society and the African Union architecture: Institutional provisions and invented interfaces" available at http://bhekinkosimoyo.com/downloads/civil_society_and_the_african_union_architecture.pdf (last visited October 4, 2016).
[19] Statute of the Economic, Social and Cultural Council of the African Union, Article 2(3).
[20] Statute of the Economic, Social and Cultural Council of the African Union, Article 6(6).
[21] African Network on Debt and Development et al., *Towards a People-driven African Union: Current Obstacles and New Opportunities* (2007) 34.
[22] See Report of the High Level Panel on Alternative Sources of Financing the African Union, Assembly/18/(XIX) (2012).

While access to ECOSOCC is restrictive, civil society have long enjoyed a cordial and dynamic relationship with the African Commission.[23] This relationship has allowed CSOs to make immense contributions to the work of the African Commission, including in the area of standard-setting. As Viljoen observes, CSOs have been "crucial in the growth and consolidation of the Commission."[24] Lately, however, the AU Executive Council has issued directives requiring the African Commission to withdraw the observer status granted to specific NGOs. In particular, the Executive Council in June 2015 directed the African Commission to take into account in its work "the fundamental African values, identity and good traditions", and in this context, to withdraw the observer status granted to "NGOs who may attempt to impose values contrary to the African values."[25] The Executive Council singled out the Coalition of African Lesbians (CAL), an NGO registered in South Africa but with a working presence in several countries on the continent, and asked the African Commission to withdraw its observer status.[26] The Executive Council also asked the Commission to review its criteria for granting observer status to NGOs. In January 2016, it went further and asked the Commission to review the representation of "non-African individuals and groups" before it.[27] These directives raise questions about the independence and autonomy of the African Commission from AU's political organs.[28] More importantly, the directives signify a trend toward limiting civil society access to the AU in general and specifically to its human rights institutions.

[23] See A. Motala, "Non-Governmental Organizations in the African Human Rights System" in M. Evans & R. Murray (eds.) *The African Charter on Human and Peoples' Rights: The system in practice, 1986–2006* (2008) 246.

[24] F. Viljoen, *International human rights law in Africa* (2012) 383.

[25] Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII), para. 7.

[26] Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII), para. 7. Although it initially seemed to resist political pressure, the African Commission withdrew CAL's observer status in August 2018.

[27] Decision on the Activities of the African Commission on Human and Peoples' Rights (ACHPR), EX.CL/Dec.902(XXVIII) Rev 1, para. 7.

[28] See Centre for Human Rights, University of Pretoria (CHR) & The Coalition of African Lesbians (CAL), Request for Advisory Opinion No. 002/2015.

3. CHALLENGES IN STRENGTHENING OF THE CURRENT HUMAN RIGHTS COURT AND THE FUTURE HUMAN RIGHTS MANDATE

A. *Even More Restricted Access to Civil Society*

The expansion of the mandate of the ACJHR to include international crimes has impacted negatively on the ability of individuals and CSOs to access the ACJHR. Presently, the African Human Rights Court "may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the [African] Commission, and individuals to institute cases directly before it", and if the state against which the case is lodged has made a declaration allowing NGOs and individuals to file cases against it.[29] This provision has been criticized for its restrictive approach to limiting cases from NGOs and individuals, and which in part explains the rather limited docket so far of the African Human Rights Court.

The Amended ACJHR Statute is even more restrictive. It allows only "African individuals or African Non-governmental organizations with observer status with the African Union or its organs or institutions' to submit cases or applications before the ACJHR.[30] "African NGOs" are defined in the Protocol as "Non-governmental Organizations at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council."[31] Whether international NGOs would fall within this definition is debatable and concerning. "African individuals" are not defined in the preamble. In addition to potentially preventing foreign nationals and NGOs from accessing the Court, this personal jurisdiction or standing issue also risks having implications on the material jurisdiction of the Court in cases raising questions regarding extra-territorial obligations and violations.

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

[29] Protocol on the Establishment of the African Court on Human and Peoples' Rights, Articles 5 and 34(6).
[30] Amended ACJHR Statute, Article 30(f).
[31] Malabo Protocol, Article 1.

African Human Rights Court.[32] Article 53 of the Amended ACJHR Statute provides that:

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

In essence, only AU organs and institutions will be allowed to seek for an advisory opinion under the Malabo Protocol. NGOs have lost the access they enjoyed before the African Human Rights Court. With the capacity of CSOs to request for advisory opinions taken away, it is likely that the advisory role of the African Court will go into disuse and ultimately be rendered redundant. AU organs and institutions have not shown an interest and appetite to request advisory opinions from the African Court. Out of the 13 advisory requests received by the African Court as of this writing,[33] only one had been presented by an AU institution. The bulk of the rest were submitted by NGOs.

B. *Implications on the Existing Court/Human Rights Mandate of The New Court*

One of the concerns expressed by civil society, including in its 2012 joint letter,[34] is that the Malabo Protocol and the decision to expand the jurisdiction of the ACJHR to cover international crimes will impact on the operations and future of the African Human Rights Court.

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

Second, although the Preamble to the Malabo Protocol notes "the steady growth of the African Court on Human and Peoples' Rights and the

[32] But see African Court on Human and Peoples' Rights, Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP), No. 001/2013, May 26, 2017. See also A. Jones. "Form Over Substance: The African Court's Restrictive Approach to NGO Standing in the SERAP Advisory Opinion" (2017) 17 *African Human Rights Law Journal* 321.

[33] See http://en.african-court.org/#advisory-opinions (last visited October 31, 2018).

[34] 2012 Joint Letter.

contribution it has made in protecting human and peoples' rights",[35] the Protocol does not provide for the transfer of judges and the registrar of the African Human Rights Court to the ACJHR. The Protocol provides that the terms and appointment of the current judges and registrar of the African Human Rights Court will terminate on the coming into force of the Malabo Protocol, although they will remain in office until the new judges are sworn in.[36] The Protocol also provides that the staff of the African Human Rights Court will be absorbed into the ACJHR but only for the remainder of their subsisting contracts.[37] This runs the risk of losing the institutional history, experience and expertise of the judges in the new Court and does not allow for continuity. It will be important to allow for some continuity because the new Court will be required to pick up the cases pending before the African Human Rights Court.[38]

On a positive note, the Malabo Protocol provides that the seat of the ACJHR would be the seat of the existing African Human Rights Court (Arusha, Tanzania).[39] This has the advantage of increasing the ability for the African Human Rights Court to leave a legacy in terms of human rights, as documentation will be available to the ACJHR. This is important because the potential exists that the legacy of the African Human Rights Court and any experience it has attained will be lost in the process of transition to a Court with a broader mandate.

C. *Implications and Challenges for the Civil Society Campaign on Universal Ratification of the Protocol on African Court on Human and Peoples' Rights*

The Malabo Protocol may also delay, or actually prevent, any new ratification of the African Human Rights Court Statute. A total of 25 African states have not ratified the African Protocol on the Establishment of an African Court on Human and Peoples' Rights.[40] A group of CSOs, under the umbrella of the African Coalition for an Effective African Court, have been engaged in a campaign for universal ratification of the Protocol.[41] However, with the

[35] Malabo Protocol, Preamble, para. 6.
[36] Malabo Protocol, Article 4 and 7(1).
[37] Malabo Protocol, Article 7(2).
[38] Malabo Protocol, Article 6.
[39] Amended ACJHR Statute, Article 25.
[40] For the list of countries that have ratified the African Human Rights Court Protocol see www.au.int/en/sites/default/files/treaties/7778-sl-achpr_1.pdf (last visited January 7, 2016).
[41] See www.africancourtcoalition.org/index.php?lang=en (last visited October 31, 2018).

expansion of the jurisdiction of the ACJHR to cover international crimes, those states which would have considered ratifying the African Human Rights Court Statute may reconsider their position. During the 2012 Meeting of Ministers of Justice and Attorneys General, state representatives proposed that "States should be allowed to choose which instrument or section of the Court to belong to",[42] an indication that some states were not willing to be party to a Court with an expanded jurisdiction covering international crimes. This proposal was not taken on board as the Legal Counsel explained that allowing states to pick which section of the Court to belong to was not advisable and would result in "many technical and practical difficulties based on the proposed number and deployment of judges within the Court."[43] Thus, in the end, the Malabo Protocol provides states with "an all-or-nothing option."[44] As a commentator observed when the first draft of the Amended ACJHR Protocol and Statute was adopted in 2012: "When it is faced with an all-or-nothing choice, a state that would be attuned to the protection of human rights or its obligations under the ICC Statute, may decide not to ratify the Amending Court Protocol at all, due to its reticence to accept a court that deals with international criminal justice issues."[45]

4. LEGAL STANDARDS, COMPETING OBLIGATIONS AND CHALLENGES OF DOMESTICATION

Throughout the drafting process and after the ACJHR Statute was adopted, civil society organizations raised some key concerns about certain aspects of the Protocol, including the immunity provision, the definition of several offenses under the Statute which might have human rights implications, including the crimes of unconstitutional change of government and terrorism, as well as concerns about domestication of the Statute in light of states' other obligations under international and regional treaties, particularly for AU member states who are also parties to the Rome Statute. The following section therefore focuses on issues raised by civil society with respect to legal standards, competing obligations and challenges of domestication that may arise

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

[43] Ibid., para. 18(ii).

[44] F Viljoen "AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol", available at http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/ (last visited January 7, 2016).

[45] Ibid.

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upon operationalization of the Court, and suggests avenues for civil society engagement in addressing these concerns in order to strengthen the court.

A. *Immunity*

Civil society groups have been very vocal in opposing the immunity clause, which is considered to be the most controversial provision in the Amended ACJHR Statute. The relevant provision reads as follows[46]:

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

This provision was approved despite the fact that during discussions, delegations at the Ministerial Meeting raised concerns regarding its conformity with international law, domestic laws of Member States and jurisprudence.[47] Delegations also underlined the challenges inherent in widening immunities, the lack of a precise definition of "senior state official" and the difficulty in providing an exhaustive list of persons who should be included in the category of senior state officials.[48] CSOs have also repeatedly raised concerns about this clause in the Malabo Protocol,[49] including in a joint letter signed by 141 organizations to Ministers of Justice and Attorneys General of African Union member states, published in May 2015.[50] In this letter, for example, Timothy Mtambo, Executive Director at Malawi's Centre for Human Rights and

[46] Malabo Protocol, Article 46A *bis*.

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

[48] Ibid.

[49] See South African Litigation Centre, SALC in the News: Africa Should Reject Free Pass for Leaders, November 18, 2013, available at: www.southernafricalitigationcentre.org/2013/11/18/salc-in-the-news-icc-africa-should-reject-free-pass-for-leaders/ (last visited October 11, 2016); Kenya Human Rights Commission, African States: Reject Immunity for Leaders, August 25, 2014, available at www.khrc.or.ke/2015-03-04-10-37-01/press-releases/387-african-states-reject-immunity-for-leaders.html (last visited October 11, 2016). See also: W. Jordash and A. Tsunga, The Day AU Leaders Justified the Existence of the ICC!, August 6, 2014, available at: http://ilawyerblog.com/day-au-leaders-justified-existence-icc/ (last visited October 11, 2016).

[50] Human Rights Watch and others, Joint Civil Society Letter on the Draft Protocol on Amendments to the Statute of the African Court of Justice and Human Rights, May 5, 2014, available at www.hrw.org/news/2014/05/12/joint-civil-society-letter-draft-protocol-amendments-protocol-statute-african-court, (2014 Joint Letter).

Rehabilitation, raised the concern that "Granting immunity to sitting officials is retrogressive, and risks giving leaders license to commit crimes. Immunity also risks encouraging those accused of the crimes to cling to their positions to avoid facing the law."[51]

Under general customary international law serving Heads of State and Government and Senior State Officials enjoy immunity from criminal jurisdiction of a third state. However, there are exceptions to this general rule including that Heads of State and Government and Senior State Officials do not necessarily enjoy immunity from criminal proceedings initiated before international criminal courts such as the ACJHR. In this regard, article 27(1) of the Rome Statute) provides that:

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

Article 27(2) further provides that:

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

Other international criminal or hybrid courts have not provided immunity for heads of state or senior officials and this is reflected in their Statutes. The Special Court for Sierra Leone, in relation to Charles Taylor, for example, held that "[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[52]

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

[51] Ibid.

[52] Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003–01-I, Appeals Chamber, Decision on Immunity from Jurisdiction (May 31, 2004), at para. 52. See also: Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004 (NS/RKM/1004/006), Article 56, which provides that "The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment."

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

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

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

As the strongly voiced concerns of CSOs concerning this provision and its implications on impunity in Africa were disregarded during the initial drafting process, the Statute should therefore be re-opened for amendment of Article 46Abis to ensure it complies with international standards. Civil society organizations should engage in sensitization activities regarding this aspect of the Protocol and continue to advocate that states either amend this provision or enter reservations with regards to this provision in the event that it is not amended.

B. *Vaguely Defined Crimes and the Challenges of Ensuring Respect for Human Rights Standards*

CSOs have also voiced concerns about the implications of vague/broadly defined crimes in the ACJHR Statute, and in particular, with respect to the crimes of terrorism and unconstitutional change of government.

The Malabo Protocol contains an extensive and ambitious list of crimes. Arguably, the list covers areas or crimes which have particular relevance to the African continent. However, some crimes included under the jurisdiction of the ACJHR are yet-to-be well articulated and established in international law, prominent among which is the crime of unconstitutional change of government. Unconstitutional change of government is a phenomenon that is considered as "one of the essential causes of insecurity, instability and violent conflict in Africa."[53]

Since 1999, the AU has adopted a number of decisions and declarations opposing unconstitutional change of government,[54] which eventually culminated in the adoption of the African Charter on Democracy, Elections and Governance ("ACDEG") in 2007 and its entry into force in 2012. The ACDEG provides a definition of unconstitutional change of government and provides for several punitive measures including sanctions, and trial by the "competent court of the Union."[55] The genesis of the crime of unconstitutional change of government was thus inherently political. However, while it is one thing for unconstitutional changes of government to be opposed by the AU at the political level, such phenomenon has not been widely prosecuted as a crime at the international level and it remains to be seen what effect the criminalization of this crime within the Malabo Protocol will have regionally.

Moreover, the definition of the crime of unconstitutional change of government was contentious throughout the drafting process. At the center of this controversy was whether to include popular uprising as a form of unconstitutional change of government. The concern of including popular uprising as constituting a crime of unconstitutional change of government was that this would result in criminalizing protest. In the end the issue of "popular

[53] African Charter on Democracy, Elections and Governance, Preamble, para. 6.

[54] 1999 Algiers Declaration on Unconstitutional Changes of Government (OAU Doc. AHG/Dec. 141 (XXXV) (1999); OAU Doc. AHG/Dec. 142 (XXXV), the 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government; OAU Doc. AHG/Dec. 5 (XXXVI) (2000); 2002 Declaration on the Principle Governing Democratic Elections in Africa OAU Doc. AHG/Dec. 1 (XXXVIII) (2002).

[55] ACDEG, Article 25.

uprising" was deleted from the definition adopted in Article 28E of the Malabo Protocol, clearly a positive development. However, an earlier draft of Article 28E had reportedly included a specific exception to the crime of unconstitutional change of government in the case of peaceful protests – proving that any act of a sovereign people peacefully exercising their inherent right which results in a change of government shall not constitute an offense under this article. It is unfortunate that such an exception was not retained in the final ACJHR Statute, as this would be a clearer and more explicit limitation on this crime in conformity with human rights obligations, including the rights of freedom of expression, association and assembly.[56]

Such an exception would have been particularly welcome given the broad formulation of the crime in Article 28E, which as currently drafted, raises serious concerns as to compliance with the principle of legality and may criminalize conduct constituting peaceful protest. For example, while a coup d'état against a democratically elected government is criminalized there is no definition of a "coup d'état" provided in the Statute nor specification that only violent coup d'états can be criminalized.[57] Consequently, while "popular uprising" is not explicitly criminalized, the crime of unconstitutional change of government under Article 28E is sufficiently broadly drafted that it still appears to leave open the possibility that peaceful protests that result in a change in government may be criminalized, such as for example, the Arab Spring protests that ultimately led to a changes of government in several Arab states.

As some commentators have indicated, this is to be contrasted with Article 28G on terrorism which contains an exception in the case of a "struggle waged by peoples according to the principles of international law for their liberation or self-determination." As argued by Du Plessis, the ACJHR Statute thus allows for such a struggle even when it results in death or serious injury (as per the definition of terrorism in this Article), but potentially criminalizes peaceful protests under the crime of "unconstitutional change of government."[58] It is therefore difficult to reconcile these two provisions.

[56] See also Daily Maverick, "AU Summit Conclusions: Number Ones look out for Number One, Again", July 4, 2014, available at www.dailymaverick.co.za/article/2014-07-04-au-summit-conclusions-number-ones-look-out-for-number-one-again/#.V86nSvmLTIU (last visited October 11, 2016).

[57] Further, there is no definition of "coup d'état" in the ACDEG, from where the crimes contained in Article 28D have been taken almost verbatim.

[58] See M. Duplessis, who makes this argument in "Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders", ISS Paper 278, November 2014, p. 4, available at: www.issafrica.org/uploads/Paper278.pdf (last visited October 11, 2016).

As argued by Du Plessis, it is also difficult to see how Article 28E can be reconciled with the immunity provision in Article 46A*bis*, as it would seem that many of the crimes listed in Article 28E could only be committed by heads of state or other senior state officials. The immunity provision renders the crime of "unconstitutional change of government" inoperative with respect to the majority of those who might in fact be prosecuted for it.[59]

Amnesty International and CSOs have also been particularly concerned about the definition of terrorism as adopted in Article 28G of the Amended ACJHR Statute.[60] There is no agreed definition of terrorism under international law. Definition of terrorism in regional instruments vary greatly, and Amnesty International has frequently criticized these definitions, including the definition of terrorism in the OAU Convention on the Prevention and Combating of Terrorism, from which the definition in Article 28G is largely derived, for being vague and overly broad, thus undermining the principle of legality. Amnesty International's research also demonstrates that many governments across the world invoke broad definitions of terrorism in order to repress political opposition, target human rights defenders, and harass and intimidate "suspect" religious and/or ethnic groups, and clamp down on legitimate exercise of freedom of expression, association, assembly and other human rights. The definition in the Malabo Protocol, may be used for similar purposes as it is overly broad.

For example, Article 28G provides that acts which may cause "damage to public or private property, natural resources, environmental or cultural heritage" can be criminalized as terrorist acts, without specifying, that such damage must be "serious" or "substantial", as does for example the UN Draft Comprehensive Terrorism Convention, the African Model Anti-Terrorism Law or in several of the international counter-terrorism conventions.[61] Nor are terms such as "property", "natural resources" or "environmental or cultural heritage" defined. Similarly, the article criminalizes "disruption to public services" without specifying that this must be a "serious" disruption. As Saul indicates in his Chapter on Terrorism in this volume, Article 28G further provides that any act which is a "violation of the laws of the African Union or a regional economic community recognized by the African Union", without specifying that these must be criminal laws, with the consequence that violation of many

[59] Ibid., p. 8.
[60] Malabo Protocol, Article 28G.
[61] Article 4(xxxix)(b), African Model Counter-Terrorism Law, endorsed by the 17th Ordinary Session of the Assembly of the Union, 2011, available at http://caert.org.dz/official-documents/african-model-law-en.pdf (African Model Anti-Terrorism Law).

regulatory. laws might be criminalized under this provision. Relatively minor acts could therefore constitute terrorist acts under Article 28G, including those which might result from peaceful protest. As Saul indicates, this is particularly worrying as there is also no "peaceful protest" exception for such acts (as there is in the African Model Anti-Terrorism Law).[62]

Moreover, while incitement is listed as a mode of liability, it is not defined or limited in any way in Article 28G (or elsewhere in the Statute),[63] whereas the Special Rapporteur on Human Rights and Terrorism has indicated that in order to limit infringements upon freedom of expression, incitement should only be criminalized if it "causes a danger that one or more such offenses may be committed."[64]

This challenge is compounded by the fact that Article 28G(A) partly defines the crime in question by referring to an open-ended list of offenses contained in a series of international, regional and domestic legal frameworks, including where such offenses are themselves ill or vaguely defined, thus adding to the confusion and likely overbroad nature of the crime and its arbitrary application. This raises serious concerns as to compliance with the principle of legality, a core general principle of law, enshrined, *inter alia*, in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which requires laws to be clear and accessible and for their application in practice to be sufficiently foreseeable, and with regards to criminalization, requires that the law must classify and describe offenses in precise and unambiguous language that narrowly defines the punishable behavior.[65]

Article 28G(B) therefore prevents individuals from ascertaining with sufficient certainty which conduct could constitute a criminal offense. As such, it raises significant concerns, including with regard to the principle of legality, and paves the way for arbitrary application in practice.

Engagement with civil society throughout the process of drafting the provisions on unconstitutional change of government and terrorism would likely have helped to make them stronger, less broad, and less prone to being used to

[62] Article 4(xl)(a), African Model Counter-Terrorism Law.

[63] Saul also raises the point that it is difficult to reconcile the modes of liability provided for Article 28G with the modes of liability that are provided for more generally in Article 28N of the Statute. See Chapter 15 in this volume.

[64] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/16/51, December 22, 2010.

[65] See, *inter alia*, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, December 9, 2014, UN Doc. A/HRC/28/28.

criminalize peaceful protest. The ACJHR Statute should therefore be re-opened for input and amendments, including by civil society into these and other problematically defined crimes.

C. *Implications on Domestic Legal Standards, Competing Obligations, and Harmonization of Laws*

States may face significant difficulties in domesticating the Statute of the ACJHR in light of competing obligations under international law, as well as in harmonizing currently existing domestic laws with the provisions of the Statute. In addition to specific issues in relation to conflicting obligations under the Rome Statute and the ACJHR with which states who are already party to the Rome Statute will have to contend (which are discussed more fully below), states may also face conflicting obligations if they are also parties, for example, to the 19 international counter-terrorism conventions, the United Nations Convention on Organised Crime and/or various other international instruments relating to drug trafficking, migrant smuggling and trafficking in persons, as well as regional treaties dealing with these crimes.

In the case of terrorism for example, Article 28C contains the controversial provision on "struggles for self-determination", derived from the OAU Convention on the Prevention and Combating of Terrorism, which provides that acts committed during struggles for self-determination should not be considered to be terrorist acts. There is no such exclusion under any of international counter-terrorism instruments. Therefore, as Saul indicates in his Chapter on terrorism in this volume, states would be subject to conflicting obligations because while they would have the obligation to criminalize these acts under international counter-terrorism treaties, they would be obliged in the domestic implementation of the ACJHR Statute to include this exception.[66]

Even where there are no competing obligations, a substantial amount of drafting and legislative work may be required within states to bring domestic laws in line with the Statute of the ACJHR and other international instruments to which they are party.

It is therefore critical for civil society organizations to engage in a process of sensitizing governments of the implications of ratifying the Malabo Protocol on domestic legal standards and on the difficulties of reconciling their obligations under the ACJHR with their obligations under other international and regional instruments.

[66] See Saul, Chapter 15 in this volume.

D. *Conflicts with Obligation of Member States to Rome Statute*

CSOs have also raised concerns that the establishment of an African Court with criminal jurisdiction may cause difficulties for states who are also party to the Rome Statute. Of the 55 member states comprising the AU, 33 are also state parties to the ICC. Therefore, the expansion of the jurisdiction of ACJHR to cover international crimes will likely have a number of consequences on those AU member states which would be at once have obligations toward the ACJHR and the ICC.

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

E. *Overlapping Jurisdiction and Competing Obligations*

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

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

F. *Domestic Implementing Legislation*

Under the Rome Statute system, and due to the principle of complementarity, state parties to the ICC are under a duty to enact domestic implementing legislation. This legislation should domesticate the Rome Statute crimes as well as provide for procedures of cooperating with the ICC.[67] The Malabo Protocol also provides that it is complementary to national jurisdictions,[68] and as such, those states party to the Protocol will also have to ensure that their domestic legislation is in line with the Protocol. It follows that the process of amending, updating or indeed adding further provisions into domestic legislation to incorporate the Malabo Protocol legislative requirements will need to be considered by states party to both the ICC and the ACJHR.

This may present a number of difficulties for those ICC states parties which have or are in the process of domesticating the Rome Statute. For example, the Malabo Protocol contains some variations in the definitions of Rome Statute crimes as well as a number of crimes which are not included in the Rome Statute. This may require a substantial amount of drafting and legislative work within current Rome Statute member states to bring domestic laws in line with the statutes of both the ICC and the ACJHR. This may even prove impossible if states are unable to domestically legislate definitional differences found in the Malabo protocol and Rome Statute systems. For example, the Kenyan International Crimes Act 2008 incorporates directly in its domestic implementing legislation the definitions of genocide, crimes against humanity and war crimes found in the Rome Statute.[69] Furthermore, states parties to the ICC are required to enact domestic legislation ensuring cooperation requests, including for arrest and surrender, are properly executed by state parties. A number of African state parties' domestic legislation provides for specific ICC related cooperation, this will also have to be adapted in order to also accommodate cooperation requests of the ACJHR.

[67] Rome Statute, Article 88.
[68] Malabo Protocol, Article 46H.
[69] See, Kenya International Crimes Act 2008 available at www.issafrica.org/anicj/uploads/Kenya_International_Crimes_Act_2008.pdf (last visited October 11, 2016).

G. *Double Financial Burden*

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

It is therefore critical for civil society organizations, particularly in member states which are also parties to the Rome Statute, to engage in a process of sensitizing governments on the potential difficulties of reconciling their obligations under the ACJHR with their obligations under the Rome Statute.

5. CONCLUSION AND WAY FORWARD

The exclusion of civil society from the process of formulating the Malabo Protocol marked a retrogression in AU's standard-setting practice. As a result of this exclusion, the Malabo Protocol has received a largely lukewarm reception among civil society, a situation which undermines any possible future engagement between civil society and the ACJHR. However, it is important to note that all efforts to bring an end to impunity for crimes under international law should be welcomed and CSOs should engage with the Malabo Protocol with this spirit. This engagement must be based on a thorough understanding of the provisions of the Malabo Protocol and its legal and institutional implications. Yet, there is currently a lack of information and awareness regarding the Malabo Protocol and its legislative and institutional implications. In order to successfully be able to advocate with governments regarding the Protocol, it is crucial that civil society is educated about the implications of the Protocol and is empowered to engage in both regional and national advocacy campaigns with governments regarding the ACJHR, and to propose amendments to certain provisions of the Statute.[70]

Similarly, before states consider ratification of the Protocol, it is crucial that they are sensitized regarding the legislative history of the Protocol (including

[70] Amnesty International has taken some steps towards such a sensitization including the publication of a study on the legal, financial and logistical implications of the Malabo Protocol, which has been widely disseminated to relevant stakeholders, member states, AU Organs and civil society. (See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (Index: AFR 01/3063/2016), January 22, 2016, available at www.amnesty.org/en/documents/afr01/3063/2016/en/ (last visited October 11, 2016). It is also planning regional consultations with civil society and the press regarding the Protocol within the broader context of international justice in Africa.

on controversies surrounding the issues of unconstitutional change of government and the immunities provision), on the specific provisions of the Protocol and concerns regarding such provisions, and on the institutional and other implications with respect to conflicting obligations in domesticating the Protocol, particularly for member states of the Rome Statute. When considering whether to ratify the Protocol, African Union member states should also be encouraged to consider whether to enter reservations to certain articles, and in particular, to Article 46A bis in the event that the provision is not amended to comply with international standards

On its part, and in order to ensure an effective court, the AU should prioritize the concerns arising from the expansion of the jurisdiction of the ACJHR to include crimes under international law and transnational crimes. Citizens and CSOs from across the continent should engage with the AU to ensure that the ACJHR is the most effective possible court and that if it is granted criminal jurisdiction that it has the strongest possible statute and institutional support to ensure that it is effective in bringing suspects to fair trials. CSOs must confront, however, some key dilemmas, as to whether to advocate with states to ratify the Statute in its current form, whether to suggest that States ratify the Protocol with reservations, or whether to advocate that the Protocol be re-opened for amendments in order to address some of the concerns that are identified above.

It is hoped that the AU will engage with civil society in the next steps of the process for the court's establishment, such as the drafting of the Rules of Procedure and Evidence and of the Elements of the Crimes for the Court, even though this will not be enough to remedy the failure to involve civil society in the more controversial earlier negotiations.

Moreover, while the Rules of Procedure and Evidence and Elements of the Crime can go some way toward clarifying certain procedural and substantive aspects of the ACJHR Statute, these instruments cannot remedy some of the central concerns identified above with respect to specific provisions of the ACJHR Statute including the immunity clause. It is therefore crucial that CSOs advocate for the reopening of the Protocol for key amendments that would help resolve these issues and make the ACJHR a stronger institution.

Pending the establishment of the ACJHR, civil society should continue to work to strengthen the African Court on Human and Peoples' Rights by submitting cases to the Court in order to build up its body of jurisprudence, and campaigning for the universal ratification of the Protocol on the Establishment of an African Court on Human and Peoples' Rights. On its part, the AU should reconsider the decision to exclude civil society from its June/July

summits as well as the stringent requirements for membership in the ECOSOCC. Active civil society participation in the activities of the AU, including standard-setting, will serve to strengthen the institution in addition to truly making it an organization guided by "the need to build a partnership between governments and all segments of civil society."[71]

[71] AU Constitutive Act, Preamble, para. 7.

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