

THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT

The treaty creating the African Court of Justice and Human and Peoples' Rights, if and when it comes into force, contains innovative elements that have potentially significant implications for current substantive and procedural approaches to regional and international dispute settlement. Bringing together leading authorities in international criminal law, human rights and transitional justice, this volume provides the first comprehensive analysis of the 'Malabo Protocol' while situating it within the wider fields of international law and international relations. The book, edited by Professors Jalloh, Clarke and Nmeielle, offers scholarly, empirical, critically engaged and practical analyses of some of its most challenging provisions. Breaking new ground on the African Court, but also treating old concepts in a novel and relevant way, *The African Court of Justice and Human and Peoples' Rights in Context* is for anyone interested in international law, including international criminal law and international human rights law. This title is also available as Open Access on Cambridge Core at doi.org/10.1017/9781108525343.

Charles C. Jalloh is Professor of Law at Florida International University, a member of the United Nations International Law Commission where he was the Chairperson of the Drafting Committee for the 70th session, and the Founding Director of the African Court Research Initiative (ACRI). He has published extensively on aspects of international law and is founding editor of the *African Journal of Legal Studies* and the *African Journal of International Criminal Justice*.

Kamari M. Clarke is Professor at the University of California, Los Angeles and Co-Director of the African Court Research Initiative funded by the Open Society Foundations. Specializing in international law and legal anthropology, she has held numerous fellowships and grants and has distinguished her career with eight books and over forty book chapters and articles and research excellence awards.

Vincent O. Nmeielle is the Secretary-General of the African Development Bank Group. He is a former Legal Counsel and Director for Legal Affairs of the African Union; a former Professor of Law and Head of the Wits Programme on Law, Justice and Development in Africa, University of the Witwatersrand School, Johannesburg, South Africa; a former Professorial Lecturer in law at the Oxford University and George Washington University Human Rights Programme and a former Principal Defender of the United Nations-Backed Special Court for Sierra Leone.

Cambridge University Press
978-1-108-42273-4 — The African Court of Justice and Peoples' Rights in Context
Edited by Charles C. Jalloh , Kamari M. Clarke , Vincent O. Nmehielle
Frontmatter
[More Information](#)

The African Court of Justice and Human
and Peoples' Rights in Context

DEVELOPMENT AND CHALLENGES

Edited by

CHARLES C. JALLOH

Florida International University

KAMARI M. CLARKE

Carleton University

VINCENT O. NMEHIELLE

African Development Bank and University of the Witwatersrand



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-42273-4 — The African Court of Justice and Human and Peoples' Rights in Context
Edited by Charles C. Jalloh, Kamari M. Clarke, Vincent O. Nmeielle
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108422734

DOI: 10.1017/9781108525343

© Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmeielle 2019

This work is in copyright. It is subject to statutory exceptions and to the provisions of relevant licensing agreements; with the exception of the Creative Commons version the link for which is provided below, no reproduction of any part of this work may take place without the written permission of Cambridge University Press.

An online version of this work is published at <http://dx.doi.org/10.1017/9781108525343> under a Creative Commons Open Access license CC-BY-NC 4.0 which permits re-use, distribution and reproduction in any medium for non-commercial purposes providing appropriate credit to the original work is given and any changes made are indicated. To view a copy of this license visit <https://creativecommons.org/licenses/by-nc/4.0>

All versions of this work may contain content reproduced under license from third parties.

Permission to reproduce this third-party content must be obtained from these third-parties directly.

When citing this work, please include a reference to the DOI 10.1017/9781108525343

First published 2019

Printed in the United Kingdom by TJ International Ltd, Padstow Cornwall

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Jalloh, Charles, editor. | Clarke, Kamari Maxine, 1966-, editor. | Nmeielle, Vincent Obisienunwo Orlu, editor.

TITLE: The African Court of Justice and human and peoples' rights in context: development and challenges / Edited by Charles C. Jalloh, Florida International University, Kamari M. Clarke, Carleton University, Ottawa, Vincent O. Nmeielle, African Development Bank and University of the Witwatersrand.

DESCRIPTION: New York, NY : Cambridge University Press, 2018.

IDENTIFIERS: LCCN 2018034472 | ISBN 9781108422734 (hardback : alk. paper) | ISBN 9781108426922 (pbk. : alk. paper)

SUBJECTS: LCSH: International human rights courts—Africa. | International criminal courts—Africa. | Criminal justice, Administration of—Africa. | International criminal law—Africa.

CLASSIFICATION: LCC KQC574.A37 .A37 2018 | DDC 342.2608/50269—dc23

LC record available at <https://lccn.loc.gov/2018034472>

ISBN 978-1-108-42273-4 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

| | |
|--|------------|
| <i>Notes on Contributors</i> | page xi |
| <i>Preface</i> | xix |
| <i>List of Abbreviations</i> | xxiii |
| 1 Introduction: Origins and Issues of the African Court of Justice and Human and Peoples' Rights | 1 |
| <i>Kamari M. Clarke, Charles C. Jalloh and Vincent O. Nmehielle</i> | |
| PART I THE WIDER CONTEXT OF TRANSITIONAL JUSTICE IN AFRICA | 55 |
| 2 The Place of the African Court of Justice and Human and Peoples' Rights in the Prosecution of Serious Crimes in Africa | 57 |
| <i>Charles C. Jalloh</i> | |
| 3 Peace and 'Justice' Sequencing in Management of Violence in the Malabo Protocol for the African Court | 109 |
| <i>Kamari M. Clarke</i> | |
| 4 The African Union Transitional Justice Policy Framework and How it Fits into the African Governance Architecture (AGA): Promise and Prospects for the African Court of Justice and Human Rights | 147 |
| <i>George Mukundi Wachira</i> | |
| 5 The Advent of a Differentiated Accountability System: The African Court of Justice and Human Rights and the AU Transitional Justice Architecture | 166 |
| <i>Tim Murithi</i> | |

| | | |
|----|--|-----|
| 6 | Concurrent Jurisdiction of the International Criminal Court and the African Criminal Chamber in the Case of Concurrent Referrals | 180 |
| | <i>Erika de Wet</i> | |
| 7 | The African Criminal Court: Towards an Emancipatory Politics | 198 |
| | <i>Adam Branch</i> | |
| | PART II THE CRIMINAL LAW JURISDICTION OF THE AFRICAN COURT | 221 |
| | A THE CRIMES | 223 |
| 8 | A Classification of the Crimes in the Malabo Protocol | 225 |
| | <i>Charles C. Jalloh</i> | |
| 9 | Perspectives on the International Criminal Jurisdiction of the African Court of Justice and Human Rights Pursuant to the Malabo Protocol (2014) | 257 |
| | <i>Daniel D. Ntanda Nsereko and Manuel J. Ventura</i> | |
| 10 | Genocide and Other International Crimes by Unincorporated Groups: Will There Be Loopholes for Them in the African Court? | 285 |
| | <i>Hannibal Travis</i> | |
| 11 | The Crime of Aggression in the African Court of Justice and Human and Peoples' Rights | 314 |
| | <i>Sergey Sayapin</i> | |
| 12 | Transnational Crimes Jurisdiction of the Criminal Chamber of the African Court of Justice and Human and Peoples' Rights | 336 |
| | <i>Neil Boister</i> | |
| 13 | Jurisdiction of the Criminal Chamber of the African Court of Justice and African Court of Justice and Human and Peoples' Rights | 362 |
| | <i>Neil Boister</i> | |

| <i>Contents</i> | | vii |
|-----------------|--|-----|
| 14 | The Crime of Piracy <i>Douglas Guilfoyle and Rob McLaughlin</i> | 388 |
| 15 | The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights: Article 28G of the AU's Malabo Protocol 2014 <i>Ben Saul</i> | 409 |
| 16 | The Crime of Mercenarism: A Challenge for the Judges of the New African Court <i>José L. Gómez del Prado</i> | 449 |
| 17 | Combating Corruption Effectively? The Role of the African Court of Justice and Human Rights <i>John Hatchard</i> | 477 |
| 18 | Money Laundering and the African Court of Justice and Human and Peoples' Rights <i>Cecily Rose</i> | 505 |
| 19 | Human Trafficking in Africa: Opportunities and Challenges for the African Court of Justice and Human Rights <i>Tom Obokata</i> | 529 |
| 20 | Prosecuting Dirty Dumping in Africa <i>Matiangai V. S. Sirleaf</i> | 553 |
| 21 | Illicit Exploitation of Natural Resources <i>Daniëlla Dam de Jong and James G. Stewart</i> | 590 |
| 22 | Unconstitutional Change of Government: A New Crime within the Jurisdiction of the African Criminal Court <i>Harmen van der Wilt</i> | 619 |
| | B INSTITUTIONAL AND PROCEDURAL ISSUES | 643 |
| 23 | Complementarity at the African Court <i>Margaret M. deGuzman</i> | 645 |

| | | |
|----|---|-----|
| 24 | Defence and Fair Trial Rights at the African Court of Justice and Human and Peoples' Rights <i>Melinda Taylor</i> | 680 |
| 25 | Article 46L: Promoting an Effective Cooperation Regime <i>Dire Tladi</i> | 729 |
| | C MODES OF PARTICIPATION, IMMUNITY, DEFENCES, SENTENCES AND REPARATIONS | 741 |
| 26 | Modes of Liability and Individual Criminal Responsibility <i>Wayne Jordash QC and Natacha Bracq</i> | 743 |
| 27 | Article 46C: Corporate Criminal Liability at the African Criminal Court <i>Joanna Kyriakakis</i> | 793 |
| 28 | Administering International Criminal Justice through the African Court: Opportunities and Challenges in International Law <i>Chile Eboe-Osuji</i> | 838 |
| 29 | Article 46A Bis: Beyond the Rhetoric <i>Dire Tladi</i> | 850 |
| 30 | Defences to Criminal Liability <i>Sara Wharton</i> | 866 |
| 31 | Sentencing and Penalties <i>Mark A. Drumbl</i> | 925 |
| 32 | A Promise Too Dear? The Right to Reparations for Victims of International Crimes Under the Malabo Protocol of the African Criminal Court <i>Godfrey M. Musila</i> | 947 |
| | PART III THE HUMAN RIGHTS JURISDICTION OF THE AFRICAN COURT | 963 |
| 33 | The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights <i>Rachel Murray</i> | 965 |

| <i>Contents</i> | | ix |
|-----------------|--|------|
| 34 | Complementarity between the International Criminal Law Section and Human Rights Mechanisms in Africa <i>Pacifique Manirakiza</i> | 989 |
| | PART IV THE GENERAL JURISDICTION OF THE AFRICAN COURT | 1021 |
| 35 | The ACJHR's General Jurisdiction for General Affairs: Any Question of International Law? Not Quite <i>Edwin Bikundo</i> | 1023 |
| 36 | Some Observations on the Jurisdiction of the African Court of Justice and Human Rights over International Administrative Law <i>Adejoké Babington-Ashaye</i> | 1035 |
| | PART V FUNDING THE AFRICAN COURT AND THE ROLE OF CIVIL SOCIETY | 1055 |
| 37 | Financing and Sustaining the African Court of Justice and Human and Peoples' Rights <i>Vincent O. Nmeielle</i> | 1057 |
| 38 | Between Hope and Doubt: The Malabo Protocol and the Resource Requirements of an African Criminal Court <i>Stuart Ford</i> | 1076 |
| 39 | Civil Society and International Criminal Justice in Africa: Perspectives on the Proposed African Court of Justice and Human Rights <i>Netsanet Belay and Japhet Biegon</i> | 1101 |
| | <i>Index</i> | 1125 |

Cambridge University Press
978-1-108-42273-4 — The African Court of Justice and Peoples' Rights in Context
Edited by Charles C. Jalloh , Kamari M. Clarke , Vincent O. Nmehielle
Frontmatter
[More Information](#)

Contributors

Editors

Charles C. Jalloh is a Professor of Law at Florida International University, a member of the United Nations International Law Commission where he was Chairperson of the Drafting Committee for the 70th session and Founding Director of the African Court Research Initiative (ACRI). He has published extensively in the field of international criminal law and is founding editor of the *African Journal of Legal Studies* and the *African Journal of International Criminal Justice*. Jalloh previously practised law in the Canadian Department of Justice, the Special Court for Sierra Leone, the International Criminal Tribunal for Rwanda, and as a visiting professional, in the International Criminal Court. In 2018, he received the FIU Senate Faculty Award for Excellence in Research and the Fulbright Distinguished Chair in Public International Law at Lund University, Sweden.

Kamari M. Clarke is a professor of Global and International Studies and the Department of Law and Legal Studies at Carleton University. She is one of the co-founders of the African Court Research Initiative (ACRI) and has published extensively on issues concerning international law, politics and social policy. She was formerly a professor at Yale University and Research Scientist at Yale Law School.

Vincent O. Nmehielle is Secretary-General of the African Development Bank Group; Visiting Professor of Law, University of the Witwatersrand School of Law, Johannesburg, South Africa; Former Professor of Law and Head of the Wits Programme on Law, Justice and Development in Africa, University of the Witwatersrand School of Law; Former Legal Counsel of the African Union; and Former Principal Defender of the United Nations-backed Special Court for Sierra Leone.

Contributors

Adejoké Babington-Ashaye is currently senior counsel at the World Bank Administrative Tribunal. She was formally an Associate Legal Officer at the International Court of Justice and an Investigator in the Office of the Prosecutor, International Criminal Court. She was also Co-Chair of the Africa Committee, American Bar Association Section of International Law and the Director of Programmes of the African Association of International Law.

Japhet Biegon is the Africa Regional Advocacy Coordinator at Amnesty International and holds a doctor of laws degree (LLD) in international human rights law. He previously served as the director of investigations at the Kenya Independent Policing Oversight Authority (IPOA) where he led investigations into police misconduct. Dr. Biegon is also an extra-ordinary lecturer at the Centre for Human Rights, Faculty of Law, University of Pretoria, and is the coeditor of the seminal book, *Prosecuting International Crimes in Africa*, published in 2011 by the Pretoria University Law Press.

Netsanet Belay is the Africa Director for Research and Advocacy at Amnesty International. He was previously Director of the Policy and Research at CIVICUS World Alliance for Citizen's Participation in Johannesburg, South Africa. He spent over two years in prison in Ethiopia as a 'Prisoner of Conscience' for his role in leading human rights activism in the country.

Edwin Bikundo is a senior lecturer at Griffith Law School, Griffith University, Queensland, Australia. He also practised as an Advocate of the High Court of Kenya and taught at the Faculty of Law at the University of Nairobi and the Faculty of Arts at Egerton University in Kenya.

Neil Boister is a professor at the University of Canterbury in New Zealand. A revised version of his PhD thesis was published as *Penal Aspects of the UN Drug Conventions* (2001), described in the journal *Addiction* as 'a text of magisterial authority'. In 2014, he received the Freidrich Wilhelm Bessel Prize from the Humboldt Foundation in Germany for his work in transnational criminal law.

Natacha Bracq is a lawyer in practice at the Paris Bar, specializing in human rights. She holds a Masters' in Human Rights Law from the University of Paris X and a Masters' in Public Law from the University of Le Mans. Over the last four years she has worked before various international tribunals including the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court.

Adam Branch is a university lecturer in the Department of Politics and International Studies at the University of Cambridge and the director of the

Cambridge Centre of African Studies. Prior to joining Cambridge, he was senior research fellow at the Makerere Institute of Social Research in Kampala.

Daniëlla Dam-de Jong is an assistant professor at the Department of Public International Law and the Grotius Centre for International Legal Studies at Leiden University. Her dissertation entitled *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* received a research prize by the Foundation Praemium Erasmianum and an honorary mention by the Max van der Stoep Human Rights Award. The dissertation has been published as a monograph by Cambridge University (2015).

Margaret M. deGuzman is a professor of law at Temple University Beasley School of Law. Professor deGuzman also served as a legal advisor to the Senegal delegation at the Rome Conference where the ICC was created and as a law clerk in the Office of the Prosecutor of the International Criminal Tribunal for Former Yugoslavia. She was a Fulbright Scholar in Darou N'diar, Senegal.

Erika de Wet is a SARChI Professor of International Constitutional Law in the Faculty of Law, University of Pretoria, South Africa and also Honorary Professor in the Faculty of Law, University of Bonn, Germany. Her work has been widely cited, including by the International Court of Justice, the International Criminal Court, the European Court of Human Rights, the South African Supreme Court of Appeal and the United Kingdom Supreme Court.

Mark A. Drumbl is the Class of 1975 Alumni Professor at Washington and Lee University where he currently serves as the Director of the Transnational Law Institute. He has held visiting appointments with various law faculties and his first book, *Atrocity, Punishment, and International Law*, has been widely reviewed and critically acclaimed. In 2012, he published *Reimagining Child Soldiers* (OUP).

Chile Eboe-Osuji is the president of the International Criminal Court where he has served as a judge since March 2012. He has also served as prosecution counsel in the International Criminal Tribunal for Rwanda and as senior prosecution appeals counsel in the Special Court for Sierra Leone, as well as Legal Advisor to the United Nations High Commissioner for Human Rights.

Stuart Ford is a professor at John Marshall Law School. He is Co-Chair of the American Society of International Law's International Courts and Tribunals Interest Group and is a past Chair of the American Association of Law Schools' Section on International Human Rights. He has also served as a Visiting Professional at the International Criminal Court and as an Assistant Prosecutor at the Extraordinary Chambers in the Courts of Cambodia.

José L. Gómez del Prado is a visiting lecturer at Universities of Barcelona, Deusto – EIUC Venice, Alicante, Madrid. He also is a member of the UN Working Group on the use of mercenaries (Member/Chair); is an expert of the UN Advisory Group of the Voluntary Fund in the First International Decade of the World's Indigenous Peoples. Senior Officer, UN Office of the High Commissioner for Human Rights.

Douglas Guilfoyle is an associate professor at the University of New South Wales Canberra. He was previously a professor of law at Monash University, a reader in law at University College London, and has worked as a judicial associate in the Australian Federal Court and the Australian Administrative Appeals Tribunal. He was a Gates Cambridge Trust scholar and Chevening scholar during his graduate study at the University of Cambridge.

John Hatchard is a barrister and Professor of Law at the Buckingham Law School. He is also a senior teaching fellow at the School of Oriental and African Studies. He has also served as Chief Mutual Legal Assistance Officer at the Commonwealth Secretariat and was a Senior Fellow at the British Institute for International and Comparative Law. He was General Secretary of the Commonwealth Legal Education Association from 1996 to 2006 and is now a Vice-President of the Association.

Wayne Jordash QC has acted as an advisor to the Principal Defender at the Extraordinary Chambers in the Courts of Cambodia and has provided specialist advice to Human Rights Watch on qualified privilege for human rights workers, the Ugandan judiciary on the legality of amnesties in international law, and the International Commission of Jurists on the prospects of prosecuting a sitting head of state for international crimes.

Joanna Kyriakakis is a senior lecturer in the Law Faculty and a deputy director of the Castan Centre for Human Rights Law at Monash University. She has held visiting fellowships at Columbia University and the Lauterpacht Centre for International Law. Dr. Kyriakakis has also worked with the South Australian Crown Solicitor's Office and in private and community legal practice.

Pacifique Manirakiza is an associate professor at the Faculty of Law (Common Law Section), University of Ottawa. He was also a member of the African Commission on Human and People's Rights and was appointed member of the African Union-led Commission of Inquiry on South Sudan. Previously he served as Assistant Professor at University of Burundi and Deputy Prosecutor in Ngozi and Rudana Provinces.

Rob McLaughlin is a professor at the University of New South Wales Canberra and Director of the Australian Centre for the Study of Armed

Conflict and Society. McLaughlin previously held a career in the Royal Australian Navy as a Seaman officer and a Legal officer. His legal roles included as the Fleet Legal Officer, the Strategic Legal Adviser, as a Counsel Assisting the HMAS SYDNEY II Commission of Inquiry, Director Operations and International Law, and Director Naval Legal Service. He has also been an associate professor of law at the Australian National University.

Tim Murithi heads the Justice and Peacebuilding Programme at the Institute for Justice and Reconciliation in Cape Town, South Africa. He is also Extraordinary Professor of African Studies, at the Centre for African Studies, University of Free State, South Africa. He has held posts at the Department of Peace Studies, University of Bradford, the United Kingdom; Institute for Security Studies, in Addis Ababa; and the United Nations Institute for Training and Research (UNITAR), in Geneva, Switzerland. He has also served as an Adviser to the African Union and UNDP.

Rachel Murray is a professor of International Human Rights Law at the University of Bristol where she is also Director of its Human Rights Implementation Centre. She is on the board of the Institute for Human Rights and Development in Africa, and is a Fellow of the Human Rights Centre at the University of Essex and a member of Doughty Street Chambers.

Godfrey M. Musila is a research fellow at the Africa Center for Strategic Studies in the National Defence University. Dr. Musila was previously Head of Research at the International Nuremberg Principles Academy in Germany. He was principal author of the report of the African Union Commission of Inquiry on South Sudan and currently serves as volunteer on the Human Rights Council's Commission on Human Rights in South Sudan.

Daniel D. Ntanda Nsereko is a member of the Advisory Committee on nominations of judges of the International Criminal Court and was previously a Judge of the International Criminal Court (2008–2012), and served as a Trial Observer to Swaziland (1990) and to Ethiopia (1996). He was appointed as an Appeals Judge at the ICC in 2007.

Tom Obokata is a professor of International Law and Human Rights at Keele University. Previously he taught at Queen's University Belfast (2006–2012) and University of Dundee (2004–2006). Prior to commencing his PhD degree, Professor Obokata worked for the United Nations High Commissioner for Refugees Regional Office of Japan and the Republic of Korea (1999–2000).

Cecily Rose is an assistant professor of International Law at the Grotius Centre for International Legal Studies, Leiden Law School, and a senior editor of the *Leiden Journal of International Law*. She previously worked as

an associate legal officer at the International Court of Justice in The Hague, and at the Special Court for Sierra Leone in Freetown, Sierra Leone.

Ben Saul is Challis Chair of International Law at the University of Sydney and an Associate Fellow of Chatham House (the Royal Institute of International Affairs) in London. Saul practices as a barrister in international, regional and national courts, including the International Criminal Tribunal for the former Yugoslavia, Special Tribunal for Lebanon, Extraordinary Chambers in the Courts of Cambodia, and the Inter-American Court of Human Rights.

Sergey Sayapin is an assistant professor at KIMEP School of Law. In 2000–2014, he held several posts at the Regional Delegation of the International Committee of the Red Cross (ICRC) in Central Asia. Dr. Sayapin is a member of the Asian Association of International Law and of the Council of Advisors of the Global Institute for the Prevention of Aggression.

Matiangai Sirleaf is an Assistant Professor of Law at the University Pittsburgh Law School. She previously served as an assistant professor of law at the University of Baltimore School of Law, as a Sharswood Fellow at the University of Pennsylvania Law School, and as a lecturer for the International Human Rights Exchange Programme run by Bard College and University of the Witwatersrand. Her work focuses on remedying the accountability and responsibility gaps that exist in international law. From 2010 to 2012, Sirleaf worked in private practice with Cohen, Milstein, Sellers & Toll in Washington, D.C., where she represented plaintiffs in numerous international human rights cases litigated in federal courts. Prior to that, she served as a law clerk to Chief Justice Sandile Ngcobo of the Constitutional Court of South Africa and worked at the International Center for Transitional Justice. She received her JD from Yale Law School in 2008 and her MA from the University of Ghana (Legon) in International Affairs in 2005. In 2014, she received the Martin Luther King Jr. Humanitarian Award from New York University.

James G. Stewart is an associate professor at the Peter A. Allard School of Law, the University of British Columbia. Previously he was an Appeals Counsel with the Prosecution of the United Nations International Criminal Tribunal for the former Yugoslavia. He also worked for the Legal Division of the International Committee of the Red Cross and the Prosecution of the International Criminal Tribunal for Rwanda. Presently, he serves as a Senior Legal Advisor to judges of the Appeals Chamber of the Extraordinary Chambers in the Courts of Cambodia.

Melinda Taylor is a defence counsel before the International Criminal Court, where she has been lead counsel in the *Bemba* Article 70 Case. She was for a

longtime the Counsel in the Office of the Public Counsel for the Defence and has extensive experience in the field of international criminal law.

Dire Tladi is Professor of International Law in the Department of Public Law, and a Fellow at the Institute of Comparative and International Law in Africa at the University of Pretoria. He is a member of the United Nations International Law Commission, the Institut du Droit International and the ILC's Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*). From 2009 to 2013 he served as legal advisor to the South African Permanent Mission to the United Nations.

Hannibal Travis is a professor of law at Florida International University College of Law. He is currently an editorial advisory board member of *Genocide Studies International* (University of Toronto Press). He joined FIU after several years practising law. He is the author of *Genocide, Ethnonationalism*, and *the United Nations: Exploring the Causes of Mass Killing Since 1945* (Abingdon and New York: Routledge, 2012).

Harmen van der Wilt is a professor of International Criminal Law at the Amsterdam School of Law, University of Amsterdam. He is a member of the editorial board of the Journal of International Criminal Justice, the Netherlands Yearbook of International Law and the major Dutch journal on criminal law, *Delikt en Delinkwent*. Van der Wilt has been an ad litem Judge in the Criminal Court of Roermond and is currently an ad litem judge in the Extradition Chamber of the District Court in Amsterdam.

Manuel J. Ventura is an Associate Legal Officer, Chambers, Special Tribunal for Lebanon; Director of The Peace and Justice Initiative, and Adjunct Fellow, School of Law, Western Sydney University.

George Mukundi Wachira is Founding head of the African Governance Architecture (AGA) Secretariat, Department of Political Affairs, African Union (AU) Commission (2012–16). Currently Dr Wachira is the Chief Executive Officer of Maendeleo Group which is a legal advisory and management consulting firm incorporated to harness global human resource talent for sustainable development in Africa. Wachira holds a Doctor of Laws (LLD) Degree in International Human Rights Law from the University of Pretoria and a Master in Public Administration Degree (MPA) from the Harvard, Kennedy School of Government. He is an advocate of the High Court of Kenya.

Sara Wharton is an assistant professor at the University of Windsor. Previously, Dr. Wharton was a Postdoctoral Fellow at the National University of Singapore and a Visiting Fellow at the University of New South Wales in Sydney, Australia where she held an Endeavour Research Fellowship (Government of Australia).

Cambridge University Press
978-1-108-42273-4 — The African Court of Justice and Peoples' Rights in Context
Edited by Charles C. Jalloh , Kamari M. Clarke , Vincent O. Nmehielle
Frontmatter
[More Information](#)

Preface

On 27 June 2014, the Assembly of Heads of State and Government of the African Union 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, which seeks to establish the first-ever African court with a tripartite jurisdiction over human rights, criminal and general matters is aimed at complementing national, sub-regional and continental bodies and institutions in preventing serious and massive violations of human rights in Africa through, among other things, the prosecutions of the perpetrators of such crimes as specified in the statute annexed to the treaty. To date, the Malabo Protocol has only been signed by 11 out of 55 African Union (AU) member states. No states have ratified it. Although, in accordance with its Article 11 and AU treaty-making practice, fifteen such ratifications will be required for the treaty to enter into force. There is no guarantee that the Malabo Protocol will achieve the requisite number of ratifications anytime soon. Especially given that some AU treaties have failed to secure the support they need to enter into force two decades, and in one extreme case, three decades after its adoption. It is indeed noteworthy that, as of this writing, of the six other treaties adopted by the AU Assembly in the same meeting as the Malabo Protocol in June 2014, only one of the agreements has managed to garner seventeen signatures and five ratifications, the highest amongst the seven instruments (though this means that, about four years after its adoption, forty-four of the fifty-five AU member states have elected not to sign it). If the Malabo Protocol achieves the fifteen required ratifications to enter into force in the next ten to fifteen years, it might take years for the AU states to allocate the resources required for the new court to be established so that it can function in accordance with its high ambitions set out in the Statute and Annexure. That said, thirty-three African States are parties to the Rome Statute of the International Criminal Court and given the currently tense relationship between the Hague-based court and the AU, it is possible that

African States may have reason to fast track their signatures and ratifications of the Malabo Protocol in the future thereby bringing it into force sooner than we might otherwise anticipate.

The premise of this book is that the Malabo Protocol, which is one of the most interesting and complex treaties to ever be produced by a regional body for the purpose of creating a regional judicial mechanism, merits serious scholarly inquiry. Part of the reason for this is that while international criminal law has for the last half century only been conceptualized as applicable at the national and international levels, with a variation of 'hybrid courts' mixing the national and international to different degrees to proffer a third enforcement model, if and when it comes to force, the Malabo Protocol would become the first regional criminal jurisdiction capable of prosecuting serious crimes condemned by international law such as genocide, the crime of aggression, war crimes and crimes against humanity. It would also be the first such tribunal to prosecute crimes of particular concern to the Africa region such as unconstitutional changes of government or illicit exploitation of natural resources as well as environmental and other related crimes, including when committed by natural persons as well as corporations. This 'regionalization' and 'Africanization' of international criminal law enforcement possesses serious potential to add to the menu of accountability options available to States in order to more effectively counter serious international and transnational crimes. It is a model that is already apparently generating interest in other regions, such as Latin America, where a project is underway to propose a regional court with jurisdiction over drug trafficking offences under the banner of COPLA – an initiative supported by Argentina and a number of other states.

Though, historically, there have been some tensions between regionalization and universalization in the context of other subfields of international law, such as human rights and trade law, the existence of human rights courts have proven to be effective devices to the process of development and application of a global body of human rights standards at a level that was previously unimaginable. That complex web of human rights commissions and courts in Europe, the Americas and Africa, which now exhibits a multilayered system of norm enforcement coupled with the experimentation with ad hoc criminal tribunals, suggests that it could be worth exploring the potential of an equivalent multilevel system in the field of international criminal law. And that is just what the African Court Research Initiative (ACRI) sought to address when embarking on a four-year, three-phase project to launch a transnational research process that would provide rigorous research about the emergence of new regional mechanisms, while also providing technical assistance to the AU's Office of Legal Counsel and the future court.

This book, which is a key outcome of ACRI's efforts, aims to offer the first comprehensive analysis of the Malabo Protocol with an examination of its human rights, general and criminal jurisdictions. In addition to conducting a widespread critical analysis about the components of the future court, we have also been working on the Elements of Crimes in order to enhance further clarity in what will shape future interpretation and application of the Malabo Protocol for the African Court of Justice and Human and People's Rights. These, along with a range of research studies aimed at uncovering the factors that may delay the ratification of the Malabo Protocol, have allowed us to work on the mobilization of key information related to how the Court should be understood in Africa and internationally.

This volume, which we are pleased to present after about four years of intensive research which took place in Africa and across several other continents, will hopefully advance global scholarly engagement with the substance of the first treaty anywhere in the world to merge general, civil and human rights issues under one roof in what we describe in the introduction to this book as the 'One Court' concept.

As the project took a few years to finish, and benefited from the input and support of many people, we wish to take a few moments to thank some of them. We apologize that space constraints do not permit us to mention everyone here and ask for the understanding of those who might have been omitted. First, since it would not have been possible to convene ACRI's research without the enduring confidence of the African Union Commission, particularly the Office of the Legal Counsel for the robust access to information it granted which helped in making the research and ultimately the book a reality, we are grateful for their support. Connected to the African Union is the strong moral and political commitment from our project partners and fiscal sponsors, the Africa Regional Office of the Open Society Foundation, especially Pascal Kambale and Eleanor Thompson based in Dakar, Senegal. They supported the proposal for our independent academic research project from the first time we raised the idea. As experts on issues of accountability in Africa, they immediately grasped the need for ACRI and its desire to promote strong scholarly engagement with the substance of the Malabo Protocol. To our delight, they never wavered throughout the multi-year phases of the project, even as the project grew to encompass a wider team of authors and many more conferences than the one or two that we initially envisaged. We therefore wish to express our gratitude to them, even as we look forward to our continuing collaboration on the more practical side of ACRI aimed at developing ancillary legal instruments in an attempt to help 'fix' some of the major drafting problems and gaps in the Malabo Protocol.

Second, we are grateful to all our contributing authors. Not only did they accept to write thoughtful and original chapters, but they proved willing to engage with us, whether at the conferences we organized on the subject of the book in Miami, Arusha or The Hague. They also deserve a special medal for their deep generosity in understanding the delays in the sending of the book to publication that arose as a function of the expansion of our initial one-year project to a three- to four-year effort.

Third, we wish to thank our various research assistants and interns at Florida International University (FIU), Yale University, The University of Pennsylvania and Carleton University for their support of this project over the years. The lead project researchers contributed in important ways at crucial stages and we are grateful for their support. This included Tina Palivos, Godfrey Musila, Ermias Kassaye, Tewodros Dawit and Sixsy Alfonso, as well as Alysson Ford Ouoba and Irene Thomas towards the later stages of this work. We also thank Sarah-Jane Koulen for her research support throughout every phase of the process. And as we worked to submit the manuscript, Heather Owens, Amirah Mohammad and Priscilla de Varona, all JD candidates at FIU Law, worked to bring greater coherence and consistency to the manuscript through language edits and footnote checks. We are indebted to them all and thank them for their crucial contributions.

Fourth, we wish to acknowledge and thank the team in our partner organizations, especially the Pan African Lawyers Union. A special thank you to the always thoughtful Donald Deya, whose knowledge of the Malabo Protocol's history as its key drafter for PALU provided helpful context in often late-night conversations or lengthy Skype meetings or overlaps at key conferences in Dakar or at the AU in Addis Ababa; as well as his wonderfully capable associate, Irini Anastassiou, who was the focal point for the project in its first two years. We also thank Brian Mossi and Francis Goudabout, also at PALU, for their financial administration of the project. In the third phase of ACRI, we were grateful for the help of the team at the West African Civil Society Institute (WACS), based in Accra, Ghana.

Last but not least, we are indebted to Judge Chile Eboe-Osuji of the International Criminal Court (who has since assumed the mantle of President) for taking time out of his busy schedule to give the keynote speech in July 2016 to ACRI's Arusha international symposium. Due to the focus of the speech, on immunity, we have included it in the relevant part of this book.

In all, we could not ask for a better network of interlocutors, researchers and administrators with whom to go on this journey and we are immensely appreciative for the support that they have offered us over the years.

Abbreviations

| | |
|--------------------|--|
| ACC | African Criminal Court |
| ACDEG | African Charter on Democracy, Elections and Governance |
| ACHPR | African Court on Human and Peoples' Rights |
| ACJ | African Court of Justice |
| ACtJHPR | African Court of Justice and Human and Peoples' Rights |
| ACP | African, Caribbean |
| AfDBAT | African Development Bank Administrative Tribunal |
| AFISMA | African-led International Support Mission to Mali |
| Afr. J. Leg. Stud. | <i>African Journal of Legal Studies</i> |
| AGA | African Governance Architecture |
| AHRLR | African Human Rights Law Reports |
| AJIL | <i>American Journal of International Law</i> |
| AMIB | African Mission in Burundi |
| AMIS | African Union Mission in Sudan |
| AMISEC | AU Mission for Support to the Elections in the Comoros |
| AMISOM | African Union Mission in Somalia |
| Am. J. Int'l. L. | <i>American Journal of International Law</i> |
| ANF | Al-Nusra Front |
| APC | Armée Populaire Congolais |

| | |
|-------------------------|--|
| APSA | African Union's Peace and Security Architecture |
| ASP | Assembly of States Parties |
| ATJF | African Transitional Justice Framework |
| AQIM | Al-Qaeda in the Islamic Maghreb |
| AU | African Union |
| AUC | African Union Commission |
| AUAT | African Union Administrative Tribunal |
| AUPD | African Union High-Level Panel on Darfur |
| AUPSP | African Union Protocol Relating to the Establishment of the Peace and Security Council of the AU |
| AUTJ | African Union Transitional Justice |
| AUTJF | African Union Transitional Justice Framework |
| BiH | Bosnia-Herzegovina |
| Brook. J. Int'l. L. | <i>Brooklyn Journal of International Law</i> |
| CAL | Coalition of African Lesbians |
| CAR | Central African Republic |
| CAT | Convention Against Torture |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| Chi. J. Int'l L. | <i>Chicago Journal of International Law</i> |
| CICC | Coalition for an International Criminal Court |
| CITES | Convention on International Trade in Endangered Species |
| CNCA | Canadian Network on Corporate Accountability |
| COE | Council of Europe |
| CoH | Cessation of Hostilities |
| Colum. J. Transnat'l L. | <i>Columbia Journal of Transnational Law</i> |
| CPA | Comprehensive Peace Agreement |
| CRC | Convention on the Rights of the Child 1989 |
| Crim. L. For. | <i>Criminal Law Forum</i> |
| CSAT | Commonwealth Secretariat Arbitral Tribunal |
| CSO | Civil Society Organizations |

List of Abbreviations

xxv

| | |
|-------------------|--|
| DCAF | Democratic Control of Armed Forces |
| DDPD | Doha Document for Peace in Darfur |
| DRC | Democratic Republic of the Congo |
| Duke JCIL | <i>Duke Journal of Comparative and International Law</i> |
| EAC | Extraordinary African Chambers |
| ECCEC | Extraordinary Chambers in the Courts of Cambodia |
| ECJ | European Coalition for Corporate Justice |
| ECJ | European Court of Justice |
| ECOSOCC | Economic, Social and Cultural Council |
| ECOWAS | Economic Community of West African States |
| ECtHR | European Court of Human Rights |
| EFCC | Economic and Financial Crimes Commission |
| EHRR | European Human Rights Report |
| EITI | Extractive Industries Transparency Initiative |
| EJIL | <i>European Journal of International Law</i> |
| EO | Executive Outcomes |
| ETS | European Treaty Series |
| EU | European Union |
| EWCA | England and Wales Court of Appeals |
| EWHC | Senior Courts of England and Wales |
| FAPC | Forces Armées du Peuple Congolais |
| FATF | Financial Action Task Force |
| FDS | Ivorian Defence and Security Forces |
| FNI | Front des Nationalistes Intégrationnistes |
| FNLA | National Liberation Front of Angola |
| FPLC | Force Patriotique pour la Libération du Congo |
| FRPI | Force de Résistance Patriotique en Ituri |
| GABAC | Groupe d'Action contre le blanchiment d'Argent en Afrique Centrale |
| GEMAP | Governance and Economic Management Assistance Programme |
| Harv. Int'l L. J. | <i>Harvard International Law Journal</i> |
| HKCLR | Hong Kong Criminal Law Reports |
| HRC | Human Rights Committee |

| | |
|---------------------|--|
| Hum Rts. Q. | <i>Human Rights Quarterly</i> |
| IAC | International Armed Conflict |
| IACHR | Inter-American Commission on Human Rights |
| IACtHR | Inter-American Court of Human Rights |
| IBA | International Bar Association |
| ICAR | International Corporate Accountability Roundtable |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICGLR | International Conference on the Great Lakes Region |
| ICJ | International Court of Justice |
| ICJ | International Commission of Jurists |
| ICL | International Criminal Law |
| ICRC | International Committee of the Red Cross |
| ICT | International Criminal Tribunal |
| ICTJ | International Centre for Transitional Justice |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| IFAD | International Fund for Agricultural Development |
| IHL | International Humanitarian Law |
| IHRL | International Human Rights Law |
| IL | International Law |
| ILC | International Law Commission |
| ILO | International Labour Organization |
| ILOAT | International Labour Organization |
| IMTFE | International Military Tribunal for the Far East |
| Int'l Crim. Just. | <i>International Criminal Justice</i> |
| Int'l Crim. L. Rev. | <i>International Criminal Law Review</i> |

List of Abbreviations

xxvii

| | |
|----------------------|--|
| Int'l Rev. Red Cross | <i>International Review of the Red Cross</i> |
| Inter-Am. Ct. H.R. | Inter-American Court of Human Rights |
| IOM | International Organization for Migration |
| IRRC | International Review of the Red Cross |
| ISIL | Islamic State of Iraq and the Levant |
| J. Crim. L. | <i>Journal of Criminal Law</i> |
| J. Int'l Crim. Just. | <i>Journal of International Criminal Justice</i> |
| J. Int'l. L. | <i>Journal of International Law</i> |
| JCE | Joint Criminal Enterprise |
| JICJ | Journal of International Criminal Justice |
| KPCS | Kimberly Process Scheme for the Certification of Rough Diamonds |
| LEITI | Liberian Extractive Industries Transparency Initiative |
| LJIL | Leiden Journal of International Law |
| LNTS | League of Nations Treaty Series |
| LRA | Lord's Resistance Army |
| MAES | Assistance Mission to the Comoros |
| MICT | Mechanism for International Criminal Tribunals |
| MINUSCA | UN Multidimensional Integrated Stabilization Mission to the Central African Republic |
| MIOC | Military Observer Mission in the Comoros |
| MISCA | Africa-led International Support Mission to the Central African Republic |
| MNC | Multinational Corporations |
| MONUC | United Nations Organization Mission in the Democratic Republic of the Congo |
| MPLA | Popular Movement for the Liberation of Angola |
| MUJAO | Movement for Unity and Jihad in West Africa |
| NDEA | National Drugs Enforcement Agency |
| Neth. Int'l L. Rev. | <i>Netherlands International Law Review</i> |
| NIAC | Non-International Armed Conflict |
| NIF | National Islamic Front |
| NGO | Non-Governmental Organization |

| | |
|-------------------------|---|
| OASAT | Administrative Tribunal of the Organization of American States |
| OAU | Organization of African Unity |
| ODM | Orange Democratic Movement |
| OECD | Organization for Economic Cooperation and Development |
| OIC | Organization of the Islamic Conference |
| OTP | Office of the Prosecutor |
| PALU | Pan African Lawyers Union |
| PAP | Pan African Parliament |
| PCIJ | Permanent Court of Justice |
| PCRD | Post-Conflict Reconstruction and Development Policy Framework |
| Penn St. L. Rev. | <i>Penn State Law Review</i> |
| PMSC | Private military and security companies |
| PNG | Papua New Guinea |
| PSC | Peace and Security Council |
| PSNR | Permanent sovereignty over natural resources |
| PTC | Pre-Trial Chamber |
| PUSIC | Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo |
| R ₂ P | Responsibility to Protect doctrine |
| RCM | Regional Certification Mechanism |
| RCD-ML | Rassemblement Congolais pour la Démocratie –Kisangani/Mouvement de Libération |
| REC | Regional Economic Communities |
| RPE | Rules of Procedure and Evidence |
| RTI | Radiodiffusion Télévision Ivoirienne |
| RUF | Revolutionary United Front |
| SADC | Southern African Development Community |
| Santa Clara J. Int'l L. | <i>Santa Clara Journal of International Law</i> |
| SC | Security Council |
| SCC | Supreme Court of Canada |
| SCO | Shanghai Cooperation Organization |
| SCSL | Special Court for Sierra Leone |
| SDNY | Southern District of New York |

List of Abbreviations

xxix

| | |
|----------------|---|
| SERAC | Social and Economic Action Rights Centre |
| SSRN | Social Science Research Network |
| StAR | Stolen Assets Recovery Initiative |
| STL | Special Tribunal for Lebanon |
| Sydney L. Rev. | <i>Sydney Law Review</i> |
| TCL | Transnational Criminal Law |
| TDG | Thiodiglycol |
| TFV | Trust Fund for Victims |
| TNC | Transnational Corporations |
| TWAIL | Third World Approaches to International Law |
| UCG | Unconstitutional Change of Government |
| UKSC | United Kingdom Supreme Court |
| UN | United Nations |
| UNAMID | United Nations African Union Mission in Darfur |
| UNAT | United Nations Appeals Tribunal |
| UNCAC | United Nations Convention Against Corruption |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNDT | United Nations Dispute Tribunal |
| UNEP | United Nations Environmental Programme |
| UNGA | United Nations General Assembly |
| UNITA | National Union for the Total Independence of Angola |
| UNHCR | United Nations High Commissioner for Refugees |
| UNODC | United Nations Office for Drugs and Crime |
| UNSC | United Nations Security Council |
| UNTOC | UN Convention against Transnational Organized Crime |
| UNTS | <i>United Nations Treaty Series</i> |
| UNWCC | United Nations War Crimes Commission |
| UPC | Union des Patriotes Congolais |

| | |
|---------------------------------|--|
| UPDA | Ugandan People's Democratic Army |
| Vand. J. Transnat'l L. | <i>Vanderbilt Journal of Transnational Law</i> |
| Wash. U. Global Studies L. Rev. | <i>Washington University Global Studies Law Review</i> |
| WGAD | Working Group on Arbitrary Detention |
| WILDAF | Women in Law and Development in Africa |
| Y.B. Int'l L. Comm'n | <i>Yearbook of the International Law Commission</i> |