

**The African Court of Justice and Human Rights:
An Ambitious Project Awaiting Implementation —
A Study in Light of the 2008 Sharm El-Sheikh Protocol**

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Abstract

This study investigates the proposed African Court of Justice and Human Rights, envisaged under the 2008 Sharm El-Sheikh Protocol, as an effort to establish a continental judicial framework that combines institutional integration with functional specialization. The model seeks to consolidate general judicial functions and human rights protection within a single institution while assigning these responsibilities to two distinct specialized sections. The study examines the principal characteristics of this institutional arrangement in comparison with selected international and regional judicial systems. It further evaluates whether the Protocol adequately addressed the concerns arising from the proposed merger of the Court of Justice of the African Union and the African Court on Human and Peoples' Rights, while investigating the institutional and legal factors that have prevented the project from becoming operational.

The study argues that the importance of the Sharm El-Sheikh Protocol extends beyond the institutional consolidation of two judicial bodies. Its principal contribution lies in its attempt to achieve unity in continental adjudication without undermining the specialized functions of the judiciary within a unified institutional structure. Nevertheless, the practical and normative potential of this arrangement remains constrained by the Protocol's continued failure to enter into force. In response to this impasse, the study advocates a gradual implementation strategy that begins with operationalizing the Court envisaged by the Sharm El-Sheikh Protocol. This initial phase would provide an opportunity to assess the institution's operational capacity and consolidate its functions in general adjudication and human rights protection before proceeding to the next stage of institutional development. The latter would involve incorporating the International Criminal Law Section envisaged under the 2014 Malabo Protocol. To ensure that this phased strategy facilitates rather than indefinitely postpones institutional completion, it should be supported by clearly defined safeguards, an implementation timetable, and mechanisms preventing the transitional arrangement from becoming a permanent alternative to the envisaged judicial structure.

Keywords: African Court of Justice and Human Rights; African judiciary; functional specialization; human rights; institutional unity; Sharm El-Sheikh Protocol.

INTRODUCTION

Since the transition from the Organization of African Unity to the African Union, the institutional system of the African Union has witnessed a significant evolution in the place accorded to adjudication within the mechanisms of continental governance. Judicial institutions are no longer viewed merely as instruments for the protection of human rights; rather, the new institutional framework has moved towards entrusting multiple judicial functions to continental bodies capable of interpreting African law and adjudicating disputes arising from its application, alongside ensuring the judicial protection of rights and freedoms.

This evolution materialized through two parallel judicial tracks. The first consisted in the establishment of the African Court on Human and Peoples' Rights under the 1998 Protocol as a specialized judicial mechanism supporting the protection system established by the African Charter on Human and Peoples' Rights. The second consisted in the establishment of the Court of Justice of the African Union under the 2003 Protocol as the Union's general judicial organ. The existence of two courts at the continental level, however, raised at an early stage the question of their relationship and of the appropriateness of maintaining two independent judicial institutions within a single regional system, particularly in view of the institutional and financial burdens involved and the potential for overlap in certain areas.¹

It was against this background that the option of merging the two courts into a single judicial institution emerged. The preparatory work preceding the adoption of the Sharm El-Sheikh Protocol demonstrates that this option was not merely an organizational decision aimed at reducing the number of Union organs. It was preceded by a legal and institutional debate concerning the nature of the two courts and the consequences that could result from their merger, while emphasizing the need to ensure that the process would neither obstruct nor weaken the achievements already made in the judicial protection of human rights in Africa.² This demonstrates that, from the outset, the issue was not merely whether the courts should be merged, but how such a merger could be achieved without sacrificing the judicial specialization upon which the African Court on Human and Peoples' Rights had been founded.

This process culminated in the adoption, on 1 July 2008 in Sharm El-Sheikh, of the Protocol on the Statute of the African Court of Justice and Human Rights, which provided for the merger of the Court of Justice of the African Union and the African Court on Human and Peoples' Rights into a single court, namely the African Court of Justice and Human Rights. Rather than merging all jurisdictional functions into a single undifferentiated judicial body, the Protocol structured the Court into two sections: a General Affairs Section and a Human Rights Section, reflecting an attempt to reconcile institutional unity with the continuation of specialization within the Court.³

The significance of this structure lies not only in the reorganization of African Union organs, but also in the nature of the judicial model it sought to establish. Within a single institution, the proposed Court combines a function that, in certain respects, resembles that of the International Court of Justice in settling legal disputes and interpreting rules of law with a specialized judicial function for the protection of human rights comparable to that performed by regional human rights

courts. The Court therefore does not appear to be merely an African version of an existing judicial model, but rather an attempt to combine different judicial functions within a unified institutional framework.

At an earlier stage, the author's research focused on the development introduced by the Malabo Protocol into the structure of the African Court of Justice and Human Rights, particularly with regard to the expansion of its jurisdiction. A return to the Sharm El-Sheikh project, however, reveals that consideration of the subsequent expansion should not obscure the prior question concerning the fate of the unified Court itself, which has yet to move from legal design to actual implementation. The present study therefore revisits the original project of the Court, identifies its distinctive characteristics, and examines possible avenues for its implementation as a foundational step upon which the Court's subsequent development may be built.

The importance of this renewed examination is further reinforced by the fact that the 2014 Malabo Protocol did not establish a court independent of the Court created by the Sharm El-Sheikh Protocol. Rather, it amended its structure and expanded its jurisdiction by establishing a third section, the International Criminal Law Section, alongside the General Affairs Section and the Human Rights Section.⁴ The relationship between the two Protocols should therefore not necessarily be understood as one project replacing another, but rather as reflecting two stages in the evolution of a single African judicial project: first, the establishment of the unified Court, and subsequently, the expansion of its structure and jurisdiction.

Despite the importance of this project in the development of African adjudication, it has not received independent scholarly attention commensurate with its distinctive character. Most studies have focused on the African Court on Human and Peoples' Rights, while others have examined the unified Court from perspectives relating to its structure, jurisdiction, and the challenges associated with the merger of the two courts. Following the adoption of the Malabo Protocol in 2014, a significant portion of scholarly attention also shifted towards the new development introduced into the Court's structure, particularly the establishment of the International Criminal Law Section, thereby contributing to a decline in attention devoted specifically to the 2008 Sharm El-Sheikh project.⁵

This does not mean that the Sharm El-Sheikh Protocol has become merely a historical stage superseded by subsequent developments, since the Court it sought to establish constitutes the institutional foundation upon which the later expansion was built. From this perspective, revisiting the project is important not only for understanding the evolution of African adjudication, but also for reconsidering the possibility of bringing the Court into operation, particularly if Sharm El-Sheikh is viewed as a stage that may, in practical terms, precede the completion of the expanded framework introduced at Malabo.

Accordingly, the study addresses the following central question:

To what extent can the African Court of Justice and Human Rights be regarded as a distinctive judicial project despite the concerns that accompanied the merger of the two courts?

Answering this question requires going beyond a merely institutional description of the Protocol's provisions. It requires an analysis of the logic underlying the Court's structure and a comparison with selected international and regional judicial models, followed by an assessment of the extent to which the legal framework addresses concerns associated with the merger, before examining the reasons why the project has remained unimplemented and the possibilities for reviving it.

On this basis, the study is divided into two main parts. The first examines the distinctive judicial model of the African Court of Justice and Human Rights, while the second considers the project of the African Court of Justice and Human Rights between the concerns surrounding the merger and the requirements for its implementation.

1. The Distinctive Judicial Model of the African Court of Justice and Human Rights

The distinctive nature of the African Court does not derive merely from the fact that it is the product of the merger of two judicial institutions. Rather, it is primarily reflected in the structure chosen by the Sharm El-Sheikh Protocol to reconcile institutional unity with the plurality of judicial functions. Identifying this distinctiveness therefore requires, first, examining the institutional foundation upon which the Court's model was built and, second, considering its dual judicial function in light of selected international and regional judicial experiences.

1.1. Institutional Unity and Functional Specialization as the Foundation of the Court's Distinctive Judicial Model

The transition to a unified Court was not merely the replacement of two institutions by a single one. It resulted from a process that sought to address the issues raised by the merger concerning the continuity of judicial functions and the preservation of the distinctive character of human rights adjudication. Understanding the model established by the Sharm El-Sheikh Protocol therefore requires tracing the transition from institutional plurality to institutional unity before examining the Court's two-section structure as the mechanism adopted by the Protocol to reconcile unity and specialization.

Before examining the process leading to the establishment of the Court, it should be noted that, for the purposes of this study, the African Court of Justice and Human Rights will hereafter be referred to as "the African Court," unless the context requires a distinction between it and the African Court on Human and Peoples' Rights.

1.1.1. From a Plurality of Judicial Institutions to a Unified Judicial Institution

The early development of continental adjudication in Africa was closely associated with human rights protection. The adoption of the 1998 Protocol led to the establishment of the African Court on Human and Peoples' Rights with the aim of strengthening the function performed by the African Commission on Human and Peoples' Rights. At a later stage, the establishment of the African Union created the need for a general judicial body competent to adjudicate disputes concerning the interpretation of the Constitutive Act and other legal instruments of the Union, leading to the adoption of the Protocol of the Court of Justice of the African Union in 2003 (African Union, 1998; African Union, 2003). (Bourouba, 2017)

In theoretical terms, this resulted in two continental courts differing in the nature of their functions: one exercising specialized human rights jurisdiction and the other exercising general judicial jurisdiction. The movement towards rationalizing African Union institutions, however, prompted reconsideration of the desirability of maintaining this institutional duality, leading to the emergence of the idea of merging the two courts into a single judicial body (African Union, 2005, 2008).

This development should not be interpreted solely from an economic or administrative perspective. Although avoiding institutional duplication and reducing financial and administrative burdens formed part of the background to the merger, the preparatory work reveals a deeper concern regarding the manner in which a unified continental judicial body could be established without sacrificing the distinctive features acquired by human rights adjudication. From the project's preparatory stage, questions were raised concerning the different nature of the two courts, their jurisdictions, and the parties entitled to appear before them, while particular care was taken to ensure that the merger would neither delay nor weaken judicial mechanisms for the protection of human rights (African Union, 2005).

These considerations are particularly important because they make it possible to move beyond an interpretation that reduces the merger to mere "institutional rationalization." While organizational considerations partly explain the movement towards a single Court, the manner in which the project was designed demonstrates that its purpose became broader: to create a continental judicial institution capable of combining the general judicial function and the human rights function within a single structure (African Union, 2005, 2008).

The merger project can therefore be understood at two complementary levels. The first concerns organizational unity, through the concentration of continental judicial functions within a single institution and the avoidance of duplication in administrative and judicial structures. The second, and more important for the purposes of this study, concerns the judicial unity of African law, through the establishment of a Court capable of providing a common framework for interpreting the rules of the Union's legal order, settling disputes relating to those rules, and ensuring judicial protection of rights and freedoms (African Union, 2005, 2008).

From this perspective, the adoption of the Sharm El-Sheikh Protocol on 1 July 2008 was not simply the culmination of a technical procedure for merging two institutions. It represented an attempt to reconceptualize the place of adjudication within the African Union. The Protocol provided for the new Court to replace both the Court of Justice of the African Union and the African Court on Human and Peoples' Rights, while establishing transitional provisions intended to ensure continuity of the judicial function and prevent the loss of pending cases and proceedings associated with the former institutions (African Union, 2008).

It can therefore be argued that the merger project was not an improvised political decision. It was preceded by legal and technical preparation aimed at anticipating the concerns that might arise from merging two courts differing in jurisdiction and in the nature of the parties appearing before them. This conclusion is important because it provides the basis for understanding the solution

ultimately adopted by the Protocol: if the objective was institutional unity without sacrificing specialization, unity could not necessarily mean the unification of judicial functions (African Union, 2005, 2008).

1.1.2. The Two-Section Structure as a Mechanism for Reconciling Unity and Specialization

Although the merger achieved institutional unity at the organizational level, the more significant issue concerned the preservation of the distinctive judicial functions previously distributed between the two courts. The Statute of the African Court addressed this issue by establishing an internal structure based on multiple sections within a single judicial institution, thereby combining institutional unity with continued specialization (African Union, 2008). (Bentegri, 2020)

The Statute divided the Court into a General Affairs Section and a Human Rights Section, allocating jurisdiction between them according to the nature of the cases submitted. The General Affairs Section deals with cases falling outside the jurisdiction of the Human Rights Section, while the latter has jurisdiction over cases relating to human and peoples' rights.⁹ The Protocol therefore did not absorb human rights jurisdiction into general jurisdiction, but retained a specialized judicial framework for it within the unified Court.

The intention to preserve specialization is also reflected in the rules governing the selection of judges, as the Statute takes account of the different legal expertise required by the various judicial functions to be performed by the Court. This is not merely an administrative allocation of judges. Rather, it recognizes that institutional unity does not eliminate the need for specialized expertise in human rights law, thereby providing an important safeguard for preserving the distinctive nature of human rights adjudication following the merger (African Union, 2008).

At the same time, dividing the Court into two Sections does not amount to creating two courts within the Court. Judgments rendered by the Sections remain judgments of the African Court itself. The Statute also allows matters to be referred to the Full Court where they raise a fundamental question of law or where the expected judgment might conflict with a previous judgment.¹¹ This mechanism reveals an important dimension of the proposed model, as it seeks to reconcile the autonomy of specialization within the Sections with the preservation of the unity of the Court's jurisprudence.

Nor did the establishment of the Human Rights Section abolish existing African mechanisms in this field. Rather, the Statute establishes complementary relationships between the Court and those mechanisms, particularly the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child.¹² This confirms that institutional unity was not based on the idea of absorbing all protection mechanisms into the Court, but on placing judicial adjudication at the centre of a broader continental protection system.

The distinctive feature of the Sharm El-Sheikh model therefore lies in its refusal to choose between two seemingly opposing alternatives: multiple courts in order to preserve specialization, or a single court at the expense of specialization. Instead, it sought to construct a third solution based on institutional unity and functional specialization. This transformation may be summarized

by stating that the Sharm El-Sheikh Protocol did not abolish judicial specialization; rather, it shifted specialization from a plurality of institutions to specialization within a single judicial institution (African Union, 2008).

The significance of this choice extends beyond organizational considerations. The existence of two Sections within one Court, combined with the possibility of intervention by the Full Court in matters affecting the unity of jurisprudence, may contribute to the creation of a common judicial space in which the rules of the Union's general law interact with the rules governing human rights protection. Institutional unity may thus become an instrument serving the unity of African law without requiring the distinctive character of its different branches to disappear (African Union, 2008).

1.2. The Court's Dual Judicial Function in Light of Comparative Judicial Experience

An examination of the African Court's internal structure alone is insufficient to reveal the full distinctiveness of the project. Its originality is also reflected in the nature of the judicial functions entrusted to it. The Statute combines jurisdiction falling within general international adjudication with jurisdiction relating to the protection of human and peoples' rights. Comparison with existing judicial models helps identify, on the one hand, elements from which the African project has drawn inspiration and, on the other, the distinctive features it sought to develop.

1.2.1. General Adjudication in Light of Comparison with the International Court of Justice

The first dimension of this duality appears in the general jurisdiction conferred upon the African Court by its Statute, which in certain respects resembles the function performed by the International Court of Justice. This similarity, however, does not amount to identity, given the African Court's connection to the legal order of the Union and the broad range of legal instruments and acts falling within its jurisdiction (African Union, 2008; International Court of Justice, 1945).

As regards subject-matter jurisdiction, the Statute confers broad competence upon the Court, including the interpretation and application of the Constitutive Act of the African Union; the interpretation and application of treaties adopted within the Union; matters concerning the interpretation, application, or validity of international treaties and conventions to which the States concerned are parties; questions of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; and the nature or extent of reparation to be made for the breach of an international obligation (African Union, 2008).

This formulation reveals a clear similarity with certain forms of jurisdiction set out in Article 36 of the Statute of the International Court of Justice. The African Court is nevertheless distinguished by the direct connection of its jurisdiction with the legal order of the African Union itself. It is not merely a court for resolving disputes between States; it may also play a role in interpreting the institutional law of the Union and the treaties associated with it, giving it the potential, within the limits of its jurisdiction, to become a general judicial authority for African Union law (African Union, 2008; International Court of Justice, 1945).

The distinction is also apparent at the level of personal jurisdiction. Whereas Article 34 of the Statute of the International Court of Justice restricts contentious proceedings to States, the Statute

of the African Court permits, subject to the conditions laid down therein, access by States Parties and certain organs and institutions of the Union. This reflects the Court's dual nature as both an international court and a court embedded within a regional institutional legal order (African Union, 2008; International Court of Justice, 1945).

With regard to applicable law, the African Court remains connected to the traditional sources of international law while also operating within a broader network of African legal instruments, including the Constitutive Act and treaties and conventions adopted within the Union framework. This reveals an important difference from the International Court of Justice. Although the latter is the principal judicial organ of the United Nations, it is not a court of an integrated regional legal order in the same sense. The African Court, by contrast, may play a role more directly connected with developing legal coherence within the Union (African Union, 2008; International Court of Justice, 1945).

The Court's jurisdiction is not confined to contentious proceedings. The Statute also grants it advisory jurisdiction, allowing it to issue opinions on legal questions at the request of the entities specified by the relevant provisions. This resembles the advisory function of the International Court of Justice, while differing in its institutional setting and in the entities authorized to request an opinion (African Union, 2008; International Court of Justice, 1945).

As regards the temporal and territorial dimensions of jurisdiction, the exercise of the Court's jurisdiction is linked to the entry into force of the Statute in respect of the States concerned and to the scope of the obligations accepted by those States. Territorial jurisdiction, for its part, is connected to the nature of the dispute or the international obligation at issue rather than solely to territory in the narrow geographical sense. Jurisdiction therefore cannot be reduced to an independent spatial criterion; it must instead be considered in relation to the basis of jurisdiction and the source of the legal obligation before the Court (African Union, 2008; International Court of Justice, 1945).

Taken together, these elements demonstrate that the General Affairs Section draws upon the experience of general international adjudication, particularly the model of the International Court of Justice, without replicating it. Its integration into a single Court that also performs a human rights function, together with its direct connection to the African Union legal order, gives it a role extending beyond traditional interstate dispute settlement towards a potential contribution to the coherent interpretation of African law (African Union, 2008; International Court of Justice, 1945).

1.2.2. The Human Rights Judicial Function in Light of Regional Human Rights Adjudication

Alongside its function in the field of general adjudication, the project retains a specialized judicial function for the protection of human and peoples' rights. The significance of this function derives from the fact that it continues a judicial achievement predating the merger project. It is therefore necessary to examine how that achievement is preserved within the unified Court and, where appropriate, compare it with regional human rights adjudication (African Union, 2008).

In terms of subject-matter jurisdiction, the Human Rights Section is not limited to applying the African Charter on Human and Peoples' Rights. Under the Statute, its jurisdiction extends to legal

instruments relating to human rights to which the States concerned are parties. This broad normative basis provides considerable scope for protection by allowing the Court to operate within a body of African and international instruments rather than being restricted to a single human rights instrument (African Union, 2008).

The distinctive nature of the model becomes even clearer with regard to personal jurisdiction and access to the Court. The African system does not replicate the European model, under which Article 34 of the European Convention on Human Rights permits individuals, non-governmental organizations, and groups of individuals to submit applications to the European Court, subject to the applicable admissibility requirements. Under the system established at Sharm El-Sheikh, direct access to the Court by individuals and non-governmental organizations remains dependent upon the State concerned accepting such jurisdiction through the declaration provided for by the Protocol (African Union, 2008; Council of Europe, 1950).

This condition creates one of the project's most significant paradoxes. On the one hand, the Protocol preserves the possibility of individual access to continental adjudication, which is essential to the effectiveness of human rights protection. On the other hand, it makes that possibility dependent upon State consent through a special declaration. Institutional unity achieved through the merger was therefore not accompanied by the complete liberalization of individual access to justice, and this remains one of the issues to be considered when assessing the extent to which the Protocol responds to concerns about weakening human rights protection (African Union, 2008).

The experience of the Inter-American Court of Human Rights may also provide a useful comparison. Access to that Court operates through an institutional mechanism different from the system of direct individual application before the European Court. Comparison between these models demonstrates that regional human rights adjudication is not organized according to a single procedural formula and that the distinctive features of the African system should be evaluated in light of its own institutional structure rather than simply measured against the European model (Organization of American States, 1969).

With regard to temporal jurisdiction, the general principle remains that jurisdiction does not operate retroactively in relation to obligations that were not in force for the State concerned, subject to the particular nature of continuing violations where their effects extend into the period during which jurisdiction exists. Territorially, the Court's jurisdiction is principally connected with violations attributable to a State subject to its jurisdiction, while questions going beyond the traditional concept of territory may arise where a State exercises authority or control attributable to it under the relevant rules (African Union, 2008).

The human rights function is further reinforced by the binding nature of the Court's judgments and the obligation of States to comply with them. The effectiveness of this legal force, however, remains dependent, as in most systems of international and regional adjudication, upon enforcement and cooperation mechanisms at both national and continental levels. A binding judgment is therefore not in itself sufficient to guarantee protection unless institutional and political mechanisms capable of ensuring its implementation are also available (African Union, 2008).

The comparative analysis ultimately leads to a fundamental conclusion: the African Court is neither a copy of the International Court of Justice nor a copy of the European Court of Human Rights. It combines within a single institution two functions that are generally exercised by separate institutions. The boldness of the project therefore lies not simply in establishing a new Court, but in attempting to construct a continental model combining general adjudication and human rights adjudication within a single institution while preserving internal specialization.

The true value of the Sharm El-Sheikh Protocol thus lies not merely in merging two African courts, but in attempting to develop a new conception of continental adjudication that combines institutional unity with functional specialization and places general adjudication and human rights adjudication within a single judicial framework capable of serving the unity of African law. Although the project has drawn upon previous international and regional judicial experiences, its successful implementation could reverse the direction of influence, allowing Africa not merely to import judicial models but also to contribute to their development. This potential, however, will remain embedded in the legal text unless the commitment to merger reflected in the preparatory work is transformed into an effective commitment to completing ratification and providing the conditions necessary for the Court's independence and effectiveness.

2. The African Court of Justice and Human Rights between Concerns over the Merger and the Requirements of Implementation

Although the Sharm El-Sheikh Protocol established a distinctive legal framework for the unified Court, the value of this framework cannot be measured solely by the originality of its provisions. It must also be assessed in terms of its capacity to address the concerns raised by the merger and the possibility of moving the Court from legal existence to institutional reality. The boldness of combining general adjudication and human rights adjudication within a single institution is not, in itself, sufficient to establish the success of the project unless it is accompanied by safeguards preserving the distinctive nature of each judicial function and by a commitment capable of transforming the Court from a legal project into an institution actually exercising its jurisdiction.

From this perspective, assessing the project requires, first, examining the legal and institutional concerns that accompanied the merger and the extent to which the Sharm El-Sheikh Protocol addressed them and, second, examining the reasons for the project's stagnation and the requirements for its implementation, taking into account the subsequent development introduced into the Court's structure by the 2014 Malabo Protocol.

2.1. Concerns Accompanying the Merger and the Extent to Which the Sharm El-Sheikh Protocol Addressed Them

Combining two courts differing in jurisdiction, the nature of litigants, and judicial function generated a range of legal and institutional concerns, particularly regarding the future of judicial human rights protection within the unified Court. The significance of these concerns lies not merely in identifying them, but in assessing them against the solutions incorporated into the Sharm El-

Sheikh Protocol in order to determine the extent to which it succeeded in achieving the balance sought by the merger project.

2.1.1. The Nature of the Legal and Institutional Concerns Raised by the Merger

Reservations concerning the merger did not emerge only after the adoption of the Sharm El-Sheikh Protocol. The preparatory work demonstrates that some of them were already present during the earliest stages of the project. Those responsible for the merger process understood that it involved bringing together two institutions differing not only in jurisdiction but also in the nature of their judicial functions and in the parties entitled to access them. The principal concern was therefore that the pursuit of institutional unity might weaken the distinctive character acquired by African human rights adjudication (African Union, 2005).

This concern is understandable given the different logic underlying the two functions. General international adjudication, in its traditional form, is associated with legal relations between States and international organizations, whereas human rights adjudication is concerned with protecting individuals and groups against violations that may be attributable to the State itself. Placing both functions within a single institution therefore raised the question whether the interstate logic might overshadow the human rights function, whose principal beneficiaries include individuals (African Union, 2005).

A more specific concern related to access to justice. The effectiveness of a human rights court is measured not only by the breadth of the rights it is capable of applying, but also by the ability of rights holders to access it. Any reduction in the possibility for individuals and non-governmental organizations to reach the Court could therefore result in an organizational gain being accompanied by a decline in effective judicial protection. This issue was particularly significant given that, even before the merger project, the African system had already experienced debate surrounding the requirement of State acceptance of jurisdiction over individual applications (African Union, 2005).

A further concern involved judicial specialization. Adjudicating general international disputes requires expertise that differs, at least in part, from that required for human rights cases. In the absence of internal safeguards, there was a possibility that the merger could weaken specialized expertise or lead to human rights cases being approached through a judicial logic insufficiently attentive to their particular nature (African Union, 2005).

Combining multiple areas of jurisdiction within a single institution also raises an issue concerning the unity of jurisprudence. Although internal specialization is necessary, it could itself lead to divergent approaches between the Court's Sections, particularly where questions of general African Union law intersect with human rights issues. The merger project was therefore confronted with a delicate equation: preserving specialization without allowing it to become internal fragmentation, and achieving unity without allowing the distinctive nature of the different judicial functions to disappear (African Union, 2005).

In addition to these legal concerns, the project raises an institutional challenge concerning the human and financial resources required by a Court exercising broad jurisdiction. Institutional unity may in principle allow for rationalization of resources, but it does not mean that multiple functions

can be performed with limited means. On the contrary, broader judicial responsibilities require judges with diverse expertise, a Registry capable of dealing with different types of cases, and sufficient financial resources to guarantee the Court's independence and continuity (African Union, 2005).

This issue acquires additional significance in light of the subsequent development introduced by the Malabo Protocol. Studies concerning the expansion of the Court's jurisdiction have raised concerns that additional areas of jurisdiction could increase its financial and institutional burdens and affect the ability of its various Sections to perform their functions.¹⁹ The point here is not to transpose issues specific to Malabo onto the Sharm El-Sheikh Protocol, but rather to identify a broader principle: the breadth of judicial jurisdiction is not in itself a guarantee of effectiveness unless accompanied by institutional capacity commensurate with that jurisdiction.

The concerns accompanying the merger were therefore not objections to judicial unity as such. Rather, they reflected the need to ensure that unity would not be achieved at the expense of specialization, access to justice, or effective human rights protection. The analysis must consequently move from identifying these concerns to examining the solutions provided by the Sharm El-Sheikh Protocol (African Union, 2005).

2.1.2. The Sharm El-Sheikh Protocol's Responses to Concerns over the Merger

The concerns outlined above cannot be assessed independently of the solutions embodied in the text adopted in 2008. The Sharm El-Sheikh Protocol and the Statute of the Court contain a set of organizational, functional, and transitional safeguards that may be understood as responses to a number of issues identified during the preparation of the project, even though they did not eliminate every source of concern (African Union, 2008).

To address the concern that human rights adjudication might be absorbed into a court of general jurisdiction, the Statute declined to unify all jurisdiction within a single Section and instead established a separate Human Rights Section alongside the General Affairs Section. This division was not merely administrative, since the allocation of cases between the Sections depends upon the nature of the jurisdiction involved, while the Statute also takes specialized expertise into account in the selection of judges. The Protocol thus sought to preserve the human rights *acquis* within the new institution rather than sacrifice it in the name of unity (African Union, 2008).

The significance of this solution becomes even clearer when considered together with the unity of the Court itself. The Sections are not independent courts, and the judgments they render remain judgments of the African Court. Moreover, matters raising fundamental legal questions or a potential conflict with previous jurisprudence may be referred to the Full Court.²¹ The Protocol therefore sought simultaneously to address two opposing risks: the risk that specialization might disappear within institutional unity and the risk that specialization might turn into judicial fragmentation within a single institution.

The Protocol also addressed the concern that the merger might sever continuity with the existing human rights protection system by preserving a complementary relationship with the African Commission on Human and Peoples' Rights and the African Committee of Experts on the

Rights and Welfare of the Child.²² This approach demonstrates that the establishment of the unified Court was not intended to monopolize judicial or quasi-judicial protection, but rather to position the Court within a broader continental system in which different functions complement rather than eliminate one another.

In the same context, the transitional provisions were designed to prevent the shift from the former institutions to the new Court from creating a judicial vacuum or resulting in the loss of acquired procedural rights and pending proceedings. These safeguards are particularly significant because they confirm that the merger was conceived not as a rupture with previous experience, but as an institutional transition intended to preserve continuity in the judicial function (African Union, 2008).

Nevertheless, the Protocol's response to the concerns was not complete. This is particularly apparent with regard to individual access to the Court, since direct access by individuals and non-governmental organizations remains dependent upon a declaration by which the State accepts the Court's jurisdiction over such applications.²⁴ The preservation of a specialized Human Rights Section therefore cannot alone guarantee effective protection if access to that Section remains dependent upon the will of the respondent State.

Enforcement of judgments presents another challenge. The binding force of the Court's judgments constitutes an essential condition of effective adjudication, but the transition from legal obligation to practical implementation remains dependent upon State cooperation and the effectiveness of monitoring mechanisms within the African Union.²⁵ The project's effectiveness therefore depends not only upon the quality of the rules governing jurisdiction and procedure, but also upon the political and institutional environment in which the Court will operate.

The relationship between the unified Court and the courts of the regional economic communities also remains an area requiring further clarification. Multiple levels of African adjudication may enrich legal protection, but they may also raise questions concerning overlapping jurisdiction and divergent interpretation. The success of the unified Court therefore requires the development of mechanisms for judicial dialogue and complementarity capable of preventing African judicial pluralism from becoming a source of conflict (African Union, 2008).

These considerations lead to a balanced conclusion: the Sharm El-Sheikh Protocol did not disregard the concerns raised by the merger. It provided significant legal and institutional responses, but did not eliminate all sources of concern. It preserved specialization within unity and introduced mechanisms designed to maintain the continuity of the human rights function and the unity of jurisprudence, while retaining certain limitations relating to individual access, enforcement, and institutional capacity (African Union, 2008).

This confirms one of the study's central findings: the boldness of the legal framework is not, by itself, sufficient to guarantee effectiveness. The legal text succeeded, to a significant extent, in conceptualizing how the unified Court might operate, but the true test of this conception can begin only when the Court moves from text to practice (African Union, 2008).

2.2. From the Project's Stagnation to the Requirements of Its Implementation

The contrast between the ambition of the Court's legal framework and its continued failure to enter into force reveals a fundamental paradox in the project. The analysis must therefore move from assessing the content of the legal text to examining the process of implementation, by considering the stagnation of ratification and the shift of part of the attention towards the Malabo Protocol, before identifying the requirements capable of bringing the Sharm El-Sheikh project back to the forefront of African legal and institutional debate. (Gueldich, 2018; Bentegri, 2020)

2.2.1. The Stagnation of the Ratification Process and the Shift of Attention towards the Malabo Protocol

The adoption of the Sharm El-Sheikh Protocol was not sufficient to bring the African Court into existence. The Protocol requires the deposit of the fifteenth instrument of ratification before it can enter into force.²⁶ This requirement has not been fulfilled, and the Court has therefore remained in the legal text without becoming an operational institution.

African Union data reveal a clear gap between acceptance of the project in principle and legal readiness to complete its establishment. The latest available official status list for the Sharm El-Sheikh Protocol, dated 18 June 2020, recorded 33 signatures and only eight ratifications.²⁷ These figures should be understood as reflecting the date of the latest published official status list for the Protocol and not necessarily as figures updated to 2026. What is currently confirmed by the African Union's official treaty database is that the Protocol is still not recorded as having entered into force.

This gap cannot be explained by a single factor. Considerations of sovereignty, State hesitation regarding the expansion of continental judicial review, restrictions relating to individual access, financial and institutional burdens, and limited political follow-up of the ratification process may all play a role. The Protocol's failure to enter into force should therefore not be reduced solely to an absence of political will, although the level of ratification remains an important indicator of the degree of practical commitment to the project (African Union, 2020; Amnesty International, 2016).

Following the adoption of the Malabo Protocol in 2014, a significant portion of scholarly and institutional attention shifted towards the new development introduced into the structure of the African Court of Justice and Human Rights. Malabo did not establish a separate African criminal court; rather, it amended the structure established at Sharm El-Sheikh and added a third International Criminal Law Section alongside the General Affairs Section and the Human Rights Section, while expanding the Court's jurisdiction to encompass a broad range of crimes (African Union, 2014).

This distinction is methodologically important to the present study. The Malabo Protocol represents an expansion of the African Court of Justice and Human Rights rather than a separate judicial project. Accordingly, consideration of the subsequent criminal jurisdiction should not obscure the question of establishing the original Court itself, since the addition of the third Section institutionally presupposes the existence of the Court to which it is to be added.

Previous research on the Malabo process has shown that the expansion of the Court's jurisdiction itself raises questions concerning the breadth of subject-matter jurisdiction and the

human and financial resources required to operate the different Sections, in addition to other issues specific to the criminal section.²⁹ That experience is relevant to the present study from a different perspective: the broader the judicial structure becomes, the greater the need for institutional, financial, and judicial capacity capable of sustaining it.

This does not mean that Malabo caused the stagnation of Sharm El-Sheikh; that stagnation predates it. Nor does returning to Sharm El-Sheikh require abandoning the expansion introduced at Malabo. The issue is rather that the accumulation of stages of legal development before the basic institution itself becomes operational raises a different question: should the unified judicial project remain suspended until ratification of the broader framework is completed, or can its implementation be organized in gradual stages? (African Union, 2020; Amnesty International, 2016)

This question makes it possible to move beyond merely diagnosing the stagnation of ratification towards identifying a pathway capable of making implementation more realistic (African Union, 2020; Amnesty International, 2016).

2.2.2. Requirements for Completing Ratification and Moving towards Implementation

Overcoming the current stagnation is not limited to obtaining the required number of ratifications, since the entry into force of the Protocol would constitute only the first step towards establishing a Court capable of effectively exercising its functions. Implementation therefore requires a combination of legal, institutional, and judicial measures, together with bringing the Court back into African academic and legal debate.

The first step consists in restoring the Sharm El-Sheikh Protocol to the African ratification agenda as a legally distinct project. The shift of attention towards Malabo should not cause the foundational Court project to disappear from debate. In this context, periodic monitoring of ratification status could be strengthened; States that have signed but not ratified the Protocol could be encouraged to complete their domestic constitutional procedures; and national parliaments, the Pan-African Parliament, and continental legal institutions could be involved in bringing the project back onto the institutional agenda.

Completing ratification should, however, be accompanied by prior institutional preparation. The Court will not become effective merely because the Protocol enters into force. It will require effective guarantees of judicial independence, stable human and financial resources, a Registry capable of managing the Court's different functions, and arrangements allowing the Human Rights Section to perform its function without administrative unity undermining its functional autonomy.

Future development of the system should also reconsider the question of individual access to the Court. If one of the project's central purposes is to preserve the achievements of human rights adjudication, the effectiveness of that adjudication remains connected to the ability of individuals and non-governmental organizations to access it. Broadening direct access, while establishing admissibility requirements that ensure the seriousness of applications and prevent abuse of the right of action, could therefore constitute an important element in the development of the African judicial system.

Implementation also requires the establishment of a more effective mechanism for monitoring the execution of judgments. Adjudication whose judgments do not find their way into practice loses a substantial part of its function. The role of African Union organs should therefore not be limited to recording cases of non-compliance; regular follow-up mechanisms should be developed, linking implementation of judgments to Union institutions and sustained dialogue with the States concerned.

At the same time, the relationship between the African Court and the courts of the regional economic communities must be organized. This does not necessarily require establishing a hierarchical relationship. Instead, it may be based on complementarity, judicial dialogue, exchange of jurisprudence, and identification of areas in which jurisdictional overlap may arise, thereby allowing multiple levels of protection without undermining the coherent interpretation of African law.

The most significant lesson that may be drawn from the continued stagnation of the two projects is, in the author's view, the need to consider a gradual pathway to implementation. If the Sharm El-Sheikh Protocol established the institutional foundation of the unified Court, while Malabo subsequently expanded that structure by adding a third International Criminal Law Section, it may be practically appropriate not to make the commencement of the Court's operations dependent from the outset upon the broader and more complex form produced by subsequent developments. (Gueldich, 2018)

From this perspective, the gradual operationalization of the Sharm El-Sheikh Protocol could constitute a realistic step towards implementation of the Malabo Protocol by allowing the Court's institutional capacity to be tested and the judicial environment necessary for the later expansion of its jurisdiction to be prepared, while incorporating safeguards and a timetable preventing the transitional phase from becoming a permanent substitute for the Malabo Protocol.

This approach is not based on choosing between the two Protocols, nor does it treat Sharm El-Sheikh as an alternative to Malabo. Both instruments belong to a single institutional process, and Malabo itself legally rests upon an amendment to the Court established at Sharm El-Sheikh. The proposal concerns instead the sequencing of implementation: the Court would begin by exercising its two foundational functions in general affairs and human rights, thereby allowing its structures to be tested, its jurisprudence to develop, and mechanisms for implementing its judgments to mature. The project would then move to a broader stage through the addition of the International Criminal Law Section once the legal, institutional, and financial conditions necessary for doing so have been fulfilled.

This approach offers the additional advantage of allowing the experience to be evaluated before it is expanded. Instead of launching an institution with an extensive range of jurisdiction from the outset, the first stage could reveal strengths and weaknesses relating to organization, resources, relations with States, and relations with regional courts. The lessons learned could subsequently inform the operationalization of the International Criminal Law Section. Sharm El-Sheikh would thus become a practical foundational stage for Malabo rather than its competitor.

At the same time, gradualism should not become a pretext for postponing Malabo indefinitely. This is why safeguards and a timetable are particularly important. Operationalization of the first stage should be accompanied by a clear institutional commitment to continue the ratification process and preparations for the International Criminal Law Section. The proposed gradual approach is a means of facilitating progress towards the Court's complete institutional architecture, not of permanently redefining that architecture within the limits of Sharm El-Sheikh.

Alongside the formal institutional process, academic research and African legal institutions have an important role to play in bringing the project back into debate. The Court's continued absence from institutional reality should not result in its disappearance from legal scholarship. Academic discussion can help identify the project's potential, determine its shortcomings, and propose solutions capable of assisting African decision-makers in moving from legal text to institution. In this sense, academic researchers should not remain mere observers of the project's stagnation; they can contribute actively to bringing it back into legal and institutional debate and to shaping informed legal discourse conducive to completing the ratification process.

The analysis therefore suggests that the question is no longer necessarily: Sharm El-Sheikh or Malabo? Rather, it is: how should the stages of transition from one to the other be sequenced so that the Court can actually come into existence? The proposed approach may thus be summarized in a single formula: establish the Court first, then complete its expansion.

The implementation of Sharm El-Sheikh should consequently not be viewed as the end of the process, but as the beginning of an institutional pathway capable of leading to Malabo. If, during its initial stage, the Court can demonstrate that the model of institutional unity and functional specialization is workable in practice, the subsequent transition to a three-section Court would not begin from scratch, but would build upon an existing institution and accumulated judicial experience.

In this sense, the project that began with a decision to merge two courts still carries a potential extending beyond the mere reorganization of African adjudication. Its implementation could constitute a step towards building a more coherent continental judicial space in which Africa gradually moves beyond a plurality of institutions and imported models towards contributing to the development of its own judicial model, based on judicial unity in the service of the unity of African law.

IV. CONCLUSION

The study concludes that the 2008 Sharm El-Sheikh Protocol represents more than an institutional merger: it proposes a continental judicial model founded on institutional unity and functional specialization. Its two-section structure preserves the distinction between general adjudication and human rights adjudication while providing mechanisms intended to maintain the unity of the Court's jurisprudence. At the same time, limitations concerning individual access, enforcement, resources, and the continuing failure of the Protocol to enter into force demonstrate that normative design alone cannot ensure effectiveness. The study therefore supports a gradual implementation pathway: operationalize the unified Court created at Sharm El-Sheikh, consolidate

its institutional and judicial capacity, and subsequently complete the expansion introduced by the Malabo Protocol, subject to safeguards and a timetable preventing gradualism from becoming indefinite postponement (African Union, 2008, 2014, 2020).

Endnotes

1. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Ouagadougou, 10 June 1998; Protocol of the Court of Justice of the African Union, Maputo, 11 July 2003.

2. African Union, Report on the Decision of the Assembly of the Union to Merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, EX.CL/162 (VI), Executive Council, Sixth Ordinary Session, Abuja, 24–28 January 2005, Annex 2, Report/Work of the Group of Legal Experts.

3. Protocol on the Statute of the African Court of Justice and Human Rights, Sharm El-Sheikh, 1 July 2008, arts. 1–2; Statute of the African Court of Justice and Human Rights, arts. 16–19.

4. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Malabo, 27 June 2014.

5. G. J. Naldi & K. D. Magliveras, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg', *International Organizations Law Review*, 9(2), 2012, pp. 383–449.

6. 1998 Protocol establishing the African Court on Human and Peoples' Rights; 2003 Protocol of the Court of Justice of the African Union; S. Bourouba, 'The Role of the African Court on Human and Peoples' Rights in Protecting Human Rights', *Algerian Journal of Legal and Political Sciences*, 54(5), 2017, pp. 491–513.

7. African Union, EX.CL/162 (VI), Annex 2, Report/Work of the Group of Legal Experts.

8. Sharm El-Sheikh Protocol, arts. 1, 2, 4, 5 and 7.

9. Statute of the African Court of Justice and Human Rights, arts. 16–17; M. Bentegri, 'The African Court of Justice and Human Rights: The Necessity of Existence and Limits of Practice', *Dirassat wa Abhath: The Arab Journal of Human and Social Sciences*, 12(3), 2020, pp. 519–537.

10. *Ibid.*, art. 6.

11. *Ibid.*, arts. 18–19.

12. *Ibid.*, art. 27(2).

13. *Ibid.*, art. 28.

14. *Ibid.*, arts. 29–30; Statute of the International Court of Justice, art. 34.

15. Statute of the African Court of Justice and Human Rights, art. 53; Statute of the International Court of Justice, art. 65.

16. Statute of the African Court of Justice and Human Rights, arts. 17 and 28; S. Bourouba, 'The Role of the African Court on Human and Peoples' Rights in Protecting Human Rights', *Algerian Journal of Legal and Political Sciences*, 54(5), 2017, pp. 491–513.

17. Sharm El-Sheikh Protocol, art. 8(3); European Convention on Human Rights, arts. 34–35.

18. African Union, EX.CL/162 (VI), especially Annex 2; H. Gueldich, *The Future African Court of Justice and Human Rights: From Normative Relevance to Practical Considerations*, 2018.

19. Amnesty International, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court of Justice and Human Rights, AFR 01/3063/2016.

20. Statute of the African Court of Justice and Human Rights, arts. 6, 16 and 17; M. Bentegri, 'The African Court of Justice and Human Rights: The Necessity of Existence and Limits of Practice', *Dirassat wa Abhath: The Arab Journal of Human and Social Sciences*, 12(3), 2020, pp. 519–537.

21. *Ibid.*, arts. 18–19.

22. *Ibid.*, art. 27(2).

23. Sharm El-Sheikh Protocol, arts. 4, 5 and 7.

24. Sharm El-Sheikh Protocol, art. 8(3); Statute of the African Court of Justice and Human Rights, arts. 29–30.

25. Statute of the African Court of Justice and Human Rights, art. 46.

26. Sharm El-Sheikh Protocol, art. 9.

27. African Union, List of Countries which have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights, status list dated 18 June 2020.

28. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Malabo, 27 June 2014.

29. Amnesty International, Malabo Protocol, AFR 01/3063/2016; M. Mubiala, 'Chronique de droit pénal de l'Union africaine: l'élargissement du mandat de la Cour africaine de justice et des droits de l'homme aux affaires de droit international pénal', 2014; M. Ssenyonjo & S. Nakitto, 'The African Court of Justice and Human and Peoples' Rights International Criminal Law Section: Promoting Impunity for African Union Heads of State and Senior State Officials?', *International Criminal Law Review*, 16(1), 2016, pp. 71–102.

Referrals and references

African Union. (1998). Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Ouagadougou, 10 June 1998.

African Union. (2003). Protocol of the Court of Justice of the African Union. Maputo, 11 July 2003.

African Union. (2005). Report on the Decision of the Assembly of the Union to Merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union (EX.CL/162 (VI)), including Annex 2, Report/Work of the Group of Legal Experts. Executive Council, Sixth Ordinary Session, Abuja, 24–28 January 2005.

African Union. (2008). Protocol on the Statute of the African Court of Justice and Human Rights and Statute of the African Court of Justice and Human Rights. Sharm El-Sheikh, 1 July 2008.

African Union. (2014). Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Malabo, 27 June 2014.

African Union. (2020). List of Countries which have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights (status list dated 18 June 2020).

- Amnesty International. (2016). Malabo Protocol: Legal and institutional implications of the merged and expanded African Court of Justice and Human Rights (AFR 01/3063/2016).
- Bentegri, M. (2020). The African Court of Justice and Human Rights: The necessity of existence and limits of practice. *Dirassat wa Abhath: The Arab Journal of Human and Social Sciences*, 12(3), 519–537.
- Bourouba, S. (2017). The role of the African Court on Human and Peoples' Rights in protecting human rights. *Algerian Journal of Legal and Political Sciences*, 54(5), 491–513.
- Council of Europe. (1950). Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).
- Council of Europe. (2013). Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
- Gueldich, H. (2018). The future African Court of Justice and Human Rights: From normative relevance to practical considerations. Paper presented at an international colloquium, Maison de l'UNESCO, Paris, 10 December 2018.
- International Court of Justice. (1945). Statute of the International Court of Justice.
- Mubiala, M. (2014). *Chronique de droit pénal de l'Union africaine: l'élargissement du mandat de la Cour africaine de justice et des droits de l'homme aux affaires de droit international pénal*.
- Naldi, G. J., & Magliveras, K. D. (2012). The African Court of Justice and Human Rights: A judicial curate's egg. *International Organizations Law Review*, 9(2), 383–449.
- Organization of American States. (1969). American Convention on Human Rights. San José, 22 November 1969.
- Ssenyonjo, M., & Nakitto, S. (2016). The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting impunity for African Union heads of state and senior state officials? *International Criminal Law Review*, 16(1), 71–102.
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