

Financing and Sustaining the African Court of Justice and Human and Peoples' Rights

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1. INTRODUCTION

The resolve of the African Union (AU) to merge the currently existing African Court on Human and Peoples' Rights (ACtHPR or Human Rights Court)¹ with the African Court of Justice (ACJ)² to form the African Court of Justice and Human Rights (ACJHR) through the adoption of the Protocol on the Statute of the African Court of Justice and Human Rights³ (hereafter, Merger Protocol), no doubt began the redefinition and streamlining of the African Union organs, bodies or mechanisms. This streamlining or rationalization of institutions, or what this author would call the *Merger Project*, was predicated on the increasingly diminishing resources available to the continental body as this author has alluded to

The views expressed in this chapter are solely those of the author and not necessarily of the African Development Bank, the African Union Commission, or any other organ or agency of the African Union with whom the author worked closely during his time as the Legal Counsel of the African Union.

¹ The ACtHPR was created pursuant to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (OAU/DOC.CAB/LEG/66.5) adopted on 10 June 1998 during the Organization of African Unity (OAU) Summit in Ouagadougou, Burkina Faso. It entered into force on 24 January 2004.

² The ACJ is one of the institutions created by the Constitutive ACT of the African Union, which was adopted by the Thirty-Sixth Ordinary Session of the Assembly of the OAU in Lome, Togo on 11 July 2000. Article 18 of the Constitutive Act specifically establishes the Court, whose 'statute, composition and functions . . . shall be defined in a protocol relating thereto.'

³ Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples Rights and the African Court of Justice (Assembly/AU/Dec. 196(XI)). See specifically DOC. Assembly/AU/13(XI).

elsewhere.⁴ The further decision that the AU Assembly took in 2014 in Malabo, Equatorial Guinea⁵ to extend the jurisdiction of the ACtHPR to include international crimes (the so-called Malabo Protocol) is the latest dimension of the AU judicial institutions rationalization process. This decision thus creates one single court to be known as the African Court of Justice and Human and Peoples' Rights (ACJHPR).⁶ The extension of criminal jurisdiction to the Court has generated and continues to generate ample debates from a number of commentators – debates that range from the propriety and legality of such decision in the era of the International Criminal Court (ICC), the resource questions, to the political ramifications of the decision.⁷

It is not the intention in this chapter to delve into the debate on the propriety, legality or otherwise of the AU decision to merge the ACJ with the ACtHPR, or its extension of the jurisdiction of the Human Rights Court to include international crimes. That debate is now stale and would therefore, serve no more meaningful purposes. This author had amply dealt with the issue in the years past.⁸ Rather, this chapter, as the title suggests, focuses on the resources question relative to the significance of the African Union judicial mechanism as the composite judicial body of the Union. In other words, we must emphasize the reality that the ACJHPR when fully constituted, will be the main judicial organ of the African Union. The

⁴ V. O. Nmehielle, "Saddling" the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient? *7 African Journal of Legal Studies (AJLS)* (2014) 7–42, at 9.

⁵ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Adopted at the Twenty-third Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, 27th June 2014 (Hereafter, the Malabo Protocol). The Protocol is not yet in force. Pursuant to the provisions of Article 11 of the Protocol, it would enter into force 30 days after 15 Member States have ratified it. As at February 2018, the period of writing, only 10 AU Member States (Benin, Chad, Comoros, Congo, Ghana, Guinea Bissau, Kenya, Mauritania, Sierra Leone, and Sao Tome and Principe) have signed the Protocol. See Status List available at <https://au.int/en/treaties> (last visited 18 February 2018). There are no ratifications so far.

⁶ See the Malabo Protocol, Art. 1 that defines the term 'Court'. See also Art. 8 on the nomenclature of the Court.

⁷ See generally, Nmehielle, note 4, 7–42; C.B. Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights", 9 *Journal of International Criminal Justice* (2011), 1067–88; A. Abass, "The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects", 60 *Netherlands International Law Review* (2013), 27–50; P. Manirakiza, "The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa" (hereinafter The Case for an African Criminal Court), in V.O. Nmehielle (Ed.), *Africa and the Future of International Criminal Justice* (Eleven International Publishers, The Hague, 2012), p. 375, among various others.

⁸ See Nmehielle, note 4.

importance of this phenomenon cannot be overstated; it is indeed a big deal. While the composite court is not yet in force, it is important to engage at the strategic level on financing and sustaining the Court taking into account its significance and enormous role as a single Court. There may be the temptation to focus only on the resources needed to effectively sustain the criminal arm of the Court. That would not do justice to the significance and importance of the Court, as the holistic financing of the court must be the focus. It is also in the interest of continental norm creation and dispute resolution that a holistic emphasis is placed on the development of a robust continental judicial process that is adequately resourced. Thus, the chapter will be forward-looking; perhaps to provide the AU policy makers some food for thought in their planning in the continental body's new scheme to ensure autonomous financing of the African Union and its institutions. The chapter will not go into the dollar and cents requirements of the ACJHPR, or the numerical staffing needs of the Court, as that would be practically impossible to do in this limited piece. That would require a holistic resource-focused study. The chapter will, however, provide a thematic discussion and evaluation of the resource needs of the Court taking into account its structure and applicable international practice and standards.

The chapter is divided into seven (7) sections. Following the above introductory section, section two deals with the notion of the ACJHPR as a single Court. The section flags the holistic nature of the court particularly because there may be a tendency to have a segregated view of the African Union's judicial mechanism in the form of a separate Court of Justice, a Human Rights Court and more emphatically, an international criminal tribunal. Section three examines the adoption of the Malabo Protocol and tries to make sense of its adoption without a prior determination of the cost implication of the endeavour. Section four takes a thematic overview of the ACJHPR from a resource perspective. It examines the organic structure of the Court and juxtaposes that structure against the kind of resources that should be envisaged. In this regard, it highlights the Presidency of the Court, the Registry, Office of the Prosecutor and the Defence Office in terms of the enormity of the judicial project and its resource implications. Section five briefly discusses applicable examples of other judicial mechanisms in terms of the financial implication of organizing them. Such examples include the International Court of Justice (ICJ), the United Nations-backed Special Court for Sierra Leone (SCSL), the United Nations International Criminal Tribunal for Rwanda (ICTR), and the current African Court on Human and Peoples' Rights (ACHPR). Section 6 delves into what could be done to sustainably finance the ACJHR leveraging

on the current reform of the African Union funding mechanism – the 0.2 per cent import levy on eligible imports into the continent. Section 7 concludes the chapter, emphasizing the significance of the current AU financing mechanism reform – the 0.2 per cent levy on eligible imports into the continent, as a great opportunity for effectively financing and sustaining the ACJHPR. The section calls on the AU to make provisions for the funding of the Court through a regular budget from member states' assessed contributions, an endowment or trust fund from surpluses, and provision for voluntary contributions from willing member states and partners to cater for ad hoc needs and short-term resource requirements.

2. THE ACJHPR AS A SINGLE AND COMPOSITE COURT

It must not be lost on any observer, commentator, or policy maker that the ACJHPR is a single Court and the main judicial organ of the African Union. As a result, any evaluation of its resource needs must begin from that perspective. The court as a single and composite court will have four Organs – a Presidency, an Office of the Prosecutor, a Registry and a Defence Office.⁹ The Court will be made up of three Sections – ‘a General Affairs Section, a Human and Peoples’ Rights Section and an International Criminal Law Section’.¹⁰ Specifically, the International Criminal Section is endowed with ‘a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber’.¹¹ Similarly, all the Sections are allowed to ‘constitute one or more Chambers in accordance with the Rules of [the] Court’.¹² The General Section of the Court has jurisdiction over disputes other than human rights questions and international crimes, which are accordingly within the purview of the Human Rights and International Criminal Law Sections, respectively. The reality of the above configuration of the Court is that, in effect, you have three courts fused into one. The strategic leadership of the Court revolves around the four organs enumerated above. The President of the Court would be assisted by a Vice President¹³; the Prosecutor will have two Deputies.¹⁴ The Registry of the Court would be overseen by one Registrar who in turn would be assisted by three Assistant Registrars.¹⁵ The Defence Office would be presided over by the

⁹ Malabo Protocol, Art. 2.

¹⁰ St. of the African Court of Justice and Human and Peoples Rights, Art. 16(1).

¹¹ *Id.*, Art. 16 (2).

¹² *Id.*, Art. 9(1).

¹³ *Id.*, Art. 22.

¹⁴ *Id.*, Art. 22A.

¹⁵ *Id.*, Art. 22B.

Principal Defender¹⁶ with requisite staff complement to ensure the rights of accused persons or others that may require legal assistance.

The above structure of the Court shows the enormity of the African Union's ambitious judicial project. It is in the interest of the African Union that this judicial project is realized if it should be taken seriously in fully implementing the noble aspirations contained in the AU Constitutive Act. The fact that the African Court of Justice was not operationalized despite the entry into force of the Protocol on the ACJ¹⁷ adopted pursuant to Article 18 of the Constitutive Act – due to the *Merger Project*, calls for a meaningful engagement and credible efforts to bring the Malabo Protocol into force.

3. ADOPTING THE MALABO PROTOCOL WITHOUT COST IMPLICATIONS

Some may, for argument sake, contend that it was imprudent on the part of the African Union to adopt the Malabo Protocol without first ascertaining the cost implications of implementing the objectives and provisions of the Protocol, which was mainly to extend the jurisdiction of the merged African Court of Justice and Human Rights to include international crimes. The same argument could be made regarding any other treaty negotiated by the African Union or any other interstate institution such as the United Nations (UN) or other regional organizations. It is not usually very easy to fully appreciate the cost implications of adopting any international agreement before such an agreement is adopted. Where such a forwarding financial thinking exists, it will no doubt make life very easy for the eventual implementation of the objectives of an intended treaty. This author would, however, think that the paramount issue would be whether there is a strong collective will to undertake a particular objective through the adoption of a treaty or an international agreement. The crystallization of that objective through the actual adoption of the treaty should provide the impetus for working out the cost implication of its implementation within the timeline of preparation for its entry into force.

In the case of the Malabo Protocol, this is even more so applicable. It needs recalling that the implementation of the Protocol on the Court of Justice of the African Union despite its entry into force, was aborted by the *Merger*

¹⁶ *Id.*, Art. 22C.

¹⁷ Protocol of the Court of Justice of the African Union; adopted in Maputo, Mozambique, on 11 July 2003. The Protocol entered into force on 11 February 2009, having garnered the required 15 ratifications. As at February 2018, there are 18 ratifications. See List of Countries which have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the African Union.

Project leading to the adoption of the Merger Protocol, which also is yet to enter into force¹⁸ and which also had its own structures. During preparations for the adoption of the Malabo Protocol that eventually brought everything together, there was an attempt to evaluate the final implication of its implementation. When the Protocol was presented during the AU Summit of January 2013, it was not decided upon by the AU Assembly. The Executive Council, which normally prepared for the meeting of the Assembly rather decided that a report on the financial and structural implications of adopting the Protocol, among other issues, should be prepared and reported on at the following midyear Summit.¹⁹ The eventual adoption of the Protocol in Malabo in July of 2014 was not faced with the same fate of first elucidating on the financial and structural implications before it was adopted. The urgency of adopting the Protocol in the face of the increasing strong concerns of the African Union Assembly about the activities of the International Criminal Court (ICC) in Africa would have primarily worked on the minds of the Assembly in this regard. This author who had become Legal Counsel of the African Union during the period in November 2013, was also of the opinion that it would not be very helpful to hurry a report on the structural and financial implications of the Protocol before its adoption. The reason was simple; it was necessary that the report on the financial implications should be well informed by a thorough study between the adoption of the Protocol and its entry into force based on the finally adopted Protocol. I was of the view that an initial assessment hurriedly put together by a Consultant was not thorough enough and could not have taken adequate account of the Protocol that eventually emerged having regard to the composite character of the Court and available best practices. It mainly focused on the financial implications of extending criminal jurisdiction to the existing ACtHPR.²⁰ In terms of the structural implications of the Court, the court's structure is now very clear based on its organic composition from which a clear assessment of personnel and resource needs could be made taking into account international courts of a similar nature.

¹⁸ The Merger Protocol has only 6 ratifications as at February 2016 (Benin, Burkina Faso, Congo, Liberia, Libya and Mali) out of the 15 ratifications required by Article 9. See Ratification Status List available <https://au.int/en/treaties> (last visited 18 February 2018).

¹⁹ See Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Doc. EX.CL/Dec.766(XXII); Doc. PRC/Rpt (XXV)), p. 1, para. 2; also cited in Nmehielle, note 4 at 41.

²⁰ See *Report on the Final and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes*, EX.CL/773(XXII) Annex II, 1–7.

While awaiting the ratification and entry into force of the Malabo Protocol, it is now vital for a comprehensive study on the financial implications of the ACJHPR to be undertaken where an evaluation of the resource needs of the various sections of the Court would be made. That study will now benefit from an adopted Protocol, whose structure is set. Thus, the General, Human Rights and International Crimes Sections as the fused components of the Court would be thoroughly examined to ensure effective resource allocation. This is even more important now that the African Union has launched its reform agenda with a strong focus on effectively and adequately financing the African Union. At its Twenty-Seventh Ordinary Summit in Kigali, Rwanda in 2016, the AU Assembly took a Decision to finance the African Union 'in a predictable, sustainable, equitable and accountable manner with the full ownership by its Member States'.²¹ The Decision created a new mechanism for funding the African Union – instituting and implementing '0.2 percent Levy on all eligible imported goods into the Continent to finance the African Union Operational, Program and Peace Support Operations Budgets starting from the year 2017'.²² A committee of African Union Ministers of Finance made up of ten ministers, two from each AU region (referred to as the F10) is charged with working out the implementation of the 0.2 per cent levy to ensure adequate and sustainable funding of the African Union by being involved in the budgetary process.²³ This reform of the AU is led by President Paul Kagame of Rwanda who recently became the Chairperson of the AU Assembly. President Kagame presented his report to the AU Assembly in January 2017.²⁴

There is no doubt that the reform of the African Union, particularly the way it is funded has implications for the financing of the judicial arm of the African Union – the ACJHPR, and in a more sustainable manner. It becomes imperative for AU policy makers to look at Financing the Union in a very holistic way that pays deliberate attention to the Court in the same manner as it does to peace support operations within the renewed emphasis on the 'Peace Fund', which the Assembly financing Decision recognizes as having 'three (3) thematic windows, namely Mediation and Preventive Diplomacy; Institutional

²¹ Decision on the Outcome of the Retreat of the Assembly of the African Union, Assembly/AU/Dec.605 (XXVII), 1–2, at 1.

²² *Id.*

²³ *Id.* at 2.

²⁴ See H.E. Paul Kagame, *The Imperative to Strengthen our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union*, Presented to the African Union Assembly on 29 January 2017. On file with this author and also available at <https://au.int/en/au-reform> (last visited on 18 February 2018).

Capacity; and Peace Support Operations²⁵ The *Merger Project* is a huge initiative and must be realized. It will involve enormous resources, which resources need to be available based on a deliberate, proper and systematic planning. The question then is how does the AU assess such resource requirements to sustainably finance the Court? In this regard, there is need for a systematic evaluation of what the composite Court involves. This will bring out a clear picture of the various compartments of the Court from where a sense of the resource requirements could be established.

4. THEMATIC OVERVIEW OF THE ACJHPR'S STRUCTURE FROM A RESOURCE IMPLICATIONS PERSPECTIVE

While I continue to emphasize that the ACJHPR is a single Court, it is indeed a composite court that literally combines three courts together – the initially planned Court of Justice of the African Union, the currently existing African Court on Human and Peoples' Rights, and the Malabo Protocol's creation – the International Criminal arm. An appreciation of this composite nature of the Court will be very helpful in evaluating the resource needs of the Court because of the diverse expertise needed for the Court to fully perform its role and to achieve its mandate. It will thus be useful to examine the organs of the Court and each of the Sections and juxtapose them against what may be required in its sustainable financing.

A. *The Presidency*

The Presidency is the organ that represents the judicial and political leadership of the Court and generally oversees the strategic operation of the Court. It oversees the judges of the Court. It is a collective of the judges of all the Sections of the Court – the General Affairs, Human Rights and International Criminal Law Sections. The Court when fully constituted will be made up of 16 Judges elected by the African Union Assembly from its five AU Regions who would serve for a single term of nine years.²⁶ In the configuration of the Court and based on how the Judges are elected, the General Affairs and Human Sections will be composed of five (5) Judges each while the International Criminal Law Section will have six (6) Judges²⁷. The

²⁵ Assembly/AU/Dec.605 (XXVII), supra note 21 at 2.

²⁶ See the St. of the African Court of Justice and Human Rights, Art. 3 as amended by Art. 2 of the St. of the St. of the African Court of Justice and Human and Peoples' Rights.

²⁷ See Id., Art. 6(1) as amended by Art. 4 of the St. of the Statute of the African Court of Justice and Human and Peoples' Rights.

Presidency will be led by the President of the Court who together with the Vice President will be elected by all the judges for a term of two years renewable once.²⁸ Of the 16 Judges of the Court, only the President and the Vice President would initially serve full-time.²⁹ It is envisaged that all the Judges of the Court could serve on a full-time basis but at such a time that would be determined by the AU Assembly based on the Court's recommendation.³⁰

From a resource perspective, it means that, taking into account Article 23 of the Protocol on the Statute of the African Court of Justice and Human Rights on the remuneration of the Judges, provisions have to be made for the Presidency in a manner that firstly takes into account the salaries or allowances of the Judges for the initial period where they are largely expected to serve on a part-time basis except for the President and the Vice President who would always serve full-time and also envisaging the resource needs for when all the judges would be required to serve full-time. There is no doubt that the caseload of the Court, among other considerations, would determine whether the Court continues to function on a part-time basis over a long term or a much shorter period in terms of the salaries and allowances of the Judges. If the experience of the currently existing African Court on Human and Peoples' Rights is anything to go by, it can provide some lessons for the future.³¹ Only the President of the Human Rights Courts serves on a full-time basis and in just 12 years of its existence, the caseload and other activities of the Court have increased tremendously. In 2016 alone the Court received 59 cases and 2 advisory opinion requests³². Effectively delivering on its judicial mandate and timely so, may be impacted by the part-time nature of the Judges' work, as they are also generally involved in other occupations. Secondly, the Presidency would require formidable administrative support befitting of its role and mandate. The 16 Judges will require competent legal officers, assistants and secretaries, among other essential personnel. Such support staff complement for the Presidency must be clearly assessed taking into account the various

²⁸ See the St. of the African Court of Justice and Human and Peoples' Rights, Art. 22.

²⁹ See the St. of the African Court of Justice and Human Rights, Art. 8(4) as amended by the St. of the African Court of Justice and Human and Peoples' Rights, Art. 5.

³⁰ Id., Art. 8(5) as amended by the St. of the African Court of Justice and Human and Peoples' Rights, Art. 5.

³¹ See generally V.O. Nmehielle, 'Seven Years in Business: Evaluating Developments at the African Court on Human and Peoples' Rights' 17 *Law, Democracy and Development* (LDD) 317–41 (2013).

³² See 2016 Activity Report of the African Court on Human and Peoples' Rights, EX.CL/999 (XXX), 1–24, at 19, para. 47.

stages of the Court's development. Extrapolating from the currently existing Human Rights Court would be helpful even though the current Human Rights Court is only made up of 11 Judges, five Judges shy of the 16 required for the ACJHPR.

B. *The Registry*

In the workings of a judicial institution such as a Court, the Registry is literally the engine room where the administrative functioning of the Court is overseen. Without an effectively equipped and functioning Registry it will be very difficult for a court to deliver on its mandate. For the ACJHPR, the Registry is a vital organ of the Court. Article 22B (1) of the Statute of the ACHPR provides for a Registrar to lead the Registry supported by three Assistant Registrars. It is no coincidence that the Statute makes provision for three Assistant Registrars within the Registry. The three distinct Sections of the Court that have various jurisdictional mandates will surely require jurisdiction-specific attention in the way the Registry functions. The General Affairs Section, which is mainly a civil jurisdiction arm of the Court would require registry expertise in civil processes thus requiring an Assistant Registrar to oversee that arm. In the same vein, the Human Rights Section would need an Assistant Registrar to manage the human rights processes of the Court in the same way that the International Criminal law Section would require an Assistant Registrar versed in criminal processes. The Registrar would serve for a single term of seven (7) years while the Assistant Registrars would for a term of four (4) years renewable once.

Because of the importance of the Registry to the holistic administrative operations of the Court, it is important to properly assess its resource needs. There will be such departments or units within the Registry that are a *sine qua non* to a composite Court in the nature of the ACJHPR. Apart from the immediate office of the Registrar, there is the larger administrative services department that will be responsible for general recruitment/human resources, finance and budget, facility maintenance, procurement and the like. There will also be the language services department that will be responsible for ensuring translation of documents and the interpretation of proceedings in the various working languages of the African Union. The importance attached to a judicial process that makes for effective participation by litigants or respondents from various legal and language traditions cannot be over-emphasized. There will also be a witness and evidence unit or department that would further be arranged in terms of the civil, Human Rights and criminal dimensions of the Court. This will require a Victims and Witness

Unit as well as a Detention Management Unit to specifically account for the international criminal law requirements of the Malabo Protocol³³.

The various components of the Registry highlighted above require enormous resources that must be deliberately put in place for a credible ACJHPR to exist and to be taken seriously. It is therefore very important that AU policy makers pay attention to the detail. The detail from the beginning is important for a sustainable financing model to be arrived and applied over the years taking into account the stage of the Court in terms of its caseload and other activities over time.

C. Office of the Prosecutor

The extension of the jurisdiction of the African Court of Justice and Human Rights to international crimes that led to the adoption of the Malabo Protocol effectively created an international criminal tribunal of the African Union. In contemporary international criminal adjudication, enormous resources are required to run such courts. Article 22A of the Malabo Protocol provides for the Office of the Prosecutor which is composed of a Prosecutor and two Deputy Prosecutors who would all be elected by the Assembly of the African Union.³⁴ The Prosecutor's term of office will be one term of seven (7) years while the terms of office of the Deputy Prosecutors will be for four (4) years each, renewable only one.³⁵ The Statute vests the Office of the Prosecutor with the responsibility to prosecute and investigate the proscribed crimes.³⁶ The Statute requires the Prosecutor to be assisted by such staff as are necessary for the effective and efficient discharge of the mandate and responsibility of the office.³⁷

For the ACJHPR to be a credible Court from the perspective of its criminal justice mandate, it must be equipped to deliver quality justice through the efficiency of its prosecutorial arm. The ability of the Office of the Prosecutor to do this is dependent on how it is resourced on two fronts – its investigative and prosecution mandates. It is in this regard that the Prosecutor is assisted by two Deputy Prosecutors – one to oversee investigations and the other the prosecution. The experience of the United Nations-backed Special Court for Sierra Leone (SCSL)³⁸, the United Nations International Criminal Tribunal

³³ See St. of the African Court of Justice and Human and Peoples' Rights, Art. 22(9) (a) and (b).

³⁴ Id., Art. 22(A) (1) and (2).

³⁵ Id., Art. 22(A) (3) and (4).

³⁶ Id., Art. 22(A) (6).

³⁷ Id., Art. 22(A) (7).

³⁸ The SCSL was established by 'An Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone' pursuant to United Nations Security Resolution 1315 of 14 August 2000.

for Rwanda (ICTR)³⁹, the United Nations International Criminal Tribunal for Yugoslavia (ICTY)⁴⁰, the International Criminal Court (ICC)⁴¹, the Special Tribunal for Lebanon (STL), and most recently, the Extraordinary African Chambers (EACs)⁴², clearly shows that the work of the prosecutor is dependent on robust investigations and efficient prosecution of the alleged crimes. Apart from the general staffing and resources for the immediate or front office of the Prosecutor, ample resources will be required for properly equipping both the investigations and prosecutions departments. The number of staff as well as resources required for the various departments in the Office of the Prosecutor would of course be dependent on the stage of the Court's work, requiring a short-term and a long-term outlook. Thus, conscious preparations must be made to determine what would be need in the short, immediate and long terms for the office of the Prosecutor.

D. *The Defence Office*

A lot of emphasis is usually placed on the Prosecution of accused persons resulting in enormous resources being at the disposal of the Prosecutor with little attention paid to defence issues. The importance of ensuring the rights of accused persons in international criminal justice adjudication necessitated the need to interrogate the level of attention paid to those who undergo criminal trials in international justice mechanisms as envisaged in the Malabo Protocol. The initial main and substantive attention in this regard was the eventual creation of the Office of the Principal Defender of the Special Court for Sierra Leone, which I had referred to elsewhere as the watershed in international criminal justice adjudication.⁴³ The mandate of the SCSL Defence Office in

³⁹ The ICTR was created by UN Security Council Resolution 955 of 8 November 1994 in response to the Rwandan genocide of the same year.

⁴⁰ Pursuant to SC Res. 827, 25 May 1993, the United Nations Security Council established the ICTR for judicial accountability arising from the atrocities from the conflicts in former Yugoslavia.

⁴¹ The STL was established by an 'Agreement between the United Nations and the Lebanese Republic' pursuant to SC Res. 1757, 20 May 2007 to deal with terrorist activities that led to the killing of Prime Minister Rafiq Hariri among others.

⁴² The EACs were created pursuant to an 'Agreement between the Government of the Republic of Senegal and the African Union on the establishment of the Extraordinary African Chambers' signed on 22 August 2012. The agreement established the EACs within the judicial system of Senegal to for criminal accountability for international crimes committed in Chad from 7 June 1982 to 1 December 1990 when Hissene Habre was the president of Chad.

⁴³ See V.O. Nmehielle, 'The Defence Office of the Special Court for Sierra Leone: A Watershed in Realizing the Rights of Accused Persons International Criminal Justice' in Charles Chernor

accordance with Rule 45 of the Rules of Procedure and Evidence of the SCSL was to ensure 'the rights of suspects and accused' persons. That office carried out its mandate by providing initial advice, attending detention issues, providing legal assistance as may be ordered by the court, ensuring that facilities were made available to counsel for the defence of the accused, maintaining a roster of counsel that could be called upon to defend the accused and its personnel acting as duty counsel for the accused as me required, among various other things.⁴⁴ While the SCSL may have blazed the trail in flagging the importance of defence issues in international criminal justice, its Defence Office was not independent but subject to the administrative oversight of the Registrar of the Court. The ICC would later establish the office of the Principal Counsel for the Defence in the mould of the Principal Defender of the SCSL. It is the Special Tribunal for Lebanon that established a fully independent Defence Office as an Organ⁴⁵ within the principle of equality of arms between the Prosecution and the Defence.

The Malabo Protocol has followed in the footsteps of the STL to make the Defence Office of the ACJHPR an Organ of the Court.⁴⁶ Article 22(C) of the amended Statute of the ACJHPR establishes the Defence Office as an independent Organ under the oversight of the Principal Defender, who would be appointed by the Assembly of the African Union. He or she would be assisted by such staff members as are required to enable the office to effectively and efficiently deliver on its mandate.⁴⁷ As envisaged in the Statute of the of the ACJHPR, the Defence Office, just like other Organs of the Court would require enormous human and other resources to be able to fulfil its mandate of watching over the rights of accused persons including acting as public defender for indigent accused persons or such accused persons that the interest of justice would require the provision of legal assistance. There is nowhere else that the functions of the Defence Office would be more useful than in Africa where the average accused person is generally indigent requiring the need for elaborate legal assistance. In operationalizing the ACJHPR, attention must be paid to fully resourcing the Defence Office, as it is expected to play a vital role right from the beginning of the process in the same way as the Prosecution.

Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge: Cambridge University Press, 2013) 527–49.

⁴⁴ See Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 45(A)–(F).

⁴⁵ See St. of the Special Tribunal for Lebanon, Arts. 7 and 13.

⁴⁶ See The Malabo Protocol, Art. 2.

⁴⁷ See St. of the African Court of Justice and Human and Peoples Rights, Art. 22(C) (1)–(8).

The organic structure of the ACJHPR as described above is indicative of what operationalizing the Court involves and should inform what resource measures to put in place to have a credible court. For the African Union to be able to do this, it must evaluate the Court's resource needs in the context of what the Court is expected to do, drawing lessons from what has been done elsewhere. In this regard, it may be important to look at the Court, though a single court, from its composite nature of three courts fused into one. From this perspective, it could be said that the General Affairs Section of the Court is a mini International Court of Justice (ICJ); the Human Rights Section, a mini Human Rights Court; and the International Criminal Law Section, a mini International Criminal Court. It is thus important to study and draw lessons from similar endeavours for indicative resource needs and how that could be sustained.

5. RESOURCE NEEDS AND APPLICABLE LESSONS

Sustainably providing for the ACJHPR is a huge endeavour and requires a deliberate effort on the part of the African Union. The continental organization must draw lessons from similar institutions such as the ICJ, the SCSL, the ICTR and the ACtHPR, to name a few. The ICJ was operationalized in 1947 as the principal judicial organ of the United Nations. It is composed of 15 judges and has more or less a general affairs jurisdiction with no Human Rights and international criminal justice jurisdictions as envisaged under the ACJHPR. Structurally, it has a Presidency and a Registry. In the almost 71 years of its existence, the ICJ had had only 168 cases listed in its General List.⁴⁸ The two-yearly budget of the ICJ for 2016 to 2017 was \$ 52,543,900⁴⁹ and that of 2018 to 2019 is \$46,963,700⁵⁰. There is no doubt that the ICJ has had limited judicial work compared to regional courts of a similar nature. It is generally funded within the United Nations system and thus through the regular general member states assessment.⁵¹ Funding the ICJ through member states assessment ensures stability in the ability of the Court to function and to carry out its mandate.

The SCSL as an international criminal justice mechanism only dealt with international crimes. It had a somewhat similar structure as the International

⁴⁸ See www.icj-cij.org/en/cases (last visited 3 March 2018).

⁴⁹ See Report of the International Court of Justice 1 August 2015 to 31 July 2016, at 10.

⁵⁰ See Report of the International Court of Justice 1 August 2016 to 31 July 2017, at 10.

⁵¹ According to Article 33 of the Statute of the International Court of Justice, 'The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly'.

Criminal Law Section of the ACJHPR. While it dealt with and convicted only ten persons, its average annual budget was not low. As I have observed elsewhere, 'As small as the SCSL operation was relative to the other [international criminal] tribunals, its annual budget averaged between 26 and 30 million dollars'⁵² It is important to note that the funding of the SCSL was based on voluntary contributions – a not so good way of funding or sustaining any judicial or justice mechanism. The voluntary nature of funding the SCSL created an unhealthy anxiety from time to time regarding whether or not the Court would have adequate resources to continue to carry out its mandate.

The ICTR was the most significant international criminal justice mechanism to have operated on the African continent. As a mechanism designed to ensure legal accountability for the atrocities arising from the Rwandan genocidal war, it received enormous support having been established pursuant to a United Nations Security Council Resolution.⁵³ The ICTR indicted 93 individuals of which 62 were convicted and sentenced.⁵⁴ The Tribunal as an *ad hoc* measure operated for a period of over twenty years from 1994 to 2015 when it officially wound up and entered into a residual mechanism and it had an army of professional and general service staff. The proposed budget of the ICTR for the period 2004–2005 was \$251.4 million,⁵⁵ which meant that the resources required for the functioning of the Court from its inception to when it formally wound up and entered into a residual mechanism phase was quite enormous.

The experience of the currently existing ACtHPR is very instructive in deciphering the resource requirements of the ACJHPR. In its 12 years of existence, the Human Rights Court has received 161 applications or cases⁵⁶. The total 2016 budget of the present Human Rights Court stood at USD 10,386.101.⁵⁷ Seventy-Six percent of the said budget, representing USD 7,934,615, is from the assessed contributions of member states of the African Union while 24 per cent of the budget in the amount of USD 2,451.486 came from 'international partners'⁵⁸. This budget outlay needs to be considered

⁵² Nmehielle, note 4, at 35.

⁵³ UNSC Res. 955 of 8 November 1994.

⁵⁴ See United Nations Mechanism for International Criminal Tribunals' website – <http://unict.r.unmict.org/en/tribunal> (Last visited 4 March 2018).

⁵⁵ UN General Assembly Fifth Committee Press Release, GA/AB/3594, 24 November 2003 available at www.un.org/press/en/2003/gaab3594.doc.htm (last visited 4 March 2018).

⁵⁶ ACtHPR, Press Release – African Court on Human and Peoples' Rights begins 48th Ordinary Session, Arusha 23 February 2018.

⁵⁷ 2016 Activity Report of the African Court on Human and Peoples' Rights, *supra* note 32 at 16.

⁵⁸ *Id.*

within the context of the present characteristics of the ACtHPR as purely a part-time court that deals with Human Rights cases without the complexities inherent in criminal prosecutions of international crimes, or complex international civil claims between member states as could be envisaged in the International Criminal Law and General Affairs Sections of the ACJHPR, respectively.

The above overview of lessons from various judicial mechanisms provides a glimpse into what it may take to adequately resource the ACJHPR if it is to fulfil its mandate as a credible judicial arm of the African Union. It must be a court that should remain financially sustainable and fully financed by the resources of the African Union. How this could be done is the focus of the next section of this chapter, taking the current AU reform agenda into account.

6. SUSTAINABLY FINANCING THE ACJHPR

As an institution that fuses three jurisdictional and legal competencies into one operation, the ACJHPR must be provided with adequate financial and human resources that are competitive, and sustainably so. The Court would complete the organic structure of the African Union as one of the most vital and permanent organs of the Union. It is not therefore, a body that is envisaged to fizzle out soon; in fact not at all. It thus becomes important that in the current mood of an AU reform as an organization that needs to take the financing of the Union much more seriously, the sustainable financing of the ACJHPR should occupy a central place in AU fiscal arrangements. Within this reform and under the funding mechanism envisaged in the AU 0.2 per cent levy on eligible imported goods into the continent, the AU must deliberately address the funding of its judicial arm in a forward looking manner. This it could do in three ways – through a regular budget, an endowment or a trust fund, and voluntary contributions from member states and willing partners. A regular budget would provide for the functioning of the Court based on predictable judicial and other activities from year to year from a predictable member states assessed contributions. A trust fund or an endowment fund would provide a reliable and sustainable source of funding for the future through proper investment channels. This would ensure that the court is placed in a position where it can be sure of its financial stability knowing the volatility of African economies that are dependent on commodities. This will enable the Court to continue to adequately function in circumstances of unforeseen financial drought. Voluntary contributions on the other hand, would assist the court to deal with ad hoc projects or activities, or enable it

to bring on board short-term expertise that it may require to enhance its capacity from time to time.

It is envisaged that the new AU funding formula, if truly and fully implemented, would result in the Union generating more resources than it may immediately need or require. The situation where, in applying the 0.2 per cent import levy, member states would have the prerogative to keep for their domestic needs proceeds that are over and above their assessed contributions⁵⁹, should be rethought. Those surpluses should be the source for the seed money for the endowment or trust fund for the Court.

The AU reform agenda provides an unmatched opportunity for the Union to really address how its institutions are funded. To ensure adequate financial accountability and to match the needs of those institutions with essential resources - particularly as it affects the ACJHPR, the AU must take a needed proactive step. As discussed earlier, it is essential to evaluate through a comprehensive study, the resource needs and requirements of the ACJHPR among other AU organs. This study should analyze the Malabo Protocol in terms of the structure of the Court and the resources for the optimal functioning of each of the structures – the sectional aspects of the Court – the General Affairs Section, the Human Rights Section and the International Criminal Law Section. In the same vein, the study should look at the organic structure – the Presidency, the Registry, the Office of the Prosecutor and the Defence Office. A clear assessment of resource needs that is specifically and holistically made, will provide a chance for getting it right in the sustainable financing of the ACJHPR.

It must not be business as usual where haphazard provisions are made for African Unions institutions without adequately thinking and really being alive to the needed resource requirements. For the ACJHPR, the significance of the situation cannot be overstressed – without the operationalization of the mechanism under the Malabo Protocol, a reputable and holistic judicial arm of the African Union will remain lacking. I would not want to imagine a United Nations without the International Court of Justice to articulate and interpret the norms established over the years by the United Nations systems when the need arises. Thus, an African Union without the operationalization of its judicial mechanism that is envisaged in its Constitutive Act for a continuously

⁵⁹ According to the implementation discussions on the 0.2 per cent levy, 'Any surplus collected by Member States after the fulfillment of obligations under the assessed contribution are to be retained by the State . . .' See *Financing of the Union by Africa for Africa* (a Summary Note on the financing reform on file with the author) at 7.

long period does not support the ideals that resulted in the transformation of the Organization of African Unity to the African Union.

7. CONCLUSION

Indeed, the adoption of the Malabo Protocol in 2014 was the ultimate streamlining of African Union's judicial institutions that innovated the fusion of what could ordinarily stand as three separate courts – a Court of Justice of general jurisdiction, a Human Rights Court and an International Criminal Tribunal into a single judicial institution - the African Court of Justice and Human and Peoples' Rights. The adoption of the Protocol was one thing; in fact, the simplest thing - all things considered; but operationalizing the Court that the Protocol created remains the most difficult. And the Court must be operationalized, as the AU cannot afford not to have a respectable judicial entity that should be relied on to resolve legal disputes within the African Union system. That is the significance of the ACJHPR. The need to operationalize the Court therefore must evoke serious thinking and concrete action on the financial sustainability of the institution, which has been the preoccupation of this chapter. Granted that there was no concerted effort to fully assess the financial implications of adopting the Malabo Protocol before it was adopted, this chapter sees it as a blessing in disguise, as it would have been nearly impossible to clearly articulate what would or would not be adopted by the AU Assembly at the time. Now that the Protocol has been adopted with clear organic structures and opened for ratification, it presents an opportunity for the AU to proactively take the next step to make the financial sustainability of the Court a cardinal point of emphasis and action. The chapter sees the current reform embarked upon by the AU on how its institutions are financed as the greatest singular opportunity in this regard. The strong resolve of the African Union to take its financial future into its own hands rather than overly relying on international partners to fund its programmes and institutions could not have come at a better time. The 2016 Kigali decision by the AU to impose 0.2 per cent import levy on eligible imports into the continent as way for member states to support the financing of AU institutions rather than from state treasury has the potential of making the AU financially sustainable. In this effort, the Court must therefore be prioritized, as the fused judicial institution would require enormous and sustainable resources to be able to fulfil its mandate. To get it right, the AU must take steps to embark on a post Malabo Protocol adoption study on the comprehensive resource needs of the Court so as to be able to place

its financial requirements within the 0.2 per cent import levy financing mechanism just like the AU peace support operations. A concerted effort in this regard would ensure sustained financing for the Court through a regular budget from assessed contributions, an endowment or trust fund from surpluses as well as through voluntary contributions from partners to cater for ad hoc or short-term requirements of the Court.