

Financing the Court

a. Description of relevant provisions of the Malabo Protocol

The Malabo Protocol does not make any changes to the Merger Protocol's provisions on the budget of the African Court. Under the Merger Protocol, the budget of the African Court shall be borne by the African Union as a whole, rather than by Member States of the Court.¹ The Court will be required to submit annual budgets to the Assembly of the African Union for approval and funding.² The Court also will be required to submit regular reports on the execution of its budget, in conformity with the AU's Financial Rules and Regulations, to ensure that the budget is properly used and accounted for.³

For ease of reference, the exact language of the relevant sections, as amended by the Malabo Protocol, is provided below:

Article 26 of the Statute Budget

1. The Court shall prepare its draft annual budget and shall submit it to the Assembly through the Executive Council.
2. The budget of the Court shall be borne by the African Union.
3. The Court shall be accountable for the execution of its budget and shall submit report thereon to the Executive Council in conformity with the Financial Rules and Regulations of the African Union.

b. Analysis

Questions about how the expanded African Court will be funded are among the most pressing issues still to be resolved. The Statute of the Court states only that the budget shall be borne by the African Union, based on a draft annual budget submitted to the AU Assembly for approval.⁴ Yet many have expressed concern whether the AU will have adequate resources to dedicate to the expanded African Court.⁵ In the past, the OAU and AU struggled to adequately fund human rights

¹ AU, Protocol on the Statute of the African Court of Justice and Human Rights, annex art. 26 (July 1, 2008) [hereinafter Merger Protocol], <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>.

² *Id.*

³ *Id.*

⁴ *Id.* at annex art. 26. In fact, the Merger Protocol does not explicitly state that the Assembly must approve the Court's budget, or whether the Assembly may revise the draft budget before approval. *See id.* Nevertheless, this plainly appears to have been the intention of the drafters, since the budget that is submitted to the Assembly is only a "draft." The implication of this provision is that the budget becomes final only upon review and approval of the Assembly, the body to which the draft is submitted.

⁵ E.g., Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* 34 (2016), at 30; Vincent O. Nmehielle, *Saddling the New African Regional Human Rights Court with*

mechanisms in Africa, including both the African Commission and the African Court.⁶ Indeed, one of the original rationales for merging the African Court of Human Rights and the African Court of Justice was based on the need to minimize expenses.⁷ This history raises legitimate questions as to whether the AU is capable of supporting an expanded African Court and precisely how much additional funding will be necessary.

The AU is well aware of these concerns. In 2012, while considering a draft of the Malabo Protocol, the AU Assembly asked the AU Commission to prepare a study on the financial implications of the expanded African Court.⁸ Preliminary assessments of the Court's financial needs were undertaken, but as former AU Legal Counsel Vincent Nmeielle has explained, a full assessment could not be conducted until the Malabo Protocol was adopted and the exact composition of the expanded African Court became clear.⁹ The following sections seek to briefly review the various kinds of costs that will be incurred in the operation of the expanded African Court and some potential funding mechanisms for the Court.

i. How much funding will the expanded African Court require?

In 2017, the budget of the African Court on Human and Peoples' Rights was \$10.3 million, of which 84% came from AU Member States and 16% from international partners.¹⁰ By any measure, however, it will not be possible to run the expanded African Court with the budget of the current court. The expanded African Court will require significantly more personnel to staff its larger structure, which includes two additional judicial sections, new prosecution and defense offices,

International Criminal Jurisdiction: Innovative, Obstructive, Expedient, 8 AFRICAN JOURNAL OF LEGAL STUDIES 24 (2014), at 35-36; Frans Viljoen, *AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol*, AFRICLAW (May 23, 2012), <https://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>; Ademola Abass, *Historical and Political Background to the Malabo Protocol*, in GERHARD WERLE & MORITZ VORMBAUM, *THE AFRICAN CRIMINAL COURT* 11, 22 (2017), at 24; Ademola Abass, *The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects*, NETHERLANDS INTERNATIONAL LAW REVIEW 27, 45 (2013), at 944, http://collections.unu.edu/eserv/UNU:9/NILR_2013-1_Abass.pdf.

⁶ For example, the current African Court has described the “uncertainty regarding the availability of funds” as having “delayed the recruitment of new staff and adversely impacted on the Court’s ability to effectively discharge its mandate.” AU, Executive Council, 2016 Activity Report of the African Court on Human and Peoples’ Rights, ¶ 58 (Jan. 2017), http://en.african-court.org/images/Activity%20Reports/AfCHPR_Activity_Report_2016_E.pdf. The African Commission has likewise commented on its “insufficient funding,” which it has described as impeding the Commission’s capacity to follow-up on implementation of its decisions and missions. African Union, 42nd Annual Report of the African Commission on Human and Peoples’ Rights, ¶ 45, http://www.achpr.org/files/activity-reports/42/42nd_activity_report_eng.pdf. See also Max du Plessis, *A court not found*, 7 AFRICAN HUMAN RIGHTS LAW JOURNAL 522 (2007).

⁷ A merged court, it was suggested, would increase financial efficiency by eliminating the duplication of resources, such as the need for separate court libraries and separate court registrars. Viljoen, *supra* note 5; Nmeielle, *Saddling the New African Regional Human Rights Court with International Jurisdiction*, *supra* note 5, at 9.

⁸ AU, Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Doc. Assembly/AU/Dec.427(XIX) (2012), [http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20427%20\(XIX\)%20_E.pdf](http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20427%20(XIX)%20_E.pdf).

⁹ Draft chapter by Vincent Nmeielle on the financing of the African Court of Justice and Human and Peoples’ Rights (on file with author).

¹⁰ AU, Activity Report of the African Court on Human and Peoples’ Rights 1 January – 31 December, 2017, ¶ 6 (Jan. 2018), Doc. EX.CL/1057(XXXII), at ¶ 27.

and new units for detention services and victims' services. In addition, the expanded African Court will require adequate financial resources to conduct criminal investigations and trials, which are notoriously costly.

To ensure that sufficient resources are made available to the expanded African Court, it is vital that the AU undertake a comprehensive study on the financial needs of the Court. Any such assessment should include:

- **The Presidency and Judicial Functions**, including an annual salary and benefits for the President and Vice-President, a sitting allowance for each day the other 14 judges exercise their functions, and travel expenses.¹¹ There may also be costs for retirement pensions.¹² If and when all of the judges take up their functions full-time—something that likely will become necessary once criminal trials begin—adequate funding will be necessary to cover their annual salaries and benefits as well.¹³ In addition to the costs related to the judges themselves, funding for judicial support staff must be accounted for, including legal officers, assistants, and secretaries, as well as court support personnel during criminal trials.
- **The Registry**, including salaries and benefits for the Registrar, three Assistant Registrars, and additional Registry staff, including administrative, accounting, IT and other staff necessary to ensure the day-to-day functioning of the Court.¹⁴ In addition, the Malabo Protocol requires the Registrar to create and staff a Victims and Witnesses Unit to provide “protective measure and security arrangements, counselling and other appropriate assistance” for victims and witnesses.¹⁵ It also requires the Registrar to set up and staff a Detention Management Unit to “manage the conditions of detention of suspects and accused persons.”¹⁶ Although the Malabo Protocol does not specify how many staff members are necessary for these new units, it is possible to form a rough estimate based on offices at other supra-national courts. For example, the ICC’s Detention Section had five staff in 2017.¹⁷ The ICC’s Victims and Witnesses Section had 63 staff,¹⁸ although this number was likely higher than the African Court would initially need since the ICC had at least three ongoing trials in 2017 that would have required substantial coordination with

¹¹ Merger Protocol, *supra* note 1, annex art. 23.

¹² *Id.*

¹³ AU, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 27, 2014) [hereinafter Malabo Protocol], annex art. 5 (replacing art. 8 of the Statute), <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>; Nmehielle, *Taking Credible Ownership of Justice for Atrocity Crimes in Africa*, *supra* note 680, at 241.

¹⁴ Malabo Protocol, *supra* note 13, annex art. 12 (adding art. 22B to the Statute).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ ICC, Assembly of States Parties, *Proposed Programme Budget for 2017 of the International Criminal Court* 154, Doc. No. ICC-ASP/15/10, (Aug. 17, 2016), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf.

¹⁸ *Id.* at 154.

and assistance to victims and witnesses.¹⁹ The ICTY, in its early years, had a staff of five, plus four assistants, in its equivalent victims' unit even as trials were ongoing.²⁰

- **Office of the Prosecutor**, including salaries and benefits for the Prosecutor and two Deputy Prosecutors, as well as sufficient legal, investigative, and forensic staff to conduct investigations, trials, and appeals.²¹ International criminal investigations often are significantly more costly than those at the national level because international crimes often take place over larger geographic areas and longer time periods; involve more victims and acts of greater cruelty; and/or are committed as part of an armed conflict, causing displacement of victims and witnesses that makes it harder and more time consuming to track them down.²² In addition, prosecutions of international crimes often focus not on the direct physical perpetrators, but rather on leaders (such as rebel leaders or company managers), inciters (such as radio broadcasters), and others with more complex responsibility for the crimes, requiring additional factual research and legal argument to prove responsibility.²³ For example, the ICC's investigation into the CAR concerns the murder of over 1000 civilians and displacement of over 140,000, in addition to rape, sexual slavery, use of child soldiers, and other crimes committed over a period of years.²⁴ As a result of this complexity, investigations are lengthy and contain a multitude of evidence; the average ICC investigation, for example, takes three years, conducts over 150 witness interviews, and collects between 15,000 to 20,000 pieces of evidence.²⁵ Consistent with these figures, prosecutorial offices at international tribunals typically are large; the ICC, for example, had 239 prosecutorial staff in 2016 and proposed to increase that number to

¹⁹ See, e.g., ICC, Ongwen Case (trial began in Dec. 2016 and continued through 2017), <https://www.icc-cpi.int/uganda/ongwen>; International Justice Monitor, Laurent Koudou Gbagbo and Charles Blé Goudé (documenting proceedings in the case, including trial in 2017), <https://www.ijmonitor.org/category/laurent-koudou-gbagbo-charles-ble-goude/>; International Justice Monitor, Bosco Ntaganda (documenting proceedings in the case, including trial in 2017), <https://www.ijmonitor.org/category/bosco-ntaganda/>.

²⁰ UN General Assembly and Security Council, *Fourth Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. Doc. A/52/375-S/1997/729, ¶¶ 79-80, 93-94 (Sept. 18, 1997), http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1997_en.pdf.

²¹ Malabo Protocol, *supra* note 13, art. 12 (adding art. 22A to the Statute). As scholars have observed, much of the “high cost of international criminal prosecutions derives . . . from the excruciating evidentiary processes associated with criminal prosecutions,” including “comprehensive and expensive investigations [and] exhaustive examination of extensive materials.” Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 933, 942 (2013), at 944, <https://academic.oup.com/ejil/article/24/3/933/481582>.

²² Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed? A Gravity-Based Approach*, 16 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 1, 3, 31-37 (2017), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1604&context=law_globalstudies. On average, investigations involved 20 to 30 crime sites. *Id.* at 33.

²³ See David Chuter, *The ICC*, in VINCENT O. NHEMELLE, AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 161, 174 (2012); Prosecutor v. Musema, Case No. ICTR-96-13-A, International Criminal Tribunal for Rwanda, Judgment and Sentence, ¶¶ 12, 925, 950 (Jan. 27, 2000) (finding tea factory manager responsible for both his own crimes and the crimes of his employees), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict-96-13/trial-judgements/en/000127.pdf>.

²⁴ Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?*, *supra* note 22, at 26-27, 33.

²⁵ Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?*, *supra* note 22, at 50-53.

317 in 2017.²⁶ International criminal tribunals also have sections that “provide[] critical support functions” not mentioned in the Malabo Protocol, such as Language Services Units to provide interpretation and translation during investigations, Information and Evidence Units to control and preserve evidence, and others.²⁷ Sufficient funds for these investigations and legal processes will need to be made available if the African Court is to function effectively.

- **Defence Office**, including salaries and benefits for the Principal Defender and one or more public defenders.²⁸ Although the Malabo Protocol does not specify how many public defenders shall be on staff, estimates can be made by looking at other international criminal tribunals. The ICC’s Office of Public Counsel for the Defence, for example, has a similar mandate and was staffed with five personnel in 2017.²⁹ At its height, the ICTR had up to 90 defence counsel for indigent defendants.³⁰
- **Facilities.** The African Court will need expanded facilities for the additional offices, units, and personnel envisaged by the Malabo Protocol, including, for example, five new judges, the Office of the Prosecutor, the Defence Office, the Detention Management Unit, and the Victims and Witnesses Unit. These offices and personnel also will require additional furniture, equipment, and supplies. The addition of two new jurisdictions – the General Affairs Section and the International Criminal Law Section – also will result in a need for added courtroom space. In particular, courtrooms for the International Criminal Section will need to have adequate facilities for international trials, such as space for prosecution and defense counsel, the defendant, witnesses, translators, the media, and members of the public. In addition, the African Court will require the establishment and management of detention facilities near the Court, although it may be possible to reduce or eliminate the initial establishment (but not management) costs by using the pre-existing detention facilities of the former ICTR.
- **Trust Fund.** Finally, the Malabo Protocol includes a provision regarding the establishment of a Trust Fund for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families.³¹ The AU already has adopted a Statute on the Establishment of a Legal Aid Fund to provide assistance to indigent human rights petitioners,³² which could be modified to include funds for both criminal and human rights cases.

²⁶ *Proposed Programme Budget for 2017 of the International Criminal Court*, *supra* note 17, at 51.

²⁷ *Id.* at 56.

²⁸ Malabo Protocol, *supra* note 13, art. 12 (adding art. 22C to the Statute).

²⁹ *Proposed Programme Budget for 2017 of the International Criminal Court*, *supra* note 17, at 158.

³⁰ UN General Assembly, *Eighth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994*, ¶ 77 (July 11, 2003), <http://unictr.unmict.org/sites/unictr.org/files/legal-library/030711-annual-report-en.pdf>.

³¹ Malabo Protocol, *supra* note 13, art. 22 (adding art. 46M to the Statute).

³² 2016 Activity Report of the African Court on Human and Peoples’ Rights, *supra* note 6, ¶ 44.

Initial assessments of the funding required for an expanded African Court did not account for all of these expenses.³³ For example, a budget prepared in 2012 estimated a necessary budget of just over \$4 million, but did not include:

- the cost of judges;
- the cost for a Defence Office;
- sufficient prosecutorial investigators (just five were budgeted);
- support staff for investigations and prosecutions (such as legal assistants and case managers);
- sufficient staff in the Victims and Witnesses Unit (just one was budgeted);
- costs for increased facilities, furniture, and equipment; and
- detention related costs.

It appears likely that this budget, which is entitled “Rough Tabulation of Minimum Staff Requirements at the Outset” was meant to encompass only the costs to start the International Criminal Law Section, and not of the full court. Even then, however, it is unclear why there are no costs for judges (since the current court has only 11 judges, not 15), a Defence Office, or increased facilities and equipment. Moreover, such a budget would become obsolete once investigations and trials are underway. For planning purposes, it would be better to forecast the Court’s needs when the International Criminal Law Section is fully functional so that the AU can begin to identify the necessary resources.

While a full assessment is necessary to get a precise estimate of the funds necessary for the operations of the expanded African Court, a rough idea can be gleaned from the budgets of similar international courts. The ICTY, for example, had a budget of almost \$40 million in 1996, even as it conducted three trials.³⁴ Similarly, the SCSL had an annual budget of \$36 million at the height of its operations.³⁵ Both of these budgets were years ago, however, so it may be prudent to expect that the International Criminal Law Section alone could require a budget of between \$30 and \$50 million annually once trials are underway.

³³ AU, Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, Appendix (Jan. 21-25, 2013) (on file with author).

³⁴ *Fourth Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, *supra* note 857, at ¶ 100. The budget of the ICTY later rose significantly, to more than \$100 million in 2001. U.N. General Assembly and Security Council, *Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. A/76/379-S/2002/985, ¶¶ 308-11 (Sept. 4, 2002), http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2002_en.pdf.

³⁵ Special Court for Sierra Leone, *Fifth Annual Report of the President of the Special Court for Sierra Leone*, 44 (2008), <http://www.rscsl.org/Documents/AnRpt5.pdf>.

ii. How will the expanded African Court be financed?

In light of the high cost of running a supra-national criminal tribunal, the cost of which is likely to dramatically exceed the current \$10.4 million budget of the African Court on Human and Peoples' Rights, it is reasonable to ask where the additional funding could come from. International courts have used a variety of funding mechanisms, including:

- **Member Assessments.** Member assessments, if paid regularly and in full, guarantee a stable funding source for supra-national institutions. Such assessments could be placed directly on the States Parties that have ratified the Malabo Protocol, or they could be taken out of the assessment placed on all members of the African Union. For example, the ICJ is funded through the assessments on all UN member states.³⁶ However, the AU has experienced significant challenges with member assessments. In 2016, for example, less than half of AU states paid their assessment in full, and 15 made no payment at all.³⁷
- **Import Levy.** In 2016, the African Union decided to adopt a 0.2% levy on eligible goods imported to the continent to ensure “predictable, sustainable, equitable and accountable” funding of the Union beginning in 2017.³⁸ At least 14 AU Member States already have begun collecting the levy, while several others have initiated the requisite domestic processes to do so in the near future.³⁹ It is expected that this levy will be used to cover member assessments in the future, thereby ensuring a predictable and sustainable source of funding for the entire Union, including the African Court.
- **Voluntary Contributions.** Some courts, such as the Special Court for Sierra Leone, were funded through voluntary contributions.⁴⁰ The instability of such funding, however, led to several financial crises during the Court's operation, requiring the SCSL to repeatedly seek subventions from the UN.⁴¹ Due to this instability, voluntary contributions should not be a preferred mechanism for funding of the African Court. Such contributions could, however, be a means of raising additional court funds for special projects and/or for creating a permanent court fund (discussed further below).

³⁶ Report of the International Court of Justice: 1 August 2016-31 July 2017, *supra* note 431, at ¶ 22 (budget request for two-year period of 2018 to 2019 was \$46.9 million, making the annual budget almost \$23.5 million).

³⁷ H.E. Paul Kagame, *The Imperative to Strengthen Our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union*, p. 13 (Jan. 29, 2017), <https://au.int/sites/default/files/pages/32777-file-report-20institutional20reform20of20the20au-2.pdf>.

³⁸ AU, Decision on the Outcome of the Retreat of the Assembly of the African Union, Doc. Assembly/AU/Dec.605(XXV) (July 17-18, 2016), https://au.int/sites/default/files/pages/31953-file-assembly_au_dec_605_financing_the_au.pdf.

³⁹ Philomena Apiko & Faten Aggad, *Analysis of the implementation of the African Union's 0.2% levy: Progress and Challenges*, p. 6 (Feb. 2018), <http://ecdpm.org/wp-content/uploads/BN98-Apiko-Aggad-November-2017.pdf>.

⁴⁰ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 6, 2178 U.N.T.S. 137 (Jan. 16, 2002), <https://treaties.un.org/doc/Publication/UNTS/Volume%202178/v2178.pdf>.

⁴¹ Special Court for Sierra Leone, Eleventh and Final Report of the President of the Special Court for Sierra Leone, 44 (2013), <http://www.rscsl.org/Documents/AnRpt11.pdf>.

- **Permanent Court Fund.** In its decision to impose an import levy, the AU Assembly also decided to endow a Peace Fund of \$400 million USD.⁴² Endowed funds are another way to ensure predictable long-term funding of institutions, as the capital can be invested to grow over time with a percentage of the gains used for funding operations. Indeed, the AU's Executive Council already requested that the African Court undertake a feasibility study on the establishment of such a fund.⁴³ Now that the AU has decided to impose an import levy, funds from this levy could be used to endow a separate fund for the expanded African Court.
- **International Donors.** In 2016, international donors provided \$2.5 million (or approximately 24%) of the Court's budget.⁴⁴ A variety of international donors and institutions also provide significant funding for human rights activities on the continent, including the European Union's Strengthening the African Human Rights System Programme.⁴⁵

Of course, the expanded African Court could be funded through multiple mechanisms. For example, the regular operating costs of the Court could be funded through funds collected for the import levy, while voluntary contributions could be sought for special programs. However, in order to ensure high, long-term, and consistent levels of funding, it is highly likely that funds from the import levy will be necessary. Once a comprehensive study has been completed on the cost of the expanded African Court, the AU can evaluate these options and make a final determination.

⁴² AU Decision on the Outcome of the Retreat of the Assembly of the African Union, *supra* note 38.

⁴³ Activity Report of the African Court on Human and Peoples' Rights 1 January – 31 December, 2017, *supra* note 10, at ¶ 25.

⁴⁴ 2016 Activity Report of the African Court on Human and Peoples' Rights, *supra* note 6, at ¶ 34.

⁴⁵ African Union, 43rd Activity Report of the African Commission on Human and Peoples' Rights, ¶ 13 (2017), http://www.achpr.org/files/activity-reports/43/43rd_activity_report_eng.pdf.