

Between Hope and Doubt  
*The Malabo Protocol and the Resource Requirements  
of an African Criminal Court*

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1. INTRODUCTION

In the nearly twenty years since the Organization for African Unity became the African Union (AU),<sup>1</sup> it seems the AU has been in a state of perpetual reorganization, expansion, or modification.<sup>2</sup> The pace of change has sometimes been dizzying. Just in 2016, the AU committed to creating the African Minerals Development Centre, the African CDC, the African Science Research and Innovation Council, the Pan African Intellectual Property Organization, the Africa Sports Council, and the African Observatory in Science Technology and Innovation.<sup>3</sup>

But many of these institutions exist only on paper.<sup>4</sup> For example, the AU formally adopted a constitutive document for all of the organizations listed in the paragraph above, but those documents have not been ratified by enough member states for them to enter into force.<sup>5</sup> The result is that the

<sup>1</sup> See Corinne A. A. Packer & Donald Rukare, 'The New African Union and Its Constitutive Act', 96 *American Journal of International Law* 365 (2002) 365–379 (describing the formation of the AU); Konstantinos D. Magliveras & Gino J. Naldi, 'The African Union – A New Dawn for Africa?', 51 *International and Comparative Law Quarterly* 415 (2002) 415–425 (same).

<sup>2</sup> See Tiyanjana Maluwa, 'Ratification of African Union Treaties by Member States: Law, Policy and Practice', 13 *Melbourne Journal of International Law* 636–684, at 638 (2012) (arguing that the increase in the rate of treaty adoption after 2002 was the result of the AU's "realization that these treaties are critical to the acceleration of African economic and political integration").

<sup>3</sup> See OAU/AU Treaties, Conventions, Protocols & Charters, available at <https://au.int/web/en/treaties> (last visited June 22, 2017).

<sup>4</sup> See Maluwa, *supra* note 2, at 639–40 (noting that the AU has been far more successful at creating new treaties than it has been in getting member states to ratify those treaties so that they can enter into force).

<sup>5</sup> See OAU/AU Treaties, Conventions, Protocols & Charters, available at <https://au.int/web/en/treaties> (last visited June 22, 2017).

organizations exist in limbo waiting for the state support they need to come into being. Once their constitutive documents come into force, the AU will still have to give them the resources they need to succeed.

Even some older institutions still exist only on paper. For example, the Protocol on the African Investment Bank (adopted 2009), the Agreement for the Establishment of the African Risk Capacity Agency (adopted 2012) and the Protocol on the Establishment of the African Monetary Fund (adopted 2014) have not been ratified by enough states to enter into force.<sup>6</sup> In fact, of the three financial institutions that were specifically listed in the AU's Constitutive Act in 2001 as being core components of the AU,<sup>7</sup> none of them exist yet.<sup>8</sup> The repeated failure of the AU to create functioning institutions has raised legitimate questions about whether the AU has the political will and capacity to follow-through on its many commitments.<sup>9</sup>

These questions about the AU's ability and desire to create functioning institutions are particularly relevant to its recent adoption of the Malabo Protocol.<sup>10</sup> The Malabo Protocol adds an international criminal law component to the jurisdiction of the African Court of Justice and Human Rights (ACJHR).<sup>11</sup> The addition of criminal jurisdiction to the ACJHR represents a significant increase in the court's subject matter jurisdiction.<sup>12</sup> It also greatly increases the difficulty of the court's work and necessitates a more complex organizational structure.<sup>13</sup> But can this new and improved ACJHR be successful? Will the AU have the political will to make it a reality? This chapter argues that the resources that the AU eventually devotes to the ACJHR will shed light on whether to be hopeful or doubtful about the court's eventual success.

Building a functioning international criminal court is not easy. It requires substantial investigative and adjudicative resources.<sup>14</sup> If the AU does not

<sup>6</sup> Id.

<sup>7</sup> See Constitutive Act of the African Union, Art. 19 (listing the AU's financial organs as the African Central Bank, the African Investment Bank and the African Monetary Fund)

<sup>8</sup> The constitutive documents for the Investment Bank and the Monetary Fund have been adopted but have not yet come into force, while the constitutive document for the Central Bank is still being drafted. See *The Financial Institutions*, available at <https://au.int/web/en/organs/fi> (last visited June 22, 2017).

<sup>9</sup> See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (2016) at 29–31 (noting the difficulty the AU has had in providing sufficient resources to sustain its institutions).

<sup>10</sup> See *infra* Part 2 (describing the Malabo Protocol).

<sup>11</sup> Id.

<sup>12</sup> See *infra* Part 3.

<sup>13</sup> Id.

<sup>14</sup> See *infra* Parts 6–8.

devote sufficient resources to the ACJHR, it will not be successful.<sup>15</sup> Of course, having sufficient resources is not a guarantee of success, but if the AU devotes sufficient resources to the international criminal law component of the ACJHR that would be a very hopeful sign. First and foremost, it would indicate that the AU is committed to the ACJHR's success. This is incredibly important as the ACJHR will not be successful if it does not have the financial and political support of the AU.<sup>16</sup>

Thus, this chapter will explore the resources that will be needed to give the ACJHR a functioning international criminal law component. The International Criminal Court (ICC) will be used as a comparator. The ICC has publicly released information about the resource requirements of its own work and that will form the basis for predicting the eventual requirements of the ACJHR. While it is impossible to know exactly what resources are needed to carry out the Malabo Protocol, this chapter estimates that a fully operational ACJHR will need about 370 full-time personnel and a budget of approximately 50 million euros per year.<sup>17</sup> It is unlikely that the Malabo Protocol can be successful in the long-run with dramatically fewer resources than this. When the Malabo Protocol comes into force, the resources that the AU devotes to its implementation will give us insight into whether the expanded ACJHR can be successful.

## 2. THE DEVELOPMENT OF THE AU'S JUDICIAL BODIES

In general, the evolution of the AU's judicial bodies looks similar to the rest of the AU in that they have undergone rapid and extensive changes.<sup>18</sup> It also looks similar to the rest of the AU in that there has been a lack of follow-

<sup>15</sup> Cf. Stuart Ford, 'What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach', 16 *Washington University Global Studies Law Review* 1–70 (2017) (arguing that the ICC has insufficient resources and that is one of the reasons it has not been as successful as its supporters had hoped).

<sup>16</sup> Cf. Stuart Ford, 'The ICC and the Security Council: How Much Support Is There For Ending Impunity?', 26 *Indiana International and Comparative Law Review* 33–67, at 62–3 (arguing that the ICC is weak compared to states and that it cannot be successful without the political support of the international community).

<sup>17</sup> See *infra* Part 9. Less than this would be needed during the court's startup phase, but eventually these resources will be necessary.

<sup>18</sup> See Amnesty International, *supra* note 9, at 7–11 (describing the development of the AU's judicial bodies). See also Firew Kebede Tiba, 'Regional International Criminal Courts: An Idea Whose Time Has Come?', 17 *Cardozo Journal of Conflict Resolution* 521, at 539–545 (2016); Vincent Nmehielle, 'Saddling' the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?', 7 *African Journal of Legal Studies* 7–42, at 12–23 (2014).

through. The first judicial body within the AU was the African Court of Human and Peoples' Rights (the ACHPR). It was created to foster the "attainment of the objectives of the African Charter on Human and Peoples' Rights."<sup>19</sup> The protocol establishing the ACHPR was opened for signature in June 1998 and entered into force in January 2008.<sup>20</sup>

In addition, the AU's Constitutive Act called for the establishment of a Court of Justice<sup>21</sup> to serve as the "principal judicial organ" of the AU.<sup>22</sup> A protocol for the establishment of the African Court of Justice (ACJ) was adopted in July 2003 and entered into force in February 2009.<sup>23</sup> Almost as soon as the ACJ's constitutive document had been adopted, the AU began talking about merging the ACHPR and the ACJ into a single court.<sup>24</sup> This was premised, at least in part, on the desire to reduce the cost of supporting two separate international courts.<sup>25</sup>

In 2008, the AU issued the Protocol on the Statute of the African Court of Justice and Human Rights.<sup>26</sup> This protocol merges the two existing courts to create the ACJHR.<sup>27</sup> While the protocol to establish the ACJHR was adopted in 2008, it has never come into force. It requires fifteen ratifications to enter into force,<sup>28</sup> but has only been ratified by six states.<sup>29</sup>

Yet even though the protocol establishing the ACJHR had not come into force, in 2009 the AU began discussing modifying the ACJHR to add an

<sup>19</sup> See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, Preamble, available at <https://au.int/web/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>.

<sup>20</sup> See OAU/AU Treaties, Conventions, Protocols & Charters, available at <https://au.int/web/en/treaties>.

<sup>21</sup> See Constitutive Act of the African Union, art. 18(1).

<sup>22</sup> See Protocol of the Court of Justice of the African Union, art. 12, available at <https://au.int/web/en/treaties/protocol-court-justice-african-union>.

<sup>23</sup> See OAU/AU Treaties, Conventions, Protocols & Charters, available at <https://au.int/web/en/treaties>.

<sup>24</sup> See Amnesty International, *supra* note 9, at 8.

<sup>25</sup> See Nmehielle, *supra* note 18, at 9.

<sup>26</sup> See OAU/AU Treaties, Conventions, Protocols & Charters, available at <https://au.int/web/en/treaties>.

<sup>27</sup> See Protocol on the Statute of the African Court of Justice and Human Rights, art. 2, available at <https://au.int/web/en/treaties/protocol-statute-african-court-justice-and-human-rights> ("The African Court of Human and Peoples' Rights . . . and the Court of Justice of the African Union . . . , are hereby merged into a single Court and established as 'The African Court of Justice and Human Rights.'").

<sup>28</sup> *Id.* art. 9(1).

<sup>29</sup> See List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute Of The African Court Of Justice And Human Rights, available at <https://au.int/web/en/treaties/protocol-statute-african-court-justice-and-human-rights>.

international criminal component.<sup>30</sup> This was driven largely by the indictment of African government officials by European states and the ICC.<sup>31</sup> The indictments were seen by the AU as inappropriate interference in African affairs.<sup>32</sup> By adding a criminal component to the ACJHR, the AU hoped to take control of the indictment and trial of African leaders.<sup>33</sup> These discussions culminated in 2014 in the adoption of the awkwardly-named Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (hereafter called the “Malabo Protocol” because it was adopted in the city of Malabo in Equatorial Guinea).<sup>34</sup> Entry into force of the Malabo Protocol requires fifteen ratifications,<sup>35</sup> but, as of July 2017, it had not been ratified by a single country.<sup>36</sup>

The story of the AU’s judicial bodies has been one of over-commitment and under-delivery. Almost ten years ago, the AU decided to merge the ACHPR and the ACJ to form a single court – the ACJHR. Progress toward that goal has been slow. But despite the fact that the ACJHR had not been established yet, the AU almost immediately began discussions to greatly expand the planned ACJHR by adding an international criminal law component.

At the rate that ratifications are currently being received, it could be another five or ten years before the protocol establishing the ACJHR comes into force.<sup>37</sup> At that point, it would require another fifteen ratifications of the Malabo Protocol before the amendments to add a criminal component to the ACJHR would take effect. As a result, it is not clear when or if the Malabo Protocol will come into effect, but it is unlikely to occur in the near future.<sup>38</sup>

<sup>30</sup> See Amnesty International, *supra* note 9, at 9.

<sup>31</sup> See Nmechielle, *supra* note 18, at 18–22.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available at <https://au.int/web/en/treaties>.

<sup>35</sup> *Id.* art. 11(1).

<sup>36</sup> See List of Countries Which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available at <https://au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

<sup>37</sup> *But see* Christopher Isike and Olusola Ogunnubi, ‘The Discordant Soft Power Tunes of South Africa’s Withdrawal from the ICC’, 44 *Politikion* 173–9 (2017) (suggesting that the withdrawal of African states from the ICC could speed up the process of adopting the ACJHR protocol and the Malabo protocol).

<sup>38</sup> See Ademola Abass, ‘The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects’, 60 *Netherlands International Law Review* 27, 37–42 (2013) (noting several reasons why African states may be reluctant to ratify the Malabo Protocol); Maluwa, *supra* note 2, at 659 (arguing that the slow pace of ratification of treaties related to the AU human rights courts is the result of “the ambivalence of most member states toward the

## 3. A NEW AFRICAN CRIMINAL COURT?

Assuming that, at some point in the future, the Malabo Protocol comes into force, what would happen? The Protocol makes a number of significant changes to the ACJHR. First, it alters the structure of the ACJHR. As originally conceived, the ACJHR would have two sections: a Human Rights Section that would hear all cases relating to “human and/or peoples’ rights” and a General Affairs Section that would hear all other eligible cases.<sup>39</sup> The Malabo Protocol adds a new International Criminal Law Section,<sup>40</sup> which has jurisdiction over “all cases relating to the crimes specified” in the statute.<sup>41</sup>

The addition of a criminal component to the ACJHR required other structural changes. For example, it necessitates the creation of an Office of the Prosecutor, and a Defence Office.<sup>42</sup> The Office of the Prosecutor will be responsible for “the investigation and prosecution” of crimes<sup>43</sup> while the Defence Office will be responsible for “protecting the rights of the defence [and] providing support and assistance to defence counsel.”<sup>44</sup>

The Malabo Protocol also lays out the crimes the expanded ACJHR will have jurisdiction over. First, it will have jurisdiction over the core crimes under international law: genocide, war crimes, and crimes against humanity.<sup>45</sup> It will also have jurisdiction over the crime of aggression.<sup>46</sup> The definitions of these four crimes appear to have been largely based on the definition of those crimes in the Rome Statute of the International Criminal Court, although some changes have been made to expand them at the margins.<sup>47</sup> The ACJHR will also have jurisdiction over a number of crimes that are not within the jurisdiction of the ICC like piracy, terrorism, corruption, money laundering, drug trafficking, human trafficking, and the exploitation of natural resources.<sup>48</sup>

idea of a pan-continental judicial body empowered to stand in judgment over alleged human rights violations by these states”). *But see* Tiba, *supra* note 18, at 547 (arguing that it is a “foregone conclusion that a regional international criminal court will be up and running in Africa in the not too distant future”).

<sup>39</sup> Original Statute of the African Court of Justice and Human Rights, arts. 16, 28.

<sup>40</sup> Amended Statute of the African Court of Justice and Human Rights, art. 16.

<sup>41</sup> *Id.* art. 17(3).

<sup>42</sup> *See* Malabo Protocol, art. 2.

<sup>43</sup> *See* Amended Statute of the African Court of Justice and Human Rights, art. 22A(6).

<sup>44</sup> *Id.* art. 22C(2).

<sup>45</sup> *Id.* art. 28A.

<sup>46</sup> *Id.*

<sup>47</sup> *See* Amnesty International, *supra* note 9, at 16–17.

<sup>48</sup> *See* Amended Statute of the African Court of Justice and Human Rights, art. 28A. *See also* Nmeielle, *supra* note 18, at 29–30.

These new crimes represent a potential source of problems as some of them do not have well-established definitions.<sup>49</sup>

The overall result is a significant change in both structure and jurisdiction for the ACJHR. The resulting court will be unique in its attempt to incorporate the components of a regional international court, a human rights court, and an international criminal court into a single institution.<sup>50</sup> But will the new and expanded ACJHR be successful? This question will be explored below.

#### 4. BETWEEN HOPE AND DOUBT

The adoption of the Malabo Protocol has left many observers unsure whether to be hopeful or doubtful. On the one hand, there are reasons to be hopeful that the Malabo Protocol will make a positive impact.<sup>51</sup> First, having a regional court capable of investigating mass atrocities committed in Africa could help shrink the impunity gap on the continent.<sup>52</sup> Second, there may be some benefit in having cases arising out of African situations prosecuted in Africa.<sup>53</sup> Third, the Malabo Protocol will grant to the ACJHR the ability to prosecute some crimes that are outside the jurisdiction of the ICC, but are relevant in an African context.<sup>54</sup> Fourth, it says all the right things.<sup>55</sup> In the Preamble to the Malabo Protocol, the AU reiterated its commitment to “peace, security and stability on the continent” and to protecting human rights, the rule of law and good governance.<sup>56</sup> The members of the AU also stressed their “condemnation and rejection of impunity” and claimed that the changes in the Malabo Protocol will help “prevent[] serious and massive violations of human and peoples’ rights ... and ensur[e] accountability for them wherever they occur.”<sup>57</sup> In short, the stated goals of the Malabo Protocol are very positive.

<sup>49</sup> See Amnesty International, *supra* note 9, at 16–18. See also Abass, *supra* note 38, at 32–5.

<sup>50</sup> See Nmehielle, *supra* note 18, at 23.

<sup>51</sup> See Amnesty International, *supra* note 9, at 5–6.

<sup>52</sup> Chacha Bhoke Murungu, ‘Towards a Criminal Chamber in the African Court of Human Rights’, 9 *Journal of International Criminal Justice* 1067, at 1081 (2011).

<sup>53</sup> See Stuart Ford, ‘The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC’s Trials to Take Place at Local or Regional Chambers?’, 43 *John Marshall Law Review* 715, 715–16 (2010); Murungu, *supra* note 53, at 1085 (2011) (“It would be good for Africa to establish a court which will be close to the African people and which might have access to victims and areas where crimes have been committed.”).

<sup>54</sup> See Munguru, *supra* note 52, at 1085–6; Nmehielle, *supra* note 18, at 29–30.

<sup>55</sup> See Amnesty International, *supra* note 9, at 5.

<sup>56</sup> Malabo Protocol, Preamble.

<sup>57</sup> *Id.*

They hold out hope of preventing atrocities and ensuring accountability. Thus, there are reasons to be hopeful.<sup>58</sup>

On the other hand, there are also reasons to be doubtful.<sup>59</sup> The first concern is that the AU often appears to lack the political will and capacity to implement its vision for the organization.<sup>60</sup> This can be seen with the AU's financial institutions. Despite being identified as key to the organization in the Constitutive Act, more than fifteen years later they still do not exist.<sup>61</sup> Something similar may happen to the Malabo Protocol.<sup>62</sup> Even if the Malabo Protocol does come into force, will the AU have the political will and resources to adequately fund the expanded ACJHR?<sup>63</sup>

A second concern is whether the AU really intends the Malabo Protocol to be successful. The AU has a tense relationship with the ICC.<sup>64</sup> The ICC has brought charges against a number of African leaders and this has upset many AU member states.<sup>65</sup> The indictments of Presidents Al-Bashir of Sudan and Kenyatta of Kenya “galvanized [the] AU’s resolve to establish an African regional criminal court to basically serve as a substitute and operate parallel to the ICC.”<sup>66</sup> Thus, one way to view the Malabo Protocol is as a mechanism to prevent the ICC from exercising jurisdiction over senior government officials accused of committing crimes in Africa.<sup>67</sup> And indeed, there are

<sup>58</sup> See, e.g., Matiangai Sirleaf, ‘The African Justice Cascade and the Malabo Protocol’, 11 *International Journal of Transitional Justice* 71 (2017) (offering a guardedly optimistic evaluation of the Malabo Protocol’s future).

<sup>59</sup> See Abass, supra note 38 (offering an essentially pessimistic evaluation of the Malabo Protocol’s future); Murungu, supra note 52, at 1082–85 (noting many obstacles to the success of the Protocol).

<sup>60</sup> See Amnesty International, supra note 9, at 29–33 (noting concerns about whether the AU has the capacity to make the Malabo Protocol a success).

<sup>61</sup> See supra text accompanying notes 7–8.

<sup>62</sup> See supra text accompanying notes 31–7.

<sup>63</sup> See Murungu, supra note 52, at 1084.

<sup>64</sup> See Amnesty International, supra note 8, at 23; Abass, supra note 38, at 28–9; Murungu, supra note 52, at 1077–9.

<sup>65</sup> See Amnesty International, supra note 9, at 9; Benson Chinedu Olugbuo, ‘The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa’, 7 *African Journal of Legal Studies* 351, 352–4 (2014).

<sup>66</sup> See Amnesty International, supra note 9, at 9. See also Nmehielle, supra note 18, at 18–22 (arguing that the AU adopted the Malabo Protocol to reassert control over investigations and prosecutions of violations of international law committed in Africa).

<sup>67</sup> See Amnesty International, supra note 9, at 6 (noting that “[s]ome commentators argue that the proposal is an attempt by the AU to shield African heads of state and senior officials from being held to account when there is reasonable grounds to believe that they are criminally responsible for crimes under international law”).

some signs that the drafters of the Malabo Protocol hoped that the addition of criminal jurisdiction to the ACJHR would have this effect.<sup>68</sup>

Creating a regional court whose work would prevent the ICC from exercising jurisdiction over violations of international criminal law committed in Africa would be fine if the AU intended the ACJHR to fairly and impartially prosecute violations committed by African leaders.<sup>69</sup> But there is also the possibility that the AU intends to use the Malabo Protocol to try and shield African leaders from accountability for human rights violations.<sup>70</sup> For example, the Malabo Protocol has a worrying provision on immunities.<sup>71</sup> It prevents the ACJHR from instituting or continuing cases against “any serving AU Head of State” or “other senior state officials.”<sup>72</sup> This has led to fears that the Protocol is designed, not to end impunity, but to shield African leaders from accountability.<sup>73</sup>

Given that there are reasons to be both hopeful and doubtful about the Malabo Protocol, how should we view it?<sup>74</sup> The answer may lie in what happens

<sup>68</sup> For example, the Malabo Protocol references the AU’s Decision on the Abuse of the Principle of Universal Jurisdiction. See Malabo Protocol, Preamble. The AU has long been concerned with what it considers the abuse of the principle of universal jurisdiction, which seems to mean the charging of senior African government officials in non-African courts with crimes under a theory of universal jurisdiction. See Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.199(XI), dated July 1, 2008 (describing the use of universal jurisdiction to charge African official in non-African courts as endangering international law and order and a “clear violation of the sovereignty and territorial integrity” of African states). See also Nmeihelle, *supra* note 18, at 21–2.

<sup>69</sup> Cf. Rome Statute, art. 17(1) (noting that the ICC lacks jurisdiction in situations where a case is being investigated or prosecuted by a state unless that state is “unwilling or unable to genuinely carry out the investigation or prosecution”). While the Rome Statute refers only to states in Article 17, others have argued that this can be extended by analogy to regional organizations such that an investigation or prosecution by a regional organization would properly deprive the ICC of jurisdiction unless that investigation or prosecution was not genuine. See Murungu, *supra* note 52, at 1081; Nmeihelle, *supra* note 18, at 25. Under this reading, the creation of a regional court with jurisdiction over international criminal law would be consistent with the Rome Statute’s principle of complementarity.

<sup>70</sup> Cf. Maluwa, *supra* note 2, at 659 (noting that many AU member states are very ambivalent about creating a “pan-continental judicial body” that would have the power to investigate their own human rights abuses).

<sup>71</sup> See Amnesty International, *supra* note 9, at 11, 26–7; Tiba, *supra* note 18, at 533.

<sup>72</sup> See Amended Statute of the African Court of Justice and Human And Peoples’ Rights, art. 46A *bis*.

<sup>73</sup> See Amnesty International, *supra* note 9, at 27 (noting that the immunity provision “promotes and strengthens the culture of impunity that is already entrenched in most African countries”); Abass, *supra* note 38, at 49–50; Murungu, *supra* note 52, at 1086–1087.

<sup>74</sup> Cf. Nmeihelle, *supra* note 18, at 32–5 (acknowledging that the actions of AU member states in the past have raised legitimate concerns about whether the Malabo Protocol is intended to facilitate or obstruct human rights in Africa but arguing that the AU is not monolithic and that

if and when the Protocol enters into force. At that time, the AU will have the difficult task of turning the blueprint in the Malabo Protocol into a functioning international criminal court. It will have to staff the court and give it the resources and support it needs to be successful. This will not be an easy task.<sup>75</sup>

One key indicator of the AU's intentions toward the new and improved ACJHR will be the resources it devotes to the court. For it to live up to the hopeful vision of a successful regional court that reduces impunity and prevents atrocities, the ACJHR will have to have sufficient resources to carry out both its investigative and its adjudicative functions. On the other hand, if the court is mainly intended to insulate African leaders from accountability for human rights abuses, it will probably not be given the resources to conduct robust investigations and prosecutions. Thus, one way to evaluate the court will be to look at the resources it receives.

Of course, adequate resources are not a guarantee of success, but they are a prerequisite for it.<sup>76</sup> It will be extremely difficult for the court to be successful if it lacks the resources to carry out its functions. The rest of this chapter will examine what sort of resources one would expect the new ACJHR to need to be successful. Section 5 will look at the scope of the crimes usually investigated by international criminal courts, while Section 6 explores the investigative resources necessary to meaningfully investigate those crimes. Section 7 describes a typical trial at an international criminal court, while Section 8 explores the adjudicative resources necessary for such a trial. Section 9 presents an estimate of the staffing needs and costs of a fully operational ACJHR, while Section 10 compares those estimated costs to the AU's early projections of the expense of the court. Finally, this chapter's conclusions are presented in Section 11.

## 5. INTERNATIONAL CRIMES

Most domestic crimes involve a single perpetrator, a single victim and a single crime site.<sup>77</sup> And very few domestic crimes involve the most serious offenses

individual states want different things out of the court). Professor Nmeielle implicitly takes the position that it is too soon to know whether the Malabo Protocol is intended to be promote or obstruct justice.

<sup>75</sup> The AU is aware of the difficulties. It twice delayed adoption of the Malabo Protocol because of concerns about the "financial and structural implications" of the changes to the ACJHR. See Nmeielle, *supra* note 18, at 39–41.

<sup>76</sup> See *supra* text accompanying note 15.

<sup>77</sup> See 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, 37–8 (2017).

like rape and murder.<sup>78</sup> International crimes, at least the ones that are investigated and tried before international courts, look nothing like the typical domestic crime.

First, the kinds of crimes that are investigated and prosecuted at international tribunals are almost always perpetrated by large hierarchically organized groups working together.<sup>79</sup> Most often the perpetrators are military or paramilitary units of various sorts. In addition, the majority of international crimes take place as part of an armed conflict, with all the systematic violence that entails.<sup>80</sup> Even when there is not an armed conflict, there is still usually extensive politically-motivated violence aimed at civilians.<sup>81</sup> International crimes are also usually much larger in geographic and temporal scope than domestic investigations. The typical ICC investigation involved crimes committed at dozens of different crime sites over time periods that ranged from several months to several years.<sup>82</sup>

International crimes also tend to be extremely serious and involve the widespread commission of rape, torture, murder, inhumane treatment and forcible displacement. For example, at the ICC, the average investigation covered the unlawful deaths of more than a thousand people<sup>83</sup> and the forcible displacement of huge numbers of civilians.<sup>84</sup> Systematic rape is a common feature of international crimes.<sup>85</sup> International crimes also tend to be marked by extreme cruelty, often against vulnerable groups like women, children, and the elderly.<sup>86</sup>

As a result of these features, international crimes are vastly more complex than the average domestic crime. They involve a larger number of victims, more serious offenses, and take place over larger areas and longer time periods. They also take place during periods of systematic violence and tend to be carried out by large hierarchically organized groups. As a result, they require substantial resources to investigate.<sup>87</sup>

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 32.

<sup>80</sup> *Id.* at 31.

<sup>81</sup> *Id.* at 31–2.

<sup>82</sup> *Id.* at 33.

<sup>83</sup> *Id.* at 34.

<sup>84</sup> *Id.* at 33 (noting that the number of people forcibly displaced in the average ICC investigation ranges from hundreds of thousands to more than a million).

<sup>85</sup> *Id.* at 34.

<sup>86</sup> Examples of extreme cruelty include mutilation, disembowelment, gang rapes and abduction into sexual slavery. *Id.*

<sup>87</sup> *Id.* at 21–4 (arguing that the features of international crimes make them inherently more difficult to investigate than typical domestic crimes).

## 6. INVESTIGATIVE RESOURCES

Assuming the ACJHR undertakes criminal investigations that are similar in gravity to those undertaken by the ICC,<sup>88</sup> the ICC's experience can be a guide to the investigative resources the ACJHR will need. The typical ICC investigation lasts about three years.<sup>89</sup> The investigative team varies in size over the course of the investigation, with fewer in the first few months and the last few months. But for at least two years, during what the ICC calls the "full investigation" phase, the investigative team is composed of about 35 personnel.<sup>90</sup>

This team includes investigators and analysts, as well as a handful of lawyers, legal assistants and case managers.<sup>91</sup> It also includes specialists in forensics and digital evidence, and personnel to provide field support and security.<sup>92</sup> Over the course of three years, this team will screen hundreds of potential witnesses, interview about 170 of them, and collect thousands of pieces of physical and digital evidence.<sup>93</sup> It will then analyze this information so that the Prosecutor can decide whether to issue charges and, if so, who to charge, and what to charge them with.

It might be tempting to conclude that the ACJHR needs only one investigative team, but then it would only be able to undertake one investigation every three years. This would almost certainly not be enough. For example, the ICC anticipates opening nine new preliminary investigations and one new full investigation every year.<sup>94</sup> This is on top of the six active investigations it will have in any given year.<sup>95</sup>

The ACJHR will probably need at least two investigative teams. Given that investigative teams only need to be at full strength during the middle of the investigation, it seems plausible that two teams could handle three

<sup>88</sup> This seems to be a reasonable assumption given that a large number of the ICC's current investigations are in Africa and the primary purpose of the Malabo Protocol is to permit the ACJHR to assert control over African situations that would otherwise fall under the jurisdiction of the ICC. As a result, the ACJHR will likely face investigations similar in scope to those the ICC has undertaken in Africa.

<sup>89</sup> *Id.* at 50.

<sup>90</sup> *Id.* at 51–3.

<sup>91</sup> *Id.* at 52.

<sup>92</sup> *Id.* While the international criminal law component of the ACJHR will presumably be based in Arusha, Tanzania, it will be expected to carry out investigations anywhere in the AU. As a result, it will probably (like the ICC) need to establish field offices in countries where it is conducting investigations.

<sup>93</sup> *Id.* at 51.

<sup>94</sup> Office of the Prosecutor, Report of the Court on the Basic Size of the Office of the Prosecutor, Doc. No. ICC-ASP/14/21, dated Aug. 7, 2015 (hereafter "OTP Basic Size Document") at 4.

<sup>95</sup> *Id.*

investigations every three years (assuming that the start of the investigations was staggered). This would give the ACJHR the capacity to undertake approximately one new investigation every year. Thus, in any given year, the ACJHR would have two investigations ongoing, one that was being wrapped up, and have the ability to open one new one, if necessary. This is less investigative capacity than the ICC has, but would probably be sufficient, at least initially.

## 7. INTERNATIONAL TRIALS

Of course, completing an investigation is only the first step in a long process. The most visible part of the process comes next: the trial. International trials are complex undertakings that can take years to complete. For example, at the International Criminal Tribunal for the former Yugoslavia (ICTY), the average trial took 176 court days to complete.<sup>96</sup> During the trial, an average of 120 witnesses testified and more than 2,000 exhibits were entered into evidence.<sup>97</sup> While some have criticized international trials as too long and too slow,<sup>98</sup> it appears that this complexity is necessary.<sup>99</sup>

International trials feature a number of factors that increase their complexity relative to the average domestic trial. First of all, they often involve multiple defendants accused of acting together, which increases trial complexity.<sup>100</sup> International trials also tend to involve a large number of charges against each accused, which also increases complexity.<sup>101</sup> Finally, another hallmark of international trials is that the accused tend to be senior military or political leaders, which also increases the length of the resulting trial.<sup>102</sup>

This latter point is particularly important as it generates significant additional trial complexity.<sup>103</sup> This complexity appears to be a result of the difficulty of attributing responsibility for mass atrocities to senior leaders who are both geographically and organizationally distant from the crimes.<sup>104</sup> Attributing responsibility requires establishing evidence that links the charged persons to the crimes carried out by the direct perpetrators. International

<sup>96</sup> See Stuart Ford, 'Complexity and Efficiency at International Criminal Courts', 29 *Emory International Law Review* 1, 28 (2014).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 3–4.

<sup>99</sup> See generally Stuart Ford, 'The Complexity of International Criminal Trials is Necessary', 48 *George Washington International Law Review* 151 (2015).

<sup>100</sup> *Id.* at 172.

<sup>101</sup> *Id.* at 173.

<sup>102</sup> *Id.* at 172–3.

<sup>103</sup> *Id.* at 181–2.

<sup>104</sup> *Id.* at 182–3.

criminal lawyers refer to this as the “linking evidence” and it is critical to demonstrating the guilt of the accused. Establishing this link, however, is complex and time-consuming. This complexity is necessary, however, if courts are serious about ending impunity for those most responsible for mass atrocities.<sup>105</sup>

One result of the length and complexity of international trials is that courts need significant resources to carry them out. This is true both in the Office of the Prosecutor and Chambers. If adjudicative resources are insufficient, then trials may be delayed. In a worst case scenario, prosecutions may fail for lack of evidence or accused may have to be released because of the delay in bringing them to trial.

## 8. ADJUDICATIVE RESOURCES

So, what adjudicative resources does the new ACJHR need to conduct successful trials? Again, the experience of the ICC will be used as a guide. The Office of the Prosecutor at the ICC estimates that the average trial takes about five and a half years from the completion of the investigation until the conclusion of the appeal. This includes half a year of pre-trial preparation, three years for the actual trial, and two years for the appeal.<sup>106</sup> The core trial team is composed of about 15 personnel. The majority of these personnel come from the prosecution division and includes lawyers, legal assistants, and case managers.<sup>107</sup> They are supported by a small number of investigators who provide support for cross-examination of defense witnesses and investigation of defense theories.<sup>108</sup> This team has to be in place for about three and a half years to complete a single trial. Assuming that the ACJHR closes one investigation each year<sup>109</sup> and that (like the ICC) the majority of new investigations result in immediate trial proceedings,<sup>110</sup> then there will be approximately one new trial beginning each year. Given that each trial lasts three years, the ACJHR would need at least three trial teams to staff those trials.

The Office of the Prosecutor at the ACJHR will also need a group of lawyers and support staff dedicated to appeals. If one trial finishes each year, and appeals last two years, then on average there will be at least two final appeals

<sup>105</sup> *Id.* See also *id.* at 184–200 (arguing that there are few practical ways to reduce the complexity of international trials without sacrificing their most important goals).

<sup>106</sup> See OTP Basic Size Document at 51.

<sup>107</sup> *Id.* at 52–5.

<sup>108</sup> *Id.* at 54.

<sup>109</sup> See *supra* Section 6.

<sup>110</sup> See OTP Basic Size Document at 13.

going on at any time. To handle two final appeals plus a small number of interlocutory appeals arising out of ongoing cases, the ICC requires seven personnel.<sup>111</sup> It seems likely that the ACJHR would need an appeals section of about the same size.

In addition to the required personnel within the Office of the Prosecutor, the ACJHR will also require the necessary staff within Chambers. The new International Criminal Law Section will have within it three Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.<sup>112</sup> But, it appears the International Criminal Law Section as a whole will have only six judges.<sup>113</sup> This is almost certainly inadequate.<sup>114</sup>

The Pre-Trial Chamber requires one judge, the Trial Chamber requires three judges, and the Appellate Chamber requires five judges. Even if only one trial was going on at a time six judges would be inadequate because it would be impossible to staff all three chambers unless judges sat on multiple chambers for the same case. This would be problematic as it would require a judge who sat at an earlier stage of a case (say as a trial judge) to then adjudicate a later stage (say as an appellate judge). Having the same judge sit at different stages of the same case undermines the defendants' fair trial rights.<sup>115</sup> So, for this reason alone, the ACJHR would need at least nine judges so that no judge would have to sit at different stages of the same case.

But even nine judges would probably not be enough. Assuming that one new trial begins each year and that each trial lasts about three years,<sup>116</sup> the ACJHR will need to constitute three Trial Chambers. This would require nine judges on its own. Even if the existing Appellate Chamber could handle all of the appeals and a single Pre-Trial Chamber judge could handle all pre-trial matters that would still mean that the ACJHR would need fifteen judges just in the International Criminal Law Section.<sup>117</sup>

<sup>111</sup> *Id.* at 57.

<sup>112</sup> *See* Amended Statute of the African Court of Justice and Human And Peoples' Rights, art. 16.

<sup>113</sup> The ACJHR as a whole has sixteen judges, but it appears that five are assigned to the General Affairs Section and five to the Human and Peoples' Rights Section, leaving six to staff the International Criminal Law Section. *See* Amended Statute of the African Court of Justice and Human And Peoples' Rights, art. 6.

<sup>114</sup> *See* Amnesty International, *supra* note 9, at 26.

<sup>115</sup> *Id.*

<sup>116</sup> *See supra* text accompanying notes 110–1.

<sup>117</sup> At least in 2012, the AU was taking the position that there would “be NO addition of judges beyond the sixteen” provided in the draft protocol. *See* African Union, Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, Doc. No. EX.CL/773(XXII) Annex 2 at 2 (copy on file with author). Having said that, the same report also acknowledges that there might be a need to be “flexible” about the number of judges in the future. *Id.*

In addition to 15 judges, the International Criminal Law Section would also need the necessary legal personnel to support those judges. The ICC estimates that it needs five full-time legal personnel assigned to Chambers per trial.<sup>118</sup> If the ACJHR has similar needs, it would require fifteen legal personnel to staff the three Trial Chambers. Again, following the ICC's model, the Appellate Chamber would need a staff of ten legal officers<sup>119</sup> while the Pre-Trial Chamber would require only two personnel (assuming that only a single judge is assigned to it).<sup>120</sup>

Finally, the Chambers will need something like the ICC's Court Management Section, which maintains the official records of the proceedings, distributes orders and decisions and maintains the Court's calendar, including the scheduling of all hearings.<sup>121</sup> The ICC employs 33 people in the Court Management Section<sup>122</sup> to support the work of 18 judges.<sup>123</sup> This chapter argues that the ACJHR will eventually need fifteen judges in the International Criminal Law Section. This is on top of the judges in the Human and Peoples' Rights Section and the General Affairs Section. Accordingly, it seems likely that the ACJHR will need a similarly sized court management section to support the work of those judges.

#### 9. STAFFING A NEW INTERNATIONAL TRIBUNAL

As the previous sections have demonstrated, building a functioning international criminal court is far from simple. First, it will need to have the staff to carry out its investigative functions. Within the new ACJHR's Office of the Prosecutor this will probably mean two investigative teams of about 35 personnel each. This will include a mix of investigators, analysts, forensics experts, and legal personnel.

The court will also have to have sufficient personnel to carry out its adjudicative functions. This will almost certainly mean an increase in the number of judges assigned to the International Criminal Law Section to 15 or so judges.

<sup>118</sup> See Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated Aug. 17, 2016, at 144.

<sup>119</sup> *Id.* at 40 (noting that the ICC's Appeals Chamber needed ten legal personnel to support the five judges of the Appeals Chamber; a ratio of two legal officers per judge).

<sup>120</sup> *Id.* at 37 (noting that the ICC's Pre-Trial Chamber needed twelve legal personnel to support the six judges of the Pre-Trial Chamber; a ratio of two legal officers per judge).

<sup>121</sup> See Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated Aug. 17, 2016, at 151.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 34.

They would need to be supported by at least twice that number of legal officers. In addition the prosecutions division within the Office of the Prosecutor will need three trial teams of about 15 personnel each plus an appeals team of about 7 or 8 personnel. Finally, there must be some organ like the ICC's Court Management Section to create the official record and handle all of the scheduling issues.

And these are just the core personnel tasked with carrying out the investigations and trials. In practice, international courts need additional personnel to support the core tasks. For example, the OTP at the ICC contains a Services Section that contains the Information and Evidence Unit and the Language Services Unit.<sup>124</sup> These are important units that help control and preserve evidence and provide the interpretation and translation services that are almost certainly going to be needed by the investigative and prosecutorial teams.<sup>125</sup> The Services Section at the ICC is about one-third the size of the Investigation Division and half the size of the Prosecutions Division.<sup>126</sup>

In addition, the Amended Statute of the new ACJHR specifically says that the Registrar must create a Victims and Witnesses Unit to provide “protective measure and security arrangements, counselling and other appropriate assistance” for victims and witnesses.<sup>127</sup> It also requires the Registrar to set up a Detention Management Unit to “manage the conditions of detention of suspects and accused persons.”<sup>128</sup> Finally, the Amended Statute provides for an independent Defence Office that will be responsible for “protecting the rights of the defense, providing support and assistance to defence counsel . . . .”<sup>129</sup> These units will have to be staffed. At the ICC, the Office of Public Counsel for the Defence has similar functions to the ACJHR's Defence Office and has five personnel.<sup>130</sup> Similarly, the ICC's Detention Section has five staff members.<sup>131</sup> The ICC office most similar to the ACJHR's

<sup>124</sup> See OTP Basic Size Document at 17.

<sup>125</sup> See Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated Aug. 17, 2016, at 56–7.

<sup>126</sup> See OTP Basic Size Document at 5 (noting that the Services Section would have 81 personnel, while the Investigations Division would have 255 and the Prosecutions Division would have 142).

<sup>127</sup> See Amended Statute of the African Court of Justice and Human And Peoples' Rights, art. 22B(9).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* art. 22C.

<sup>130</sup> See Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated August 17, 2016, at 158.

<sup>131</sup> *Id.* at 154.

Victims and Witnesses Unit is the Victims and Witnesses Section.<sup>132</sup> The ICC employs 63 people in this task.<sup>133</sup>

It is also highly likely that the new ACJHR will need other more general support services. At the ICC, these are located within the Registry. It is likely the same would be true at the ACJHR.<sup>134</sup> At the ICC, the Registry includes functions like a Human Resources Section,<sup>135</sup> a Budget Section,<sup>136</sup> a Finance Section,<sup>137</sup> a Security and Safety Section<sup>138</sup> and a General Services Section.<sup>139</sup> While the ACJHR would not necessarily need to be structured in the exact same way, it will need the same services. It will need to have staff that provide security, clean and maintain the buildings, and pay the bills. Even if we assume that the new ACJHR would only need about half as many personnel in these functions as the ICC, it would still need something like 80 people in these support positions.

The following organizational charts make an educated guess about what resources the new and expanded ACJHR will need to successfully investigate and prosecute international crimes once it is fully operational.<sup>140</sup> These are not meant to be exact predictions. For example, it may be possible to make the

<sup>132</sup> *Id.* at 163 (noting that the Victim and Witnesses Section provides “protective measures and security arrangements, counselling and other appropriate assistance” for victims and witnesses).

<sup>133</sup> *Id.*

<sup>134</sup> See Amended Statute of the African Court of Justice and Human And Peoples’ Rights, art. 22B(5) (noting that the Registry “shall be responsible for the non-judicial aspects and servicing of the Court”). See also *id.* art. 22B(7) (noting that the Registrar “shall be assisted by such other staff as may be necessary for the effective and efficient performance of the functions of the Registry”).

<sup>135</sup> This office provides advice on human resources issues, develops human resources policies, helps manage the staff, participates in recruitment and placement, and deals with issues like salaries, benefits, and pensions. See Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated Aug. 17, 2016, at 144. There are 25 total staff in the Human Resources Section. *Id.*

<sup>136</sup> This office prepares and oversees implementation of the budget. *Id.* at 145. There are six staff members in the Budget Section. *Id.*

<sup>137</sup> This office oversees payments to vendors as well as payment of travel expenses. It also monitors compliance with the budget and prepares the Court’s financial statements. *Id.* at 146. There are 17 personnel in the Finance Section.

<sup>138</sup> This office provides security for the Court facilities and its personnel. *Id.* at 149. There are 72 personnel in the Security and Safety Section. *Id.*

<sup>139</sup> This office provides building maintenance, utilities services and cleaning services, among other things. *Id.* at 147. There are 46 staff members in the General Services Section. *Id.* at 148.

<sup>140</sup> These are not the resources that the court would need in its first year of operation. Personnel could be phased in over time as they are needed to lower the startup costs. For example, the court probably will not need two investigative teams in its first year and it will probably not need trial teams until the first investigations are completed, which may take two or three years. Similarly, it will not need to fully staff the Trial and Appeal Chambers until the initial investigations have been completed and the first case is ready for trial. But it will need those resources eventually.

investigations teams slightly smaller. Or it might be possible to have fewer legal officers in Chambers and fewer personnel in the Victims and Witnesses Unit. Perhaps the court can get by with fewer personnel in support roles. Of course, cutting corners on resources can be counter-productive, as the ICC has discovered.<sup>141</sup>

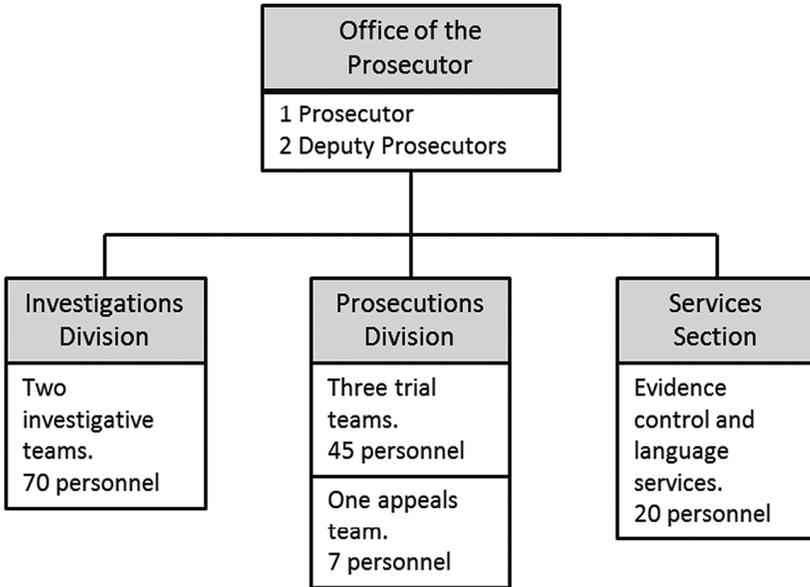


FIGURE 38.1

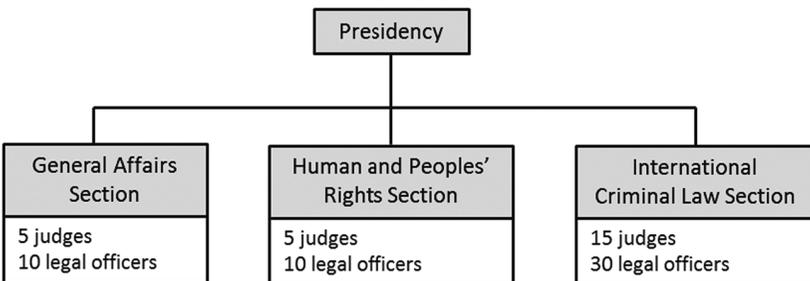


FIGURE 38.2

<sup>141</sup> The Prosecutor at the ICC initially tried lean investigations, but those resulted in weak cases and she was forced to switch back to more thorough investigations. See Ford, *supra* note 77, at 66–7.

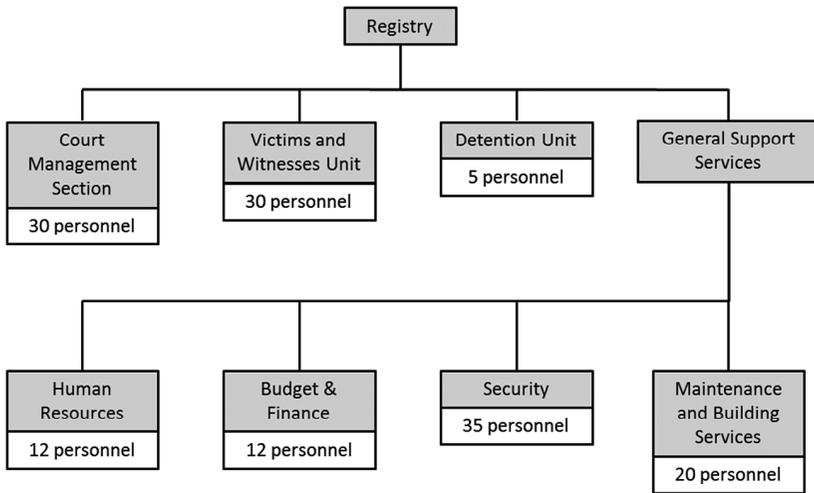


FIGURE 38.3

These figures suggest a court with about 145 personnel in the Office of the Prosecutor. The majority of the personnel in the OTP would be working on investigations. The Presidency would be composed of 25 judges and 50 legal officers. Their primary function would be to hear the trials and appeals. Finally, the Registry would require about 145 personnel to provide the needed support services to the court. In addition, the Defence Office will have five or six staff members. This assumes that there will be no permanent interpretation/translation office in the Registry and that interpretation and translation services will be provided under service contracts rather than through the hiring of full-time personnel.<sup>142</sup>

Overall, the expanded ACJHR would have a staff of about 370 personnel. This would make it roughly one-third the size of the ICC, which currently has about 1,100 personnel.<sup>143</sup> This implies an expected cost of about 48 million

<sup>142</sup> While it may turn out that some in-house interpretation/translation service is required, the large number of languages that will likely be needed and the intermittent demand for those languages probably makes it cheaper to contract for interpretation and translation as a service. Cf. OTP Basic Size Document, at 73 (noting that at the ICC the “requirement for language services is often volatile on account of uncertainty around, amongst other things, . . . how many and which languages will be encountered in any given situation country, especially regarding insider witnesses and victims whose evidence may need transcribing, and interpreting and translating into a working language and also regarding the accused, who are entitled to translations of evidence in a language they fully understand” and that, as a result, most of this work is done by freelancers rather than permanent staff).

<sup>143</sup> See Proposed Programme Budget for 2017 of the International Criminal Court, Doc. No. ICC/ASP/15/10, dated Aug. 17, 2016, at 27 (noting that the ICC is budgeting for 980 permanent posts and 179 GTA positions in 2017).

euros per year for the new ACJHR.<sup>144</sup> This is many times the current budget of the AU's judicial bodies.<sup>145</sup>

#### 10. EARLY AU ESTIMATES OF THE ACJHR'S NEEDS

The AU's member states have been concerned about the consequences of expanding the ACJHR's jurisdiction.<sup>146</sup> So, for example, at a meeting of Ministers of Justice in 2012, various delegations asked about the "financial and budgetary implications" of expanding the jurisdiction of the court.<sup>147</sup> This concern has resulted in a small number of documents that discuss the expected resource requirements of the ACJHR. Unfortunately, these documents are from 2012, so it is unclear whether they still represent the position of the AU.<sup>148</sup> But given that they are the only financial projections from the AU that are available, this chapter will discuss them.

The reports discuss whether there are existing courts that could be used as examples of the resources the ACJHR will need. For example, the report of the meeting of Ministers of Justice notes that the Special Court for Sierra Leone (SCSL) cost \$16 million per year in 2011 and employed slightly more than 100 personnel.<sup>149</sup> It also notes that the International Criminal Tribunal for Rwanda (ICTR) cost \$130 million per year in 2010 and employed 800 staff.<sup>150</sup> But it takes no position on whether either of them is a good model for the ACJHR. Another report suggests that the trial of the former President of Chad, Hissène Habré, in Senegal, which reportedly cost about 7 million euros over three years, represents the "most appropriate" comparison.<sup>151</sup>

<sup>144</sup> This number was arrived at by taking the ICC's cost in 2017 (150 million euros for 1,160 positions) and scaling it down to account for the 370 expected positions at the ACJHR. *Id.* (noting that the ICC budget for 2017 is 150 million euros). *Cf.* Nmehielle, *supra* note 18, at 35 (noting that "effectively establishing and sustaining such a court would run into hundreds of millions of dollars").

<sup>145</sup> *Id.* at 35–6.

<sup>146</sup> *See supra* note 76.

<sup>147</sup> *See* African Union, Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, dated 14 and 15 May 2012 at 5–7 (copy on file with author).

<sup>148</sup> There may be more recent reports that provide updated estimates on the resource requirements of the ACJHR, but if so they do not appear to be publicly available.

<sup>149</sup> *Id.* at 7.

<sup>150</sup> *Id.*

<sup>151</sup> *See* Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, *supra* note 117, at 4.

All of these comparisons are flawed. The ACJHR probably does not need to be as big as the ICTR at its height.<sup>152</sup> Nor is the trial of a single individual – Hissène Habré – likely to represent the experience of the ACJHR, which may need to open one new investigation and begin one new trial every year.<sup>153</sup> The SCSL in 2011 is not a particularly good comparison either. By 2011, the SCSL had almost completed its mandate. The only significant legal activity that year was the trial of Charles Taylor.<sup>154</sup> There were no new investigations<sup>155</sup> and minimal activity by the Appeals Chamber.<sup>156</sup> The expanded ACJHR will have to undertake complex investigations and be able to deal with more than one trial and appeal at a time. The most obvious contemporaneous comparator is the ICC. The omission of references to the ICC in the AU's documents may stem from its difficult relationship with the ICC.<sup>157</sup>

If the SCSL is to be used as a comparator, however, then the SCSL in 2007 is a better choice. In that year, the SCSL was engaged in the CDF trial, the RUF trial, and the AFRC trial.<sup>158</sup> There was also substantial activity in the Appeals Chamber.<sup>159</sup> The Office of the Prosecutor, in addition to participating in the ongoing trials, was also engaged in the investigation of the Charles Taylor case.<sup>160</sup> This is more like what a fully operational ACJHR can expect. But it is worth noting that the SCSL cost \$36 million in 2007 and employed more than 400 people.<sup>161</sup> This is similar to the projections in this chapter.<sup>162</sup>

Besides looking for appropriate comparators, one of the AU's reports also contains a proposed staffing table for the expanded ACJHR.<sup>163</sup> A summary of that information is contained below in Table 38.1.<sup>164</sup> One noticeable (and presumably deliberate) omission is any entry for the judges and their salaries.

<sup>152</sup> See *supra* Section 9.

<sup>153</sup> See *supra* Sections 6, 8.

<sup>154</sup> See SCSL, Eighth Annual Report of the President of the Special Court for Sierra Leone, June 2010 to May 2011, at 11–17.

<sup>155</sup> *Id.* at 22–3.

<sup>156</sup> *Id.* at 14–17.

<sup>157</sup> See *supra* text accompanying notes 65–9.

<sup>158</sup> See SCSL, Fifth Annual Report of the President of the Special Court for Sierra Leone, June 2007–May 2008, at 13–18.

<sup>159</sup> *Id.* at 22 (noting that the Appeals Chamber rendered judgments in two appeals).

<sup>160</sup> *Id.* at 28–30.

<sup>161</sup> *Id.* at 44.

<sup>162</sup> See *supra* Section 9.

<sup>163</sup> Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, *supra* note 117, at 5–7.

<sup>164</sup> The AU report is somewhat ambiguous, but it appears that the column titled “Number in ACJHPR” represents the projected staffing of the expanded ACJHR. *Id.*

TABLE 38. 1 AU's Proposed Staffing for ACJHR

Office	Components	No. of Staff	Estimated Cost
Registrar	Office of the Registrar	18	\$420,791
	Information and Communication	3	\$89,403
	Languages Unit	41	\$1,127,451
	<i>Sub-Total</i>	62	\$1,637,645
Legal Division	Office of the Division	1	\$45,551
	Legal Unit	16	\$511,568
	Library, Archives, and Documentation	14	\$266,692
	<i>Sub-Total</i>	31	\$823,811
Finance, Admin. and HR	Office of the Division	2	\$91,102
	Finance, Budgeting, and Accounting	6	\$131,838
	HR and Administration	8	\$169,668
	Procurement, Travel, and Transport	11	\$144,809
	IT Services	10	\$254,860
	Security and Safety	30	\$326,022
	Protocol Unit	9	\$168,546
	<i>Sub-Total</i>	76	\$1,286,845
Office of the Prosecutor	Office of the Prosecutor	6	\$189,696
	Prosecution Division	5	\$161,511
	Investigation Division	1	\$38,489
	<i>Sub-Total</i>	12	\$389,696
<b>Total</b>		<b>181</b>	<b>\$4,137,997</b>

But beyond that, there are some staffing assumptions that are simply unrealistic.

For instance, the Office of the Prosecutor does not have sufficient capacity. Apart from the Prosecutor and two Deputy Prosecutors, it has only four legal officers in the Prosecution Division. This might be enough to conduct a single, relatively simple trial, but even then it lacks sufficient support in the

form of legal assistants and case managers.<sup>165</sup> It would not permit the ACJHR to undertake complex trials or try more than one case at a time. There is also no provision for an appellate team. This may not be needed at start-up, but at some point the Office of the Prosecutor will need staff devoted to appeals.<sup>166</sup>

A bigger problem is the lack of investigative capacity. The staffing table only provides for a single individual in the Investigation Division. This is inadequate, even at start-up. International criminal investigations are enormously complex and require substantial resources.<sup>167</sup> The typical ICC investigation team is composed of 35 personnel, including investigators, analysts, lawyers, legal assistants, case managers, and specialists in forensics and digital evidence.<sup>168</sup> Without a robust investigative capacity, the ACJHR cannot be successful.

There are also problems in other organs of the court. For instance, there appears to be only a single person assigned to the Defence Office and a single person assigned to the Victims and Witnesses Unit. Both of these units will almost certainly need additional staff. The ICC has five personnel in the Office of Public Counsel for the Defence and 63 people in the Victims and Witnesses Section.<sup>169</sup> The ACJHR may not need this many personnel, but two people is almost certainly insufficient.

In addition to omitting the judges and their salaries, the proposed staffing table does not provide for any legal officers in Chambers. The ICC averages almost two legal officers per judge, which implies a need for approximately 30 legal officers in Chambers.<sup>170</sup> A final issue is that the proposed staffing table does not appear to provide for a large enough court management section. It indicates that there will be 9 personnel assigned as either court recorders, assistant court recorders, or court clerks. This is probably not enough.<sup>171</sup>

While the staffing proposal is presented as the ACJHR's staff requirements at the "outset,"<sup>172</sup> it would not be sufficient even at start-up. As soon as the

<sup>165</sup> See *supra* text accompanying notes 108–9 (noting that ICC trial teams are comprised of about 15 personnel including lawyers, legal assistants and case managers supported by a small number of investigators).

<sup>166</sup> See *supra* text accompanying note 112.

<sup>167</sup> See *supra* Parts 5–6.

<sup>168</sup> See *supra* text accompanying notes 91–3.

<sup>169</sup> See *supra* text accompanying notes 130–3.

<sup>170</sup> See *supra* text accompanying notes 119–21.

<sup>171</sup> See *supra* text accompanying notes 121–3 (estimating that the ACJHR will need about 30 personnel in its court management section).

<sup>172</sup> Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, *supra* note 117, at 5 (describing the staffing proposal as a "rough tabulation of minimum staff requirements at the outset").

ACJHR received its first case, which would likely occur during the court's first year of operation, the problems would begin. Without any investigative capacity it would not be able to conduct an investigation. The court would likely be overwhelmed with victims and witnesses that it is ill-prepared to accommodate. It also seems to lack the legal officers and court management personnel necessary to support the judges in their work.

It may be a mistake to read too much into the AU's early projections. Nevertheless, if the expanded ACJHR's staffing ends up looking like the 2012 proposal, it is unlikely that it will be successful. Such a court might be able to try one small case every two or three years, but it would not be able to live up to the AU's expectations. The Malabo Protocol states that the expanded ACJHR is intended to prevent serious violation of human and peoples' rights and ensure accountability for those violations.<sup>173</sup> For it to achieve these goals, the ACJHR will need robust investigative, prosecutorial, and adjudicative capacity. Furthermore, if it does not have sufficient resources to investigate and prosecute those situations which would otherwise fall under the purview of the ICC, it will not be able to achieve the AU's goal of depriving the ICC of jurisdiction over situations in Africa either.<sup>174</sup>

## 11. CONCLUSION

The main takeaway from this chapter is that operating an international criminal court is not cheap. Investigating and prosecuting mass atrocities takes significant resources. Thus one way to evaluate the expanded ACJHR will be to look at the resources the AU assigns to the court. If the AU does not assign it sufficient resources to carry out complex in-depth investigations and difficult multi-year trials and appeals, then it is extremely unlikely that the court will be successful in shrinking the impunity gap or preventing atrocities. If, on the other hand, the AU does provide the ACJHR with the resources and political support it needs to carry out its mandate, then there will be reason to be hopeful about its eventual success.<sup>175</sup>

<sup>173</sup> See *infra* Section 4.

<sup>174</sup> See *supra* text accompanying notes 31–33, 64–8.

<sup>175</sup> See Nmehielle, *supra* note 18, at 36–7 (suggesting that if the ACJHR receives sufficient funding, capable staff, and the political support of the AU, it can be successful).