



Funding for the Court: Trust Fund Babies- A New Era in Court Financing

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Judicial Education Programme for Judges of the African Court of Human and Peoples' Rights

Arusha, Tanzania
5-7 March 2014

The African Court on Human and Peoples' Rights (the Court) is a continental court established by African countries to ensure the protection of human and peoples' rights in Africa. Judge Sylvain Oré, a national of Côte d'Ivoire, was elected President of the African Court on Human and Peoples' Rights (the African Court). It complements and reinforces the functions of the African Commission on Human and Peoples' Rights. The Court was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol) which was adopted by Member States of the then Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004. As of now, only nine (9) of the thirty (30) States Parties to the Protocol had made the declaration recognising the competence of the Court to receive cases from NGOs and individuals. The nine (9) States are: Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Mali, Malawi, Tanzania and Republic of Tunisia.

Remarks

By

The Right Honourable Sir Dennis Byron, President of the Caribbean Court of Justice,

on the occasion of

**The Judicial Education and Training Programme for Judges of the African Court of
Human and Peoples' Rights**

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Introduction

There is no escaping the fact that we live in trying times. The global financial crisis, technological advancements, climate change, crime and violence, terrorism and corruption are all changing the landscape of modern existence. It is in the bleakest of hours that the judicial system shines as a beacon of hope. After all, courts are “Society’s Emergency Room.”¹ They play a crucial role in the maintenance of democracy and the rule of law.

But like our babies, courts need to be well nourished. The effectiveness of the court largely depends on the resources available to it. There is a wide disparity in the quality of care in Emergency Rooms depending on the way they are funded. In a discussion such as this it is unnecessary to do more than express the truism that courts need adequate funding.

The African Court on Human and People’s Rights (AfCHPR)

A watershed moment in the modern human rights movement on the African continent was the development of the African Charter on Human and People’s Rights as an integral instrument in the

¹ American Bar Association Task Force on the Preservation of the Justice System, Report to the House of Delegates.

Constitutive Act of the African Union. This development signalled a move away from the priority given to state sovereignty towards a recommitment to the respect for fundamental human rights, gender equality, social justice, peace and security and international co-operation.² The enforcement mechanisms of the African Charter were strengthened when the African Commission on Human Rights (the Commission) was inaugurated in 1987. Another Giant step in the institutional arrangements was achieved with the establishment of the African Court for Human and Peoples' Rights in 1996.³ The important role of the court is expressed in its mission statement as follows:

“The Mission of the Court is to enhance the protective mandate of the African Commission on Human and Peoples' Rights by strengthening the human rights protection system in Africa and ensuring respect for and compliance with the African Charter on Human and Peoples' Rights, as well as other international human rights instruments, through judicial decisions.”

The importance of this Court to the protection of human rights in Africa cannot be overstated.

The current President Justice Sophia A.B. Akuffo has described the AfCHPR as “one of Africa's most valuable resources for the timely adjudication of disputes relating to human and peoples' rights, and for affording effective remedies for the violation of those rights.”⁴

However the court has challenges which are affected by the level of its funding. 53 member states of the African Union have ratified the Charter. Of these 27 ratified the protocol establishing the court (as at 31 December 2011), and only 7 have deposited the declaration accepting the

² Joseph M. Isanga, *The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?* 11 Santa Clara J. Int'l L. 267 (2013).

³ See Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

⁴ Report of the African Court on Human and Peoples' Rights on the Relevant Aspects regarding the Judiciary in the Protection of Human Rights in Africa (2012).

jurisdiction of the court to deal with cases from individuals and NGOs. This seriously impacts on the rights of citizens of several member states to access the court for resolution of disputes relating to their human rights, adversely impacting on the vision of the African Union. Rectifying this requires investment. The annual reports of the Court has demonstrated that the court has embraced this challenge and has engaged in public education and other outreach programs to fulfil its role in the sustained development of a human rights culture and language for the African continent. These activities need to be increased. Further the operation of the court is unavoidably hampered by the fact that apart from the President the Judges still work on a part time basis. In the meantime, the need to strengthen the administrative support to the judiciary is being addressed by reforms in the Registry involving increases in staff and equipment. Then there is the support to access to justice by providing free legal representation for indigenous peoples and minorities and other deserving cases. Then there are the demands which will emerge from the inevitable increase in workload as more member states sign on to the protocols. All of these require robust financial support and there will be need for significant increases in budgetary demands. It is clear from all of this that the budgetary demands of the court cannot be static, and will inevitably expand. The ability to react to this will influence the effectiveness of the court. It is also obvious that the court has been very prudent and frugal and had been able to function well within the budgets it has in fact been receiving. Perusal of the annual report for 2012 (the last on the website) indicates that the budget allocated to the Court as contributions from Member States for 2011 stood at US\$6,478,591 while the overall expenditure, as at 30 November 2011, amounted to US\$4,498,157. In addition the Executive Council approved contributions by external partners in the sum of US\$2,862,000 of which US\$770,000 had been spent. At present the funding arrangements are governed by Article 32 of the Protocol which provides that budget shall be determined and borne

by the African Union in consultation with the Court. This requires annual applications to the political establishment and dependence on their compliance with decisions taken. Despite the fact that the system is functional, it nonetheless has inherent dangers, on which elaboration is not necessary. And, it is worth looking at another model for the future.

The 'Trust Fund Baby'

One possible avenue for reform is the use of an independent Trust Fund sufficiently resourced to allow the interest from its investments to fund the court into perpetuity. This is a financial structure which has been successfully implemented in the Caribbean Court of Justice (the CCJ). At the time of its establishment, although well tested as an endowment funding strategy it was unique as a funding mechanism for courts. It is possible that even today the CCJ is the only Court functioning as a Trust Fund Baby.

The CCJ is a court serving 12 countries in the CARICOM region. It has two distinct jurisdictions: (i) exclusive dispute resolution mechanism for disputes relating to the interpretation and application of the Treaty establishing the Caribbean Community and Single Market; and (ii) final appellate court replacing the Privy Council in the Commonwealth Caribbean states.

When the court was being planned there was concern about the concept of the independence of the court and also about its sustainability. A financing model was found which guaranteed, independence from the political establishment, and financial stability and sustainability. The plan is described in an article by Douglas Leys then general counsel for the Caribbean Development

Bank, an essential partner in the financing arrangements, an article attached for your more leisurely consumption.⁵

The member states entered into an Agreement to establish the Trust Fund. This agreement has the status of a Treaty and is interpreted in accordance with international law. In a nutshell the member states agreed to invest a capital sum in the Fund whose income would support the court in perpetuity. There was a predetermined payment ratio based on the economic status of the states. The agreement sets out the regulations governing the operation of the Trust Fund and states as its declared purpose that the Fund is to be used is to finance the capital and operating budget of the court in perpetuity.

The capital sum was accessed by the CDB and paid directly into the Fund. The member states had agreed with the CDB to repay their respective shares as a loan over a 10 year period. The capital sum was professionally quantified and assessed at US\$100 Million, using a system of assessing the projected budget over a decade or so and then calculating the capital sum which would generate and income to satisfy the estimated budget requirements.

One of the major attractions of this model is that the states only had to make a one time payment. The interest would fund the court in perpetuity. Of course there was the risk that the initial assessment may prove inadequate for any variety of reasons and there was provision to top up the fund if it became necessary to do so. The initial investment was not burdensome as it was shared between the initial 12 member states. I attach a table of contributions to the CCJ for information.

⁵ ccj-administrativeandfinancialstability-leys.pdf



The following table shows the contributions of each CARICOM state to the CCJ Trust Fund:

	USD	%
Antigua	2200,000	2%
Barbados	13500,000	14%
Belize	3700,000	4%
Dominica	2200,000	2%
Grenada	2200,000	2%
Guyana	8800,000	9%
Jamaica	28700,000	29%
St. Kitts and Nevis	2200,000	2%
St. Lucia	2200,000	2%
St. Vincent and the Grenadines		2%

	2200,000	
Trinidad and Tobago	31600,000	32%
	9,9500,000	100%

Imagine if this was divided among the 56 states who signed the AU charter or even the 26 who ratified the AC how easy it would be to establish the fund with no state suffering any financial pain.

In terms of fund adequacy, although the expenditure of the CCJ and the AC has not been too dissimilar it is reasonable to expect that the budget of both courts would need to grow to keep pace with the vision and demands of the courts as their operations expand. The actual expenditure of the CCJ in 2011 was US \$5,482,075.

COURT & COMMISSION EXPENDITURE									
2005 TO 2012 BASED IN USD									
	2005	2006	2007	2008	2009	2010	2011	2012	8 YEAR TOTAL
CCJ									
RECURREN	2867,9	3483,6	4244,3	4612,6	3961,2	5260,3	5218,5	5482,1	35130,9
T	38	70	26	69	44	04	77	85	13

CCJ									
CAPITAL	1220,5 33	1648,7 50	491,71 1	807,84 8	442,82 6	1162,5 36	263,49 8	658,13 0	6695,83 2
TOTAL CCJ									
EXPENDITURE	4088,4 71	5132,4 20	4736,0 37	5420,5 17	4404,0 70	6422,8 40	5482,0 75	6140,3 15	41826,7 45
RJLSC									
RECURRENT	136,73 1	191,58 7	290,70 5	292,82 9	289,18 1	418,64 8	362,68 6	329,86 6	2312,23 3
CAPITAL		1,333	25,954	3,939		1,094			32,320
TOTAL RJLSC									
EXPENDITURE	136,73 1	192,92 0	316,65 9	296,76 8	289,18 1	419,74 2	362,68 6	329,86 6	2344,55 3
TOTAL COURT & COMMISSION	4225,2 02	5325,3 40	5052,6 96	5717,2 85	4693,2 51	6842,5 82	5844,7 61	6470,1 81	44171,2 98

During the operations of the court since 2005, the fund has paid out about US \$47m and at the end of 2013 the Fund balance was in excess of US\$100m despite the disastrous years of the global financial crisis when it suffered losses⁶. However, the idea was a novel one, developed more than a decade ago. Just as a matter of history since the inception, the cost of services have increased, the returns on investments have decreased and the vision of the operations of the court have expanded. But the agreement makes provision for member states to respond for further investment when that becomes necessary. However, this can be avoided in new trust fund babies by calculating in a provision to minimise this possibility as it is cheaper to do it at the onset while the expenditure is much lower than the returns on investment. This would allow the capital to grow – a healthy baby.

The trust fund is tax free. It is managed by an independent board of trustees so far removed from political influence that it must give the public confidence that the fund will support judicial independence. These respected citizens, above the political fray, are responsible for overseeing the investment and management of the fund. The day to day operations of the trust fund are manned by professionally trained officers, whose operations are also financed from the proceeds of the trust fund.

The importance attached to the creation of a board that would be independent and professionally competent is demonstrated in the provisions for appointment set out in The Trust Fund Agreement. It appointed the following persons or their nominees

- (a) The Secretary General of Caricom
- (b) The Vice Chancellor of the University of the West Indies;

⁶ Newspaper article

- (c) The President of the Insurance Association of the Caribbean;
- (d) The Chairman of the Association of Indigenous Banks of the Caribbean;
- (e) The President of the Caribbean Institute of Chartered Accountants;
- (f) The President of the Organization of Commonwealth Caribbean Bar Association;
- (g) The Chairman of the Conference of Heads of the Judiciary of Member States of the Caribbean Community;
- (h) The President of the Caribbean Association of Industry and Commerce,
- (i) The President of the Caribbean Congress of Labour.

The Fund has been effective. Despite the global financial crisis, the CCJ has not suffered from funding shortages.

I attach a chart showing the performance of the fund over the period of its operation. More detailed information could be gleaned from the attached annual report for 2012

CCJ TRUST FUND RETURNS

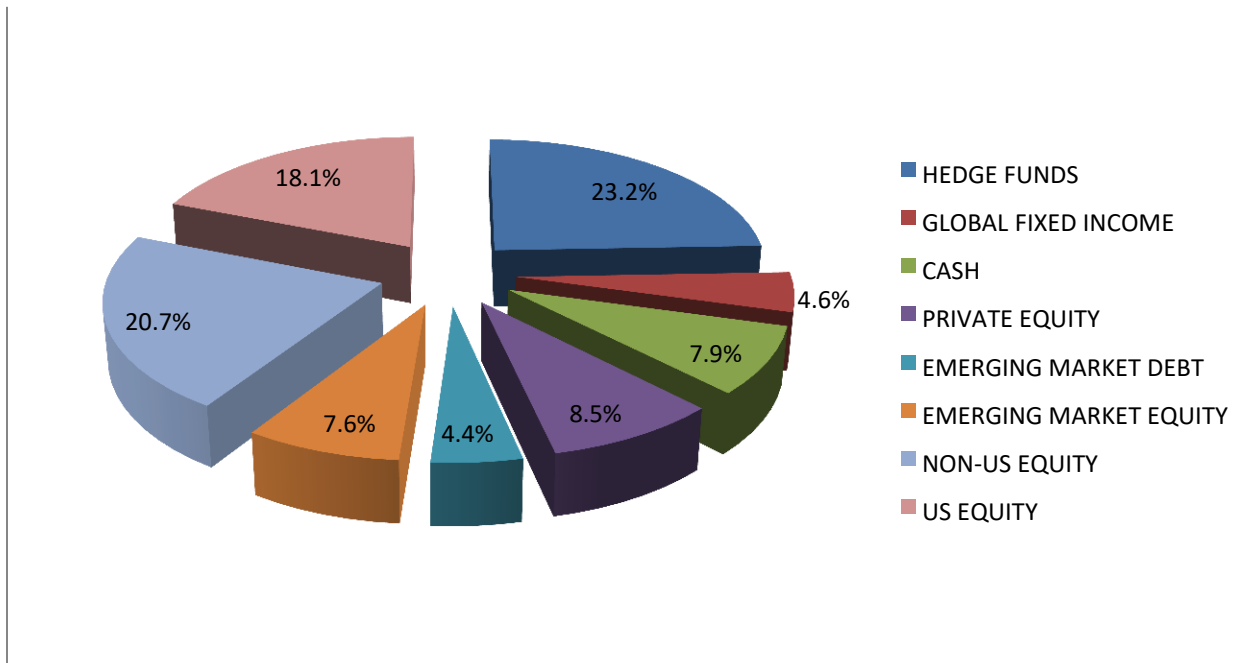
PERIOD	PERIOD RETURN	ANNUALISED RETURN FROM INCEPTION
JANUARY 1, 2006 TO DECEMBER 31, 2006	10.4%	9.3%

JANUARY 1, 2007 TO DECEMBER 31, 2007	9.2%	9.3%
JANUARY 1, 2008 TO DECEMBER 31, 2008	-19.5%	0.7%
JANUARY 1, 2009 TO DECEMBER 31, 2009	15.9%	3.5%
JANUARY 1, 2010 TO DECEMBER 31, 2010	10.3%	4.7%
JANUARY 1, 2011 TO DECEMBER 31, 2011	-1.8%	3.7%
JANUARY 1, 2012 TO DECEMBER 31, 2012	10.1%	4.5%

CCJ TRUST FUND PORTFOLIO ASSET COMPOSITION AS AT 31 DECEMBER 2012

(%)

HEDGE FUNDS	23.2%
GLOBAL FIXED INCOME	4.6%
CASH	7.9%
PRIVATE EQUITY	8.5%
EMERGING MARKET DEBT	4.4%
EMERGING MARKET EQUITY	7.6%
NON-US EQUITY	20.7%
US EQUITY	18.1%



The CCJ's financial arrangements have been favourably reviewed, being described in the following terms:

“This novel arrangement for securing the funding of the Court appears to have worked well and, ... the overall model is one which has been widely praised both in the region and the international court community more widely. Although such a relatively extreme means of insulating the funding of the Court from the vagaries of political fluctuations may be less obviously applicable and necessary for more established international courts such as the International Court of Justice and the European Court of Justice, for newly created courts and for those which are set up in the future which may be more vulnerable to political pressure or financial insecurity, this funding model is one which could bring important benefits in securing the long-term independence of the courts. Moreover, although the older international courts are unlikely to find that their funding is withdrawn or cut as a crude response to politically unpopular decisions, more subtle attempts to curb the reach and activism of certain international courts through tightening of funds is quite possible. Such attempts to check the expansive role of the courts through the control of the pursestrings has been seen many times at national level. Likewise, many instances can be cited of less politically motivated budget cuts driven rather by simple neglect or undervaluing of the work of the courts. The effect of such cuts is no less damaging on the quality and effectiveness of the court. For these reasons the funding arrangements of the CCJ warrant serious consideration for wider adoption by the community of international courts.”⁷

⁷ Kate Malleson, *Promoting Judicial Independence in the International Courts: Lessons from the Caribbean*, I.C.L.Q. 2009, 58(3), 671-687.

The AfCHPR is too big to fail. the mandate of the Court must not be frustrated by a lack of resources. I will borrow the words of a son of the African soil, current US President Barrack Obama who once observed “Money is not the only answer, but it makes a difference.”

There are many advantages in this model. I would think that foremost is that it could enhance the independence of the court. It would also make it easier for the AU to discharge its obligation to fund the operations of the court and it would be easier and in the long term cheaper for the member states to provide adequate funding in perpetuity. A court of this importance must be given the necessary sustenance.

As a Trust Fund Baby this should be guaranteed in perpetuity.