

Shambolic, shameful and symbolic

Implications of the African Union's immunity for African leaders

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Summary

African heads of state recently adopted an amended protocol on the Statute of the African Court of Justice and Human Rights, which contains a provision that grants immunity from prosecution to serving African Union (AU) heads of state and other senior officials. This paper looks at the real motivation behind this provision and its context. The amendment should be seen against the backdrop of the AU's open hostility to the International Criminal Court's (ICC's) investigations currently focusing on Africa. The immunity provision is short-sighted, at odds with the AU's own Constitutive Act, does not sit with certain tenets of international law and has drawn much criticism from civil society and human-rights groups. But, in the end, it probably serves as little more than a symbolic fist shake in the face of the ICC.

ON 27 JUNE 2014, African heads of state and governments meeting in Malabo, Equatorial Guinea, adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (known as the ACJHPR Amendment). This amendment revises the (not yet in force) Protocol on the Statute of the African Court of Justice and Human Rights (the ACJHR Protocol), which was adopted in 2008 to merge the African Court on Human and Peoples' Rights with the proposed African Court of Justice.

The aim of the 2014 ACJHPR Amendment is to grant the resultant court jurisdiction over international criminal law, adding to the human-rights jurisdiction it currently exercises and the general international-law jurisdiction it is expected to exercise when the 2008 ACJHR Protocol comes into effect (whenever that may be). If that weren't complicated enough, the ACJHPR Amendment also introduces a change in nomenclature: the new court will be called the African Court of Justice and Human and Peoples' Rights (ACJHPR) (Article 8, ACJHPR Amendment).

To give effect to its aims, the 2014 ACJHPR Amendment contains a number of revisions to both the 2008 ACJHR Protocol and the statute of the court (attached to the protocol). However, if matters were not already confusing and time-warped, the 2014 ACJHPR Amendment is *itself* a revised version of an earlier draft, approved by African ministers of justice and attorneys general, and recommended to the African Union (AU) Assembly in May 2012 (the 2012 draft

amendment). The 2012 draft amendment was the subject of considerable criticism when it appeared.¹ In short, general concerns were raised as to the rushed drafting process and lack of consultation, and specific concerns were raised as to difficulties surrounding jurisdiction, the definition of crimes, immunities, institutional design and the practical issues of administering and enforcing an expanded jurisdiction, among others.

This paper considers the various amendments to the ACJHPR Amendment between 2012 and 2014, focusing in particular on the provision for immunity. The author attempts to explicate the inclusion of this provision by discussing the broader context of the AU's concerns about the International Criminal Court (ICC) and international criminal justice generally. The conclusion is that, even as a Machiavellian tactic, the immunity provision is short-sighted and shameful, and probably serves as little more than a symbolic fist shake in the face of the ICC. The paper first discusses some of the other revisions that have been made to the 2012 draft amendment relating to the creation of a defence office (in the section headed 'the good') and the definition of crimes ('the bad'). To provide context, the paper briefly summarises where we have come from with the African Court protocol amendments and the state of play before the ACJHPR Amendment was introduced in June 2014.

The African Court goes criminal

In February 2010, in accordance with a decision taken by the AU Assembly a year earlier, the AU Commission appointed consultants to draft the amended protocol to expand the jurisdiction of the African Court to prosecute crimes. In June 2010, only four months after receiving their brief, the consultants completed a first draft protocol, which was considered at two validation workshops coordinated by the AU Pan-African Parliament in late 2010 and at three meetings of government experts convened by the AU Commission during 2011. The draft was reviewed at a meeting of AU government legal experts, held in May 2012 in Addis Ababa, Ethiopia. A meeting of ministers of justice and attorneys general adopted the draft protocol – with the exception of the provision relating to the crime of unconstitutional change of government (which was apparently to be given more thought because of its definitional problems).

Although this process appears to have extended over three years, either by design or default it nevertheless eschewed input and acquired very little buy-in from across the continent. Most notably, government representatives were not invited to the validation workshops in 2010. Consequently, African governments (for whom the implications are the greatest) only had a year to review the draft protocol. Compounding this, the text of the draft protocol was only made available to states and their legal advisers in March 2011. At a round-table meeting hosted in April 2012 by the Institute for Security Studies, legal advisers and senior representatives from several southern African states confirmed that the process, they believed, had been rushed and complex, and that it did not provide enough time for proper consideration.

Furthermore, NGOs and other external legal experts were not asked for comment, and the draft protocol was not made available on the websites of the AU or its consultants, nor was it publicly posted for comment in other media. If the AU's response is that this is how it ordinarily drafts important protocols, and that nothing was done differently in respect of the ACJHPR amendment, then that is cause itself for concern about the law-making processes of the AU, its commitment to broad government participation therein, and the extent to which any of its protocols can be truly regarded as considered expressions of its member States' interests or input.



INTERNATIONAL CRIMINAL TRIALS ARE A SLOW AND LABORIOUS PROCESS AT THE BEST OF TIMES, PARTICULARLY IF PROPER FAIR-TRIAL GUARANTEES ARE TO BE RESPECTED

In any event, the short time frame that the AU allowed for the complex task of drafting the amendments is telling. The hurried process and its flawed result should be seen against the backdrop of the AU's open hostility to the ICC's focus on Africa. It is also unfortunate that the rushed process to expand the African Court's jurisdiction and the lack of transparency had not permitted adequate consultation. Questions around jurisdiction, the definition of crimes, immunities, institutional design and the practicality of administration and enforcement of an expanded jurisdiction, among others, require careful examination. And in the spirit of transparency and good regional governance, the AU would have benefited from a genuine process of consultation.

The AU has shown itself to be committed to a regional exceptionalism of the most egregious kind: immunity for African leaders who have committed international crimes

Expanding the African Court's jurisdiction is a process fraught with legal and practical complexities, and one that has implications on an international, regional and domestic level. All these implications need to be considered, particularly the impact on domestic laws and obligations, and the relationship between African states parties to the Rome Statute of the ICC, the ICC itself and the African Court.

The first concern is with the court's ambitious jurisdictional reach. Even before the International Criminal Law (ICL) Section was introduced, the African Court would have had its hands full. With the new ICL Section, there are legitimate questions about the court's capacity to fulfil not only its newfound ICL obligations, but also about the effect that this extra burden will have on the court's ability to deal with its general and human-rights obligations.

In the first place, the subject matter of the court's ICL jurisdiction is anything but modest. The ICL Section 'shall have the power to try persons' for a long list of the worst crimes known to humanity: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, the crime of aggression and inchoate² offences.

Each of these crimes is separately defined as an offence under the draft protocol. The problems surrounding some of these definitions would require treatment in a separate paper. For now it is enough to note that the court is expected not only to try the established international crimes, but also to tackle a raft of other social ills that plague the continent. While in principle this

is laudable, the fact remains that international criminal trials are a slow and laborious process at the best of times, particularly if proper fair-trial guarantees are to be respected. The process of doing justice with these types of prosecutions runs the risk of being severely compromised when a court is expected to do too much by way of the crimes on its docket. A related difficulty involves cost: to ensure that justice can be done to that jurisdiction, a vast amount of money is needed to ensure that the court is properly staffed and has the capacity to run international criminal trials.

As indicated earlier, the 2012 draft amendment was the subject of criticism when it appeared.³ Regrettably, for the most part the drafters of the 2014 ACJHPR Amendment did not use the two intervening years to address these concerns. Rather, they have made a number of revisions that compound them and have introduced new ones.

Given these interrelated and material difficulties with the establishment of an international criminal chamber at the African Court, the question must be asked, what is the real motivation behind the draft protocol? There are serious questions about whether the draft protocol is an example of so-called negative complementarity – an attempt to secure regional exceptionalism in the face of the ICC's investigations currently directed on the continent. As discussed later, the 2014 ACJHPR Amendment introduces a provision of particular concern – one that grants serving AU heads of state of government, as well as other senior officials of unspecified rank, immunity from prosecution (Article 46A bis, ACJHPR Amendment). This provision has drawn considerable criticism from various quarters, not just because it is retrograde as far as combating impunity is concerned – which the AU has committed itself to on numerous occasions – but because it is unclear which officials are granted immunity. Most importantly, the AU has shown itself to be committed to a regional exceptionalism of the most egregious kind: immunity for African leaders who have committed international crimes.

The good

The 2014 ACJHPR Amendment contains a few positive revisions. Chief among these is the addition of the Defence Office as one of the four 'organs of the court' (Article 2(4), ACJHPR Amendment) – the other organs being the Presidency, the Office of the Prosecutor and the Registry. In addition, the ACJHPR Amendment sets out a number of protections (see Article 22C), which include:

- The requirement that 'the Defence Office shall ensure that there are adequate facilities to *[sic]* defence counsel and persons entitled to legal assistance in the preparation of a case'.

- The creation of a position of a ‘principal defender’, appointed by the Assembly, to manage the Defence Office, who shall ‘enjoy equal status with the Prosecutor in respect of rights of audience and negotiations *inter partes*’.

These are positive developments in a number of respects. It is worth recalling that, historically, defence counsel have been under-considered and under-capacitated as far as international criminal trials are concerned.⁴ To some extent, this has been perpetuated by the ICC, where the Office of the Public Counsel for the Defence is located within the Registry, and is not an independent organ of the ICC.⁵ In contrast, the Office of the Prosecutor is.⁶ In fact, a survey of the various international and hybrid tribunals for the prosecution of international crime reveals that only one – the Special Tribunal for Lebanon – positions the Defence Office as a separate organ of the court.⁷ This division sits uncomfortably with the principle of equality of arms. For this reason, the inclusion in the ACJHPR Amendment of the Defence Office as a separate organ within the structure of the court is to be applauded.

In a similar vein, the requirement that the Defence Office ensures that defence counsel are adequately resourced is an important innovation introduced by the ACJHPR Amendment. Lack of sufficient funding was an issue that has plagued the ad hoc and hybrid international criminal tribunals (such as the International Criminal Tribunal for Rwanda), and has been raised by defence counsel at the ICC.⁸

The establishment of a principal defender, on par with the prosecutor, is as unprecedented as it is welcome. The ACJHPR Amendment takes seriously the complaint made by many that the principle of equality of arms demands the creation of an ‘independent body to exclusively support the defence and to resolve any difficulties that individual defence teams may encounter’.⁹

Defence counsel play a crucial role in all criminal trials to ensure both the fairness of proceedings and the legitimacy of the outcome. International criminal trials are no different.¹⁰ Here, the words of Robert Jackson – a judge at the Nuremberg Trials – are worth repeating: ‘If you are determined to execute a man in any case, there is no occasion for a trial. *The world yields no respect to courts that are merely organized to convict.*’¹¹ For these reasons, the revisions of the ACJHPR that seek to entrench and support the independence and efficacy of defence counsel before that institution are most welcome.

Unfortunately, however, these provisions are the high watermark of the ACJHPR Amendment.

The bad

In a previous paper, concerns were raised about the ‘rushed drafting process’ that has typified the African Court’s amendments.¹² Unseemly haste is yet again a hallmark of the drafters’ work in respect of the ACJHPR Amendment. The most recent publicly available draft contains numbering errors (Article 28C(1)(a), (b), (a), (b), (c) and Article 28L(3)), and typographical anomalies (see Article 28L, dealing with ‘Trafficking in Hazardous Wastes’, which imports the definition of ‘hazardous wastes’ from the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa [1991], but does not modify the language accordingly).

Similarly, concerns were raised about the ‘legal and practical complexities’ entailed in the expansion of the African Court’s jurisdiction to include a number of new,



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sometimes previously undefined, crimes.¹³ These concerns remain and have been compounded in at least one instance by the most recent revisions.

In the 2010 draft amendment, the definition of the novel 'crime of unconstitutional change of government' was bracketed – indicating that it remained the subject of some dispute among the drafters and some states. In the previous version, this crime was defined in broad terms, but made subject to the proviso that 'any act of a sovereign people peacefully exercising their inherent right [*sic*] which results in a change of government shall not constitute an offence under this article'.

This proviso is by no means perfect, but it at least had the benefit of narrowing down a crime that is otherwise so broadly defined as to cast doubt on the legal validity of the provision. For example, the crime includes as an *actus reus* 'any amendment or revision of the constitution or legal instruments, which is an *infringement on the principles of democratic change of government or is inconsistent with the constitution*'. (Author's emphasis.)

In the 2014 ACJHPR Amendment, this proviso is removed altogether. As a result, the exception to this crime created on the grounds of peaceful democratic protest is no longer provided for. This revision is difficult to reconcile with the definition of terrorism given in the ACJHPR Amendment (Article 28G), in terms of which an exception is created for 'struggle waged by peoples according to the principles of

Immunities continue to be an absolute (if temporary) bar to prosecution in certain instances

international law for their liberation or self-determination'. Under this exception, such individuals are 'excused' from committing conduct that would otherwise amount to terrorist acts. This includes violent conduct that results in 'serious injury or death to any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage', that 'is calculated or intended to ... create general insurrection in a State' (Article 28G(A)).

The perverse result of these two provisions, when read together, is that any person *peacefully* exercising his or her rights, which results in an 'unconstitutional change of government' may be guilty of a crime, but a person who commits violent acts – including those that cause 'death to ... any number of persons' – and does so with the purpose of causing 'general insurrection' in a state, may be excused from criminal liability.

The ugly

Undoubtedly, the most controversial provision of the ACJHPR Amendment is Article 46A bis, which deals with immunities. This provision states: 'No charges shall be commenced or continued before the court against any serving AU Head of State of Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.'

Leaving aside the broader concerns regarding the inclusion of this provision for now, questions must be raised about precisely how to interpret this enigmatic provision. It again confirms the haste with which the amendment was drafted and raises questions about the legal merit and force of the provision.

Before considering the provision in detail, it is necessary to say something broadly about immunity under international law.

Immunities and international criminal law

Immunities have long been considered a legitimate and necessary feature of international law. As Cryer et al note:

The law of immunities has ancient roots in international law, extending back not hundreds, but thousands, of years. In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys could have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide both inviolability for the person and premises of a foreign State's representatives and immunities from the exercise of jurisdiction over those representatives.¹⁴

That said, the rise of international criminal law has produced a competing good: prosecuting those most responsible for international crimes. As a result, there is a tension between these two imperatives and, although there is some movement towards resolving this tension in favour of combating impunity, immunities continue to be an absolute (if temporary) bar to prosecution in certain instances.

Immunities are divided into functional immunity (known as immunity *ratione materiae*, or subject-matter immunity) and personal immunity (or immunity *ratione personae*, or procedural immunity).

Functional immunity relates to conduct carried out on behalf of a state. This form of immunity is based on the notion that 'a State may not sit in judgment on the policies and actions of another State, since they are both sovereign and equal'.¹⁵ For this reason, functional immunity does not attach to all conduct performed by state officials: it is limited to conduct carried out within the official capacity.

Personal immunity ‘provides complete immunity of the person of certain officeholders while they carry out important representative functions’.¹⁶ In contrast to functional immunity, personal immunity is absolute (i.e. it covers both private and public acts committed by officials), but temporary (i.e. it only applies while the person holds the office in question) and can be waived by the state of the officeholder.

As far as international criminal law is concerned, there is near universal acceptance of the principle that international crimes cannot be covered by immunity *ratione materiae*, before international or domestic tribunals. The International Military Tribunal at Nuremberg held that such immunity does not apply to ‘acts condemned as criminal by international law’.¹⁷ Similarly, the statutes of ad hoc UN tribunals for both Yugoslavia and Rwanda contain a provision stating that the ‘official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment’.¹⁸ The Rome Statute (in Article 27(2)) similarly provides for inadmissibility of immunities before the ICC and before domestic courts of states that are a parties to the Rome Statute.

The same is true in much domestic jurisprudence on immunity *ratione materiae*. In the leading domestic decision on the irrelevance of functional immunity in the Pinochet case, for example, the UK House of Lords found that General Pinochet could not rely on functional immunity to avoid being extradited for allegations of torture¹⁹ because ‘international law does not protect the same acts that it prohibits and condemns’.²⁰

The relevance of immunity *ratione personae* in the prosecution of international crimes, however, is more complex. One must distinguish between proceedings before international tribunals and those before domestic courts.

Support for the proposition that customary immunity *ratione personae* under international law does not apply to individuals in proceedings before international courts can be found in the jurisprudence of a number of such courts, as well as in the academic literature. International tribunals have either expressly or by implication considered such immunity to be irrelevant for their purposes. The Statute of the Nuremberg Tribunal stated: ‘Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan’.²¹

Although the ad hoc UN Tribunals of the 1990s did not contain a specific provision addressing immunity *ratione personae*, the International Criminal Tribunal for the former Yugoslavia indicted Slobodan Milošević while he was still head of state. Similarly, the hybrid Special Court for Sierra Leone held that ‘the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court’.²² Finally, in the *Arrest Warrant* case the International Court of Justice (ICJ) stated that:

... an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VI1 of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention.²³



THE RELEVANCE OF IMMUNITY
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State practice therefore consistently confirms that the rules on personal immunities are made to yield in prosecutions before international criminal tribunals. Such tribunals may indict and charge the most senior officials of a state, including heads of state, suspected of crimes under their jurisdiction, even if they are still in power.

Conversely, there is considerable authority for the opposite proposition as far as domestic prosecutions are concerned. Customary international law surrounding immunity *ratione personae* continues to apply in such proceedings.²⁴ As Cryer et al note, ‘while inroads have been made into functional immunity, State practice and jurisprudence have consistently upheld personal immunity, *regardless of the nature of the charges*’; that is, irrespective of whether the crime is a war crime, genocide, or crime against humanity.²⁵

Some national courts have recently considered immune from their jurisdiction foreign defence ministers and ministers of the interior

In the *Arrest Warrant* case the ICJ held that Belgium had ‘failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law’ when it issued an arrest warrant for the minister for crimes against humanity and war crimes.²⁶ This has been confirmed by a number of domestic courts in subsequent decisions in the UK (in respect of General Pinochet,²⁷ albeit *obiter*), Belgium, France, Spain and the US, among others.²⁸

Therefore, under customary international law, heads of state and certain other officials enjoy absolute personal immunity, even for international crimes, before the domestic courts of other states.

In summary, then, the current position of international law regarding the application of immunities to international criminal law is as follows: immunity *ratione materiae* (functional immunity) does not apply to such prosecutions, regardless of the forum (i.e. international or domestic). Immunity *ratione personae* (personal immunity) does not apply before international criminal tribunals but continues to apply before domestic courts, unless a waiver from the state concerned can be obtained.

As to the scope of personal immunity, although it clearly applies to heads of state and – according to the ICJ in the *Arrest Warrant* case – a foreign minister, it remains to be determined which other officials enjoy this form of immunity while in office. Heads of state and government clearly do enjoy such immunity, and the ICJ has added foreign ministers to this category.

However, the court’s finding that ‘diplomatic and consular agents, [and] certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs’ enjoy immunity *ratione personae* suggests that more officials might be added to the list.²⁹ In the *Arrest Warrant* case, the ICJ suggested that considerations include the function performed by the official and the duties he or she would otherwise be hindered from performing:

The functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.³⁰

Some national courts have recently considered immune from their jurisdiction foreign defence ministers and ministers of the interior.³¹ The trend to extend the right to immunity beyond heads of state and foreign ministers is not yet established as a rule of customary international law, however.³² Micaela Frulli suggests that such extension of immunity ‘risks the enlargement indefinitely of the categories of state officials who benefit from personal immunities’ and ‘does not express an adequate balance between the need to preserve the stability of international relations and the fight against impunity for the most serious international crimes’.³³

Article 46A bis

With that overview of immunities in place, this section examines the protocol’s introduction of Article 46A bis.

This appears to be an attempt to grant certain serving officials immunity *ratione personae*, that is immunity in relation to the person of certain officeholders while they carry out important representative functions. The wording of Article 46A bis suggests that the immunity conferred is absolute (i.e. there can be ‘no charges’) but temporary (it applies to ‘serving Heads of State during their tenure of office’).

Notably, this form of immunity does not necessarily lead to impunity, in the sense of protection from prosecution for all times. As the ICJ stressed in the *Arrest Warrant* case – albeit in the context of immunity before domestic courts:

The immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdiction immunity is procedural in nature, criminal responsibility is a question of substantive law.³⁴

The cloak of immunity enjoyed by officials is removed the moment they leave office. This means that as far as the ACJHPR is concerned, the court will not prosecute such individuals while they are in office. (Ironically, in the *Arrest Warrant* case the ICJ noted that criminal proceedings could nevertheless proceed in certain circumstances, including before international courts.)³⁵

This form of immunity is to be distinguished from immunity *ratione materiae*, which attaches to certain conduct carried out on behalf of the state and which is permanent – in other words, this form of immunity does not lapse when the official ceases to hold office.

What is not clear from this insertion in the ACJHPR Amendment is precisely who benefits from personal immunity while in office. The reference made in the protocol to ‘AU heads of state or government’ presumably refers to people occupying such office in a state that is party to the AU Constitutive Act. So far, so good. However, the circumstances in which someone might be ‘acting or entitled to act’ in the capacity of head of state are unclear. Furthermore, the catch-all phrase ‘or other senior state officials based on their functions’ gives little to no guidance about which functions are likely to result in immunity being granted.

To be fair, this uncertainty is not a problem the AU created. As pointed out earlier in the general discussion on immunities, there is considerable debate in international law on this point. The ICJ did not help matters in the *Arrest Warrant* case, where it found that ‘diplomatic and consular agents, [and] certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs’ enjoy immunity *ratione personae*.³⁶ That said, the current formulation in the ACJHPR Amendment does little to solve this problem – if anything, it augments it.

This provision is also difficult to square with the rest of the ACJHPR Protocol and, in particular, its inclusion of a number of the new crimes which either by definition or by implication are committed, or are most likely to be committed by incumbent heads of state and senior officials. (See, for example, the definitions of the crimes of unconstitutional changes of government, corruption and aggression.) Experience confirms that in certain circumstances immunity that attaches to an office bearer can create an incentive for that person to stay in office to avoid prosecution. The simultaneous expansion of the ACJHPR’s criminal jurisdiction, as well as the extent of office bearer-based immunities, exponentially increases the chances of such stalemates taking place.

Take the crime of unconstitutional change of government and consider situations in which the incumbent may commit such a crime. This could be by his refusal to ‘relinquish power to the winning party or candidate after free, fair and regular elections’ (Article 28E(1)(d)), or revising ‘the Constitution or legal instruments’ (Article 28E(1)(e)) or modifying ‘the electoral laws ... without the consent of the majority of the political actors’ (Article 28E(1)(f)). The incumbent, however, cannot be prosecuted because of the provisions of Article 46A bis, which secures his or her immunity before the court. The immunity provision has therefore rendered this crime entirely redundant.

The politics of Article 46A bis

The question to be asked, then, in attempting to make sense of this legal imbroglio is, why was this provision included at all?

Two related issues cast long shadows over the drafting of the ACJHPR Amendment, and here lie the reasons for the inclusion of this provision.



ON 4 MARCH 2009, THE ICC DECIDED TO ISSUE AN INTERNATIONAL ARREST WARRANT FOR PRESIDENT OMAR AL-BASHIR OF SUDAN

The first is the ongoing fracas between the AU and the ICC over the ICC's efforts to ensure the prosecution of certain senior African leaders. International criminal law has sometimes been criticised for 'providing victors in a conflict with an opportunity to demonise their opponents, sanitise their crimes and perpetuate injustice'.³⁷ Furthermore, since the ICC was established there have been concerns that the court has only concentrated on the 'usual suspects'. Some have argued that the ICC has shown bias, in that it has pursued cases in Africa while neglecting similar violations of the Rome Statute in other continents.³⁸ These concerns are reflected in statements to the effect that the ICC is a 'hegemonic tool of Western powers which is targeting or discriminating against Africans', as all of the cases to date have come from one continent – Africa.³⁹ At the same time, there are concerns that this rhetoric of condemnation (namely, that the ICC is 'anti-African, and merely an agent of neocolonialism or neo-imperialism') may damage the institution to such an extent that it is simply abandoned.⁴⁰

While the tension between the ICC and the AU has a long history, it began with the arrest warrant issued for President al-Bashir

The flashpoint came about principally from a decision made by the ICC on 4 March 2009 to issue an international arrest warrant for President Omar al-Bashir of Sudan for grave crimes committed by his government's officers and soldiers. The warrant was issued after the UN Security Council decided in 2005 to refer the crimes committed in Sudan to the ICC for investigation and possible prosecution. Matters came to a head with the AU's response to the ICC's investigation of President al-Bashir. While the ICC warrant of arrest for al-Bashir was welcomed by human-rights organisations,⁴¹ the AU (with South Africa's support – or at least acquiescence) called on the Security Council to defer the ICC's investigation by invoking Article 16 of the Rome Statute, which allows for a suspension of prosecution or investigation for a period of up to 12 months.⁴² Then, on 3 July 2009, at an AU meeting in Sirte, Libya, the AU took a resolution calling on its members to defy the international arrest warrant issued by the ICC for al-Bashir.⁴³

This AU decision placed African states parties to the Rome Statute in the 'unenviable position of having to choose between their obligations as member states of the AU on the one hand, and their obligations as states party to the Rome Statute, on the other'.⁴⁴ To date, even though al-Bashir is the subject of an arrest warrant by the ICC there have been reports of several states parties failing to enforce the warrant after inviting

al-Bashir to visit their country – including Chad, Djibouti, Malawi and Kenya.

In addition to the complaints made by African states against the ICC's pursuit of justice in respect of al-Bashir, a further objection is that the Security Council (with its skewed institutional power), while entitled to refer cases to the ICC, has made itself guilty of a double standard because, although it has done so in respect of Sudan and Libya, it has not done so in relation to, for instance, Gaza or Iraq.

Another objection is that the ICC has proceeded against a head of state (President al-Bashir) of a country (Sudan) that is not party to the Rome Statute, and more recently has chosen to embark on the prosecution of President Kenyatta of Kenya, and his vice president, William Ruto. The complaint essentially raises questions about immunity for heads of state under customary international law and the extent to which the Rome Statute's provisions, which strip that immunity, can be made applicable to President al-Bashir.⁴⁵

Therefore, while the tension between the ICC and the AU has a long history, it can safely be said that it began with the ICC arrest warrant issued for President al-Bashir in 2009, and has been brought to its peak by the ongoing proceedings against President Kenyatta. But, while the origins of the souring of the relationship between the AU and the ICC can be traced to al-Bashir's arrest warrant, the specific issue of immunity and the inclusion of Article 46A bis arise more directly from the Kenyatta and Ruto cases.

It should be noted that the earlier drafts of the protocol did not include provision for immunity. This provision was included only following the AU resolutions taken in May and October 2013 demanding that the ICC stop the Kenyan cases. This was followed by a request to defer the Kenyan cases, a request that was defeated at the Security Council in late October 2013. Then, at the 12th Assembly of States Parties in The Hague in November 2013, Kenya and the AU demanded and received an extended plenary debate on head-of-state immunity. The protocol was initially supposed to be considered at the January 2014 AU summit but was withdrawn at the last minute to allow the amendment to introduce immunity – an amendment driven by the Ethiopian prime minister, who pointed out the inconsistency between the demands the AU was making for immunity at the ICC and the lack of immunity in the AU's own proposed law. This led to a meeting of the ministers of justice and attorneys general in May 2014 to amend the draft to include immunities before it was finally adopted by the heads of state the following month.

This has led to a situation where the issue of immunity has begun to take central place, with various objections raised by

the AU against proceedings directed at African heads of state, one of which was that under customary international law, as well as the Rome Statute of the ICC (Article 98), these leaders were entitled to immunity.

The second issue is the related, but distinct, response from African states (and one taken up formally by the AU) to the perceived targeting of its leaders by European prosecutors and judges, often said to be along old colonial lines. While these complaints have largely been directed at the perceived 'abuse of the principle of universal jurisdiction', they also raise the question of whether the assertion of jurisdiction by Europeans is an affront to the immunity (under international law) that attached to African leaders by dint of their elevated official status. One such complaint made by the AU was directed at the indictment by a French judge of nine senior Rwandan officials, three of whom Rwanda claimed were entitled to personal immunity as senior Rwandan government officials.⁴⁶ As a result of this perceived affront to its sovereignty, Rwanda severed diplomatic relations with France and filed a case against France at the ICJ for violating its diplomats' immunities.⁴⁷

This is a very broad overview of these two complex developments, which raise both political and legal questions that lie beyond the scope of this paper. These developments also confirm the views of those who have suggested for some time that the ICC's exclusive focus on African situations is placing the court's legitimacy at risk – and providing the AU with an excuse to undermine the work of the court.⁴⁸

The point is that questions might rightfully be raised about the impartiality and independence of the ICC's prosecutor (and the ICC as a whole), and whether political considerations, such as the ICC's relationship with the US (which has, historically, a well-documented interest in the Israel–Palestine conflict), have outweighed questions of law and objective considerations of justice.⁴⁹ But what the ICC and its supporters have failed to fully appreciate is that the court's evasion of certain situations to avoid an American and European backlash has ironically but unavoidably affected the health of the court. By avoiding criticism from one quarter, the ICC has simply exposed itself to pain from another. And that pain – now inflicted by African leaders who, in principle or out of self-interest, are unwilling to be the scapegoats for the international criminal-justice project – is detrimental to the continued well-being of that project.

Evidence of this pain is now plain for all to see. There can be little doubt that a correlation exists between the frosty relations between the AU and the ICC (including the perceived abuse of universal jurisdiction by European states) and Article 46A bis of the ACJHPR Amendment. It seems likely that Article 46A bis is largely motivated by these broader concerns and that it is an attempt to use the ACJHPR to advance an African position for the continued relevance of immunity for African leaders – either legally or politically, or both. What is more, this legal posturing by African states has little to do (at least for now) with the operation of the ACJHPR, which may or may not come into force at some stage.

The confusing and conflicting trouble with Article 46A bis

Assuming this assessment to be correct of the AU's motivation for reclaiming immunity for Africa's powerful, what is immediately troubling is that Article 46A bis is transparently at odds with the AU's own Constitutive Act. It also conflicts with previous official AU statements relating to the expansion of the African Court to the effect that impunity for international crimes is intolerable and that the perpetrators of such crimes must be held accountable.



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The AU's Constitutive Act proclaims as a founding principle in Article 4(h) 'the right of the Union to *intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity*'.⁵⁰ (Author's emphasis.) In its report on universal jurisdiction, the AU's Office of Legal Counsel noted that Article 4(h) 'provides the basis of the practice of the African Union on universal jurisdiction over war crimes, genocide and crimes against humanity'.⁵¹

The AU's Model Law on Universal Jurisdiction recognises that 'certain crimes are of most serious concern to Member States of the African Union and the international community as a whole *and they must not go unpunished*'.⁵² (Author's emphasis.) In addition, the stated purpose of the AU Model Law is 'to provide for the exercise ... of universal jurisdiction [by a member state] ... over international crimes and for connected matters and to give effect to its obligations under international law'.⁵³ (Author's emphasis.)

It is inappropriate for an international organisation to create uncertainty as regards its own legal commitments. Such uncertainty is offensive to victims of international crimes

Aside from its commitment under its own Constitutive Act (and its statements as regards its AU Model Law), the AU's motivations for the proposed amendment to the African Charter – aimed at granting the African Court jurisdiction over such crimes – explicitly recognises the role of 'national, regional and continental bodies and institutions' in 'preventing serious and massive violations of human and peoples' rights ... *and ensuring accountability for them wherever they occur*'.⁵⁴ (Author's emphasis.)

So, the first problem with Article 46A bis is that it is difficult to square with the AU's other commitments regarding accountability. It is inappropriate for an international organisation to create uncertainty as regards its own legal commitments. Such uncertainty is offensive to victims of international crimes, who are entitled to demand that their regional body acts clearly and consistently in an area as important as accountability for international crimes.

The AU's conduct also creates tension and confusion for African states. For example, the duty to prosecute international crimes (and to deny immunities for international crimes) has been recognised at a subregional level. The International Conference on the Great Lakes Region (2006) has adopted a Protocol for

the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (2006).⁵⁵ Under the terms of this protocol, member states are obliged to prevent international crimes and punish their perpetrators.⁵⁶ Member states to the conference are Angola, Burundi, the Central African Republic, the Republic of Congo, the Democratic Republic of the Congo, Kenya, Rwanda, South Sudan, Sudan, Tanzania, Uganda and Zambia. The AU has apparently forgotten that under this protocol, immunities are denied to African heads of state. Hence, it is impossible to reconcile Article 46A bis of the AU protocol with Article 12 of the Great Lakes Protocol, which provides as follows:

The provisions of this chapter [demanding accountability for international crimes] shall apply equally to all persons suspected of committing the offences to which this Protocol applies, irrespective of the official status of such persons. In particular, the official status of a Head of State or Government, or an official member of a Government or Parliament, or an elected representative or agent of a State shall in no way shield or bar their criminal liability.

There is further potential confusion for the 34 African states that are also party to the ICC, and this is made worse for the small number of states (such as South Africa) that have domesticated the Rome Statute into their own law.⁵⁷

One way for African states to avoid this confusion will be to eschew the ACJHPR Amendment for the African Court in favour of their continued commitment under the Rome Statute and their domestic implementing legislation. If they do that, then it appears that the AU's self-serving move to club together in protection of African elites would ironically affirm the importance of viable alternatives of justice, namely the ICC and states taking their own action to prosecute international criminals in their domestic courts pursuant to their complementarity obligations. As Arnold Tsunga and Wayne Jordash have written presciently (in a passage that deserves full quotation):

One question that also emerges is whether the AU heads' decision weakens the ICC. Far from it. It unwittingly reinforces the need for the ICC and enforces its fundamental object and purpose. The cornerstone of the ICC is that of complementarity. In short, the ICC will not prosecute where there is domestic willingness and ability to deal with perpetrators of serious, widespread and systematic violations even in situations where such violations have been committed by the head of state. The head of state has no immunity from prosecution under the ICC Rome Statute. By making it impossible, or less likely, for African heads of state to be prosecuted for serious, widespread and systematic human rights violations in

Africa, the AU may have left victims of such violations with no other remedy than ICC prosecutions under the Rome Statute. So in a stroke of a self-serving pen, the AU removed African solutions for African problems and justified the existence of the ICC. Granted that the ICC has its fair share of its own problems and that some of the complaints by the AU heads against the ICC need to be addressed, but those are issues for another day and another article. Suffice to note at this stage, that by trying to undermine the ICC, the AU heads have now demonstrated to the world that victims of widespread and systematic human rights violations by African leaders have no other regional arena of justice in Africa and must instead rely upon the ICC. What an irony, or even a paradox! The current AU heads have placed an unnecessary burden upon future (more enlightened) AU leaders to disentangle the continent from this web of injustice and yoke of oppression.⁵⁸

Conclusion: much ado about nothing?

At the political level, the inclusion through Article 46A bis of immunity before the African Court sends a firm message that, for one or other reason, African leaders reject trials of sitting heads of state – so long as they are African. Various reasons might be advanced to explain this position, some more palatable than others. One explanation that has been raised is that there is something neocolonial about African leaders being put on trial in The Hague before the ICC, worse still, by their former ‘colonial masters’.

This is a powerful criticism, which will find much sympathy in Africa and beyond. However, it is clear that despite its potential appeal, it is a criticism that has no force in explicating the inclusion of Article 46A bis. That is because this article would only serve to shield African leaders from being tried by an African court.

Another explanation that has been raised is that prosecuting heads of state may complicate or even derail delicate peace processes, and that peace must come before justice. However, even if this claim might prove attractive in certain conflict-ridden situations, any concerns about prosecutions disrupting peace efforts could have been accommodated by including a provision in the ACJHPR Amendment granting the AU Assembly, or the AU’s Peace and Security Council, the power to defer such criminal trials in such circumstances (along the same lines as Article 16 of the Rome Statute of the ICC). Granting blanket immunity for all sitting heads of state and senior government officials is an exercise in overreaching: the cannon has been hauled out to kill a fly. Furthermore, any political advantage gained by the inclusion of this provision would have to be weighed against the obvious political cost that it has already, and will continue to incur for the AU.

At a legal level, the inclusion of Article 46A bis might have helped advance the argument that, as a matter of customary international law (at least as far as African states are concerned) heads of state continue to enjoy immunity from prosecution while in office irrespective of the nature of the crime in question. Attempts could be made to advance this retrograde step by the AU (retrograde as far as the fight against impunity is concerned) as evidence of both state practice and *opinio juris* – the co-determinants of customary international law – on the part of African states.

However, even if one accepts this possibility, its force would be limited. First of all, the internal inconsistencies wrought by the ACJHPR Amendment (as discussed above) would weaken the legal strength of Article 46A bis – which sits uneasily in an amendment suffering from obvious hasty drafting and whose legal logic and drafting integrity are open to doubt, at best, and ridicule at worst.



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Second, the amendment's weight, to the extent that it is meant to be a reflection of state practice by African states, is diminished by countervailing African state practice. This is reflected in the AU's previous statements concerning the need to ensure accountability for international crimes: the 34 African states parties to the ICC through their membership have accepted that immunity is not a bar to prosecution of the powerful. The amendment also runs counter to the growing body of African states that have domestically incorporated the ICC statute into their domestic law and in the process – as a matter of home-grown law – have scrapped immunities for such crimes.

Thirdly, the amendment would in any event only serve to advance the proposition that, under customary international law, such immunities continue to apply before international courts. That is because the rationales for immunities before domestic and international courts are different, and the presence or absence of immunity before one does not necessarily correlate with the other (this has been implicitly endorsed by the ICJ in the *Arrest Warrant* case). As such, the AU's move with Article 46A bis would not help shore up the argument for immunities to operate before domestic courts.

The wording of Article 46A bis suggests that the immunity conferred is absolute but temporary

Perhaps the most obvious flaw, though, is that even if Article 46A bis might have been used to advance the argument that under customary international law personal immunities continue to apply before international courts (contra to the ICJ's findings in *Arrest Warrant*), its current formulation does not do so. This is because, by providing that only AU heads of state or government shall enjoy immunity while in office, and not heads of state or government *generally*, the AU has effectively, even if unwittingly, abandoned the customary international-law immunity argument in favour of a treaty-based immunity argument. This is a significant concession. Throughout its engagement with the ICC, the AU has premised its immunity argument on customary international law. Now it will be difficult for the AU to raise that argument in future given that Article 46A bis effectively removes the general customary international-law immunity afforded to heads of state and other senior officials, and replaces it with a regional treaty-based immunity afforded only to African leaders.

Given the dubious political and legal premises upon which Article 46A bis is based, it may be that the AU's efforts will prove in the end to be nothing more than a symbolic display of

support for African leaders and a backhanded affront to the ICC, and its European and American backers. The argument that the AU's efforts to provide immunity for African leaders might be little more than posturing is confirmed by a practical consideration: the entry into force of the amendment – and the expansion of the African Court's jurisdiction to matters of international criminal law – would appear to be a long way off. Before it can happen, the 2008 protocol must first come into force. But, to date, only five states have ratified that protocol, and 15 states must do so for it to become operational. It may now be very difficult, if not impossible, for African states that are already members of the ICC to do so without embroiling themselves in a potentially embarrassing conflict of obligations. Until all the member states ratify the protocol, many of the concerns raised above remain hypothetical and, although it would be a difficult task, the ACJHPR could be further amended to address them.

That said, the effect of Article 46A bis was immediate and negative. It has been roundly condemned by civil society in both Africa and abroad⁶⁹ because it raises serious questions about Africa's commitment to the fight against impunity. It is difficult to dissociate this provision from the ongoing disputations between African states and the ICC (and international criminal justice more broadly). It is also difficult to ignore the fact that at least some African states are dragging the African Court into that melee for reasons that are self-serving and which ultimately risk the integrity of the court. This is particularly so because of the haste with which this process has been undertaken when, for the foreseeable future, there is no African Court of Justice and Human Rights to speak of. If this is the case, the benefits of the latest escalation are illusory. The costs, however, are witheringly evident for all to see, and the affront caused to the victims of such crimes is shameful.

At first it looked like just an ordinary piece of business – an announcement at the end of another AU summit of heads of state and government to the effect that it had voted to adopt the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights. And with a title like that, the casual observer might reckon it didn't merit further thought: a document likely to be filled with tedious procedural stuff.

Now the subterfuge starts making a little more sense, though, as Africa's citizens reflect on the AU's brazen step to legislate a rule to protect African leaders from prosecution. Equality before the law is a principle that is not only central to our present-day legal systems, but has also served as the motivation for liberation. So it is reasonable to assume that AU leaders were aware that the general public would not be best pleased to learn that although they, the citizens, were liable for certain crimes, their leaders would not be.

That is especially so when it is these leaders, and not the general public, who are most likely to commit the sorts of crimes in question. Crimes such as genocide and other crimes against humanity are generally perpetrated on a massive scale and have a systematic nature. They take root where a lack of accountability prevails. Those who have the means to perpetrate these crimes, who see themselves as above the law, are generally those who wield the greatest power. Yet the protocol gives them greatest protection from prosecution.

Article 46A bis of the protocol places the AU in direct conflict with the Rome Statute of the ICC, which provides that its rules 'shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility.'

It is likely that AU leaders will defend the inclusion of immunity on the basis that it is intended to ensure the smooth, efficient workings of state – allowing state officials to go about their work undisturbed by looming court proceedings. It is likely that they will argue that accountability is not removed but merely delayed, and that state officials can be prosecuted when they retire from office. This, however, ignores the perverse incentive that is generated: abusive leaders will seek to remain in power in perpetuity so that they are forever shielded from prosecution. Apart from the mere fact of the incentive for leaders to remain in power forever, in countries with weak judicial institutions and non-existent witness-protection agencies, the suggestion that victims should wait for five to 10 years before a prosecution can take place will have the practical effect of aborting justice. Witnesses will disappear or recant, as we have seen in the Kenyatta and Ruto cases before the ICC. Immunity will mean impunity, and justice will not merely be delayed, but denied.

Far from contributing to a culture of accountability and protection, by legislating for immunity for leaders, the AU places Africa's citizens at greater risk. For those who will suffer the terror of a genocidal ruler, there is the further tragedy: that ruler will now have every incentive to stay and stay and stay.

Notes

- 1 Institute for Security Studies, Implications of the AU decision to give the African Court jurisdiction over international crimes, issue paper 235, June 2012; see also Max du Plessis, A new regional International Criminal Court for Africa? *South African Journal of Criminal Justice*, 2, 2012, 286.
- 2 This is an incomplete or 'inchoate' crime, such as direct and public incitement to commit genocide.
- 3 Ibid.
- 4 See, generally, Jarinde T Tuinstra, Defending the defenders: The role of defence counsel in international criminal trials, *Journal of International Criminal Justice*, 8, 2010, 463–486.

- 5 Regulation 77, ICC.
- 6 Article 42, Rome Statute.
- 7 Article 7(d), Statute of the Special Tribunal for Lebanon.
- 8 Kate Kerr, Fair trials at international criminal tribunals: Examining the parameters of the international right to counsel, *Georgetown Journal of International Law*, 36:4, 2005, 1227.
- 9 Jarinde T Tuinstra, Defending the defenders: The role of defence counsel in international criminal trials, *Journal of International Criminal Justice*, 8, 2010, 483–484.
- 10 See, generally, Jolyon Ford, Bringing fairness to international justice, Institute for Security Studies, 2009.
- 11 Robert Jackson, *The Legal Basis for Trials of War Criminals*, Temple Law Quarterly, vol xix, 1945.
- 12 Institute for Security Studies, Implications of the AU decision to give the African Court jurisdiction over international crimes, issue paper 235, June 2012.
- 13 Ibid.
- 14 R Cryer et al, *An introduction to international criminal law and procedure*, Cambridge University Press, 2007, 422.
- 15 Ibid., 422. The International Criminal Tribunal for the former Yugoslavia Appeals Chamber explained the rationale for functional immunity as follows: 'State officials acting in their official capacity ... are mere instruments of a State and their official actions can only be attributed to the State. They cannot be the subject of sanctions and penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity".' Appeals Chamber, *Prosecutor v. Blaskic*, judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, 29 October 1997, IT-95-14-AR108 bis, para. 38.
- Dapo Akande adds that 'the immunity of state officials in foreign courts prevents circumvention of the immunity of the state through proceedings brought against those acting on behalf of the state. In this sense, this immunity operates as a jurisdictional or procedural bar and prevents courts from indirectly exercising control over acts of the foreign state through proceedings against the official who carried out the act.' See D Akande, International law immunities and the International Criminal Court, *American Journal of International Law*, 98:3, 2004, 407–433, 413.
- 16 R Cryer et al, *An introduction to international criminal law and procedure*, Cambridge University Press, 2007, 422.
- 17 In *Re Goering & others*, (1946) *International Law Reports*, 13, 203, 221; see also *Arrest Warrant case (Democratic Republic of the Congo v. Belgium)*, 2004, dissenting opinion of Judge Van den Wyngaert, para. 36 (hereinafter 'Arrest Warrant case').
- 18 Article 7(2) of the International Criminal Tribunal for the former Yugoslavia Statute and 6(2) of the statute of the International Criminal Tribunal for Rwanda.
- 19 *R v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* (no. 3) [1999] 2 All ER 97, HL.
- 20 R Cryer et al, *An introduction to international criminal law and procedure*, Cambridge University Press, 2007, 430; see also Chinkin, Regina v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte, *American Journal of International Law*, 93:3, 2003, 703. See, however, D Akande, International law immunities and the International Criminal Court, *American Journal of International Law*, 98:3, 2004, 414–415.
- 21 Article 6, Charter of the International Military Tribunal, 1946.
- 22 SCSL, *Prosecutor v. Charles Taylor, immunity from jurisdiction*, no. SCSL-03-01-I (May 31, 2004), para. 52.
- 23 See *Arrest Warrant case*, para. 61.

- 24 Akande notes: 'Judicial opinion and state practice on this point are unanimous and no case can be found in which it was held that a state official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has committed an international crime'. (D Akande, International law immunities and the International Criminal Court, *American Journal of International Law*, 98:3, 2004, 411.)
- 25 R Cryer et al, *An introduction to international criminal law and procedure*, Cambridge University Press, 2007, 425.
- 26 *Arrest Warrant* case, para. 75.
- 27 For instance, Lord Nicholls in the first Pinochet case held that '... there can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity' (see *R v. Bow St Magistrate, ex parte Pinochet Ugarte*, [1998] 4 All ER (Pinochet 1), 938). Lord Millett, in the third Pinochet case, said that 'Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him' (see *R v. Bow St Magistrate, ex parte Pinochet Ugarte* (no. 3) [1999] 2 WLR 824, 905 H).
- 28 See, for example, *Ghaddafi* case, no. 1414 (Cass. crim. 2001) (Fr.), 125 ILR 456; *Castro* case, no. 1999/2723, Order (Audiencia Nacional Mar. 4, 1999) (Spain); *H.S.A. et al v. S.A.*, Cass. 2e civ., Feb. 12, 2003, no. P.02.1139.F (Belg.), translated in 42 ILM 596 (2003); *Regina v. Bow Street Stipendiary Magistrate, ex parte Pinochet* (no. 3), [1999] 2 All E.R. 97, 126–27, 149, 179, 189 (H.L.) (per Goff, Hope, Millett, Phillips, L.J.J.); *Plaintiffs A, B, C, D, E, F v. Jiang Zemin*, 282 F. Supp. 2d 875 (N.D. Ill. 2003); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001); *Arrest Warrant Against General Shaul Mofaz* (Bow St. Mag. Ct. 12 Feb. 2004), *International & Comparative Law Quarterly*, 53, 769, 771.
- 29 *Arrest Warrant* case, para. 51
- 30 *Arrest Warrant* case, para. 45.
- 31 See Rumsfeld in Germany (decision of the German Prosecutor, 10 February 2005); and Mofaz (application for arrest warrant against General Shaul Mofaz, Bow Street Magistrates' Court, London, 12 February 2004), and Bo Xilai (Re Bo Xilai, Bow Street Magistrates' Court, London, 8 November 2005, 128 ILR, 713) in the UK.
- 32 Micaela Frulli, Immunities of persons from jurisdiction, in Cassese (ed.), *Oxford companion to international criminal justice*, Oxford University press, 2009, 369.
- 33 *Ibid.*
- 34 ICJ, *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (ICJ), 14 February 2002, para. 60.
- 35 *Ibid.*
- 36 *Arrest Warrant* case, para. 51.
- 37 W Schabas, *An introduction to the International Criminal Court*, Cambridge University Press, 2004, 1; see also CS Igwe, The ICC's favourite customer: Africa and international criminal law, *Comparative and International Law Journal of South Africa*, 40, 2008, 295.
- 38 CS Igwe, The ICC's favourite customer: Africa and international criminal law, *Comparative and International Law Journal of South Africa*, 40, 2008, 294. However, other situations were under preliminary examination by the Office of Prosecutor in Afghanistan, Colombia, Chad, Georgia and Guinea; in this regard, see M Ssenyonjo, The International Criminal Court arrest warrant decision for President al-Bashir of Sudan, *International & Comparative Law Quarterly*, 59, 2010, 205.
- 39 Max du Plessis, Recent cases and developments: South Africa and the International Criminal Court, *South African Journal of Criminal Justice*, 3, 2009, 442.
- 40 N Fritz, Black-white debate does no justice to a nuanced case, *Business Day*, 13 August 2008.
- 41 See Human Rights Watch, ICC: Bashir warrant is warning to abusive leaders, 4 March 2009, <http://www.hrw.org/en/news/2009/03/04/icc-bashir-warrant-warning-abusive-leaders> (accessed 6 November 2014); Human Rights Watch stated that the ICC warrant indicates that 'not even presidents are guaranteed a free pass for horrific crimes'; also see Amnesty International, ICC issues arrest warrant for Sudanese President al-Bashir, 4 March 2009, <http://www.amnesty.org/es/node/9632> (accessed 6 November 2014).
- 42 Max du Plessis, Recent cases and developments: South Africa and the International Criminal Court, *South African Journal of Criminal Justice*, 3, 2009, 442, 443. Article 16 empowers the UN Security Council to defer an investigation or prosecution for one year if it is necessary for the maintenance of international peace and security under Chapter VII of the UN Charter. The Security Council would need to determine that the continued involvement of the ICC is a greater threat to international peace and security than suspending the ICC's work.
- 43 *Ibid.*, 443.
- 44 Dire Tladi, The African Union and the International Criminal Court: The battle for the soul of international law, *South African Yearbook of International Law*, 34, 2009, 57.
- 45 This complaint has resulted in an effort by the AU to afford immunity to African leaders in respect of prosecutions before a new (proposed) international criminal chamber of the African Court on Human and Peoples' Rights. The complexities of this development fall beyond the scope of this paper. See, more generally, Max du Plessis and Nicole Fritz, A (new) new regional international criminal court for Africa?, 2 October 2014, ilawyerblog.com (accessed 6 November 2014).
- 46 See Charles C Jalloh, Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction, *Criminal Law Forum*, 21:2, 2010, 1–65.
- 47 See ICJ, The Republic of Rwanda applies to the International Court of Justice in a dispute with France, 18 April 2007, <http://www.icj-cij.org/presscom/index.php?pr=1909&p1=6&p2=1> (accessed 6 November 2014).
- 48 See, for example, Max du Plessis, Universalising international criminal law: The ICC, Africa and the problem of political perceptions, *Institute for Security Studies*, 6 December 2013.
- 49 For more detail on this, and criticism of the prosecutor of the ICC's decision, see John Dugard, 'Palestine and the ICC: Institutional failure or bias?', *Journal of International Criminal Justice*, 11:3, 2013, 563–570.
- 50 The AU was established in 2001 to replace the Organization of African Unity. See Constitutive Act of the African Union (2001), http://www.au.int/en/sites/default/files/Constitutive_Act_en_0.htm (accessed 6 November 2014).
- 51 Report on Model Law, Office of the Legal Counsel of the African Union, 2012, para. 40.
- 52 Preamble, African Union (Draft) Model National Law on Universal Jurisdiction Over International Crimes, 2012.
- 53 *Ibid.*, Article 1.
- 54 See Preamble, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2011.
- 55 See <http://www.genprev.net/wp-content/uploads/2012/07/ProtocolGenocidePrevention.pdf> (accessed 6 November 2014).
- 56 See articles 8 and 9.
- 57 Eight African countries that have passed implementation legislation (of some form) are Burkina Faso, the Central African Republic, Comoros, Kenya, Mauritius, Senegal, South Africa and Uganda.
- 58 See Arnold Tsunga and Wayne Jordash, The day AU leaders justified the existence of the ICC!, 6 August 2014, <http://ilawyerblog.com/day-au-leaders-justified-existence-icc/> (accessed 6 November 2014).
- 59 See, for example, The day AU leaders justified the existence of the ICC!, 6 August 2014, <http://ilawyerblog.com/day-au-leaders-justified-existence-icc/> (accessed 6 November 2014).

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The Institute for Security Studies is an African organisation that aims to enhance human security on the continent. It does independent and authoritative research, provides expert policy analysis and advice, and delivers practical training and technical assistance.

Acknowledgements

The ISS is grateful for support from the following members of the ISS Partnership Forum: the governments of Australia, Canada, Denmark, Finland, Japan, Netherlands, Norway, Sweden and the USA.

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