

**Is the African Union's decision on the ICC and the adoption of Article 46A Bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights unlawful under international law?**

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**Abstract**

The proceedings brought against Kenyan President Uhuru Kenyatta and his deputy, William Ruto for post-election election violence in 2007 by the International Criminal Court has resulted in action by the African Union that undermines individual criminal responsibility for heads of state and government officials and for the promotion and protection of human rights in Africa. This thesis will assess whether the African Union's decision to not cooperate with the International Criminal Court, and the adoption of Article 46A Bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights is unlawful under the principles of international law. This thesis will also assess how these decisions will impact Africa's ability to promote and protect human rights on the continent.

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## **Chapter One:**

### **1. Introduction**

The African Union made a decision about the International Criminal Court at its extraordinary summit on 12 October 2013 that no criminal charges can be brought against a sitting head of state or government.<sup>1</sup> Following this decision, the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights<sup>2</sup> (the Protocol on Amendments) to merge the African Court on Human and People's Rights and the African Court of Justice at the 23<sup>rd</sup> Ordinary Summit of the AU in Malabo, Equatorial Guinea in June 2014. Article 46A Bis of the Protocol on Amendments provides immunity for serving heads of state and senior government officials.

The decision about the ICC and the adoption of Article 46A Bis by the African Union reflect the tension between the principles of sovereignty and the duty to prosecute those that commit crimes under international law. The AU's actions are contrary to the well-established rule in both customary international law and treaty law, that head of state immunity cannot be invoked when an individual is alleged to have committed a crime under international law. Despite this, the AU actions point to the unwillingness of African states to hold individuals in positions of power accountable for gross human rights violations on a continent where the rights of victims are not upheld.

The African Union's decision on the ICC and Article 46A Bis can be considered to be in violation of various principles of international law and international treaties. Firstly, the African Union decision and Article 46A Bis are in violation of states' duty to prosecute individuals who commit international crimes. Secondly the decision and Article 46A Bis is in violation of customary international law, specifically Article 27 of the Rome Statute, which states that official capacity as a Head of State or a member of government shall not exempt a person from criminal

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<sup>1</sup> Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia

<sup>2</sup> Protocol on Amendments to the Protocol of the Statute of the African Court of Justice and Human Rights

responsibility. Thirdly, the decision and the adoption of the Protocol on Amendments is in direct violation of the Constitutive Act which aims to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments and to reject impunity. This thesis will conclude that the African Union's actions are unlawful under international law. It will also conclude that and Article 46A Bis which provides that heads of state and government officials are immune to criminal prosecution at the African Court of Justice and Human Rights will promote impunity and will undermine efforts to promote and protect human rights in Africa.

### 1.1 The African Union's Decision on its relationship with International Criminal Court

Under Article 15 of the Rome Statute, the Prosecutor may initiate an investigation *proprio motu* on the basis of information on crimes within the jurisdiction of the court. On 31 March 2010, the Pre-Trial Chamber authorised the Prosecutor to investigate the 2007 post-election violence in Kenya. Charges were brought against six Kenyan citizens accused of being responsible for the violence. The current head of state, Uhuru Kenyatta and his deputy William Samoei Ruto stand accused of being criminally responsible as indirect co-perpetrators pursuant to Article 25(3)(a) of the Rome Statute for crimes against humanity. Kenyatta faces charges of murder<sup>3</sup>, deportation or forcible transfer of population<sup>4</sup>, rape<sup>5</sup>, persecution<sup>6</sup> and other inhumane acts<sup>7</sup>. Ruto faces charges of murder, deportation or forcible transfer of population and persecution.

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<sup>3</sup> Article 7(1)(a) of the Rome Statute of the International Criminal Court

<sup>4</sup> Article 7(1)(d) of the Rome Statute of the International Criminal Court

<sup>5</sup> Article 7(1)(g) of the Rome Statute of the International Criminal Court

<sup>6</sup> Article 7(1)(h) of the Rome Statute of the International Criminal Court

<sup>7</sup> Article 7(1)(k) of the Rome Statute of the International Criminal Court



On 11 and 12 October 2013, the African Union made a decision about its relationship with the International Criminal Court at an Extraordinary Summit<sup>8</sup> in Addis Ababa.<sup>9</sup>

The key points of the AU Assembly decision<sup>10</sup> are the following:

1. In order to safeguard the constitutional order, stability and integrity of the member states, no charges shall be commenced or continued before any international court or tribunal against any serving AU Head of State or government.
2. The trials of Uhuru Kenyatta and William Samoei Ruto should be suspended until they complete their term of office.
3. The process to expand the mandate of the African Court on Human and People's Rights (AFCHPR) to try international crimes should be fast tracked.
4. The Commission should expedite the process of expansion of AFCHPR to deal with international crimes in accordance with the relevant decision of the Policy Organs and invites member states to support this process.
5. African states parties had proposed relevant amendments to the Rome Statute in accordance with article 121 of the Statute.<sup>11</sup>
6. African states parties to the Rome Statute of the ICC are requested to inscribe on the agenda the issue of indictment of African sitting heads of state and government by the ICC and its consequences on peace, stability and reconciliation at the forth coming sessions of the Members of the Bureau of the Assembly of States Parties.

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<sup>8</sup> Under Article 6 of the 2000 Constitutive Act, the Assembly meets at least once a year in ordinary session. At the request of any member state and on approval by a two thirds majority of the Member states, the Assembly shall meet in extra ordinary session.

<sup>9</sup> Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1(Oct.2013), Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia

<sup>10</sup> Article 7 (1) of the Constitutive Act states that the Assembly shall take decisions by consensus, or failing which, by two-thirds majority of the member states of the Union.

<sup>11</sup> On 22 November 2013, Kenya submitted proposed amendments to the Rome Statute in accordance with Article 121 of the Rome Statute which provides that after the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties. Kenya proposed amendments to Article 27 to exempt sitting heads of state and their duties exemption from prosecution during their current terms of office (Submission by the Republic of Kenya on Amendments to Rome Statute of the International Criminal Court for Consideration by the Working Group on Amendments. C.N.1026.2013.TREATIES-XVIII.10. 14 March 2014)

7. Any AU member state that wishes to refer a case to the ICC may inform and seek the advice of the AU.
8. Kenya should send a letter to the UN Security Council requesting for deferral in conformity with Article 16 of the Rome Statute in the cases of Kenyatta and Ruto.

The decision reaffirmed the Assembly's dissatisfaction with the ICC and the threat to African sovereignty. In the preamble of the AU's decision, the organisation reaffirmed its conviction against the abuse of the principle of universal jurisdiction and the activities of the ICC because its methods impede and jeopardize efforts to promote lasting peace. It reiterated that it was concerned about the "politicisation and misuse" of indictments against sitting African leaders, specifically the unprecedented proceedings against heads of state by the ICC. It also underscored that the unprecedented indictments of both Kenyatta and Ruto, could potentially undermine the sovereignty, stability and peace in Kenya and in other member states, as well as reconciliation, reconstruction and the normal functioning of constitutional institutions. The AU also reaffirmed the principles of state immunity as derived from international customary law.<sup>12</sup>

## 1.2 ICC Proceedings against Kenya:

The announcement of the 27 December 2007 presidential election results triggered widespread violence in Kenya which lasted from December 2007 to January 2008. Opposition leader of the Orange Democratic Movement (ODM), Raila Odinga and his supporters rejected the election victory of Party of National Unity (PNU) leader Mwai Kibaki, claimed that the electoral process was fraudulent. More than 1133 people were killed and 600 000 civilians displaced. Evidence surfaced that the ethnic violence was pre-meditated by ODM leaders who were accused of murder, rape, deportation of forcible transfer of the population and other inhumane acts.<sup>13</sup> The

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<sup>12</sup> Preamble of the Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1(Oct.2013), Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia

<sup>13</sup> Human Rights Watch 'Kenya: Prosecute Perpetrators of Post-Election Violence' 9 December 2011. Available online at: <http://www.hrw.org/news/2011/12/09/kenya-prosecute-perpetrators-post-election-violence>, accessed on 12 December 2013

failure of the government to prosecute post-election violence crimes led to the intervention of the ICC.

As previously stated, pursuant to Article 15 of the Rome Statute, the Pre-Trial Chamber of the ICC granted the Prosecutor's request to investigate the post-election violence in Kenya. The Chamber had to consider three circumstances that would allow for the Prosecutor to investigate the case. These circumstances are provided for in Article 53 of the Statute.

The first circumstance that the Chamber had to consider was whether there was a reasonable basis that a crime under the jurisdiction of the court has been committed. Pursuant to Article 53(a), the Prosecutor should consider the information available to determine whether a crime under the jurisdiction of the court had been committed. A crime falls under the jurisdiction of the court if it falls within the crimes listed in Article 5, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression. It must also fulfil the temporal requirements under Article 11 which provides that the court has jurisdiction only with respect to crimes committed after the entry into force of the Statute.

Based on the available information, the Chamber found that there was reasonable basis to believe that crimes against humanity had been committed on the territory of Kenya,<sup>14</sup> specifically murder, rape and other forms of sexual violence, forcible transfer of population and other inhumane acts.<sup>15</sup> It held the view that a number of attacks were planned, directed or organised by various groups which included local leaders, businessmen, members of the police force and politicians affiliated to the ODM and PNU.<sup>16</sup>

The second circumstance provided for under Article 53(b) is that the case should or would be admissible under Article 17(1) of the Statute. A case is therefore deemed to be inadmissible when the conditions listed in Article 17 have been met. These are:

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<sup>14</sup> International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*. ICC-01/09-19 para 73

<sup>15</sup> *Ibid* para 102

<sup>16</sup> *Ibid* para 117

- (a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.
- (b) The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute.
- (c) Person has already been tried for conduct which is the subject of the complaint
- (d) The case is not of sufficient gravity to justify further action of the court.

The Chamber's admissibility test refers to the admissibility of one or more potential cases within the context of the given situation. Two elements must therefore be considered. The first is to consider the groups of persons involved that are likely to be the object of an investigation, and second is to consider the crimes within the jurisdiction of the Court that have allegedly been committed during the incidents that are likely to be the focus of an investigation. Information provided by the Prosecutor is therefore assessed to determine whether these elements have been satisfied.<sup>17</sup>

With regard to Article 17(1)(a) and (b), the Chamber had to consider the Prosecutors submissions with regard to national proceedings in Kenya and third parties for perpetrators of post-election violence. At the time, there had been an indication that the Kenyan government wanted to establish a special tribunal that would prosecute perpetrators of the post-election violence. The Kenyan government also regularly promised to prosecute perpetrators in national courts. This tribunal and these national trials, however, never materialised and therefore there were no domestic proceedings being initiated in Kenya, nor was there a prospect that such proceedings would take place in the near future.<sup>18</sup> On 18 February 2010, the Prosecutor further submitted that there were no domestic proceedings either in Kenya or a third state with respect to leaders associated with the PNU and ODM. The Chamber therefore saw this as an

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<sup>17</sup> Ibid para 182

<sup>18</sup> Ibid para 183

indication of reluctance from the Kenyan authorities to address the potential responsibility of those who are likely to be the focus of the court's investigation.<sup>19</sup>

With regard to the last condition under Article 17(1)(d), the Chamber had to first consider whether persons or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed and second, the gravity of the crimes allegedly committed within the incidents which are likely to be the object of the investigation. Factors guiding this determination were the scale, nature, manner of commission, impact of crimes committed on victims and the existence of aggravating circumstances.<sup>20</sup> The Chamber held that the supporting material submitted by the Prosecutor showed that groups of persons likely to be the focus of the Prosecutor's investigations would be high ranking officials and their alleged role in the post-election violence. Therefore the first element of gravity was satisfied. With regard to the second element, the Chamber considered the scale of the violence with regard number of deaths, burned houses and displaced people. The crimes also had an element of brutality, such as burning victims alive and beheadings.<sup>21</sup> This therefore satisfied the gravity threshold of Article 17(d).

The third circumstance, as provided for under Article 53(c), states that the Prosecutor, taking into account the gravity of the crime and the interests of victims, there are substantial reasons to believe that an investigation would not serve the interests of justice. The Chamber, however, considered that a review of this requirement was not necessary with regard to this case because the Prosecutor had not determined that an investigation would not serve the interests of justice, which would not prevent him from proceeding with a request for authorisation of an investigation.<sup>22</sup>

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<sup>19</sup> Ibid para 184

<sup>20</sup>Ibid para 188

<sup>21</sup> Ibid para 199

<sup>22</sup> Ibid para 6

As a result of the above circumstances, the Chamber, therefore, granted the prosecutor authorisation to investigate the situation in Kenya based on the above mentioned reasons.

### 1.3 Jurisdiction of the International Criminal Court and Kenya

The AU and Kenya have both tried to adopt measures that would remove Kenyatta and Ruto from the jurisdiction of the ICC. Firstly, as provided for by Article 16 of the Rome Statute, the AU and Kenyan government appealed to the UN Security Council to halt the investigation and prosecution of Kenyatta and Ruto. Secondly, the Kenyan parliament passed a motion to withdraw from the Rome Statute. It is therefore important to determine whether the withdrawal of Kenya from the Rome Statute will have any effect over the jurisdiction of the Court to proceed with its trial against Kenyatta and Ruto or Kenya's obligations under the Rome Statute.

### 1.4 Article 16 and the United Nations Security Council

The AU and the Kenyan government requested the United Nations Security Council to defer the investigation and prosecution of Kenyatta and Ruto for a period of 12 months in accordance with Article 16 of the Rome Statute. The decision to defer an investigation or proceedings is vested in the United Nations Security Council under Chapter VII of the UN Charter. This therefore means that the UNSC should consider whether a pending case in the ICC would pose a threat to international peace and security.

In September 2013, Al-Shabaab militia stormed the Westgate Mall in Nairobi, killing 67 people. The terrorist attack targeted expatriates and members of the diplomatic corps, and was launched in response to Kenya's intervention in Somalia in 2012. The attack in Nairobi created an opportunity for Kenyatta and Ruto to question the legitimacy of the ICC proceedings during their terms in office. Kenya and the AU argued that the proceedings would 'distract and prevent' Kenyatta and Ruto from fulfilling their constitutional responsibilities.<sup>23</sup> Another request was submitted to the

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<sup>23</sup> Preamble of the Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1(Oct.2013) Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia para 6

UN Security Council to have the case postponed under Article 16 on the basis that the proceedings interfered with Kenya's ability to respond to the attacks and that this was a threat to international peace and security.

On 15 November 2012, the Security Council failed to adopt the resolution which sought the deferral of the Kenyan leaders' ICC trials.<sup>24</sup> The rejection of the deferral suggests that the UN Security Council failed to determine that the Westgate Mall attack posed a threat to international peace. The United Kingdom representative, for example stated that the sponsors had failed to establish that the Charter VII threshold beyond which the Court's proceedings against the Kenyan leaders would pose a threat to international peace.<sup>25</sup> United States representative, Ambassador Samantha Power stated that the families of the victims of the 2008 post-election violence had already waited for longer than five years for judicial proceedings to begin. She emphasised that the justice for the victims was critical to the country's long-term peace and security and that it was imperative that the international community support accountability for those responsible for crimes against humanity.<sup>26</sup>

Considering the powers of the UN Security Council under Chapter VII of the UN Charter and the wording of Article 16 of the Rome Statute, it could be argued that this provision is meant to be a temporary measure. It therefore cannot be used to discontinue an investigation or proceeding in the Court. It could also be argued that such a request would only be granted in the most exceptional of circumstances. Had the Kenyan request been successful, it may have weakened the ICC's ability to prosecute heads of states and other government officials as it would have set a precedent to allow individuals, specifically heads of states and government delay court proceedings at the ICC.

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<sup>24</sup> Security Council 7060<sup>th</sup> Meeting, 'Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption with 7 Voting in Favour, 8 Abstaining' SC/11176 15 November 2013

<sup>25</sup> Ibid

<sup>26</sup> United States Mission to the United Nations 'Explanation of Vote by Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, on Kenya's International Criminal Court Article 16 Deferral Request, November 15, 2013. Available online at <http://usun.state.gov/briefing/statements/217614.htm>, accessed on 10 July 2014

### 1.5 Kenya's Motion to Withdraw from the ICC

In September 2013, the Kenyan Parliament approved a motion to withdraw from the ICC. A Bill is currently being drafted by the Kenyan Attorney General to repeal the International Crimes Act 1998, which incorporated the Rome Statute into Kenya's domestic law. There is, however no legal basis for this decision under international law, specifically under the Rome Statute.<sup>27</sup>

A state may withdraw from the Rome Statute, as provided for by Article 127.<sup>28</sup> A withdrawal does not, however, relieve the State from any of its obligations of the Statute whilst it was a state party. The State is therefore still obligated to cooperate with the court in connection with any criminal investigations and proceedings that it has a duty to cooperation with and that had commenced prior to the date the withdrawal came in to effect. This means that even if Kenya were to withdraw from the Statute, it would still have to fulfil its duty to cooperate with the investigations and proceedings of Kenyatta and Ruto.

One could also argue that the intention to withdraw from the Rome Statute is in violation of Article 26 of the Vienna Convention on the Law of Treaties which states that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Article 1 of the Rome Statute provides that the court shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern and states party to the Statute accept the jurisdiction of the court with regards to the crimes referred to in Article 5.<sup>29</sup> Withdrawing from the statute in an attempt to avoid the jurisdiction of the court and the prosecution of Kenyatta and Ruto could be considered to be in bad faith.

The Bill to repeal the International Crimes Act would also not have any effect on Kenya's duties under international law. Article 27 of the Vienna Convention on the Law of Treaties provides that a party may not invoke the provisions of its internal

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<sup>27</sup> F Biketi 'Bill to withdraw Kenya from Rome Statute cooking at AG' *Standard Digital* 20 October 2013. Available at <http://www.standardmedia.co.ke/?articleID=2000095837>, accessed on 17 January 2014.

<sup>28</sup> Article 127(1) provides that a state may withdraw from the statute by written notification to the UN. The withdrawal shall take place effect one year after the date of receipt, unless the notification specifies a later date.

<sup>29</sup> Article 11 of the Rome Statute of the International Criminal Court



law as justification for its failure to perform a treaty. One could therefore argue that any changes that the Kenyan government makes to its municipal laws will on no way have an effect on its obligations under the Rome Statute. It would also not limit the court's ability to exercise jurisdiction over Kenyatta and Ruto.

This thesis will argue that the attempts by the Kenyan government and the AU to disrupt the ICC investigations and proceedings of Kenyatta and Ruto can be considered to be contrary to the duty of states to prosecute individuals who commit crimes under international law and the rule that immunity cannot be granted when international crime has been committed.

### 1.6 Merging the African Court of Human and Peoples' Rights and the African Court of Justice

The decision to combine the African Court of Justice and the African Court on Human and Peoples' Rights was made during a meeting in Addis Abba in July 2004 by the Assembly of Heads of State and Government of the African Union. This was prompted by the need to make the two existing Protocols for the African Court of Justice and the African Court of Human and People's Rights more efficient by pooling resources onto one judicial organ. When this protocol comes into force, the African Court of Justice and Human and People's Right's will be the main judicial organ of the African Union and that the court will be constituted and function in accordance with the Statute.<sup>30</sup>

#### 1.6.1 Article 46A of the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

At the 23<sup>rd</sup> Ordinary Session of the African Union in Malabo, the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (The Protocol on Amendments) was adopted.<sup>31</sup> Members were also called upon to speedily sign and ratify the legal instrument. The adoption of Protocol on Amendments undoubtedly comes of the heel of the AU decision on the ICC, and

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<sup>30</sup> Article 2 of the Protocol on the Statute of the African Court of Justice and Human Rights, adopted 1 July 2008

<sup>31</sup> African Union 'The 23<sup>rd</sup> Ordinary Session of the African Union ends in Malabo', Press Release 18/23 AU Summit.

the cases brought against Kenyatta, Ruto and the Sudanese President Omar al-Bashir.<sup>32</sup>

Members of the AU adopted the Protocol on Amendments which extends the jurisdiction of the African Court of Justice and Human Rights to genocide, war crimes and crimes against humanity. Article 46A bis of the Protocol Amendments, however, states that “no charges shall be commenced or continue before the court against any serving African Union Head of State or government, or anybody acting or entitled to act in such a capacity, or other senior State officials base on their functions, during the tenure of office.” Heads of state and senior government officials are therefore immune from being persecuted by the court for genocide, war crimes and crimes against humanity.

The decision of the AU on the ICC and the adoption of the Protocols on the Amendment can be constituted as being contrary to principles of international law, mainly because heads of state and governments officials are not entitled to immunity with regards to genocide, war crimes and crimes against humanity.<sup>33</sup>

Chapter two of this thesis will examine the principles of individual criminal responsibility and state immunity to determine whether or not the proceeding brought against Kenyatta and Ruto are consistent with international law.

Chapter three of this thesis will consider the proceedings brought against Kenyatta and Ruto with regards to the concept of sovereignty and the universal nature of human rights. This chapter will consider the relationship between the principle of sovereignty and state obligations to victims of gross human rights violations.

In Chapter four, I will look at the challenges faced by Africa’s current human rights system. It will determine that a lack of cooperation with the ICC and non-compliance with the Rome Statute will further frustrate the continent’s ability to grant justice and

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<sup>32</sup> The ICC has brought a case against President of Sudan, Omar Al-Bashir for genocide and war crimes committed in Darfur.

<sup>33</sup> Article 27 the Rome Statute provides that states that official capacity as a Head of State or a member of government shall not exempt a person from criminal responsibility, specifically for the crimes stated on Article 5 of the Rome Statute which include crimes against humanity, genocide and war crimes.

redress to victims of human rights violations and will further weaken Africa's human rights mechanisms to promote and protect human rights.

Chapter five of this thesis will firstly consider the legality of the AU's decision on the ICC as a regional body on the international plane. It will consider the consequences in international law of the decisions or resolutions passed by a regional body. Secondly it will argue that the actions of the AU are in contravention of the Constitutive Act and provisions of the Rome Statute. Thirdly, it will determine that Kenya's actions are in contravention of Kenya's regional and international obligations to fight impunity and hold individuals responsible for committing international crimes.

## **Chapter Two:**

### **2. State Immunity and Individual Criminal Responsibility**

The AU decision on Africa's relationship with the ICC underscores that it is the first time that a sitting head of state and his deputy have had criminal proceedings brought against them in an international court.<sup>34</sup> The decision further requests that the trials of Kenyatta and Ruto should be suspended until they complete their terms of office.<sup>35</sup> . It further adopted the Protocol on the Amendments for Protocol of the Statute of the African Court of Justice and Human Rights which grants sitting heads of states and government officials' immunity from prosecution in the Court. It is therefore important to consider the principles of individual criminal responsibility and state immunity to determine whether or not the proceeding brought against Kenyatta and Ruto are consistent with international law.

#### **2.1. State Immunity under International Law**

Sovereign equality is a fundamental principle in international law. This is confirmed in Article 2(1) of the UN Charter and reaffirmed in the Friendly Relations Declarations of the General Assembly of 1970. State immunity flows from the concept of sovereignty. As a general rule in customary international law, states are immune from the jurisdiction of the national courts of another state.<sup>36</sup>

Sovereign immunity is based on two major principles. The first principle is that states share a status of equality and therefore cannot have their disputes settled in one another's courts.<sup>37</sup> The second principle is that of non-intervention in the internal affairs of other states.<sup>38</sup> Domestic courts can therefore not make a foreign sovereign party subject to legal proceedings against its will.

State practice, in the form of national legislation and municipal court decisions, has shown that the states have adopted a doctrine of restrictive immunity which only

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<sup>34</sup> Decision on Africa's Relationship with the International Criminal Court (ICC), para 5.

<sup>35</sup> Decision on Africa's Relationship with the International Criminal Court (ICC) para 10(ii).

<sup>36</sup> Article 5 of the UN Convention on Jurisdictional Immunities of States and their Property

<sup>37</sup> Ian Brownlie *Principles of Public International Law 5ed* (1998) 327

<sup>38</sup> Brownlie 328

allows immunity for acts of government (*jure imperii*) and not commercial acts (*jure gestionis*)<sup>39</sup>. The UN Convention Jurisdictional Immunities of States and Their Property<sup>40</sup> codified the restrictive immunity doctrine in Article 10. Restrictive immunity restricts the absolute nature of state immunity with regards to various acts.

### 2.1.1 Immunity and acts *jure imperii* in Domestic Courts

There have been a number of cases that have had to consider the rules of state immunity, specifically with regards to human rights violations. Despite the *jus cogens* nature of the crimes allegedly committed by Kenyatta and Ruto, they cannot be subject to the jurisdiction of a foreign domestic court because of the principle of state immunity.

In *Al-Adsani v United Kingdom*, for example, the applicant argued that the act of torture had acquired the status of a *jus cogens* norm in international law and therefore took precedence over treaty law and other rules of international law.<sup>41</sup> The Court, however, held that a state should be granted immunity even when acts of torture have been committed.<sup>42</sup> In the *Arrest Warrant case*, Belgium argued that national court judgements supported the contention that immunity could be withheld with regard to serious crimes under international law.<sup>43</sup> The Court held that sitting heads of state, government and foreign ministers enjoyed immunity from criminal proceedings before foreign domestic courts even when they had committed crimes under international law.<sup>44</sup> In *Jurisdictional Immunities of the State* where the Court had to consider whether Italian domestic courts breached the principle of state immunity by allowing Italian nationals to bring cases against Germany for human rights violations during World War II.<sup>45</sup> Italy argued that it was justified to deny immunity to Germany because the nature of the acts that the nationals were bringing before the court. It argued that international law does not accord immunity to states when it has

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<sup>39</sup> Such an example is the United States Foreign Sovereign Act 1976 and the United Kingdom State Immunity Act 1978

<sup>40</sup> The Convention was adopted on 2 December 2004 but has not yet come into force.

<sup>41</sup> *Al-Adsani v United Kingdom* Council of Europe, European Court of Human Rights, 21 November 2001, 35763/97 para 57

<sup>42</sup> *Al-Adsani v United Kingdom* supra (n41) at para 61

<sup>43</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgement I.C.J. Reports 2002, p. 3 para 56

<sup>44</sup> *Arrest Warrant* supra (n43) at para 58

<sup>45</sup> *Jurisdictional Immunities of the State*, Judgement, I.C.J Reports 2012 99 para 51

committed serious violations of international humanitarian law.<sup>46</sup> The Court therefore had to consider whether the *jus cogens* nature Germany's acts displaced its entitlement to state immunity. It ultimately held that state practice did not support the notion that a state was not entitled immunity when it had committed serious human rights violations and therefore could not be considered to be part of customary international law. State practice showed that international customary law does not treat a state's entitlement to immunity as dependent upon was the gravity of the act which it was accused of on the peremptory nature of the rule it allegedly violated.<sup>47</sup> Under these circumstances, there was no conflict between the rule of *jus cogens*, which was a substantive issue and the rule of state immunity, which was a procedural issue. That is because the rules of state immunity are meant to determine whether the courts of one state may exercise jurisdiction on another state and not whether the conduct being considered is lawful or unlawful.<sup>48</sup> Therefore, it was determined that Italy breached its obligations under international law by denying Germany the immunity that is owed to it.<sup>49</sup>

### 2.1.2 International Tribunals and Jurisdiction

The rules that govern the jurisdiction of national courts with regard to crimes under international law are, however, not the same as those that govern the jurisdiction of international courts and tribunals. It can be argued that state immunity can be revoked when an individual who is representing a state commits crimes under international law when that international court has the power to exercise its jurisdiction.

In *Arrest Warrant*, the relationship between an individual who had official capacity and the state was considered by the court. The Democratic Republic of Congo (DRC) brought a case before Belgium concerning an arrest warrant against Minister of Foreign Affairs, Abdulaye Yerodia Nolombasi for crimes against humanity. Congo argued that Belgium violated the principle that a state may not exercise authority on the territory of another state and the principle of sovereign equality among all

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<sup>46</sup> *Jurisdictional Immunities of the State* paras 80-81

<sup>47</sup> *Jurisdictional Immunities of the States* supra (n45) at paras 83-84

<sup>48</sup> *Jurisdictional Immunities of the State* supra (n45) at paras 92-93

<sup>49</sup> *Jurisdictional Immunities of the State* supra (n45) at para 107

members of the UN. The court had to determine whether Belgium had jurisdiction under international law in relation to the subject matter. After considering state practice, the court held that there was no rule under customary law where there is a form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent state officials where they are suspected of having committed war crimes or crimes against humanity. It also held that there was no rule that enabled foreign national courts to exercise jurisdiction over individuals with official capacity that had allegedly committed crimes under international law. Therefore, Belgium could not exercise its jurisdiction over the DRC's Minister of Foreign Affairs based on the notion that he has committed a crime under international law.

*Arrest Warrant* affirmed that immunity from criminal jurisdiction and individual criminal responsibility are two separate concepts.<sup>50</sup> On the one hand, state immunity flows from the principle of sovereign states. This principle provides that a state may not exercise jurisdiction over another state in its domestic courts. On the other hand, individual criminal responsibility refers to the obligations international law places on individuals not to commit international crimes. State immunity can therefore be invoked when an individual is subject to criminal proceedings before a national court but not when that individual is subject to proceedings in an international court that has jurisdiction.

## 2.2 Individual Criminal Responsibility under international law

International law imposes rights and duties not only on states, but also on individuals. Noting the concern that international law produced no punishment for actors within sovereign states who committed offences against the law of nations and the law of wars.<sup>51</sup> The Nuremburg judgement held that crimes against international law were committed by “men and not abstract entities” and that international law could only be enforced by punishing individuals who committed such crimes,<sup>52</sup> specifically crimes against peace, war crimes and crimes against humanity as stated

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<sup>50</sup> *Arrest Warrant* supra (n43) para 61

<sup>51</sup> International Military Tribunal Judgement of 1 October 1946. The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany. Part 22, 22 August 1946 – 1 October 1946, para 446

<sup>52</sup> Nuremberg judgement supra (n51) at para 447

in the Nuremberg Charter.<sup>53</sup> Article 7 of the Nuremberg Charter provided that the official position of a defendant did not exempt that individual from criminal responsibility. This included head of state or responsible officials in government departments.

The Nuremberg Charter has since become part of international law. In 1946 its principles were adopted by the General Assembly in Resolution 95(1).<sup>54</sup> These principles have also been adopted in the statutes of previous international tribunals and hybrid courts such as the ICTY, ICTR and the SCSL, and the Genocide Convention<sup>55</sup>. Article 25 of the Rome Statute reflects these principles of customary international law with regard to individual criminal responsibility. It provides that an individual who commits a crime within the jurisdiction of the court shall be held individually responsible and liable for punishment in accordance with the statute.

### 2.2.1 Personal Immunity

*Ratione personae* immunity arises from customary international law and the principle of sovereign equality. It is attached to an individual by virtue of his or her office and confers immunity on to that individual from civil, criminal and administrative jurisdiction. Heads of State, Heads of Government and Ministers of Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.<sup>56</sup> In the *Arrest Warrant* case, the court held that it was firmly established that certain holders of high-ranking office in a state enjoy immunities from jurisdiction in other states.<sup>57</sup> Immunity *ratione personae* covers all acts, whether private or official, during or prior to their term of office.<sup>58</sup>

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<sup>53</sup> Article 6 (a)-(c) of the Charter of the International Military Tribunal 8 August 1946.

<sup>54</sup> Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal A/Res/1/95, 11 December 1946.

<sup>55</sup> Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide provides that persons who commit genocide or any other acts enumerated in the Convention shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

<sup>56</sup> International Law Commission Report on the work of its sixty-fifth session on 6 May to 7 June and 8 July to 9 August 2013, No. 10 (A/68/10) para 49

<sup>57</sup> *Arrest Warrant* supra (n43) at para 51

<sup>58</sup> Article 4(2) of the International Law Commissions' Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction 2013



Head of state immunity is generally accepted as absolute with regard to criminal proceedings in foreign domestic courts. In the *Gaddafi* case, the French domestic courts tried to prosecute former Libyan president Muammar Gaddafi in connection with a bomb attack on a French DC-10 airliner over the Niger in 1989. The French Court de Cassation affirmed that unless there was a contrary international provision which was binding on the two parties involved, international customary law prohibits the exercise of criminal jurisdiction over foreign heads of state in office.<sup>59</sup> Serving heads of state and other government officials may only be prosecuted in international tribunals when it is provided for in that tribunal's statute.<sup>60</sup> Immunity *Ratione personae*, however, ceases once the state official has vacated the office and is then replaced by immunity *ratione materiae*.

*Ratione materiae* is a functional immunity and covers state officials from foreign jurisdiction for official acts performed in the discharge of their mandate.<sup>61</sup> State officials can therefore not be held accountable for acts performed in an official capacity.<sup>62</sup> Immunity *ratione materiae* continues after the individual ceases to hold office.

### 2.2.2 Criminal Individual Responsibility and Head of State Immunity in International Law

It is an established rule in customary international law that there immunity cannot be invoked when the individual has committed crimes against humanity, war crimes and genocide in an international court which has that jurisdiction. This provision can be found in the Nuremberg Charter,<sup>63</sup> the UN Resolution 95(1), Genocide Convention of 1948,<sup>64</sup> the International Criminal Tribunal for Yugoslavia statute,<sup>65</sup> the

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<sup>59</sup> S. Zappala "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation" 12 EJIL (2001) 595 at 597

<sup>60</sup> The 1919 Versailles Treaty, 1945 Charter of the International Military Tribunal at Nuremberg, Statutes of the Yugoslavia and Rwanda War Crimes Tribunals all had provisions which expressed that individual criminal responsibility exists irrespective of that individual's official capacity.

<sup>61</sup> Article 3 of the ILC's Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction (2013)

<sup>62</sup> Article 39(2) of the Vienna Convention 1961 states that with respect to acts performed by a person entitled to immunities in the exercise of his functions as a member of a mission, immunity shall continue to subsist.

<sup>63</sup> Article 7 of the Nuremberg Charter

<sup>64</sup> Article 4 of the Genocide Convention 1948

<sup>65</sup> Article 7 of the International Criminal Tribunal for Yugoslavia statute

International Criminal Tribunal for Rwanda statute and the Article 27 of the Rome Statute.<sup>66</sup> Despite this established rule in customary international law, a sitting head of state has never faced criminal proceedings before an international court. One could, however, argue that even though the ICC proceedings against Kenyatta and Ruto do not violate the principles of head of state immunity and sovereignty with regard to individual criminal responsibility, even though they are both still in office.

In the *Arrest Warrant* case, the Court held that Belgium could not exercise jurisdiction over the Minister of Foreign Affairs of the DRC because the rules that governed the jurisdiction of national courts were not the same as those that governed the jurisdiction of international courts or tribunals.<sup>67</sup> The court did, however, state that immunity from jurisdiction did not equate to impunity with respect to crimes committed by that individual. As previously mentioned, immunity from criminal jurisdiction and individual criminal responsibility are two different concepts and should be treated as such. Therefore, the immunity upheld in the *Arrest warrant* case does not absolve the individual from being criminally prosecuted.<sup>68</sup> Kenyatta and Ruto can therefore be prosecuted in either a domestic court in Kenya or the ICC, because it has ratified the Rome Statute.

### 2.3 Article 27 of the Rome Statute and Kenya's Domestic Law

Article 27 of the Rome Statute provides that the Statute shall apply equally to all individuals. The official capacity of individuals, in particular that of Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall not exempt a person from criminal responsibility under the Statute, nor shall it be the grounds for a reduced sentence. States that ratify the statute therefore accept that they cannot invoke the rules that govern state immunity to avoid the jurisdiction of the court when a crime listed in Article 5 of the Rome Statute has been committed by an individual of that state.

In the *Pinochet* case, Lord Browne-Wilkinson held that Pinochet's actions were contrary to international law and therefore his actions could not give rise to immunity

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<sup>66</sup> Article 6 of the International Criminal Tribunal for Rwanda statute

<sup>67</sup> *Arrest Warrant* case supra (n43) at para 59.

<sup>68</sup> *Arrest Warrant* case supra (n43) para 61.

*ratione materiae*. The fact that Chile had signed the Torture Convention meant that it had agreed to outlaw acts of torture and accepted that all other state parties to the Convention could exercise jurisdiction over state officials of other member states for torture.<sup>69</sup> One can therefore argue that Kenya cannot claim that Kenyatta enjoys immunity for two reasons.

Firstly by ratifying the Rome Statute, Kenya accepts the jurisdiction of the court over persons who commit the international crimes as set out in Article 5 of the Statute, specifically in this case, crimes against humanity. This means that Kenya accepted that such a crime was a crime under international law as provided for in Article 1 and therefore Kenyatta cannot claim immunity *ratione materiae*. Secondly, Kenya signed and ratified the Rome Statute which means that it accepted the jurisdiction of the Court over all of its nationals, including the head of state and other state officials. This means that they cannot claim immunity because the ratification of the Rome Statute meant that it waived immunity for state officials.

### 2.3.1 Kenya's Municipal Law and the International Crimes Act of 2008

Kenya's Constitution provides that the immunity of the President shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is a party which prohibits such immunity.<sup>70</sup>

Article 143(1) of the Constitution also provides that criminal proceedings shall not be instituted in any court against the President in respect of any act done, or not done in the exercise of their powers under the Constitution.

The International Crimes Act<sup>71</sup> is an act of parliament that provides for the punishment of certain international crimes, namely genocide, crimes against

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<sup>69</sup> Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division) 24 March 1999

<sup>70</sup> Article 143(4) of the Constitution of Kenya of 2010

<sup>71</sup> The International Crimes Act of 2008

humanity and war crimes. It enables Kenya to co-operate with the ICC and the provisions of the Rome Statute and is binding on the Kenyan government.<sup>72</sup>

Article 27(1) of the Act provides that the existence of any immunity or special procedural rule attached to the official capacity of any person shall not constitute grounds for refusing or postponing the execution of a request for surrender or other assistance by the ICC, holding that a person is ineligible for surrender, transfer or removal to the ICC or another state, or holding that a person is not obliged to provide the assistance sought in a request by the ICC. Kenya's Constitution therefore enables the ICC to exercise jurisdiction over all of its nationals, regardless of official capacity.

One can therefore argue that despite the unprecedented nature of the proceedings brought against Kenyatta and Ruto, the Head of State and his deputy can be held individually responsible for crimes against humanity before the ICC based on both international and domestic law. The in-action of the Kenyan government to establish viable and effective remedies at a domestic level means that the termination or absence of ICC proceedings could deny the victims of the 2007 post-election violence the right to justice and redress.

The adoption of the Protocol on the Amendments and the AU's decision on the ICC further demonstrates the unwillingness of African states to hold leaders accountable for mass violation of human rights on the continent as they fear that allowing for the prosecution of sitting heads of state will undermine the principle of sovereignty. The next chapter will look at the relationship between the principle of sovereignty and human rights on the African continent.

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<sup>72</sup> Article 3 of the Kenyan International Crimes Act

## **Chapter Three:**

### **3. The Protection of Human Rights and Sovereignty**

The AU decision on the ICC argued that the proceedings brought against Kenyatta and Ruto could undermine the sovereignty, stability, and peace in Kenya and in other Member States, as well as reconciliation and reconstruction and the normal functioning of constitutional institutions.<sup>73</sup> The provision of immunity from prosecution of African heads of state and government officials can be considered to be a response to ICC prosecutions and an attempt to protect the sovereignty of African states. It is therefore important to consider the implications of the AU's decision and on adoption of the Protocol on the Amendments on the protection of human rights on the continent. The proceedings brought against Kenyatta and Ruto highlight the issues associated with the concept of sovereignty and the universal nature of human rights. This chapter will consider the relationship between the principle of sovereignty and the state obligations to victims of gross human rights violations.

#### **3.1 The International Protection of Human Rights**

##### **3.1.1 International Human Rights Mechanisms**

The United Nations Charter was the first instrument to recognise the universal character of human rights. Article 1 of the Charter provides that the United Nations requires cooperation in promoting and encouraging the respect of human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. Article 55 (c) of the Charter also provides that the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion.<sup>74</sup> Article

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<sup>73</sup> Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1(Oct.2013), Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia para 5

<sup>74</sup> Article 55 of the UN Charter also provides that the UN shall promote higher standards of living, full employment, and conditions of economic and social progress and development; and solutions of international economic, social, health, and related problems; and international cultural and educational cooperation.

56 further provides that member states pledge themselves to take joint and separate action in cooperation with the UN for the achievement of the purposes provided for in Article 55. These provisions only obligate states to promote human rights and cooperate in achieving human rights. They do not, however, obligate member states to enforce human rights. These human rights instruments do however, express the universal nature of human rights.

The adoption and ratification of various human rights treaties such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights shows that states, including African member states, accept the common standards that should be enforced to protect individuals from human rights violations. Despite the general acceptance of the universal nature of human rights, enforcing compliance to these standards has proven to be problematic. One problem is the conflict between international human rights and sovereignty.

### 3.1.2 International Obligations to Prosecute and Punish International Crimes

Under international law, a peremptory norm, also known as *jus cogens*, is a fundamental principle of general international law which no derogation is permitted.<sup>75</sup> International crimes with *jus cogens* status automatically impose obligations *erga omnes*. In *Barcelona Traction, Light and Power Co*, the Court held that obligations *erga omnes* are obligations that a state has towards the international community as a whole.<sup>76</sup> The Articles on Responsibility of States for Internationally Wrongful Acts further provides that States are obligated to end any serious breach arising under a peremptory norm of general international law.<sup>77</sup> It can therefore be argued that states have the obligation to prosecute those that commit these crimes, and punish them if they are found guilty.

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<sup>75</sup> Article 53 of the Vienna Convention on the Law of Treaties provides that a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.

<sup>76</sup> *Barcelona Traction, Light and Power Company, Limited* Judgement, I.C.J Reports 1970, p.3 para 33

<sup>77</sup> Article 40 and Article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts, UN general Assembly Resolution 56/83, 12 December 2001.

State practice and *opinio juris* shows that states have a duty and obligation to prosecute crimes under international law through the establishment of various international courts and tribunals from the early 1990s such as the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>78</sup> the International Criminal Tribunal for Rwanda (ICTR),<sup>79</sup> and the Special Court for Sierra Leone (SCSL)<sup>80</sup>. The statutes of these criminal tribunals reflect that the duty of states to prosecute and punish those that have committed international crimes exists in customary international law.

The Rome Statute itself obligates member states to investigate and prosecute those that commit the “most serious crimes of international concern”, specifically crimes against humanity, genocide, war crimes and aggression.<sup>81</sup> As provided for in Article 1, the International Criminal Court is complementary to national jurisdictions and should be considered to exercise its jurisdictions only when national courts have failed to prosecute individuals who have committed the crimes provided for in the statute. One can therefore argue that the member states have the initial duty and obligation to investigate and prosecute individuals that commit international crimes.

### 3.2 The Principle of Sovereignty in Africa

#### 3.2.1 Changing Notions of Sovereignty in Africa

During the decolonisation period in Africa, the main objective of the Organisation of African Unity (OAU) was to end colonisation and apartheid. States sought independence and sovereignty and this was reflected in the OAU Charter.

The preamble of the OAU Charter states the members’ determination to safeguard and consolidate the “hard-won” independence, sovereignty and territorial integrity of

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<sup>78</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc S/RES/827 (25 May 1993).

<sup>79</sup> Statute of International Criminal Tribunal for Rwanda, UN Doc S/RES/955, 8 November 1994

<sup>80</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002. Endorsed by UN Security Council in SC Res 1400, UN Doc S/RES1400, 28 March 2002

<sup>81</sup> Article 5 of the Rome Statute of the International Criminal Court

states, and to fight all forms of neo-colonialism.<sup>82</sup> Article 2(c) provided that one of the purposes of the organisation was to defend the sovereignty, territorial integrity and independence of African states. Member states affirmed to the principles of sovereign equality amongst states,<sup>83</sup> non-interference in the internal affairs of states,<sup>84</sup> and respect for sovereignty and the territorial integrity of each state and its inalienable right to independent existence.<sup>85</sup>

The Constitutive Act of the AU also reflects the importance of the principle of sovereignty to African member states. Similar to Article 2(c) of the OAU Charter, Article 3(b) of the Constitutive Act re-iterates that one of the objectives of the AU is to defend the sovereignty, territorial integrity and independence of its member states. Article 4(a) provides that the AU shall function in accordance with the principle of sovereign equality and interdependence among member states. Article 4(g) provides that the AU shall function in accordance with the principle of non-interference by any member state in the internal affairs of another.

The Constitutive Act does, however, contain various provisions that curb the principle of sovereignty. Article 4(h) provides that the AU has the right 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. Article 4(j) also provides that member states have the right to request intervention from the AU in order to restore peace and security. Interventions by the AU have mostly involved passing resolutions to establish peace keeping missions in member states. The Constitutive Act therefore reflects a level of acceptance with regard to intervention when human rights violations are occurring or when peace and stability is being threatened. Article 4(h) does not, however, specify what type of measure should be taken with regards to intervention. The Peace and Security Council of the AU is mandated to make recommendations to the Assembly when it has established that a crime provided for in Article 4(h) has been committed in a member states and

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<sup>82</sup> The preamble of the Organisation of African Unity Charter para 5.

<sup>83</sup> Article 3(1) of the Organisation of African Unity Charter

<sup>84</sup> Article 3(2) of the Organisation of African Unity Charter

<sup>85</sup> Article 3(3) of the Organisation of African Unity Charter



intervention is needed.<sup>86</sup> The final decision to intervene, however, ultimately lies with the Assembly either through consensus or a two third majority.<sup>87</sup>

### 3.2.2 Human Rights and Sovereignty in Africa

The OAU Charter did not create any specific rights and duties with regard to the protection of human rights on the continent. The only mention of human rights in the Charter is in the preamble and Article 2(e) which provides that one of the purposes of the organisation was to promote international cooperation, having due regard to the UN Charter and the UDHR. This means that it did not include any sort of judicial mechanism or institution to effectively deal with human rights violations or disputes in Africa. These disputes were predominantly handled through informal mechanisms based on negotiation and consensus amongst states.<sup>88</sup>

It was only in 1981 that the OAU adopted the African Charter on Human and Peoples' Rights<sup>89</sup> which reflects internationally accepted human rights norms. The African Commission on Human and Peoples' Rights (African Commission) was established by the African Charter to promote human and peoples' rights and ensure their protection in Africa.<sup>90</sup> The Rules of Procedure of the Commission provides that the Commission can take provisional or interim measures when states parties violate human rights.<sup>91</sup> Rule 98 provides that the Commission has the power to request a state to adopt provisional measures to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands.

The Commission is, however, considered to be weak in terms of being able to implement these measures and more specifically because its communications are not binding on member states. Such an example is the case which concerned an Ogoni

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<sup>86</sup> Article 7(e) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union

<sup>87</sup> Article 7(1) of the Constitutive Act of 2000

<sup>88</sup> K Kindiki 'The proposed integration of the African Court of Justice and the African Court of Human and Peoples' Rights' (2007) 15(1) *AJICL* 138 at 139

<sup>89</sup> The African Charter on Human and Peoples' Rights was opened for signature in 1981 and entered into force in 1986. It has been ratified by all 53 member states for the AU.

<sup>90</sup> Article 30 of the African Charter

<sup>91</sup> Rules of Procedure of the African Commission of the African Commission on Human and Peoples' Rights approved during the Commissions 47<sup>th</sup> Ordinary Session in Banjul from 12-26 May 2010 and entered into force on 18 August 2010.

activist, Ken Saro-Wiwa. He and other activists were sentenced to death by a special tribunal formed by the Nigerian government. The African Commission used its power under the Rules of Procedure and requested the Nigerian government to stop the execution. This request was, however ignored by the Nigerian government and they proceeded to execute Saro-Wiwa and the other activists.<sup>92</sup>

In 1998 the Protocol establishing the African Court of Human and Peoples' Rights was adopted.<sup>93</sup> This court was formed to complement the protective mandate of the African Commission.<sup>94</sup> This court therefore has the competence to decide all cases and disputes submitted to it that concerns the interpretation and application of the African Charter, the Protocol, and any other relevant Human Rights instrument that has been ratified by the States concerned.<sup>95</sup> Further, it is also mandated to provide an opinion on any legal matter which relates to the African Charter or any other human rights instrument.<sup>96</sup> The African Court of Human and Peoples' Rights therefore provided a legal mechanism for the African Commission when it entered into force.<sup>97</sup> When the court has decided that there has been a violation of peoples' or human rights, it has the power to make appropriate orders to remedy the violation, which includes the payment of fair compensation or reparation. More specifically, the court has the power to adopt provisional measures to request state parties to abstain from causing irreparable harm.<sup>98</sup>

In 2000 the Constitutive Act created the African Court of Justice, which is the judicial organ of the AU.<sup>99</sup> After the creation of the African Court of Justice, there

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<sup>92</sup> C Heyns 'African regional human rights system: The African Charter' (2003-4) PSLR 679 at 698

<sup>93</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted in 1998 and entered into force on 25 January 2004 after receiving the necessary 15 ratifications from member states.

<sup>94</sup> 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

<sup>95</sup> Article 3 of the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights

<sup>96</sup> Article 4 of the African Court on Human and Peoples Rights

<sup>97</sup> Heyns op cit (n92) 699

<sup>98</sup> Article 27 of the African Court on Human and Peoples' Rights

<sup>99</sup> The Protocol of the African Court of Justice of the African Union was adopted on 11 July 2003 and was enforced 11 February 2009. It has been ratified by 16 member states, namely Algeria, Comoros, Egypt, Gabon, Gambia, Libya, Lesotho, Mali, Mozambique, Mauritius, Niger, Rwanda and South Africa.

was concern about the proliferation of judicial bodies on the continent.<sup>100</sup> It was therefore decided that the two courts should be merged under the Protocol on the Statute of the African Court of Justice and Human Rights (2008). The AU decided to adopt this new Protocol for an integrated court that would have a General Affairs and a Human Rights section each with eight judges.<sup>101</sup> The General Affairs section has the competence to hear all cases brought to it under Article 28 of the Statute, except for those that deal with human and peoples' rights issues. The Human Rights section of the Court only has the competence to hear cases that are related to human and peoples' rights issues.<sup>102</sup> In June 2014, the AU adopted the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights created an additional international criminal law section.<sup>103</sup> Article 28A of the Protocol on Amendments provides that the international criminal law section shall have the power to try persons for 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 and the crime of aggression.

Similar to the establishment of the African Commission and the African Court on Human and Peoples' Rights, the Court of Justice and the Protocol on the Amendments of the Statute of the African Court of Justice and Human Rights provides a platform for intervention when human rights violations have been committed or when an individual commits a crime provided for in the statute. One can therefore argue that the adoption of these protocols and statutes reflect an acceptance and agreement by member states that the principles of non-intervention and state sovereignty are not absolute. There however continues to be a gap between member states obligations under both regional and international human rights instruments and mechanisms.

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<sup>100</sup> TF Yerima 'Comparative Evaluation of the Challenges of African Regional Human Rights Courts (2011) 4(2) *JPL* 120 at 120

<sup>101</sup> Article 16 of the Protocol of the Statute of the African Court of Justice and Human Rights

<sup>102</sup> Article 17(12) of the Protocol of the Statute of the African Court of Justice and Human Rights

<sup>103</sup> Article 6 of the Protocol on the Amendments to the Protocol of the Statute of the African Court of Justice and Human Rights replaced Article 16 of the Draft Protocol.

The decision of the AU about the ICC and the adoption of the Protocol on Amendments for the Statute of the African Court of Justice and Human Rights, which provides for the immunity for serving heads of states and government officials before the court further demonstrates African states' inclination to protect their sovereignty. It also frustrates efforts to hold those that commit mass atrocities on the continent accountable. The following chapter will analyse the Protocol for the African Court of Justice and Human Rights and will demonstrate how the adoption of the Protocol for the Amendment will further weaken the region's human rights mechanisms.

## **Chapter Four:**

### **4. Regional and Domestic Human Rights Mechanisms**

The adoption of the Protocol of Amendments not only grants immunity to heads of state but also increases the mandate of the existing Protocol of the Statute of the African Court of Justice and Human Rights to prosecute international crimes

The adoption of this Protocol will further frustrate efforts to promote and protect human rights on the continent. This chapter will look at the challenges faced by Africa's current human rights system. It will determine that a lack of cooperation with the ICC and non-compliance with the Rome Statute will further frustrate the continent's ability to grant justice and redress to victims of human rights violations and will also weaken Africa's human rights mechanisms to promote and protect human rights.

#### **4.1 The African Court of Justice and Human Rights and the Protection of Human Rights in Africa**

As previously mentioned, the decision to merge the African Court of Justice and the African Court on Human and Peoples' Rights was made during a meeting in Addis Abba in July 2004 and was prompted by the need to make the two existing Protocols for the African Court of Justice and the African Court of Human and People's Rights more efficient by pooling resources onto one judicial organ. As highlighted in Chapter one, the AU adopted the Protocol on Amendments to allow for the Court to exercise jurisdiction over international crimes in Africa. When this protocol comes into force, the African Court of Justice and Human and People's Right's will be the main judicial organ of the AU and the court will be constituted and function in accordance with the Statute.<sup>104</sup> There are however a few challenges with regards to merging the African Court of Justice and the African Court on Human and People's Rights two courts.

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<sup>104</sup> Article 2 of the Protocol for the Statute of the African Court of Justice and Human Rights, adopted 1 July 2008

#### 4.2 A Merged Court African Court of Justice and Jurisdiction

The process of replacing one court with another has its fair share of complexities. From a legal perspective, there is the complex task of trying to integrate two separate courts that have two different Protocols and two different jurisdictions.

Some scholars initially pointed out that merging the African Court of Human and Peoples' Rights and the African Court of Justice would face challenges based on the fact that the two courts have two different jurisdictions because they were initially established for two different reasons. The human rights court was established to protect and promote human rights, therefore its jurisdiction extends to all cases and disputes concerning the interpretation and application of the African human rights Charter, the Protocol establishing the Human and Peoples' Rights court and all other human rights instruments that have been ratified by the state at issue. The Court of Justice was established to deal with disputes between states and it has a broader jurisdiction which covers all AU treaties and conventions, international law and bilateral treaties and conventions between AU member states.<sup>105</sup>

The merging of the African Court of Justice and the African Court on Human and Peoples' rights would not present such a huge problem with regards to the court's jurisdiction. That is because even though the Human Rights section of the court can only handle human and people's rights cases, the General Affairs section is not precluded from hearing cases that have human rights aspects.<sup>106</sup> He argue that the two sections of the court may share common jurisdiction in some cases. Such an example is the competence of the Court of Justice to deal with cases such as the right to property.<sup>107</sup>

The addition of an international criminal court which has the jurisdiction over individuals who commit international crimes would, however, complicate the mandate of the court. There is a fundamental difference between the African Court of Justice and the African Court of Human and Peoples' Rights mandates to deal with state responsibility as opposed the a mandate of an international criminal court to

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<sup>105</sup> Kindinki op cit (n88) 141

<sup>106</sup> Kindinki op cit (n88)142

<sup>107</sup> Hansungule op cit (n88) 235

deal with individual criminal responsibility. The one is concerned with the state and concerned with the individual.

#### 4.3 Individuals Access to the Court and Article 9(3)

A weakness of both the African Court of Human and Peoples' Rights<sup>108</sup> and the Protocol for the African Court of Justice and Human Rights is that individuals had limited access to the Court.<sup>109</sup> The Protocol on Amendments has not increased individual and NGO access to the Court. Article 30(f) has been amended to state that "African individuals" or "African NGOs" with observer status with the AU or its organs or institutions can bring a case directly to the Court, but only with regard to a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a state party which has not made a Declaration in accordance with Article 9(3) of the Protocol on the Amendments.<sup>110</sup>

This provision remains an obstacle for individuals and NGOs who want to bring serious human rights violation cases to the Court because they would need to have a declaration from the state in question. It is very unlikely that African states are willing to expose themselves to being brought to the Court. Such an example is in *Michelot Yogogombaye v. The Republic of Senegal* where a citizen of Chad brought a claim against the state of Senegal to prevent it from conducting a trial against Hissene Hadre, the former president of Chad. The human rights court held that it had

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<sup>108</sup> Article 5 of the African Court on Human and Peoples' Rights only allows individuals to submit cases to the court in accordance with Article 34(6) of the Protocol. Article 34(6) provided that at the time of ratification, the state shall make a declaration accepting the competence of the Court to receive cases under Article 5(3). The Court shall not receive any petition under Article 5(3) involving a state party which has not made such a declaration.

<sup>109</sup> Article 30 of the Protocol provided that only state parties to the protocol, the African Commission on Human and People' Rights, the Committee of Experts on the Rights and Welfare of the Child, African intergovernmental organisations accredited to the AU or its organs, African national human rights institutions or individuals or relevant NGOs accredited to the AU or its organs can submit a claim to the court when there is an alleged human rights violation.

<sup>110</sup> Article 9(3) of the Protocol on Amendments provides that any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30 (f).

no jurisdiction over the matter because Senegal had not made a declaration under Article 34 (6) which would have allowed the court to hear the case.<sup>111</sup>

When there is an absence of a declaration from the State in question, another member state can make a declaration that an NGO or an individual can submit a case to the court. There is still a limitation on which NGOs and individuals can bring cases before the African Court of Justice and Human Rights as it is very unlikely that other States will give a declaration to allow for the court to have jurisdiction over another African state based on the fiercely guarded principle of sovereignty. Therefore, the need for a state party to make a declaration limits the opportunities for individuals and NGOs to hold states accountable for violating human rights obligations in practice.

#### 4.4 Enforceability of the Court's Judgements

On the face of it, decisions of the merged Court will be enforced. Articles 45(1) and (2) of the Protocol on Amendments provides that if it is determined that there has been a violation of crime in the Statute, the Court shall establish in the Rules of Court principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. The Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss or injury to, or in respect of, victims and will state the principles on which it is acting. With respect to its international criminal jurisdiction, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Decisions of the court are binding on the parties.<sup>112</sup> Where a party fails to comply with a judgement, the court shall refer the matter to the Assembly which shall decide upon the measures to be taken to give effect to that judgement, and decide to impose

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<sup>111</sup> *Michelot Yogogombaye v. The Republic of Senegal*, African Court on Human and Peoples' Rights, 15 December 2009 para 46

<sup>112</sup> Article 46 (1) of the Protocol of the Court of Justice and Human Rights



sanctions on that state.<sup>113</sup> However, there is scepticism about the court's ability to enforce these judgements based on the fact that African governments have continued to commit gross human rights violations. Such an example is suspension of the Southern African Development Community (SADC) Tribunal after it handed down several judgements against the Zimbabwean government. As a result, it was decided that a new Tribunal would be negotiated and that its mandate would be limited to interpretation of the SADC Treaty and Protocols relating to inter-state disputes. The Tribunal no longer has a human rights mandate and it cannot consider individual cases.<sup>114</sup> As seen by the lack of political will to carry out the decisions of the SADC Tribunal, the merged court is also likely to battle effectively to hold states and individuals accountable for their actions.

With reference to the African Court on Human and People's Rights, Franz Viljoen argues that the Court is ill-equipped to address situations that involve a large number of victims. He also points to the fact that a court that runs on a part-time basis is incapable of resolving urgent human rights violations and that only individuals who can access the court will be granted remedies. Yerima argues that the merged court may face the same obstacles when trying to handle cases and making judgements. He further states that it is unlikely that imposing sanctions on states is relevant to the victims of human rights violations when the court orders the offending state to pay a fair compensations but it refuses to comply.<sup>115</sup> Heyns also points to the importance of trade and other links between state parties as to create the conditions to impose sanctions to affect the behaviour of states.<sup>116</sup>

Therefore, judgements and decisions can only be effective if there is a level of compliance with both domestic and regional human rights norms. Africa's political environment is currently an impediment to the Court's ability to enforce judgements.

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<sup>113</sup> Article 46 (4) and (5) of the Protocol of the Court of Justice and Human Rights

<sup>114</sup> Pierre De Vos. UCT Law Faculty statement on suspension of SADC Tribunal. 19 September 2012. Available online at: <http://constitutionallyspeaking.co.za/uct-law-faculty-statement-on-suspension-of-sadc-tribunal/>, accessed on 19 September 2014

<sup>115</sup> Yerima op cit (n100) 124

<sup>116</sup> Heyns op cit (n92) 701

#### 4.5 Funding and Resources for Regional Human Rights Mechanisms

The preamble of the Protocol of the Court of Justice and Human Rights states that the state parties recall “their commitment to take all necessary measures to strengthen their common institutions and to endow them with the necessary powers and resources to carry out their missions effectively”. The rapid proliferation of institutions in Africa and the need to rationalise the two existing courts and make them more cost effective was the main reason behind the decision to merge the Court of Justice and the Court of Human and Peoples’ Rights. Funding of the court is, however, considered to be a challenge.

African states have a poor record of providing adequate funding for its human rights institutions and this could become highly problematic when it comes to the efficiency of the merged Court. Not only are funding and resources important for the Court but so is the proper management of the resources that are available.<sup>117</sup> It has been noted that one of the problems faced by the African Commission has been funding and this has made it less effective in being able to promote human rights throughout Africa. It is also considered to be under resourced.<sup>118</sup> The commission has at various times been forced to rely on extra budgetary funding from donors due to the insufficient funds it received from the AU.<sup>119</sup> This made certain states criticise the commission for being influenced by foreign donors.<sup>120</sup> It was strongly recommended that the Member states of the AU support the commission both morally and financially or else AU would be undermining the African Charter.<sup>121</sup>

The merged court is most likely to face the similar challenges. Funds are needed to finance various aspects of the merged court such as a new building, provide registry staff, lawyers, a library and a document centre.<sup>122</sup> . Sufficient human resources and finances will be needed to make sure that Court is able to effectively carry out its

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<sup>117</sup> Heyns op cit (n92) 701.

<sup>118</sup> UO Umzurike, ‘The African Charter on Human and Peoples’ Rights: Suggestions for more effectiveness’ (2007) 13 ASICL 179 at 188.

<sup>119</sup> GM Wachira ‘African Court on Human and Peoples’ Rights: Ten years on and still no justice’ (2008) Report from Minority Groups International 10.

<sup>120</sup> In 2008 the AU made a decision to increase the budgetary allocation to the African Commission by over 400% to end its dependency on erratic donor funding.

<sup>121</sup> Yerima op cit (n100) 125

<sup>122</sup> Yerima op cit (n100) 124

mandate.<sup>123</sup> Failure by member states to provide for the court will be a huge detriment to its ability to effectively function.

In addition to the more apparent funding issues, the introduction of an international criminal section will increase the costs of the Court. It has been documented that international courts and tribunals operate at extremely high costs. Since the establishment of the ICC in 2008, for example, the Court had spent approximately US\$900 million by the 2012.<sup>124</sup> The inclusion of a third section will therefore require large investment. This is in contradiction to the underlying motivation for merging the African Court of Justice and the African Court on Human and Peoples' Rights as a way of cutting costs and saving resources to make a single court more efficient. Failure efficiently to fund the Court will make it difficult for the court to operate in practice.

#### 4.6 The Effectiveness of Africa's Human Rights Mechanisms

The preamble of the Protocol states that the establishment of an African Court of Justice and Human Rights shall assist in achieving the goals pursued by the African Union. It further states that the objectives of the African Charter on Human and Peoples' Rights can be attained by the establishing a judicial organ to supplement and strengthen the mission of the African Commission on Human and Peoples' Rights as well as the African Committee of Experts on the Rights and Welfare of the Child.

From a human rights perspective, there is a concern that that there will be a lack of focus on the mandate of the African Court of Human and People's Rights which is solely to deal with human rights violations on the continent. Various international human rights bodies criticised the merger of the two courts, stating that the AU has abandoned the idea of creating a strong court that could effectively deal with human rights issues on the continent, as envisioned by the mandate of the African Court on

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<sup>123</sup> Wachira op cit (n119) 26

<sup>124</sup> Jon Silverman, 'Ten Years, \$900m, one verdict: Does the ICC cost too much?' BBC News Magazine. 14 March 2012. Available online at: <http://www.bbc.com/news/magazine-17351946>, accessed on 9 September 2014.

Human and Peoples' Rights.<sup>125</sup> The adoption of the Protocol on Amendments further to include international crimes could further dilute the focus on human rights on the continent which the African Court on Human and Peoples Rights was initially mandated to promote and protect. The high costs that will be associated with the international criminal court may also result in the divergence of funds away from the human rights section in an attempt to fund the international criminal court section.

The African Court of Justice and Human Rights faces many challenges that could impede its ability to be a strong judicial organ that can effectively deal with the continent's human rights violations and be able to hold member states accountable for these abuses. An efficient judicial organ will greatly help with the promotion and protection of human rights and will also have the effect of enhancing justice and rule of law in Africa.<sup>126</sup>

There are surely positive aspects of the merged Court and it can be seen as a sign of progress for Africa's human rights system. Yerima acknowledges that it will strengthen the universality norm of human rights and also help loosen the rigid principle of state sovereignty. The court will also help with the growth and development of human rights jurisprudence in Africa.<sup>127</sup> The success of the court, however, mainly lies with the political will of the member states of the AU. There needs to be an adequate and widespread level of compliance with human rights norms by a significant amount of state parties on the domestic level for there to be a more efficient and stronger regional system.<sup>128</sup> Heyns argues that if the level of respect for human rights norms on the domestic level is low and domestic courts are also ineffective, there will be very little hope for a functioning regional enforcement mechanism.<sup>129</sup>

The efficiency of this court can also be bolstered if states have the courage to make the special declarations under Article 9(3) that will allow individuals and NGOs direct access to the court when human rights violations occur. This will greatly help

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<sup>125</sup>M Hansungule 'African courts and the African Commission on Human and Peoples' Rights' in A Bosl and J Diescho *Human Rights in Africa: Legal Right and their protection* (2009) 236

<sup>126</sup> Kindinki op cit (n88) 145

<sup>127</sup> Yerima op cit (n100) 121

<sup>128</sup> Heyns op cit (n92) 700

<sup>129</sup> Heyns op cit (n92) 700

in giving victims the chance to be approach the courts and be granted remedy for these violations. It will also help in holding states accountable for the crimes that they commit. Further, it is important that member states abide to their obligations under the African Charter and also comply with their financial obligations to make sure that the African commission and the Court are sufficiently funded.<sup>130</sup>

Africa's political and legal environment limits access to justice and redress for victims of human rights violations. African heads of states and government officials are most likely to be the perpetrators of massive human rights violations on the continent. A lack of AU cooperation with the ICC and the adoption of Article 46A Bis of the Protocol on Amendments will further limit the avenues for human rights victims to access justice and redress and would mean that these individuals would not be held accountable for these actions. This would therefore be in violation of AU state obligations to promote and protect human rights.

The next chapter will therefore look at how the AU decision on the ICC and the adoption of Article 46A Bis of the Protocol on Amendments is unlawful because it promotes impunity on the continent. It will also argue that the AU is in contravention of the Constitutive Act.

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<sup>130</sup> Yerima op cit (n100) 126

## **Chapter Five:**

### **5. The African Union and Kenya's Obligations under International Law**

The African Union and Kenya's actions are arguably unlawful under both regional and international law because they endorse impunity on the continent. Following the adoption of the Protocol on Amendments, Amnesty International's Africa Director for research and advocacy stated that:

'At a time when the African continent is struggling to ensure that there is accountability for serious human rights violations and abuses, it is impossible to justify this decision which undermines the integrity of the African Court of Justice and Human Rights, even before it becomes operational. We are deeply disappointed that African Heads of State and government have failed to provide the leadership needed to ensure justice for victims of crimes under international law, opting instead to shield themselves and future generations and leaders from prosecution for serious abuses.'<sup>131</sup>

This chapter will firstly consider the legality of the AU's decision on the ICC as a regional body on the international plane. It will consider the consequences in international law of the decisions or resolutions passed by a regional body. Secondly it will argue that the actions of the AU are in contravention of the Constitutive Act and provisions of the Rome Statute. Thirdly, it will determine that Kenya's actions are in contravention of Kenya's regional and international obligations to fight impunity and hold individuals responsible for committing international crimes.

#### **5.1 The African Union and International Legal Personality**

In order to determine the legality of the African Union's decision on the International Criminal Court and the adoption of Article 46A Bis of the Protocol on Amendments,

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<sup>131</sup> Global Justice, "A step towards impunity for grave crimes: AU approves immunity for those in power", 3 July 2014. Available online at: <http://ciccglobaljustice.wordpress.com/2014/07/03/a-step-towards-impunity-for-grave-crimes-au-approves-immunity-for-those-in-power/>, accessed on 07 July 2014

it is important to determine the characteristics of the African Union and its legal personality.

#### 5.1.1 Characteristics of the African Union

The Organisation of the African Union was established on 25 May 1963 in Addis Ababa, Ethiopia. The OAU's main purposes were to promote the unity and solidarity of African states; to coordinate and intensify cooperation and efforts to achieve a better life for the peoples of Africa; to defend sovereignty, territorial integrity and independence; eradicate all forms of colonialism; and to promote international cooperation, having due regard to the UN Charter and the Universal Declaration of Human Rights.<sup>132</sup> The decolonisation process and the independence of African states made the purposes of the OAU obsolete. It was therefore important to establish an organisation which was competent in dealing with the historical processes occurring and the emerging challenges of the continent.

The African Union was established under Article 2 of the Constitutive Act which entered into force on 26 April 2001. The Assembly of the African Union is the supreme organ of the organisation and is composed of Heads of State and government or their duly accredited representatives.<sup>133</sup> The powers and functions of the Assembly are to determine the common policies of the AU; receive, consider and take decisions on reports and recommendations from the other organs of the AU; consider requests for membership of the AU; establish any organ of the Union; monitor the implementation of policies and decisions of the Union as well ensure compliance by all Member States; adopt the budget of the Union; give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace; appoint and terminate the appointment of the judges of the Court of Justice; and appoint the Chairman of the Commission, deputy or deputies and Commissioners of the Commission and determine their functions and terms of office.<sup>134</sup>

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<sup>132</sup> Article 2 of the Organisation of the African Union Charter

<sup>133</sup> Article 6 of the Constitutive Act of 2000

<sup>134</sup> Article 9 of the Constitutive Act of 2000

### 5.1.2 The Legal Personality of the African Union and its decision on the ICC

The issue of international legal personality was considered in *Reparations for Injuries Suffered in the Service of the United Nations*.<sup>135</sup> The Court had to determine whether the United Nations had the capacity to bring an international claim against another state. The Court first considered whether the UN Charter gave the United Nations international personality. If it did have such personality, it would be capable of “availing itself of obligations incumbent upon its members”.<sup>136</sup>

The Court held that the UN Charter defined the position of member states in relation to the UN by:

- i. requiring them to give it assistance in any action undertaken by it
- ii. accepting and carrying out the decisions of the Security Council
- iii. authorizing the General Assembly to make recommendations to the members
- iv. giving the organisation legal capacity and privileges and immunities in the territory of each of its members; and
- v. providing for the conclusion of agreements between the organisation and its members<sup>137</sup>

The Court also noted that the UN was a political body that carried out political tasks which covered the maintenance of international peace and security, the development of friendly relations amongst nations, and the achievement of international cooperation in solving problems that have an economic, social, cultural or humanitarian character, as stated in Article 1 of the Charter.<sup>138</sup> The court therefore concluded that the UN was intended to exercise and enjoy the functions and rights on the basis of possessing international personality and the capacity to operate upon an international plane.<sup>139</sup>

Considering the above case, it can be argued that the AU has international legal personality. Similar to the UN it is a political body which consists of a permanent

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<sup>135</sup> *Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174.

<sup>136</sup> *Reparations for Injuries Suffered* supra (n135)178

<sup>137</sup> *Reparations for Injuries Suffered* supra (n135) 178 -179

<sup>138</sup> *Reparations for Injuries Suffered* supra (n135) 179

<sup>139</sup> Ibid



assembly of Heads of State and government. The Constitutive Act gives the Organisation international personality as it requires that its members allow for the supreme organ of the AU to carry out functions to determining the common policies of the AU; to receive, consider and take decisions on reports and recommendations from the other organs of the AU; and to monitor the implementation of policies and decisions of the Union as well ensure compliance by all Member States. Therefore, it can be argued that the Constitutive Act confers rights and duties to the AU. The organisation would not be able to carry out these functions if it was void of legal personality.

The AU's legal personality is, however, limited. Unlike the UN, the AU only consists of African member states of which all are also members of the UN. Therefore, the AU only creates rights and duties for member states of the organisation. Despite the fact that the AU has international legal personality, it can be argued that the AU can only exercise its powers regionally and not internationally. Therefore, the decision made by the AU cannot be enforced internationally.

## 5.2 Impunity in Africa and the Constitutive Act of the African Union

### 5.2.1 The ICTR and the SCSL and Jurisprudence on Impunity

International criminal tribunals in Africa have made positive contributions to the jurisprudence on individual criminal responsibility and the rejection of impunity in Africa. The International Criminal Tribunal of Rwanda (ICTR)<sup>140</sup> was the first international tribunal to prosecute individuals who had committed international crimes in Africa. The Rwandan government requested the Security Council to establish this tribunal to prosecute the individuals that were responsible for genocide and other serious violations of international humanitarian law that were committed in the territory of Rwanda and in neighbouring states between 1 January 1994 and 31 December 1994.<sup>141</sup> The tribunal was set up because there were no other politically feasible remedies for victims of the genocide.<sup>142</sup> The ICTR was the first

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<sup>140</sup> The ICTR was established by the Security Council under VII of the UN Charter. UN Doc. S/RES/955, 8 November 1994

<sup>141</sup> Preamble of the International Criminal Tribunal of Rwanda statute

<sup>142</sup> L.J. van den Herik *The Contribution of the Rwanda Tribunal to the Development of International Law*, 31

international criminal tribunal to prosecute and convict a former state official in the *Kambanda* case.<sup>143</sup> This judgement confirmed that state immunity could not be invoked as a defence for state officials who had committed international crimes. It also confirmed that international criminal tribunals could exercise jurisdiction over state officials.<sup>144</sup>

The ICTR was followed by the Special Court for Sierra Leone (SCSL). Following international crimes committed in the territory, the government of Sierra Leone requested the UN to help establish a court to prosecute and punish individuals responsible for committing crimes against humanity and war crimes.<sup>145</sup> Unlike the ICTR, which was established under Chapter VII, the Security Council established the SCSL<sup>146</sup> under Chapter VI of the UN Charter as a hybrid criminal court which applies both international and domestic law.<sup>147</sup>

Under Article 1(1) of the SCSL statute, the court has the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in territory of Sierra Leone since November 1996. The statute also gives the court the power to exercise jurisdiction over individuals who commit crimes against humanity<sup>148</sup>, serious violations of humanitarian law<sup>149</sup> and Sierra Leonean domestic law.<sup>150</sup>

The SCSL further contributed to the jurisprudence on individual criminal responsibility. It provided that the official position of an accused person, including that of head of state, did not relieve that person of criminal responsibility nor mitigate their punishment.<sup>151</sup> Pursuant to this provision the SCSL, under Article 15,

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<sup>143</sup> *Prosecutor v Jean Kambanda*, International Criminal Tribunal for Rwanda, 4 September 1998. Jean Kambanda, who was the Prime Minister of Rwanda was prosecuted and convicted for the crime of genocide and other international humanitarian law.

<sup>144</sup> George William Mugwanya "The Contribution of the International Criminal Tribunal of Rwanda to the Development of International Criminal Law" in Chacha Murungu & Japhet Biegon (eds) *Prosecuting International Crimes in Africa* 91

<sup>145</sup> United Nations Security Council Resolution 1315 (2000) of August 2000 (UN Doc S/RES/1315)

<sup>146</sup> The SCSL started operating on 1 July 2002.

<sup>147</sup> Chacha Murungu. "Prosecution and Punishment of International Crimes by the Special Court of Sierra Leone" in Chacha Murungu & Japhet Biegon (eds) *Prosecuting International Crimes in Africa* 98

<sup>148</sup> Article 2 of the Statute for the Special Court for Sierra Leone

<sup>149</sup> Article 4 of the Statute for the Special Court for Sierra Leone

<sup>150</sup> Article 5 of the Statute for the Special Court for Sierra Leone

<sup>151</sup> Article 6.2 of the Statute for the Special Court for Sierra Leone

brought a case against the head of state of Liberia, Charles Taylor for crimes against humanity, war crimes and other serious violation of international humanitarian law.<sup>152</sup> He was found guilty on all counts and sentenced to 50 years in prison.

The establishment of the ICTR and the SCSL has allowed Africa to contribute to international criminal law and the jurisprudence which supports the notion that individuals with official capacity cannot be granted immunity when they have committed an international crime.

### 5.2.2 Article 4 of the Constitutive Act of the African Union

Article 4 (o) of the Constitutive Act provides that the AU shall function with respect of the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities. AU actions have, however, shown to be in contravention of this provision.

Such an example is the AU's actions with regards to the ICC case against Sudanese President Hassan Omar Al Bashir. Al Bashir was accused of committing crimes against humanity, genocide and war crimes in Darfur by the prosecutor of the ICC. On 4 March 2009, an arrest warrant was issued against Al Bashir for war crimes and crimes against humanity<sup>153</sup> and on 3 February 2010, the arrest warrant was amended to include genocide.<sup>154</sup> There was a distinct outcry against the issuing of a warrant from the Sudanese government, national governments and regional organisations. The AU Peace and Security Council called the Prosecutors' request for an arrest warrant a threat to peace in the region and appealed to the UN Security Council to

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<sup>152</sup> Article 15 provides that the prosecutor is responsible for the investigation and prosecution of persons who bear the greatest responsibility for various violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor acts independently as a separate organ of the court.

<sup>153</sup> Steve Odero "Politics of international criminal justice: The ICC's Al Bashir and the African Union's Neo-Colonial Conspirator Thesis" in Mrungu and Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 146-147

<sup>154</sup> The Court ruled that there was insufficient evidence at the time to prosecute Al Bashir for genocide at the time that the warrant was issued. Pursuant to Article 58(6) of the Rome Statute, the Appeals Chamber reversed the Pre-Trial Chamber decision to reject the genocide charge.

suspend proceedings and investigations against Al Bashir for a period of 12 months under Article 16 of the Rome Statute.<sup>155</sup>

At the 13<sup>th</sup> AU Summit in July 2009, the AU further voted to not cooperate with the ICC when the arrest warrant was issued. It expressed its concern that the indictment against the Al Bashir had “unfortunate” consequences on the delicate peace processes underway in Sudan. It also expressed that the indictment undermined the ongoing efforts aimed at facilitating the early resolution of the conflict.<sup>156</sup> Al Bashir has not been arrested and still remains at large. Since the arrest warrant was issued, Al Bashir has visited various African countries, including Kenya, Central African Republic and Chad. These African states that are party to the Rome Statute have an obligation to cooperate with the Court.<sup>157</sup> The lack of cooperation from state parties has impeded the Court’s ability to apprehend Al Bashir since his arrest warrant was issued.

The AU’s decision about its relationship with the ICC and Article 46A Bis is a further attempt by African states to protect its leaders from prosecution when they have committed international crimes. This is in direct violation of Article 4(o) of the Constitutive Act as it promotes impunity instead of “rejecting” it. Granting immunity to sitting heads of state and senior officials will undoubtedly create an incentive for those who are or have committed international crimes to hold on to power as a way of avoiding prosecution. As seen by the Al Bashir case, African states lack the political will to fight against impunity in Africa.

### 5.3 Legal Implications of the African Union’s Conduct

#### 5.3.1 The Legal Implications of the AU’s decision on the ICC

It is clear that the AU’s decision on its relationship with the ICC is in contradiction with the AU’s stated commitment to reject impunity and prosecute those that commit

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<sup>155</sup> Annalisa Ciampi “The Proceedings against President Al Bashir and the Prospects of their suspension under Article 13 of the ICC Statute” *JICJ* 6 (2008) 885 at 886

<sup>156</sup> Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XII) Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia

<sup>157</sup> Lutz Oette “Peace and Justice, or Neither? The Repercussions of the *Al Bashir* Case for International Criminal Justice in Africa and Beyond” *JICJ* 8 (2010) 345 at 360

international crimes, regardless of official capacity. It is also in direct violation of Article 27 of the ICC Statute which 34 AU member states are party to, including Kenya. The AU's decision is in no way legally binding for the ICC or African states who have ratified the statute. Therefore, the decision will have no legal impact on the ICC's ability to exercise its jurisdiction in African states that have ratified the Rome Statute.

### 5.3.2 Legal Implications of Article 46A Bis of the Protocol on Amendments and the Rome Statute

The decision to grant immunity for sitting heads of states and senior government officials in the African Court of Justice and Human Rights can be considered to be an attempt to shield presidents from prosecution when they are alleged to have committed human rights violations.

Article 1 of the Rome Statute provides that the Court will exercise its jurisdiction based on the complementarity principle. The ICC is considered to be court of last resort. Therefore the court is supposed to only investigate a case when domestic courts have failed to exercise jurisdiction over an individual who is alleged to have committed a crime provided for the in the Rome Statute.

The Rome Statute can be read to mean that it can exercise its jurisdiction over nationals of member states, regardless of official capacity, when a domestic court has failed to act. In *Belgium v Senegal*, Senegal had referred a case against Hissene Habre<sup>158</sup> to the AU in 2006 in an attempt to delay prosecution and extradition to Belgium.<sup>159</sup> The ICJ, however, held that Senegal's referral of the matter to the AU could not justify Senegal's delays in complying with its obligations under Article 7(1)<sup>160</sup> of the Torture Convention.

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<sup>158</sup> Habre was the President of Chad from 7 June 1982. He was overthrown on 1 December 1990 when he requested political asylum in Senegal. In 2000, Chadian nationals lay a complaint against Habre in a Senegal Court for alleged human rights crimes during his presidency. Habre argued that Senegal had no jurisdiction and no legal basis for the proceedings. In 2009, a Belgian national of Chadian origin then filed a complaint with civil party application in Belgium for torture and genocide.

<sup>159</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgement of 20 July 2012. I.C.J Reports 2012 p. 422 para 23

<sup>160</sup> Article 7(1) of the Torture Convention requires that member states take all measures necessary for the implementation of the Convention as soon as possible.

One can therefore argue that the African Court's provision to grant immunity to sitting heads of state and senior government officials will have no bearing on the ICC's ability to exercise jurisdiction when a domestic court of a state that has ratified the Rome Statute has failed to prosecute an individual who is alleged to have committed a human rights. That is because that state has accepted the jurisdiction of the ICC to prosecute individuals in that circumstance. As stated before, the adoption of this protocol by member states of the Rome Statute would cause them to be in direct conflict and breach of Article 27.

#### 5.4 The AU's support for National Prosecutions in Kenya

The AU had previously supported and endorsed the East Africa region's request for a referral of the ICC investigations and prosecutions in relation to the 2007 post-election violence in Kenya, in line with the principle of complementarity, to allow for a national mechanism to investigate and prosecute the cases.<sup>161</sup> It can, however, be argued that national jurisdictions do not have the political will to prosecute heads of state and government officials who commit international crimes. This results in the promotion of impunity on the continent.

##### 5.4.1 Kenya's Failure to Establish Domestic Mechanisms

As provided for in Article 1 of the Rome Statute, domestic courts have the primary responsibility to prosecute individuals who have committed international crimes, based on the complementarity principle. The Kenyan government has failed to institute any proceedings against Kenyatta and Ruto in the past six years with respect to alleged crimes committed during the post-election violence in 2007. There have also been no adequate investigation of the crimes committed during this period which left 1 100 people dead and 600 000 displaced across the country. As a result, a large number of victims have not received compensation or reparations for injuries, the loss of family members or the loss of property.<sup>162</sup> It has been reported that some

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<sup>161</sup> Decision on International Jurisdiction, Justice and the International Criminal Court (ICC). Doc. Assembly/AU/Dec.482(XX1). Assembly of the Union. Twenty-First Ordinary Session 26-27 May 2013, Addis Ababa, Ethiopia.

<sup>162</sup> Amnesty International. 'Kenya Victims still seeking justice for the post-election violence' 15 July 2014. Available online at: <http://www.amnesty.org/en/news/kenya-victims-still-seeking-justice-post-election-violence-2014-07-15>, accessed on 13 August 2014

victims have received cash, varying from US\$116 to US\$4 650, while others have simply received tins of maize as reparations.<sup>163</sup>

Victims have also been robbed of the opportunity of seeing the perpetrators of the violence face justice. Following the aftermath of the post-election violence, Kenyan authorities stated that they were willing and able to prosecute cases domestically. In 2008, the Ministry of Internal Security drew up a list of cases and ordered the police to speed up investigations, specifically those that were linked to serious offences. The ministry also directed that cases should be ranked according to their gravity so that the suspects could be charged expeditiously. Those that were charged in court were never brought to trial to be convicted.<sup>164</sup>

In October 2008, the Commission of Inquiry into the Post-Election Violence released the Waki Commission report which recommended the establishment of a special tribunal mandated to prosecute those that had perpetrated crimes during the post-election violence. The commission also submitted a list of alleged perpetrators and evidence to the Panel of Eminent African Personalities whilst the special court was to be established.<sup>165</sup> On 16 December 2008, Kenyan President, Kibaki and Prime Minister Odinga, agreed to prepare and submit a Bill that would establish the Special Tribunal. Parliament, however failed to enact the bill that would establish the tribunal on numerous occasions. An attempt to amend the constitution to allow for the tribunal was objected by parliament on the basis that the matter should be transferred to the ICC to avoid internal interference of proceedings.<sup>166</sup> The failure to establish a domestic mechanism to deal with this matter prompted the Panel of Eminent African Personalities to hand over the cases to the ICC prosecutor.<sup>167</sup>

Various shallow attempts have been made to establish a domestic mechanism.<sup>168</sup> In November 2012, for example, the Judicial Service Commission approved

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<sup>163</sup> Natalie Ojewski "Uhuru Kenyatta's Trial" A case study in what's wrong with the ICC" The Global Post, 6 February 2014. Available online at:

<http://www.globalpost.com/dispatch/news/regions/africa/kenya/140206/uhuru-kenyattas-trial-case-study-whats-wrong-the-icc>, accessed on 7 August 2014

<sup>164</sup> Human Rights Watch. "Turning Pebbles" Evading Accountability for Election Violence in Kenya" December 2011, 17 – 18.

<sup>165</sup> Ibid 22

<sup>166</sup> Ibid

<sup>167</sup> Ibid

<sup>168</sup> Ibid 24

recommendations to establish an International Crimes Division of the High Court to deal with mid and lower level perpetrators of crimes during the post-election violence of 2007 and crimes committed during the 1992 and 1997 election period.<sup>169</sup>

#### 5.4.2 Kenya and the International Criminal Court Proceedings

The ICC case against Kenyatta has been faced with many difficulties. Despite an initial statement made by then President Mwai Kibaki and Prime Minister Raila Odinga stating that Kenya remained fully committed to cooperating with the ICC within the framework of the Rome Statute and Kenya's International Crimes Act,<sup>170</sup> Kenya has failed to live up to its obligations in an attempt to shield its leaders from prosecution.

Article 93(1)(b) of the Rome Statute provides that state parties shall comply with requests by the Court to provide assistance with the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary. The court has not been able to collect important evidence due to a lack of cooperation by the Kenyan government in submitting records and documents that are pertinent to the case. Kenyan authorities, for example, have failed to grant prosecutors access to Kenyatta's banking records which could ultimately prove that he had made payments to the perpetrators who carried out the post-election violence.<sup>171</sup> Kenyatta's trial has been postponed several times because of the high number of witnesses that have withdrawn from the case. Reports have suggested that allies close to Kenyatta have adopted tactics such as "paying off witnesses; threatening the families of witnesses who have accepted witness protection;

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<sup>169</sup> Betty Waitherero. "Can the International Crimes Division prosecute Kenya's PEV cases?" *The Daily Nation*, 8 February 2014. Accessed on 22 February 2014. Available online at: <http://mobile.nation.co.ke/blogs/International-Crimes-Division-bring-accountability/-/1949942/2197978/-/format/xhtml/-/ch6vpg/-/index.html>

<sup>170</sup> Office of the Prosecutor of the International Criminal Court. Statement on the Situation in Kenya. 14 August 2013. The Hague. Available online at: [http://www.iccnw.org/documents/14\\_August\\_2013\\_Statement\\_JCCD-SM\\_\(2\).pdf](http://www.iccnw.org/documents/14_August_2013_Statement_JCCD-SM_(2).pdf), accessed on 12 November 2013

<sup>171</sup> Simon Allison. "Kenya: ICC should temporarily withdraw charges against Kenya's President". *The Standard Digital News*, 19 July 2014. Available online at: <http://www.standardmedia.co.ke/article/2000128841/icc-should-temporarily-withdraw-charges-against-kenya-s-president>, accessed on 11 August 2014



publicising the identity of witnesses; and violence against witness, including mysterious disappearances.”<sup>172</sup>

In 2013, the Kenyan government submitted amendments to the Rome Statute in accordance with Article 121. Kenya proposed add a third paragraph to Article 27 which would allow serving heads of state, their deputies and anybody acting or is entitled to act as such to be exempt from prosecution during their current term of office.<sup>173</sup>

The Kenyan government has also unleashed a diplomatic campaign to rally support against the ICC by uniting African leaders who are often accused of committing human rights violations by amplifying perceptions that the ICC is biased against Africa and that they infringe on the principles of state sovereignty.<sup>174</sup> This is particularly damaging because the ICC relies on the support of its member states. Kenya’s political campaign has no doubt had an impact on AU decisions and legal frameworks and this is having a negative effect on the ICC’s ability to effectively prosecute this case.<sup>175</sup>

Domestically, the Kenyan parliament adopted a motion for repealing the International Crimes Act which incorporated the Rome Statute into municipal law in an attempt to ultimately withdraw from the Rome Statute. As argued in Chapter one a withdrawal does not relieve the State from any of its obligations of the Statute whilst it was a state party. The State is therefore still obligated to cooperate with the court in connection with any criminal investigations and proceedings that it has a duty to cooperation with and that had commenced prior to the date the withdrawal came in to effect. The motion to withdraw can therefore be considered to be part of Kenya’s campaign against cooperation with the ICC and an effort to protect prosecution of its head of state and deputy.

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<sup>172</sup> Ibid

<sup>173</sup> Submission by the Republic of Kenya on Amendments to Rome Statute of the International Criminal Court for Consideration by the Working Group on Amendments. C.N.1026.2013.TREATIES-XVIII.10. 14 March 2014.

<sup>174</sup> Ojewski op cit (n171)

<sup>175</sup> Allison op cit (n171)

### 5.4.3 Impunity as a barrier to human rights protection

The AU and the majority of its member states have adopted legal and policy mechanisms to protect victims from human rights violations and to hold those that commit human rights violations accountable. The preamble of the AU's decision on Africa's relationship with the ICC re-iterates the organisations "unflinching commitment to fight impunity, promote human rights and democracy and good governance in the continent."<sup>176</sup>

Despite these sentiments, the AU has failed to consider the victims of the 2007 post-election violence. Article 4(h) provides for the right of the AU to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, specifically war crimes, genocide and crimes against humanity. The final decision to intervene, as highlighted in chapter 2, ultimately lies with Assembly of states. African states have however, proven to refrain from intervening in other member states based on the notion of sovereignty, even when gross human rights violations have taken place. Instead, the AU has shielded those who are responsible for crimes against humanity to evade prosecution without due regard for the victims of those violations. The actions of the AU, and in particular Kenya, can be deemed to be unlawful because they promote impunity.

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<sup>176</sup> Preamble of the Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1(Oct.2013), Extraordinary Session of the Assembly of the African Union, 12 October 2013 para 2

## **Conclusion**

This thesis has argued that the African Union's decision on its relationship with the international criminal court and the adoption of Article 46ABis of the Protocol on Amendments are contrary to principles of international law, namely Article 27 of the Rome Statute and state obligations to promote and protect human rights. These actions, however, demonstrate that the African states lack a real commitment to ensure that victims of serious human rights violations have access to justice and redress. These actions also demonstrate a lack of political will to hold African leaders accountable for committing gross human rights violations on the continent.

The actions of the African Union in no way effect the jurisdiction of the International Criminal Court. The court can still investigate and prosecute sitting heads of state and government officials in Africa in accordance with the Rome Statute. However, the proceedings brought against Kenyatta and Ruto highlight that the lack of cooperation from states who have ratified the Rome statute could limit the court's ability to investigate and prosecute these officials. A lack of cooperation with the ICC and a provision that allows for the immunity of heads of state will further limit avenues for victims of human rights violations to access justice and redress. The situation in Kenya has highlighted the difficulties associated with accessing both domestic and regional courts for justice and redress. The African Union's actions are therefore a betrayal of victims of human rights violations.

The African Union's actions are also violation of Article 4 of the Constitutive Act and its own human rights provisions. On a continent where impunity is rife, AU actions will undoubtedly encourage heads of state and government officials to hold on to power as a way of avoiding prosecution. It has been argued that heads of states and government officials are most likely to be the perpetrators of mass human rights atrocities, specifically genocide, crimes against humanity and war crimes. These demonstrate to African leaders that they can commit gross human rights violations without any consequences or repercussions.

It is therefore crucial that African states demonstrate political courage and resist the pressure to shield leaders from prosecution for serious international crimes in the interest of their citizens.

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