

A LEAP FORWARD AND A STEP BACKWARD

**Discourse on the Immunity Clause (46A Bis) of the Protocol on
Amendments to the Protocol of the African Court of Justice and
Human Rights**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF
LAWS (LL.B) OF STRATHMORE UNIVERSITY**

STRATHMORE UNIVERSITY

LAW SCHOOL

JANUARY 2016

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ACKNOWLEDGMENTS

I am grateful to my supervisor, John Ambani, for the guidance in the writing of this dissertation, to my lecturer, Harrison Mbori for the last minute review and encouragement too.

In a special way, I would like to thank my mother, Jayne Waggema for pushing me through every chapter with kind words and enough motivation for two; my brother, David Waggema for challenging me with deadlines and to my sister, Karimi Irungu for reminding me to take everything in stride.

Last and in no way the least, to God for seeing me this far in my studies and for the good plans He has for me.

DECLARATION

I declare that this dissertation is my original work and has not been submitted for the award of a degree or any other award in any other university.



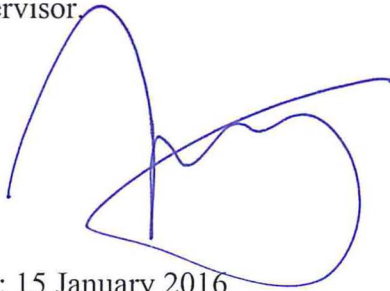
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ABSTRACT

The prosecution of international criminal law has been introduced into the jurisdiction of the African Court of Justice and Human Rights in a move unprecedented by the international community. On the one hand, this can optimistically be viewed as an attempt by the leadership of the African continent to put an end to impunity and to mete out justice by punishing the perpetrators of the worst crimes known to human kind. However, viewing it through the lens of the African Union's rejection of the International Criminal Court, its open disregard for warranties issued from the Hague and the criticism for the indictment of sitting Heads of State and Government within Africa it may be deduced that rather than indigenizing justice, the AU seeks to pervert the course of justice.

To add fuel to this fire, the Assembly of the AU has adopted the contentious Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. This Amendments Protocol establishes absolute immunity for Heads of State and Government as well as senior government officials during their tenure from prosecution for international crimes.

This study, through extensive literature review, evaluates this position and its potential implications on the criminal justice environment of the continent as well as in relation to international consensus.

LIST OF ABBREVIATIONS

AFCHPR	-African Court of Human and People's Rights
ACJ	-African Court of Justice
ACJHR	-African Court of Justice and Human Rights
ALL ER	-All England Law Reports
AU	-African Union
CeDIE	-European Centre for International Law
EJIL	-European Journal of International Law
ICC	-International Criminal Court
ICJ	-International Court of Justice
ILC	-International Court of Justice
ILR	-International Law Review
IMT	-International Military Tribunal
IMTFE	-International Military Tribunal for the Far East
ICTR	-International Criminal Tribunal for Rwanda
ICTY	-International Criminal Tribunal for the former Yugoslavia
OAU	-Organization of African Unity
QB	-Queen's Bench
SCSL	-Special Court for Sierra Leone
UCG	-Unconstitutional Change of Government
UN	-United Nations
UNGA	-United Nations General Assembly
UNSC	-United Nations Security Council
UNTS	-United Nations Treaty Series

LIST OF CASES

1. The Trial of German Major War Criminals, Judgment, International Military Tribunal at Nuremberg
2. Re Bo Xilai
3. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports 2002
4. Twycross and others v Dreyfuss Brothers and others 1877, [1874-80] All ER
5. Jones v Ministry of Interior of The Kingdom of Saudi Arabia and others, [2009] QB
6. Prosecutor v. Slobodan Milosevic (2005), Decision on Interlocutory Appeal on Kosta Bulatovic Contempt Proceedings), International Criminal Tribunal for the former Yugoslavia
7. Prosecutor v Charles Ghankay Taylor (2003), Decision on Immunity from Jurisdiction, Special Court for Sierra Leone

CHAPTER ONE: INTRODUCTION

Background

The idea of an African court with a criminal mandate is not novel.¹ It was conceived as early as the enactment and adoption of the Constitutive Act of the African Union.² The AU adopted the Protocol of the Court of Justice of the African Union³ and established the African Court of Justice (ACJ) but did not expressly bestow upon it criminal prosecution mandate. Having two separate courts, the ACJ and the African Court on Human and Peoples' Rights (AFCHPR) proved to be a challenge to the AU and they were merged to create the African Court of Justice and Human Rights⁴, hereinafter called the ACJHR or the Court.

The reasons supporting this merger included the cost effectiveness of running one as opposed to two courts, the avoiding of the problem of the partly duplicate human rights prerogative of the African Court on Human and Peoples' Rights and the African Court of Justice, potentially stronger enforcement power of a merged court and increased likelihood that that human rights will permeate all of the jurisprudence of the Court.⁵

However, a host of reasons were offered for the Court's potential failure, and these ranged from logistical concerns to legal and operational ones. Practical issues surrounding resources and protocols were included to the list. Jurisdictional concerns about the two courts and their varying obligations as well as matters of institutional duality were raised.⁶

¹ Asaala E, 'The African Court of Justice and Human and Peoples' Rights: An Opportunity for International Criminal Justice?' in Van der Merwe, *International Criminal Justice in Africa: Challenges and Opportunities*, Konrad Adenauer Stiftung & Authors, 2014, 36

² Preamble, *Constitutive Act of the AU*

³ *Protocol of the Court of Justice of the African Union*, 2003

⁴ Article 2, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008

⁵ S Sceats, 'Africa's new Human Rights Court: Whistling in the Wind?', The Royal Institute of International Affairs, Briefing Paper, 2009

⁶ M Schulman, 'The African Court Of Justice And Human Rights: A Beacon Of Hope Or A Dead-End Odyssey?' *Inkundla Journal*, University of Witwatersrand, 2012

Despite this, the African Union Assembly, in its summit in February 2009, requested the Commission of the African Union to assess the implications of mandating the African Court of Justice and Human Rights to try International Crimes⁷. This would, in fact, further increase the mandate of the merged court. This was acted upon and in June of 2014 the Assembly of the African Union adopted the Protocol on Amendments to the African Court of Justice and Human Rights Protocol (Protocol on Amendments).⁸

The criminal mandate of the ACJHR has raised eyebrows among legal scholars, and caused outcry from many civil society and non-governmental organizations.⁹ The main reason for this was not, in fact the mandate of the Court to try international crimes, but rather the grant of immunity that the Protocol awards to sitting Heads of State and Government and senior state officials¹⁰, for crimes that fall under the scope of international criminality at both regional and international level.

The Protocol on Amendments was adopted despite objections from civil society groups that Article 46A bis not only posed serious risks to the integrity of the ACJHR and of the AU's declared goal of ensuring justice for victims of serious crimes under international law but also risked promoting impunity among sitting Heads of State, Heads of Government and senior state officials.¹¹ There are therefore serious concerns that the Court will lack the capacity to address the scourge of international crimes that have afflicted the continent for decades now.¹²

Problem

The provisions at Article 46A bis of the Protocol on Amendments, that accord immunity to sitting Heads of State, Heads of Government and senior state officials, provide an

⁷ AU, Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec606(XVII) 2011.

⁸ AU, Decision on the Draft Legal Instruments, Assembly/AU/Dec529(XXIII) 26-27 June 2014

⁹ <http://www.issafrica.org/uploads/CSO-letter-African-Court-5-May-2014.pdf> accessed on 5 March 2015

¹⁰ Article 46A bis, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (2014)

¹¹ <http://www.africalegalaid.com/news/immunity-proposal-for-african-leaders-in-the-african> on 17 February 2015

¹² Amnesty International, *Terms of Reference for a Consultant to Undertake a Study on the Legal, Institutional and Other Implications of the Proposed Criminal Jurisdiction of the African Court of Justice and Human Rights*, http://www.sadcla.org/new1/sites/default/files/Amnesty_ToR_ACJHR_Oct%202014.pdf accessed on 5 March 2015

incentive for impunity, and disregard of international criminal law as it protects the most likely perpetrators of the same. They also appear to contradict international consensus and development of law. This immunity allowance seems to contravene the Member States of the AU's commitment to fighting impunity in conformity with the provisions of Article 4(o) of the Constitutive Act of the African Union and undermine the importance of the role that the ACJHR can play in reinforcing the pledge of the African Union to promote continuous peace, security and stability on the African Continent and to encourage justice and human and people's rights.

Hypothesis

The African Union has established immunity from prosecution for international crimes for sitting Heads of State, Heads of Government and senior government officials under the proposed ACJHR.

Immunity is a widely accepted protection for the above mentioned persons in foreign and domestic jurisdictions. It is not so, under international courts or tribunals. Further, the proposed immunity goes against the letter and spirit of the Constitutive Act and other legal instruments of African Union including the ACJHR Protocol and the Protocol on Amendments. Lastly it is expressly done away with by the Rome Statute of the International Criminal Court, which is seen as the embodiment of current international consensus on immunity.

Methodology

This research will mainly take the form of desktop research, through reading of articles, journals and relevant online and e-resources. It will also involve library research, and use of materials available within libraries. In the event that time and resources allow it, there may be interviews with scholars and experts in the field of International Criminal Law, in order to get their point of view, firsthand.

Limitations

The limitations to this study are the geographical scope of the study. It focuses on the African Union collectively and does not necessarily factor in the specific positions of

particular state with regard to the subject matter. The views of the AU are taken to be representative of the consensus of the member states. Further, with limited resources available to the researcher, the study is limited to literature review by desktop research into available material on all institutions and topics covered. It was not possible to make appointments with experts in the field and the research relies on available online and library resources.

Literature Review

The philosophy surrounding head of state immunity represents the classical theory of international law. This is a time-honored principle, one that is founded on and one that also protects the equality and sovereignty of states.¹³ However, recent development and advancement of International Human Rights Law and International Criminal Law, has influenced the modern school of thought for international law. It has expanded in both jurisprudence and scope, to cover universally condemned crimes, such as genocide and torture. When a head of state commits a crime under international law, these two doctrines clash.¹⁴

According to Reinhold Gallmetzer and Mark Klamburg, the principle of individual responsibility for crimes under international law was recognized in the Charter and the Judgment of the Nuremberg Tribunal.¹⁵ This recognition made it possible to indict and punish individuals for grave abuses of international law. The third of the legal principles of the Nuremberg Trials states:

"The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law."¹⁶

¹³ Mitchel AD, 'Leave Your Hat On? Head Of State Immunity and Pinochet', 25, *Monash University Law Review*, 1999, 225

¹⁴ Mitchel AD, 'Leave Your Hat On? Head Of State Immunity and Pinochet', 227

¹⁵ *The Trial of German Major War Criminals*, Judgment, International Military Tribunal at Nuremberg 1946

¹⁶ *The Trial of German Major War Criminals*, Judgment, International Military Tribunal at Nuremberg 1946

It did not matter then, one's position or power- if one was found responsible or liable in any way for a crime under international law, they would be prosecuted. This precedent from Nuremberg also established a number of other significant and associated principles aimed at ensuring individual culpability for crimes under international law, such as the crimes punishable under international law, and Principle IV, which states: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him".¹⁷ This Individual criminal accountability developed further in the context of the Balkan wars¹⁸ and the Rwandan genocide.^{19 20}

Like the statutes of the ICTY²¹ and the ICTR²², the Rome Statute of the International Criminal Court makes provisions for the principle of individual criminal responsibility of natural persons.²³ Furthermore, it applies equally to all persons without any exceptions based on official capacity, such as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official.²⁴ It states:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

¹⁷ Gallmetzer R and Klamberg M, 'Individual responsibility for Crimes under International Law, the UN Ad hoc Tribunals and the International Criminal Court', The Summer School on International Criminal Law, 2005, 61

¹⁸ Article 7(2), Statute of the International Criminal Tribunal for the former Yugoslavia, 1993, UNSC S/RES/827 (1993)

¹⁹ Article 6(2), Statute of the International Criminal Tribunal for Rwanda, 1994, UNSC S/RES/995 (1994)

²⁰ Rau K, 'Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights' Minnesota Law Review, 2012

²¹ Article 7(2), Statute of the ICTY

²² Article 6(2), Statute of the ICTR

²³ Article 25, Rome Statute of the International Criminal Court, 2002

²⁴ Article 27, Rome Statute

Finally, there is a specific provision dealing with the criminal responsibility or liability of Commanders and other superiors.²⁵ International conventions, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²⁶ the Convention on the Prevention and Punishment of the Crime of Genocide²⁷, and the Geneva Conventions of 1949 recognize the importance of accountability for individuals who have committed serious crimes irrespective of their official position.

These provisions set the tone for international consensus on individual criminal responsibility. International Criminal Justice standards do not allow for persons who are not subject to law, more so, those whose actions violate international criminal law. This appears to not be the case, where the ACJHR is concerned. Dr. Ken Obura asserts that, an examination of international law confirms that international obligation to prosecute and punish international crimes exists. This is the first discourse against the implementation of Article 46 A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.²⁸

Article 46 A of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights states thus:

'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'.²⁹

It goes further to enunciate under Article 46B that,

²⁵ Article 28, Rome Statute

²⁶ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 UNTS 1465

²⁷ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, UNTS 1021

²⁸ Obura K'Duty to Prosecute International Crimes under International Law', in Murungu C and Biegon J (Eds) *Prosecuting International Crimes in Africa*, Pretoria University law Press, 2011, 14-31

²⁹ Article 46A bis, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*

- (1) *'A person who commits an offence under this Statute shall be held individually responsible for the crime*
- (2) *Subject to the provisions of Article 46Abis of this Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment.*

This part of the Statute generally confers immunity to sitting Heads of States, Heads of Governments to senior state officials, regardless the crimes they commit.

The move to establish an international crimes court within the African region was viewed as a leap forward in the legal and jurisprudential field of Africa. Thus, despite the many criticisms it received, it seemed that there was hope and a step in the right direction for Africa. However, it appeared that this move forward was quickly undone by the provision to protect Heads of State and Senior Government Officials from criminal liability for their actions. Critics of the new structure of the ACJHR argue that some amendments to the Protocol have twisted the ACJHR into a mechanism that will protect these state officials from being targeted by the International Criminal Court (ICC)³⁰

Immunity takes away the possibility that victims can find justice at the ACJHR when leaders commit atrocities.³¹ Angela Mudukuti³² puts forward that “Instead of retreating from important achievements to limit impunity, advance the rule of law, and promote respect for human rights, African governments should remain steadfast in supporting justice for victims of the worst crimes by rejecting immunity before the African Court.” Granting sitting heads of state and senior government officials immunity from the jurisdiction of African courts would be an exercise in shielding these leaders from accountability and, in effect, permit such leaders to perpetuate these human rights abuses.

³⁰ *The African Court for Justice and Human Rights: Protecting Africans, or Just Africa's Leaders?*, 359 Briefing Paper, South African Catholic Bishops Conference Parliamentary Liaison Office, 2014

³¹ <http://www.hrw.org/news/2014/08/24/african-states-reject-immunity-leaders> accessed on 5 March 2015

³² ICJ Project lawyer, South African litigation Centre.

However, before criticizing this move, it is important to look into the reason behind the enactment of this provision.

The African Union has often expressed concern over the indictment of sitting Heads of State, such as Omar Al-Bashir of Sudan and President Uhuru Kenyatta of Kenya.³³ According to some, it perceives international justice as an impediment to peace, given that indictment of a Head of State could lead to civil unrest and political feud. This, given the history of Africa, is a plausible concern. It is, perhaps, with this in mind that the controversial article has been incorporated into the Protocol on Amendments to the Protocol on the African Court of Justice and Human Rights.

This research will look into the international consensus and standards for immunity against individual criminal responsibility for international crimes, and then delve into the view of the African Union, as encapsulated in the Protocol on Amendments to the Protocol on the African Court of Justice and Human Rights. After that, seeking the loopholes that exist in the attempt to obtain justice for both victims and perpetrators of international crimes.

Chapter Breakdown

The writer begins with an introduction and back ground into the research topic-Immunity for certain high ranking sitting representatives of state. Following that, the writer seeks to establish what the international norm is, and back it with both writings and cases that have arisen under international criminal law in the last century. Thereafter, an analysis is made of Article 46A bis of the protocol on Amendments, critiquing the rationale behind it and its contravention of the objectives of the African Union. Finally, the study concludes with an attempt at recommendations for the African Union and more so the Statutes relating to the ACJHR mandate over international criminal law.

The writer does not attempt to determine whether the provision for immunity under the Protocol on Amendments is lawful, as has been done by other authors. The principle

³³ AU, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec. 243-267 (XIII) 2009

objective is to determine whether it will potentially hamper the proper functioning of the ACJHR

CHAPTER TWO: IMMUNITY FROM CRIMINAL PROSECUTION

This chapter provides a theoretical basis for the principle of immunity. The questions for which answers are sought are: What is immunity? What is the importance of immunity under International Law? Finally, what are the philosophical justifications for immunity? It avers that immunity for sitting Heads of State and Government as well as senior government officials in certain instances, is a right accorded to every sovereign state. It ensures proper functioning of the state in its various capacities, and is a sign of respect for the autonomy and sovereignty of the state. The chapter attempts to develop the context within which the immunity provisions of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights³⁴ (hereinafter, the Protocol) will be examined.

What is Immunity?

Immunity refers to a legal status where a principle or an entity is exempt from criminal prosecution or civil liability in order to protect “societal claims” that outweigh the liability in that instance.³⁵ These may range from the necessary protection of state officers in the rightful pursuit of their duties, to immunities invoked in times of war or other state emergencies.³⁶

Historically, immunity from criminal liability is seen to have originally come about through the sovereign in a constitutional monarch.³⁷ This sovereign immunity was a principle by which the sovereign could not be found to have committed an illegal act: *rex non potest peccare* which is translated to ‘the king can do no wrong’.³⁸ This was not to mean that the sovereign was above the law and could do as they pleased with no mind for right or wrong, but that they could not be found answerable to the people- the sovereign’s subjects- as they would before them. It is further understood as a duty of the

³⁴ AU, Decision on the Draft Legal Instruments, Assembly/AU/Dec529(XXIII) 26-27 June 2014

³⁵ Knowles D, *Political Obligation: A Critical introduction*, Routledge, 2009, 26

³⁶ Knowles D, *Political Obligation: A Critical introduction*, 26

³⁷ Broom H, *A Selection of Legal Maxims: Classified and Illustrated*, 23

³⁸ Broom H, *A Selection of Legal Maxims: Classified and Illustrated*, Stevens and Norton, 1845, 23

crown to not engage in any unlawful conduct. Rather than being beyond the rule of law, the crown cannot, may not, do any wrong.³⁹

*Par in parem non habet imperium*⁴⁰ is a principle of public international law that means that 'one sovereign power cannot exercise jurisdiction over another sovereign power'. This is the basis for the doctrines of 'act of state' and sovereign immunity. Immunity for state officials from the jurisdiction of another state developed within this context. The actions of a state official are seen to be the actions of the state itself and the criticism and passing of judgment upon the conduct of another state is deemed interference with that state's right to independence, a right that is recognized and codified under the international law.⁴¹ The adjudicating state would implicitly be making its own opinions superior to that of the other state and claiming jurisdiction over it.

There are two broad categories of immunity under international law: immunity *ratione personae* and immunity *ratione materiae*.

Immunity Ratione Personae

Immunity *ratione personae* is accorded to whoever holds the highest office in a state, and to the person responsible for its international relations. It is accepted under international customary law that heads of state, heads of government and foreign affairs ministers enjoy this total status immunity from foreign criminal prosecution, this is prosecution under the jurisdiction of foreign courts, for both private and official acts committed before or during their tenure.⁴² These persons, without having to produce evidence of full powers are considered to be representing their state⁴³ and they enjoy this personal immunity by the mere fact of the office they hold.⁴⁴

³⁹ Broom H, *A Selection of Legal Maxims: Classified and Illustrated*, 24

⁴⁰ 'Equals do not have authority over one another'

<http://oxfordindex.oup.com/view/10.1093/oi/authority.20110803100306400> on 12 December 2015

⁴¹ Article 2, *Charter of the United Nations*, 1945, 1 UNTS XVI

⁴² D'Argent P, 'Immunity of State Officials and Obligation to Prosecute' 4, *Cahiers du Le Centre Charles de Visscher pour le droit international et europeen (CeDIE)*, (2013), 6

⁴³ Article 7, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS I-18232

⁴⁴ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, ICJ Reports 2002, 20

The Head of State is the highest representative of a country and is considered the personification of the state. They are a symbol of the sovereignty of the nation⁴⁵ and by virtue of this position, their person is inviolable.⁴⁶ In Francis Oppenheim's words, "*The highest organ of the state, representing it, within and without its borders, in the totality of its relations is the Head of State*".⁴⁷ It would, therefore, be deemed an affront to their state if they are prosecuted before any courts. In some countries, the role of the Head of State and the Head of Government are held by the same person. However, in others, the role is separate, and the Head of State is more ceremonial, as is the case in the United Kingdom, where the Head of State is the Queen, while the Head of Government is the Prime Minister. However, the immunity accorded to one is the same as the other as they are equally seen as high ranking representatives of their state, and do not need to produce evidence of their authority.

A foreign minister oversees their nation's international relations and diplomatic affairs.⁴⁸ They are in charge of their state's embassies and consuls.⁴⁹ The purpose of this immunity is not for their own personal benefit, but for the efficient performance of their functions in representing the state.⁵⁰ This position was further enunciated in case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)⁵¹

Under the Vienna Convention on Diplomatic Relations (1961), this immunity is further extended conditionally to diplomats and members of special missions in the states in which they are accredited, the condition being that the immunity only be for possible criminal proceedings in said states.⁵² In *Re Bo Xilai*⁵³, the Chinese Minister for

⁴⁵ Binkley WE, 'The President as a National Symbol' 283 *The Annals of the American Academy of Political and Social Science* (1952), 90

⁴⁶ Franey EH, 'Immunity, Individuals and International Law: Which Individuals are Immune from the Jurisdiction of national Courts under International Law?' Unpublished PhD Thesis, London School of Economics, June 2009, 78

⁴⁷ Oppenheim LFL, *International Law (Volume 1)* 9, Oxford University Press, 1992, 1033

⁴⁸ Franey, Immunity, Individuals and International Law, 97

⁴⁹ Article 10, *Vienna Convention on Diplomatic Relations*, 18 April 1961, UNTS 500

⁵⁰ Preamble, *Vienna Convention on Diplomatic Relations*

⁵¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, ICJ Reports 2002, 22

⁵² Article 31(1), *Vienna Convention on Diplomatic Relations*

⁵³ 8 November 2005 Bow Street Magistrates Court, 129 *International Law Review* 713

International Trade was granted immunity from prosecution based on allegations of conspiracy to torture. The reasoning behind this was on the basis of the Arrest Warrant Case. The court adjudged that Mr Bo was eligible for immunity as part of a diplomatic mission and would not be able to perform his function unless he were able to travel freely.⁵⁴ Two challenges face the application of this kind of immunity, the first being that the courts have not always been able to conclusively determine what the minimum threshold for 'high ranking' official is, and criteria for this has varied in the past.⁵⁵ The second challenge is that applying immunity on the basis of an office being charged with international functions has broadened the spectrum. Today, there is a wider range of officials who would fall under such category.

Immunity *ratione personae* is limited in three material ways. Once a person protected by immunity *ratione personae* ceases to hold office through which such immunity was made available to them, their immunity ceases to exist.⁵⁶ This means that they may be found liable for personally liable for acts of a private nature as was in *Ex King Farouk of Egypt v Christian Dior*.⁵⁷ The second way is by waiver- if the state represented waives the immunity of its own state officer, it then ceases to exist as well.⁵⁸

The third and perhaps the most relevant to the following discussion is the non-recognition of this immunity under International Criminal Law. This position, established in the aftermath of the Second World War has been widely upheld as evident in the number of state parties to the Rome Statute of the International Criminal Court (hereinafter the Rome Statute).⁵⁹

Immunity Ratione Materiae

This kind of immunity, also known as functional immunity, attaches to the acts performed by state officials in the carrying out of their functions or the discharge of their roles. It is conferred upon those performing 'acts of state' and includes more than just the state officials covered under personal immunity. This means all representatives of

⁵⁴ *Re Bo Xilai*, 713

⁵⁵ Franey, *Immunity, Individuals and International Law*, 128

⁵⁶ *D'Argent, Immunity of State Officials and Obligation to Prosecute*, 7

⁵⁷ *France, Court of Appeal of Paris*, 11 April 1957 24 *International Law Review* 228

⁵⁸ *D'Argent, Immunity of State Officials and Obligation to Prosecute*,

⁵⁹ Article 27, *Rome Statute of the International Criminal Court* (1998) UNTS 2187

the state acting as such or 'all the natural persons who are authorized to represent the State in all its manifestations'⁶⁰ fall under the blanket of functional immunity. The scope of immunity *ratione materiae* is wider than that of immunity *ratione personae*, and attaches to the official even after the conclusion of the term of the official. It extends to *jus imperii* or public acts of the state and *jure gestionis* which are private or commercial acts of the state provided they were not done in private capacity, but officially.⁶¹

The underlying idea for this immunity is that you cannot sue the agent in absence of the Principal.⁶² They are acting on behalf of the Principal, in this case the state, and are not individually responsible for what they do as it is their duty. To make the agent a defendant therefore, was to subject a foreign sovereign to the jurisdiction of the courts of another- a position widely accepted as contrary to customary international law

While this paper is focused on immunity from criminal prosecution, it is perhaps of import to briefly discuss the doctrine of restrictive immunity. This refers to circumstances where a state can in fact be sued, and developed with the appreciation of a state's ability to engage in activities that a private person could engage in as well, known as *acta jure gestionis* or acts of a private nature.⁶³ This is as opposed to *acta jure imperii* or acts of a sovereign, which are covered under immunity. For example, when a government enters into a contract for purchase of supplies, they are bound to honor it as an ordinary person would, and the seller has right to remedies through the judicial system, against the purchaser who is the government. The defendant in such a suit would be the government itself, and not the agent authorized to execute the documents on its behalf.

Justifications and Importance of Immunity.

The principle of immunity is closely linked with the sovereignty and autonomy of a state. It prevents a state from criticizing or adjudicating on the merits or lawfulness of a state's actions or policy. Where a state's sovereignty cannot and should not, under international law, be challenged by another, it therefore stands that its actions are not

⁶⁰ International Law Commission, *Report of the 43rd Session*, 1991, 18

⁶¹ D'Argent, *Immunity of State Officials and Obligation to Prosecute*, 8

⁶² *Twycross and others v Dreyfuss Brothers and others* 1877, [1874-80] All ER, 133

⁶³ Franey, *Immunity, Individuals and International Law*, 136

subject to scrutiny in another jurisdiction. Immunity is often accorded to persons who by virtue of the office that they hold, are seen as the embodiment of the state they represent.⁶⁴ Immunity for these individuals from criminal prosecution in foreign courts, or in an international court or tribunal is thus considered important and as such is limited to only high ranking government officials. In *Jones v Ministry of Interior of The Kingdom of Saudi Arabia and others*,⁶⁵ Lord Bingham said that “A state can only act through servants and agents, their official acts are acts of the state and the state’s immunity in respect of them is fundamental to the principle of state immunity”.⁶⁶ Therefore, the actions of a state’s highest officers, or the actions of a state official pursuant to the carrying out of their duty are seen as actions of the state itself. Subjecting a state agent to the jurisdiction of another is tantamount to insult to that state.

Another argument for immunity states that this privilege is necessary for the proper carrying out of the official’s functions or duties to their state. In *Democratic Republic of the Congo v Belgium*⁶⁷ an arrest warrant against the Minister for Foreign Affairs of the Democratic Republic of the Congo, issued by Belgium under its universal jurisdiction laws had been sent out to many countries. The International Court of Justice gave reference to precedence in the high courts of the United Kingdom and France, which asserted that immunity was not granted to state officials for their personal benefit, but to ensure the effective performance of their duties⁶⁸. This position was in line with The Vienna Convention on the Law of Treaties⁶⁹ as earlier stated. The Court went further to say that being a minister of foreign affairs meant that the minister, against whom the warrant was filed, was in charge of handling the relations between the Democratic Republic of the Congo and other states. He could not do so while apprehensive of potential arrest should he set foot in another country.

Immunity is also important for purposes of diplomatic harmony. As stated earlier, states will often avoid antagonizing one another and this may be through the arrest and/or

⁶⁴ D’Argent, *Immunity of State Officials and Obligation to Prosecute*, 6

⁶⁵ [2009] QB, 699

⁶⁶ *Jones v Ministry of Interior*, Lord Bingham, para. 30

⁶⁷ *Democratic Republic of the Congo v Belgium*, 6

⁶⁸ *Democratic Republic of the Congo v Belgium*, 22

⁶⁹ Preamble, *Vienna Convention on Diplomatic Relations*

indictment of a high ranking government official of a foreign state. This is often the clashing point between the competing interests of justice and international relations.⁷⁰

Immunity for protected persons from criminal prosecution in foreign courts is not as straight-forward in International Criminal Law.

Individual criminal responsibility is a general principle of law under both national and international criminal law.⁷¹ It is now accepted under international law that individuals must be held accountable for international crimes, regardless the position of their own states or the states in which such crimes were committed⁷². This was affirmed by the United Nations General Assembly (UNGA) in stating that this principle can be applied to natural persons as subjects of International Criminal Law, irrespective of the provisions of national legislation⁷³ and in the adoption of the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁷⁴, the International Criminal Tribunal for Rwanda (ICTR)⁷⁵ and the International Criminal Court (ICC)⁷⁶ as well as Article 2 (1), (2) and (3) of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind of the International Law Commission (ILC).⁷⁷ The judgment of the International Military Tribunal (IMT) at Nuremberg stated that, “Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced”.⁷⁸

⁷⁰ Foakes J, ‘Immunity for International Crimes’, 4

⁷¹ Bassiouni MC, *International Criminal Law: Sources, Subjects and Contents*, Brill, 2008, 46

⁷² Foakes J, ‘Immunity for International Crimes: Developments in the Law on Prosecuting Heads of State in Foreign Courts’, 2 *International Law Programme* (2011), 2

⁷³ UNGA, *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, UN A/Res/95 /236, 11 December 1946

⁷⁴ Articles 7 (1) and 23 (1), *Statute of the International Criminal Tribunal for the former Yugoslavia*, 1993, UNSC S/RES/827 (1993)

⁷⁵ Articles 6 (1) and 22 (1), *Statute of the International Criminal Tribunal for Rwanda*, 1994, UNSC S/RES/995 (1994)

⁷⁶ Article 25, *Rome Statute of the International Criminal Court*, 2002

⁷⁷ UNGA, *Draft Code of Crimes Against the Peace and Security of Mankind: Titles and texts of Articles on the Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session*, UN A/Res/4/532 (1996)

⁷⁸ *The Trial of German Major War Criminals*, Judgment, International Military Tribunal at Nuremberg 1946, 55

So far, it has been established that immunity for Heads of State and Heads of Government from criminal prosecution is recognized under both domestic and international law. This protection is often absolute for the duration of their tenure and extends to senior government officials mainly by virtue of the office they hold and to lesser officials for functions performed on behalf of the state. The reasons for this range from the protection of the sovereignty of the state through protection of its actors, to the need for ensuring civil and political stability within the states. The next chapter looks further into this principle and its application under International Criminal Law and chapter four examines the provisions for immunity under the African Union's mandate through the African Court of Justice and Human Rights.

CHAPTER THREE: INTERNATIONAL LEX LATA ON IMMUNITY FOR SITTING HEADS OF STATE FROM PROSECUTION FOR INTERNATIONAL CRIMES

Immunity has for a long time been considered legitimate and necessary under international law. To avoid conflicts, societies have needed reassurances that their representatives would remain unharmed when out of their home territories. Thus the law developed at both domestic and international levels to make inviolable the person of a state representative.⁷⁹ However, in the last century international criminal law appears to have taken, or to be taking a different approach with regard to immunity from criminal prosecution specifically for international crimes. This is to say that while immunity for state representatives, more so high ranking state officials is widely accepted as the norm, there has emerged a trend where prosecution of crimes perceived to be of worst kind take precedence over both the immunity *ratione materiae* and immunity *ratione personae* of said officials before an international court or tribunal. This chapter seeks to analyze this premise and examine why this shift is taking place.

Obura asserts that, 'once a crime has been identified as having *jus cogens* status, it inevitably imposes obligations *erga omnes* or obligations owed to all mankind.'⁸⁰ A close evaluation of international law affirms that the international obligation to prosecute and punish international crimes actually exists.⁸¹ This is the first discourse against the implementation of Article 46A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

Customary International Law and the Specialized International Courts and Tribunals

The last decade of the Twentieth Century saw the establishment of a number of specialized courts and tribunals to address crimes considered to be of international import and to ensure the people behind them were punished accordingly. These institutions reinforced an already recognized norm that international crimes could not go

⁷⁹ Cryer R, Friman H, Robinson D and Wilmschurst E, *An Introduction to International Criminal Law and Procedure*, Cambridge University press, 2007, 422

⁸⁰ Obura K, 'Duty to Prosecute International Crimes under International Law', in Murungu C and Biegion J (Eds) *Prosecuting International Crimes in Africa*, Pretoria University law Press, 2011, 14

⁸¹ Obura K, 'Duty to Prosecute International Crimes under International Law', 31

unpunished and had in them clauses to ensure those most responsible for them were dealt with at law.⁸²

The Charter and Constitution of the International Military Tribunal (IMT) of Nuremberg states that, “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”⁸³ Following the Second World War, many high ranking officials of the German National Socialism Party were indicted and convicted of various international crimes. The Tribunal was tasked with bringing to justice the perpetrators of crimes against humanity, war crimes and crimes against peace as defined in the Charter of the IMT and did so with no heed to the official ranking of the defendants, many of whom were very senior government officials. This was one of the first landmark cases under international criminal law where no regard was given to the doctrine of immunity of any kind. Similarly, the Charter of the International Military Tribunal for the Far East (IMTFE) stated that, “Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”⁸⁴

The statutes of the International Criminal Tribunal for the former Yugoslavia⁸⁵ and the International Criminal Tribunal for Rwanda⁸⁶ both of which were mandated by the UN have identical wording in stating that ‘the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment’. Slobodan Milošević was indicted by the ICTY while he was still the President of the Federal

⁸² Obura K, ‘Duty to Prosecute International Crimes under International Law’, 25

⁸³ Article 7, *Nuremberg Charter of the International Military Tribunal Constitution*, 1945

⁸⁴ Article 6, *International Military Tribunal for the Far East Charter*, 1946, TIAS/1589

⁸⁵ Article 7 (2), *Statute of the ICTY*, 1993, UNSC S/RES/827 (1993)

⁸⁶ Article 6 (2), *Statute of the ICTR*, 1994, UNSC S/RES/995 (1994)

Republic of Yugoslavia.⁸⁷ This move echoed the Nuremberg Trials and Principles, over half a century later.

The Special Court for Sierra Leone held in its Decision⁸⁸ that was based on the Statute of the Special Court for Sierra Leone⁸⁹ that the special court had competence to prosecute ‘persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law’⁹⁰ and the ‘official position (including as Head of State) of such persons shall not relieve them of criminal responsibility nor mitigate punishment’.⁹¹

In the Arrest Warrants Case, the ICJ stated in its judgment that an incumbent or former Minister for Foreign Affairs, who really is a person considered a high ranking official in the government as discussed in chapter two here, may be subjected to criminal proceedings before certain international criminal courts, where they are found to have jurisdiction.⁹² This implicitly means that persons who are protected by immunity *ratione personae* can be prosecuted under international criminal law for international crimes under certain statutes. The immunity at this level therefore, is no longer absolute.

The International Criminal Court and the Principle of Irrelevance of Official Capacity

Article 27 of the Rome Statute of the International Criminal Court stipulates the principle of irrelevance of official capacity. It states:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from

⁸⁷ Prosecutor v. Slobodan Milosevic(2005),*Decision on Interlocutory Appeal on Kosta Bulatovic Contempt Proceedings*, International Criminal Tribunal for the former Yugoslavia IT-02-54-A-R77.4

⁸⁸ Prosecutor v Charles Ghankay Taylor (2003), *Decision on Immunity from Jurisdiction*, Special Court for Sierra Leone, SCSL-2003-01-I

⁸⁹ UNSC S/RES/1315 (2000), 2

⁹⁰ Article 1 (1), *Statute of the SCSL*

⁹¹ Article 6 (2), *Statute of the SCSL*

⁹² *Democratic Republic of the Congo v Belgium*, 26

criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Where a state has subscribed to the jurisdiction of the International Criminal Court, the immunity provisions often afforded to senior government officials at national level, and in foreign domestic courts is cast aside. From the Preamble of its statute, it is evident that one of the objectives of the ICC is to put an end to impunity and contribute to the prevention of international crimes. This is therefore made possible by making sure that there are not technical legalities or loopholes that a person who has committed such crimes may use to evade justice.

The Rome Statute is the unification of various principles of international law that have been practiced, even codified in the Statutes of specialized courts and tribunals. The purpose for this was to create long lasting solutions to conflict that are primarily caused by the blatant disregard of law and rampant criminal activity of leaders who felt above it. These violations often led to large scale abuse of human rights and little if any justice for the victims. Therefore, immunity which might have barred prosecution is disregarded at this level.

Another key reason for this provision is the complementarity principle. The Rome Statute recognizes the need for states to first try to rectify a conflict at the national level and thus the ICC is a court of last resort.⁹³ However, many constitutions endorse immunity for sitting Heads of State and Heads of Government and the municipal courts have no authority to try them. The ICC, therefore, is a tool to correct this loophole that has marred many judicial systems and that has been abused by holders of senior government post.

In practice, therefore, the rules on immunity *ratione personae* give way in the face of prosecution under international criminal tribunals.

⁹³ Preamble and Article 17, *Rome Statute*

CHAPTER FOUR: IS THE PROPOSED IMMUNITY UNDER ARTICLE 46A BIS OF THE PROTOCOL ON AMENDMENTS DETRIMENTAL TO THE MANDATE OF THE ACJHR?

The African Union at its twenty third Ordinary Session Summit in Malabo, adopted a protocol⁹⁴ to enlarge the mandate of the proposed African Court of Justice and Human and Rights (ACJHR) to include original and appellate jurisdiction over international crimes.⁹⁵ This is the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Protocol on Amendments). It revises the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR Protocol) that was adopted in 2008 and has not yet come into force. If adopted, the jurisdiction of the African Court of Justice and Human Rights will extend beyond interstate dispute and state responsibility for human rights violations, and allow it to try individuals on the basis of individual criminal responsibility for international crimes. The comprehensive list of crimes within the scope of the International Criminal Section of the Court expressly includes the following crimes: Genocide, Crimes Against Humanity, War Crimes, the Crime of Unconstitutional Change of Government (UCG), Piracy, Terrorism, Mercenarism, Corruption, Money Laundering, Trafficking in Persons, Trafficking in Drugs, Trafficking in Hazardous Wastes, Illicit Exploration of Natural Resources and the Crime of Aggression.⁹⁶ It goes on to define each of these crimes in detail. Further, the protocol allows the Assembly, with the consent of the State Parties to add to this already broad list in order to reflect developments under international law.⁹⁷ This move has been recognized as a step forward for Africa, which has long suffered from mass violations of human rights.⁹⁸ It is seen as a potential tool to fight impunity

⁹⁴ AU, Decision on the Draft Legal Instruments, Assembly/AU/Dec529(XXIII) 26-27 June 2014

⁹⁵ Article 3, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014

⁹⁶ Article 28A (1), Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014

⁹⁷ Article 28A (2), Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014

⁹⁸ Mbaku JM, *International Justice: The International Criminal Court and Africa*, The Brookings Institution, 2014

and prevent the unchecked exercise of power that leaves many of the continent's leaders unaccountable for their actions.

Despite the potential regional advancement in international criminal law and even human rights law, the African Union has suffered severe criticism for the provisions embodied under Article 46A bis. This article proscribes immunity for sitting Heads of State and Government, as well as other senior government officials for crimes under the Protocol on Amendments for the duration of their term.

The Basis for International Criminal Jurisdiction in the ACJHR

Before beginning the analysis on the immunity provisions of Article 46 A bis of the Protocol, it is important to understand the basis for this international criminal jurisdiction in the African Court of Justice and Human Rights (The Court). Then it may be better understood how the immunity provisions could hamper the effective functioning of the Court in executing its mandate under the ACJHR Protocol and the Protocol on Amendments.

The idea of such jurisdiction is not new to the continent and neither is it, as studies have revealed, a consequence of the fallout between the International Criminal Court and Africa even if the latter did indeed accelerate the process.⁹⁹ The reasons for the extended jurisdiction are given as follows.

The legal obligation on the African Union, derived from its constitutive act, 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.¹⁰⁰ Interestingly, these are the same crimes that are envisioned in the Rome Statute of the International Criminal Court (Rome Statute).

During the drafting of the African Charter on Human and Peoples' Rights, an African judicial institution with criminal jurisdiction was envisioned.¹⁰¹ This was motivated by the apartheid rule in South Africa that was labeled a crime against humanity by the

⁹⁹ Abass A, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' 24(3)*European Journal of International Law* (2013), 936

¹⁰⁰ Article 4(h), *Constitutive Act of the African Union* (2000)

¹⁰¹ Abass A, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 937

United Nations General Assembly.¹⁰² However, it was deemed premature, as there were already plans by the United Nations for an international court to repress crimes against mankind.¹⁰³ A penal court for this crime was never established and the AU felt the need to address matters that were of grave concern to the African people, but which seemingly did not have much prosecutorial weight on the international scene.

The AU is mandated to prosecute crimes peculiar to the African continent that are not under the jurisdiction of the ICC and are not recognized as international crimes in the rest of the world. One such crime is the crime of Unconstitutional Change of Government (UCG)¹⁰⁴ which has been a source of conflict in many parts of the continent.¹⁰⁵ The criminalization of UCG can also be said to be a preventative measure: where the ICC deals with crimes that are often the aftermath of disruption of law and order, the AU seeks to deal with the matter before it escalates.¹⁰⁶ This recognition of UCG in Africa began with the influence of the OAU on state practice, led to customary practice of the same and finally after pronouncements and the Lome Declaration of 2000¹⁰⁷, it led to the adoption of the African Charter on Democracy Elections and Governance in 2007.¹⁰⁸ Without the provisions for prosecution of international crimes in its judicial arm, the AU would only have managed to enact unenforceable legislation, so to speak.

Analysis of Article 46 A Bis

Article 46A bis of the Protocol on Amendments:

¹⁰² UNGA, *the Policies of Apartheid of the Government of the Republic of South Africa*, UN A/Res/2202 (XXI) 16 December 1966

¹⁰³ OAU, *Rapporteur's Report of the Ministerial Meeting in Banjul, The Gambia, Organization of African Unity*, OAU Doc. CAB/LEG/67/Draft. Rapt. Rpt (II)

¹⁰⁴ Article 28 (e), *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, (2014)

¹⁰⁵ Abass A, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 939

¹⁰⁶ Article 2, African Charter on Democracy Elections and Governance, Assembly/AU/Dec. 147 (VIII) (2007).

¹⁰⁷ Declaration on the Framework for an AU response to Unconstitutional Changes to Government, OAU Doc/AHG/Dec.5 (XXXVI) (2000)

¹⁰⁸ Preamble, African Charter on Democracy

“No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”¹⁰⁹

The immunity envisioned under Article 46A bis is immunity *ratione personae* as it is accorded to a person by virtue of the office they hold, as opposed to mere performance of official duties. Two characteristics of this immunity can be adduced from the wording of the Protocol: it is absolute and it is temporary.¹¹⁰ It is absolute, in that it states categorically under this article 46A bis that “no charges shall be commenced or continued...” and there are no exceptions listed in the same. Further, this position is asserted by the exception to individual criminal liability under Article 46B of the Protocol on Amendments, which states that subject to the provisions of Article 46A bis a person shall be held individually criminally liable for crimes under the jurisdiction of the Court, regardless their official position.¹¹¹

The immunity under the Protocol on Amendments is temporary. It affords the protection from prosecution to “serving” Heads of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, “during their tenure of office”. Therefore, when one has ceased to hold the office through which they held this immunity, they are no longer immune to the jurisdiction of the Court.

Proponents of this immunity clause argue that there are possible positive outcomes brought forth by this Article 46A bis. On the one hand, the argument goes, Heads of State, Heads of Government and other protected persons are better able to perform their function if they do not feel threatened and at risk at the Court if they are adequately protected. The AU legal Counsel justified it as a compromise to allow government

¹⁰⁹ Article 46A bis, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (2014)

¹¹⁰ Du Plessis M, ‘Shambolic, Shameful and Symbolic: Implications of the African Union’s Immunity for African Leaders’, 278 *Institute for Security Studies Paper* (2014), 7

¹¹¹ Article 46B, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*

officials to fully tend to their duties.¹¹² Further, it is seen as a deterrent, as the holders of immunity are not immune for the actions done after they leave office. Therefore, the temporal nature of the immunity serves as an incentive to act in good faith and not engage in actions that would constitute international crimes under the Protocol on Amendments.

Criticism for Article 46a Bis

Critics of this immunity provision generally cite three potential consequences, should the adopted protocol come into force:

- 1. The immunity provision may render defunct some provisions of the Protocol, in particular, the possible prosecution of perpetrators of international crimes**

The inclusion of several 'new' crimes to the list of international crimes has seen the introduction in particular of something that may be the most common cause of conflict in the African Continent: the crime of Unconstitutional Change of Government (UCG).¹¹³ Prohibited under Articles 28A (1) and 28E of the Protocol on Amendments, this crime includes the illegal replacement of democratically elected governments, preventing a democratically elected government from ascending to power by refusing to relinquish power and changing the law in order to maintain one's authority, contrary to the constitution of the country. However, if a person successfully carries out such action and becomes the sitting Head of State or Government, they would be entitled to immunity under provisions of Article 46A bis of the Protocol on Amendments. Therefore, this provision may potentially bar the effectiveness of the Court in carrying out its mandate.¹¹⁴ The Court would have no authority or ability to rectify such wrongs. This would render that part of the Protocol redundant.

¹¹² Kanyogonya TN, *The Relationship between the proposed African Court of Justice and Human and Peoples' Rights and the International Criminal Court: Questions of Jurisdiction and Complementarity*, Unpublished LLM Thesis, University of Amsterdam, 16 June 2015, 23

¹¹³ Abass A, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 939

¹¹⁴ Du Plessis M, 'Shambolic, Shameful and Symbolic', 8

2. The immunity provision increases the risk of African leaders holding on to power, long after their tenures.

The proposed immunity clause offers temporal protection, in that the persons granted such immunity have it for the duration of their tenure. However, this temporary nature could turn these terms into permanent positions especially for Heads of State or Heads of Government who have committed crimes under the Protocol on Amendments.¹¹⁵ This is because the protection is stripped once they are out of office, and they may then face the law for their actions after their terms. This is compounded by the fact that the immunity attaches to the office that the person holds, rather than to official functions. Thus it becomes an incentive to hold on to power in order to avoid facing the proverbial music.

3. The immunity clause has too wide a scope of protected persons.

The phrasing of Article 46A bis raises concern where it includes “other senior state officials based on their functions”. This is a very wide scope, as it does not state who these officials are and what functions make the one carrying them out a senior state official.¹¹⁶ Such ambiguity would leave the definition to the court’s discretion. However, it is reasonably apprehensible that this discretion could easily be manipulated.

It is therefore perceivable that the proposed immunity places at risk thousands of men women and children who have been and others who may be victims of heinous international crimes as the judicial mechanism with the mandate and authority to make accountable the perpetrators would be barred from doing so.

The AU has also been criticized for passing the Protocol on Amendments in a rush, failing to give time and voice to civil society groups through interested Non-Governmental Organizations and non-government experts.¹¹⁷

¹¹⁵ Du Plessis M, ‘Shambolic, Shameful and Symbolic’, 7

¹¹⁶ Du Plessis M, ‘Shambolic, Shameful and Symbolic’, 8

¹¹⁷ Abraham G, ‘Africa’s Evolving Continental Court Structures: At the Crossroads?’, 209 *South African Institute of International Affairs* (2015), 11

Article 46a Bis of the Protocol on Amendments vis a vis the Constitutive Act of the AU

The wording of the Constitutive Act of the African Union enunciates the determination of the AU to ‘promote and protect human and peoples’ rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law’ and even further to ‘take all necessary measures to strengthen [the] common institutions and provide them with the necessary powers and resources to enable them discharge their respective mandates effectively’.¹¹⁸

The Act further lists its principles, among them ‘respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities’.¹¹⁹ The ‘condemnation and rejection of impunity’ herein is not evidenced, and in fact the contrary appears to be the case with the adoption of the immunity clause. By granting immunity to sitting leaders, the Protocol on Amendments promotes impunity by creating incentive for them to remain in power in order to avoid prosecution.¹²⁰ By allowing that perpetrators of international criminal acts to be saved from prosecution simply by the office they hold means that the AU is taking steps to prevent the course of justice goes against the letter and spirit of the Act.

One of the objectives under the African Charter on Democracy, Elections and Governance is to ‘protect and promote the independence of the judiciary’.¹²¹ While this is a noble goal, it appears improbable for the AU to promote judicial independence while in fact its own judiciary is not independent. The ACJHR would not be able to independently take steps to bring leaders who have committed crimes in contravention of the Protocol on Amendments to justice. It therefore cannot be a true authority on judicial independence, let alone an example to be emulated by the African states. It would not be able to provide the necessary support to states in pursuit of their own independence for their judiciaries.

¹¹⁸ Preamble, *Constitutive Act of the AU*

¹¹⁹ Article 4 (o), *Constitutive Act of the AU*

¹²⁰ Amadhila NNN, ‘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?’, Published PHD Thesis, University of Cape Town, 15 September 2014, 51

¹²¹ Article 2 (5), Charter on Democracy

These are just a few examples, but there are numerous legal instruments that the immunity clause would be contravening and provisions in other AU statutes that could be rendered obsolete or impracticable if the Protocol on Amendments came into force without the deletion or drastic improvement of Article 46A bis.

CONCLUSION: PROPOSING A WAY FORWARD

This dissertation has reiterated that immunity for sitting Heads of State and Governments is a necessary tool under international law for the proper undertaking of stately duties. Further, it is necessary to prevent conflict between sovereign states over infringement on their right to autonomy and self-determination. However, emerging jurisprudence particularly in international courts and tribunals has quashed this long established position, and argued that under such jurisdictions as the International Criminal Court and special courts and tribunals for prosecuting international crimes, the right to immunity is done away with in favour of the pursuit of justice. Therefore, any legislation to the contrary would be going against international consensus as under the Rome Statute, specifically stated under Article 27: the principle of irrelevance of official capacity as well as the international obligation to prosecute international crimes. It is also argued in this paper that the decision of the Assembly of the African Union to adopt the Protocol on Amendments inclusive of Article 46A bis is contrary to the objectives of the constitutive act of the African Union. This piece of legislative text is, therefore, demonstrative of political will exerting itself over the execution of justice and even the principle of judicial independence.

In doing so, the AU finds itself an accessory to the mass violations of human rights and disregard of the rule of law and democracy. The actions of the AU, therefore encourage the Heads of State who commit atrocious crimes under international law to hold on to power and rule without due regard for the same. This, in a continent wrought with strife and conflict over the same is akin to actually supporting the orchestrators of the crimes and the crimes themselves.¹²²

However, all is not lost. There are certain steps that may be taken by the AU and its Member States as well as civil society groups and the international community to ensure that normative standards of justice are upheld.

¹²² Amadhila NNN, '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?', Published PHD Thesis, University of Cape Town, 15 September 2014, 58

African nations are the members of the African Union, and they have a key role to play in ensuring that the organization established to oversee and offer guidance as well as justice is able to do that. By refusing to ratify the Protocol on Amendments as it is, and making sure that it does not come into force, the integrity of the AU is protected. Sadly only one state- Botswana- did not support the Protocol on Amendments as it was passed.¹²³ The demonstration of not only willingness but also active participation in the fight against protecting perpetrators of international crime would perhaps be the most effective way to do so.

Alternatively, the Assembly of African Union ought to make amendments to the Protocol on Amendments, deleting the provisions for immunity for any person for crimes under international law. This retraction will not only restore faith in the organization, but also remove the tainted image of the ACJHR which has formed even before the ACJHR Protocol has come into force. Further and even more importantly, it would be a direct and unquestionable stance in ensuring that leaders are held accountable as their actions are scrutinized. The argument that a government's highest representatives should work without fear of prosecution holds some water at a domestic or municipal level. However, on an international crimes scale, it is repulsive to the sense of justice. No person accused of such crimes should hold the highest positions of authority in a state, much less be offered protection for the same crimes on any grounds.

Finally, the African Union, in its actions discussed in this paper has shown that it can enact legislation to hamper the working of an independent judiciary. While the ACJHR is a creature of law- the ACJHR Protocol- the organization must ensure that whatever subsequent or complementary laws it enacts do not go against the intended purpose of the court. Therefore, any statutes that are contrary to the Constitutive Act and the ACJHR should not be passed, more so if the violation is of such high magnitude.

¹²³ <http://www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/> on 4 January 2016

Criminal prosecution and the trial process has the goal of finding the guilty party and ensuring that they are liable and penalized for their crimes.¹²⁴ And while the official tasks of certain individuals, in representing their states require they are protected from prosecution, the lawmaker must weigh such protections as against the nature of the crimes the immunity holders are accused of. If this balance is not maintained, then a society risks being overrun with the very mischiefs that led to the enactment of the laws in the first place.

On a sociological level, the stigmatization of a person responsible for a violation of the law has a number of consequences¹²⁵: First, it strengthens the people's faith in the legal system and thereby strengthening the social system itself. The public becomes confident in the government. Second, justice is not only upheld, but is seen to be upheld, and this has a purgative effect on the populace. On the other hand, if the sense of justice is not fulfilled, it leaves feelings of unrest that can lead to grave consequences as the people attempt to take the law into their own hands. Third, addressing the injustice or the crime enables the legal system to examine the facts and the consequences and take steps to prevent similar occurrences.

A small victory was achieved when the Protocol on Amendments officially recognized even more crimes as being under the international criminal law jurisdiction of the AU through the ACJHR, and more so with the tailoring of such law to the peculiarity of the African context- for example, codification of UCG as an international crime punishable by the court. However, the introduction of Article 46A bis into the same Protocol on Amendments is a leap backward and may make futile all efforts to restore peace and prevent conflict in the African continent.

¹²⁴ Safferling CJM, 'Can Criminal Prosecution be the Answer to Massive Human Rights Violations?', 5 *German Law Journal*: "The Political Economy of Jurisdictional Competences for Human Rights" (2004), 1481

¹²⁵ Safferling CJM, 'Can Criminal Prosecution be the Answer to Massive Human Rights Violations?' 1479

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Statutes

1. Protocol On Amendments To The Protocol On The Statute Of The African Court Of Justice And Human Rights
2. Protocol on the Statute of the African Court of Justice and Human Rights
3. Updated Statute of the International Criminal Tribunal for the former Yugoslavia
4. Statute for the International Tribunal for Rwanda
5. Rome Statute of the International Criminal Court
6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
7. Convention on the Prevention and Punishment of the Crime of Genocide
8. The Geneva Conventions of 1949