

# NO PLACE FOR IMMUNITY: THE ARGUMENTS AGAINST THE AFRICAN CRIMINAL COURT'S ARTICLE 46BIS

By: *Miriam Abaya\**

## I. INTRODUCTION

Recent disagreements between the International Criminal Court (ICC) and African leaders have led the African Union (AU) to move forward with a new possibility in international criminal law: a regional criminal court. In 2009, the heads of AU Member States asked the AU to consider the creation of an international criminal chamber in the African Court on Human and People's Rights, or an African Criminal Court (Court).<sup>1</sup> The draft protocol that resulted extended the Court's jurisdiction to include international crimes and renamed the court the African Court of Justice and Human Rights (ACJHR).<sup>2</sup> Though the protocol has not yet entered into force,<sup>3</sup> it appears that the Member States are seriously considering giving this regional court jurisdiction over international crimes.<sup>4</sup>

The most controversial aspect of this new proposed Court has been the inclusion of an immunity clause.<sup>5</sup> The provision would not allow the Office of the Prosecutor to indict or prosecute heads of state and senior officials for international crimes while they are in office.<sup>6</sup> Human Rights Watch and Amnesty International

---

\* J.D. Candidate, Temple University James E. Beasley School of Law, 2017. I would like to thank Professor Meg deGuzman for her guidance throughout this process. Thanks to the staff and editors of Temple International Comparative Law Journal for bringing the best out of this comment. Lastly, I thank my family and friends who have supported my passion for the law and justice.

1. Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects, and Challenges*, 24 EU. J. INT'L L. 933, 933 (2013). There are 54 Member States of the AU including states in West and North Africa. *Id.* *Member States of the AU*, AFRICAN UNION, [http://www.au.int/en/AU\\_Member\\_States](http://www.au.int/en/AU_Member_States) (last visited Oct. 3, 2016).

2. *See* Abass, *supra* note 1, at 934 (indicating that international crimes include genocide, war crimes, and crimes against humanity).

3. *Id.*; *Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights*, AFR. CT. COALITION (July 12, 2014), [http://www.africancourtcoalition.org/index.php?option=com\\_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12](http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12).

4. *See* African Court Coalition, *supra* note 3 (indicating that five members ratified and thirty countries signed to Protocol on the Statute of the African Court of Justice and Human Rights).

5. Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Annex art. 46A *bis*, EX.CL/846(XXV) (May 15, 2014) [hereinafter Draft Protocol].

6. *Id.*

have spoken out against this clause, claiming that it goes against customary international law and gives senior state officials free reign to commit international crimes while in office.<sup>7</sup> Yet, others have stated that in practice, international criminal courts have rarely indicted and have never prosecuted a sitting head of state.<sup>8</sup>

This comment argues that the immunity clause should be eliminated for three reasons: (1) the clause violates customary international law, (2) the clause undermines the Court's legitimacy domestically and internationally, and (3) the reasons for the clause can be addressed by prosecutorial discretion. This comment begins by describing the formation, structure and jurisdiction of the proposed ACJHR. It then explains the ACJHR's immunity clause and the international community's reaction to the clause. It then discusses the state of customary international law for crimes under the Court's jurisdiction and why customary international law mandates that immunity not apply for sitting state officials. The comment then discusses how the immunity clause delegitimizes the Court in the eyes of AU countries' citizens and their counterparts in the international community. Lastly, the comment argues that the immunity clause should be removed because the reasons the AU gives for including the clause in the Draft Protocol can be addressed by prosecutorial discretion.

## II. THE PROPOSED ACJHR OR AFRICAN CRIMINAL COURT

### *A. Events Leading Up to the Draft Protocol*

The relationship between African states, Western nations, and international courts has long been difficult. African state officials have been indicted in Western domestic courts and the ICC, and African states have often had disputes with Western nations before the International Court of Justice (ICJ).<sup>9</sup> The relationship between the ICC and African states has become particularly volatile.<sup>10</sup> However, this was not always the situation. In fact, Senegal was the first country in the world to sign and ratify the Rome Statute of the International Criminal Court (Rome Statute), which created the ICC.<sup>11</sup> Of the 120 states that are parties to the Rome Statute, the African continent is the most represented region, with thirty-four

---

7. See Dan Kuwali, *Article 46A Bis: A Step Backward in Ending Impunity in Africa*, SOC. SCI. RESEARCH COUNCIL (Sept. 22, 2014), <http://forums.ssrc.org/kujenga-amani/tag/article-46a-bis/> (stating that the Article is contrary to international law and prevents justice for victims of atrocity crimes).

8. See Mary Margaret Penrose, *The Emperor's Clothes: Evaluating Head of State Immunity Under International Law*, 7 SANTA CLARA J. INT'L L. 2, 114 (2010) (explaining that most heads of states have been granted immunity when sued in the United States).

9. Mbori H. Otieno, *The Merged African Court of Justice and Human Rights (ACJ&HR) as a Better Criminal Justice than the ICC*, SOC. SCI. RESEARCH NETWORK (June 3, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2445344](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445344).

10. See *id.* (explaining that the ICC tried African leaders in former imperial powers such as Belgium and France).

11. Alebachew Birhanu Enyew, *The Relationship Between the International Criminal Court and Africa: From Cooperation to Confrontation?*, BAHIR DAR UNIV. J.L. 12 (Dec. 2012); see generally Rome Statute of the International Criminal Court art. 5, July 17, 1998, 37 I.L.M. 999.

member states.<sup>12</sup> African civil society and non-governmental organizations (NGOs) have also contributed to the ICC by advocating for the Court domestically.<sup>13</sup> As a result, various African states have referred situations in their territory to the ICC and enacted legislation to implement the Rome Statute domestically<sup>14</sup> and by doing so, African states have played an active role in the ICC since its creation.

Over time, however, some African states have moved from cooperation with the ICC to contention with the ICC.<sup>15</sup> Thus far, the ICC has indicted only African nationals for alleged offenses during conflicts in states, such as Uganda, Central African Republic, Democratic Republic of Congo, Sudan, Kenya, Libya, Côte d'Ivoire, and Mali.<sup>16</sup> While some of these cases were referred to the Court by the states themselves, others were referred by the U.N. Security Council or initiated under the Prosecutor's discretion after authorization from the judges.<sup>17</sup> The Security Council's referrals have particularly created tension, as the Council is able to refer situations to the ICC that occur in states that are not states parties to the ICC.<sup>18</sup>

As a result, the AU has accused the ICC of unfairly singling out African states for investigation and prosecution by the Court.<sup>19</sup> Additionally, the AU has voiced concern about indicting and prosecuting sitting African heads of state because of the political instability it can cause in his or her respective country.<sup>20</sup> This issue was brought to a head when the ICC indicted Sudanese President Omar Al-Bashir in 2009 based on a referral by the UN Security Council.<sup>21</sup> The AU requested that the proceedings against Al-Bashir be suspended, stating that his indictment would destabilize Sudan and endanger foreign aid workers in Darfur.<sup>22</sup> After the request

---

12. *Id.*

13. *Id.*

14. *Id.* at 14.

15. *See id.* at 25 (indicating that the prosecution of African countries, U.S. involvement, and the Court's location outside of Africa is the source of the conflict).

16. Lydia A. Nkansah, *International Criminal Court in the Trenches of Africa*, 1 AFR. J. INT'L CRIM. JUST. 8, 11 (2014).

17. *Id.*; *see also Office of the Prosecutor*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/otp> (last visited Oct. 13, 2016) (listing the three ways that a case can come under the ICC's jurisdiction). After a case has been raised by a state, the Security Council, or under the Prosecutor's power, the Office of the Prosecutor then opens a preliminary examination to determine whether there is a reasonable basis to open an investigation into crimes under the ICC's jurisdiction. *Id.*

18. *See UN Security Council Referrals to the ICC*, AMICC, <http://www.amicc.org/icc/referrals> (last visited Oct. 13, 2016) (explaining the Security Council's referrals of Sudan and Libya to the ICC); *see also The States Parties of the Rome Statute*, INT'L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Oct. 13, 2016) (listing the states parties of the ICC with Libya and Sudan not listed).

19. Nkansah, *supra* note 16, at 12.

20. *Id.* at 20–21.

21. *Id.* at 15.

22. *African Union Wants ICC Warrant Against Sudan's President Suspended*, VOICE OF

was rejected, the AU instructed its members not to cooperate with the ICC in arresting Al-Bashir.<sup>23</sup> This announcement displayed the widening rift between African states and the ICC.<sup>24</sup>

In 2010, the AU requested studies from the African Union Commission (“AU Commission”) and the Pan African Lawyers Union to explain the implications of giving an African court jurisdiction over international crimes.<sup>25</sup> The purpose of this inquiry was to establish a means by which crimes could be addressed within the region without the involvement of the ICC.<sup>26</sup> Based on the AU’s request, a Protocol (Amending Protocol) was proposed to amend the Protocol on the Statute of the African Court of Justice and Human Rights, which was adopted in 2008.<sup>27</sup> The 2008 Protocol was adopted to merge the African Court on Human and Peoples’ Rights and the African Court of Justice.<sup>28</sup> The Amending Protocol would add a criminal chamber to the new Court.<sup>29</sup> The AU has not yet adopted this new Protocol,<sup>30</sup> as the Protocol does not have the requisite number of signatures.<sup>31</sup>

### ***B. Proposed Structure of the ACJHR’s Criminal Chamber***

The amended ACJHR would have three sections, including a newly added International Criminal Law Section.<sup>32</sup> The International Criminal Law Section would have a pre-trial, trial and appellate chamber.<sup>33</sup> The pre-trial chamber would

---

AMERICA (Nov. 1, 2009, 8:10 PM), <http://www.voanews.com/a/a-13-2008-07-15-voa2/406752.html>.

23. Nkansah, *supra* note 16, at 15 (indicating that the AU hoped to delay or suspend the ICC’s proceedings against Al-Bashir).

24. *Id.* at 21.

25. *Briefing Note on the Extension of the Jurisdiction of the African Court on Human and Peoples’ Rights to Deal with Criminal Matters*, JOURNALISTS FOR JUSTICE (Feb. 14, 2014, 6:57 AM), <https://web.archive.org/web/20140509032802/http://www.jfjustice.net/briefing-note-on-the-extension-of-the-jurisdiction-of-the-african-court-on-human-and-peoples-rights-to-deal-with-criminal-matters> [hereinafter *Briefing Note*].

26. *Id.*

27. *See id.* (indicating that the AU engaged a consultant to explore expanding the African Court of Justice and Human Rights’ jurisdiction).

28. *Id.* The ACJHR has jurisdiction over cases involving human rights, whereas the ACJ was created to address matters related to economic integration and politics. Frans Vilgoen, *AU Assembly Should Consider Human Rights Implications Before Adopting the Amending Merged African Court Protocol*, AFRICLAW (May 23, 2012), <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/#more-213>.

29. *Briefing Note*, *supra* note 25.

30. *Id.*

31. *See* List of Countries Which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AFR. UNION (Jan. 4, 2016), [http://www.au.int/en/sites/default/files/treaties/7804-sl-protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_19.pdf](http://www.au.int/en/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_19.pdf) (showing that only nine African states, out of the fifteen needed, have signed the Draft Protocol).

32. *Briefing Note*, *supra* note 25; Draft Protocol, *supra* note 5, art. 16.

33. Draft Protocol, *supra* note 5, art. 16.

issue orders and warrants requested by the Prosecutor to investigate and prosecute.<sup>34</sup> The pre-trial chamber would also issue orders to protect witnesses, victims, and accused persons, and for presentation of evidence.<sup>35</sup> The trial chamber would conduct trials and receive appeals from the pre-trial chamber,<sup>36</sup> while the appeals chamber would receive appeals from the trial chamber.<sup>37</sup>

The ACJHR's Prosecutor serves a single, non-renewable term of seven years and is responsible for investigating and prosecuting crimes under the Court's Statute.<sup>38</sup> To ensure the rights of suspects and the accused, the ACJHR's statute also creates a Defense Office.<sup>39</sup> The Defense Office may include public defenders and would provide assistance to the accused and defense counsel.<sup>40</sup>

The ACJHR's criminal chamber, in particular, would have jurisdiction over the crimes that the ICC statute calls "the most serious crimes of concern to the international community": genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>41</sup> Beyond those crimes, the criminal chamber would also have jurisdiction over the crimes of the unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, drugs, and hazardous wastes, and illicit exploitations of national resources.<sup>42</sup> The AU General Assembly may also, by consensus, extend the criminal chamber's jurisdiction based on developments in international law.<sup>43</sup> The intent of extending the crimes included beyond core international crimes is to address crimes that the AU believes are plaguing the African continent.<sup>44</sup>

### ***C. The Immunity Clause***

The most controversial clause of the amended Statute for the ACJHR is Article 46A *bis* (hereinafter immunity clause).<sup>45</sup> The immunity clause states that "[n]o 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 in office."<sup>46</sup> This immunity clause limits the ACJHR's jurisdiction by excluding heads of state and senior government officials from prosecution while

---

34. *Id.* art. 19 *bis*, ¶ 2.

35. *Id.* ¶ 3.

36. *Id.* ¶ 4–5.

37. *Id.* ¶ 6.

38. *Id.* Annex art. 22A, ¶¶ 3, 6.

39. *Id.* Annex art. 22C, ¶ 1.

40. *Id.* ¶ 2.

41. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

42. *Briefing Note*, *supra* note 25; Draft Protocol, *supra* note 5, art. 28A, ¶ 2.

43. Draft Protocol, *supra* note 5, art. 28A, ¶ 2.

44. *See id.* (recognizing the need for intervention in respect to war crimes, genocide, and crimes against humanity).

45. *Id.* art. 46A *bis*.

46. *Id.*

they are in office.<sup>47</sup> This immunity clause is directly contrary to the statutes of other international criminal courts, which state that a person's position does not shield them from being indicted and tried.<sup>48</sup>

### 1. AU Arguments in Favor of the Immunity Clause

The AU has argued that the immunity clause is necessary given the current tumultuous context of the continent.<sup>49</sup> The ACJHR has jurisdiction over all Member States of the AU, including those that are not member states of the ICC.<sup>50</sup> The immunity clause would help increase those non-member states' willingness to submit to the jurisdiction of the ACJHR.<sup>51</sup> The individuals in these states would then be held accountable for the crimes under the ACJHR's jurisdiction, even if only after their term in office.<sup>52</sup> Given the immunity they would have while in office, the government officials of these African states would also be willing to cooperate and comply with the ACJHR, aiding the functions of the Court.<sup>53</sup>

Additionally, the AU argues that the immunity clause also allows government officials to focus on their responsibilities while in office.<sup>54</sup> The AU demonstrated this point by examining the effect that an ICC indictment of Kenya's president, President Uhuru Kenyatta, would have on the nation in 2007.<sup>55</sup> The AU noted that the Kenyan president was making efforts to bring about peace and reconciliation in the country after post-election violence in 2007.<sup>56</sup> Indicting the president, the AU

---

47. See *African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights' Statute*, INT'L JUST. RES. CTR. (July 2, 2014), <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/> (explaining that the amendment was offered in order to promote unity among African Union members).

48. See Statute of the International Criminal Tribunal for the Former Yugoslavia, The Secretary General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) art. 7, ¶ 2, U.N. Doc S/25704, Annex at 36 (1993)(indicating the ICTY does not grant immunity to heads of state); see also Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 6 para. 2, Annex, Nov. 8, 1994, U.N. Doc. S/RES/955 (indicating the International Criminal Tribunal for Rwanda does not grant immunity to heads of state).

49. See Kuwali, *supra* note 7 (indicating that African Union members passed the law in response to indictments of African leaders by European prosecutors in the International Criminal Court).

50. Draft Protocol, *supra* note 5, art. 3, ¶ 2.

51. See MAX DU PLESSIS, SHAMBOLIC, SHAMEFUL AND SYMBOLIC: IMPLICATION OF THE AFRICAN UNION'S IMMUNITY FOR AFRICAN LEADERS, Institute for Sec. Studies, Paper 278, 4 (Nov. 2014) [hereinafter Du Plessis 278] (explaining that the Draft Protocol mandates that the Defense Office be adequately funded to have equal status with the Prosecutor).

52. See *id.* (indicating that immunity is reserved for heads of state while still in office).

53. See Kuwali, *supra* note 7 (indicating that in addition to promoting cooperation of African officials the immunity clause would allow them to attend to their responsibilities).

54. *Id.*

55. African Union Decisions, Declarations and Resolutions, Decision on Africa's Relationship with the International Criminal Court (ICC) ¶ 7, May 2013, African Union Commission [hereinafter AU Decisions May 2013].

56. *Id.* Kenyan President Uhuru Kenyatta was indicted by the ICC crime for his role in allegedly planning the post-election violence in Kenya. J.J. Wangui, *African Court Comes with Built in Impunity*, INST. FOR WAR & PEACE REPORTING (July 26, 2015), <https://iwpr.net/global->

argued, would undermine the peace and reconciliation efforts being made and would prevent proper implementation of reparation measures.<sup>57</sup>

The AU further argues that the immunity clause prevents the constitutional duties of state officials from being disrupted.<sup>58</sup> Kenya's situation again illustrates this argument.<sup>59</sup> The AU stated in 2007 that Kenya is playing a very specific role in combating terrorism in the world and in East Africa.<sup>60</sup> If a senior state official were indicted, he or she would be unable to focus on his or her responsibilities to ensure national and regional security.<sup>61</sup> A month following the October 2013 AU declaration in favor of the immunity clause, Kenya's Attorney General, Githu Mugai, argued that indicting a sitting head of state poses a threat to security in the region.<sup>62</sup>

Additionally, the AU has argued that indicting sitting state officials would disrupt the functions of constitutional institutions.<sup>63</sup> Beyond Kenya, many African countries have suffered from political instability since their independence.<sup>64</sup> These states have suffered from hostile, military takeovers because of ineffective leadership.<sup>65</sup> However, pluralism and participatory democracy, if only on paper, have gained a foothold in African nations.<sup>66</sup> For example, African states such as Tanzania and Somalia have either created or revised their constitutions,<sup>67</sup> and steps

---

voices/african-court-comes-built-impunity.

57. *Id.* ¶ 6; *see also* African Union Decisions and Declarations, Decision on Africa's Relationship with the International Criminal Court (ICC) ¶¶ 6–7, Oct. 2013, African Union Commission [hereinafter AU Decision October] (indicating the President of Kenya's indictment by the ICC interferes with his ability to deal with security issues).

58. *Id.* ¶ 9.

59. *Id.* ¶¶ 6–7.

60. *See Who are Somalia's al-Shabbab?*, BBC NEWS (Apr. 3, 2015), <http://www.bbc.com/news/world-africa-15336689> (explaining the terrorism group al-Shabbab and the problems they cause for East Africa).

61. *See* AU Decision October, *supra* note 57, ¶ 6 (explaining that this is a novel situation which will undermine stability in Kenya).

62. Lilian Ochieng, *African Court No Substitute for ICC*, INST. FOR WAR & PEACE REPORTING (May 14, 2014), <https://iwpr.net/global-voices/african-court-no-substitute-icc>.

63. AU Decision October, *supra* note 57, ¶ 5.

64. *See generally* Antony Otieno Ong'ayo, *Political Instability in Africa: Where the Problem Lies and Alternative Perspectives*, AFRICAN DIASPORA POLICY CTR. (Sept. 19, 2008), [http://www.diaspora-centre.org/DOCS/Political\\_Instabil.pdf](http://www.diaspora-centre.org/DOCS/Political_Instabil.pdf). The political process in African countries such as Uganda, Nigeria, Kenya, and Zimbabwe is accompanied by instability and violence which is mostly state sponsored. *Id.* at 6–7.

65. *See id.* at 4 (noting how outside influences and African cultural-political philosophy creates the political leadership in African countries).

66. *Id.*

67. *See Institutions Needed to Sustain Democracy*, DEMOCRATIZATION IN AFRICA: AFRICAN VIEWS, AFRICAN VOICES 48 (1992); William Eagle, *Push for More Democracy Drives Constitutional Change in Africa*, VOICE OF AMERICA NEWS (Mar. 2012), <http://www.voanews.com/a/push-for-more-democracy-drives-constitutional-change-in-africa-144879625/179291.html> (describing the context of Tanzania's constitutional development).

are being taken towards reconciliation and peace.<sup>68</sup> In some cases, state officials are leading the movement towards open government.<sup>69</sup> For the momentum towards good governance to continue, the AU argues for the continuity of leadership and state officials to remain in place.<sup>70</sup>

The AU also argues that prosecuting sitting government officials disrupts the constitutional order of states and could undermine the sovereignty of the offices they hold.<sup>71</sup> Because most African nations are modeled after modern western state systems, state officials reside in the executive branch and have important functions in government.<sup>72</sup> The AU argues that prosecuting senior officials could render them unable to perform their duties in their respective branches of government, leaving an administrative vacuum.<sup>73</sup> The government offices that prosecuted officials hold could lose their weight and dignity if the individuals in them are facing trial for crimes before the court.<sup>74</sup> Further, the citizens of these states play a role in electing officials for their government, and indictment of these officials would disrupt the citizens' chosen officials to serve in the constitutional order.

Lastly, the immunity clause also preserves the sovereignty of African nations. The sovereignty of nations is based on the concept that states have exclusive jurisdiction over their own territory and population<sup>75</sup> and do not interfere with the exclusive jurisdiction of other states.<sup>76</sup> Though the ICC is not a state, its indictment of state officials can be seen as undue interference of an international entity in the sovereign jurisdiction of African states.

In sum, the AU argues that the immunity clause maintains the punishment of

---

68. *Id.* at 10.

69. See Richard Joseph, *Democracy and Reconfigured Power in Africa*, BROOKINGS (Nov. 2013), <http://www.brookings.edu/research/papers/2011/11/09-democracy-power-africa-joseph> (giving examples in Tanzania and Senegal of government liberalization and cooperation among political parties in the 1990s and 2000s).

70. AU Decision October, *supra* note 57.

71. *Id.*

72. See Alhaji Ahmadu Ibrahim & Lawan Cheri, *Democracy, Political Instability and the African Crisis of Underdevelopment*, 1 J. POWER, POL. & GOVERNANCE 59, 62 (discussing the difference between how African states are modeled and how they govern); see also *Types of Governments*, MAPS OF WORLD, <http://www.mapsofworld.com/thematic-maps/types-of-governments.html> (last visited Oct. 4, 2016) (mapping the type of governments that countries have, including African states).

73. See Aggrey Mutambo, *AU Defends Immunity Clause for Sitting President*, DAILY NATION (Aug. 25, 2015), <http://www.nation.co.ke/news/africa/AU-defends-immunity-clause/1066-2430376-doqvavz/index.html>. This argument is similar to those given for the Twenty-Fifth Amendment of the United States Constitution, which creates a succession of power in case the president is unable to perform his duties. See Annenberg Classroom, *Presidential Disability and Succession*, CONSTITUTION CTR., <http://constitutioncenter.org/interactive-constitution/amendments/amendment-xxv> (last visited Oct. 3, 2016) (explaining the reason behind the 25<sup>th</sup> Amendment); see also AU Decision October, *supra* note 57 (outlining the AU's argument against indicting sitting state officials).

74. AU Decision October, *supra* note 57, ¶ 5.

75. Father Robert Araujo, *The Meaning of International Law*, 24 FORDHAM INT'L L.J. 1477, 1488 (2000).

76. *Id.*

crimes under the Court's jurisdiction and furthers peace and stability in African nations.<sup>77</sup> The AU views the granting of immunity to leaders during their tenure as enabling them to work on reconciliatory efforts to create peace, ensure that constitutional institutions operate normally, and prevent the creation of a power vacuum.<sup>78</sup> Additionally, the AU views the immunity clause as promoting cooperation with the ACJHR which has jurisdiction over member states.<sup>79</sup>

## 2. Objections to the Immunity Clause

Despite the AU's arguments in favor of the immunity clause, strong arguments exist against including it in the ACJHR amended Protocol. For example, Amnesty International wrote an open letter to state its concern with the clause,<sup>80</sup> while others like Steve Arther Lamony, Senior Advisor at the Coalition for the ICC have written to explain their opposition to it.<sup>81</sup>

The legal argument against the clause is that it violates international law because it is contrary to customary international law, international court statutes, the AU Constitutive Act,<sup>82</sup> and even some AU member states' national laws.<sup>83</sup> The AU argues that national laws and customary international law allows immunity for sitting state officials.<sup>84</sup> However, 34 AU countries have ratified the Rome Statute of the ICC, where Article 27 states that a person's official capacity will not exempt

---

77. Charles C. Jalloh, *Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa*, 7 AFR. J.L. STUD. 43, 48 (2014).

78. See AU Decision October, *supra* note 57, ¶ 5 (reasoning that proponents of the statute argue it will increase participation from states in the international court); see also African Union Decisions and Declarations, Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court (ICC) ¶ 10, January 30, 2014, African Union Commission [hereinafter AU Decision January] (outlining the AU's argument against indicting sitting state officials).

79. Kuwali, *supra* note 7.

80. AMNESTY INT'L, *Open Letter to the Heads of State and Government of the African Union* (June 19, 2014), <https://www.amnesty.org/download/Documents/4000/afr010122014en.pdf> [hereinafter *Amnesty International Open Letter*].

81. See Kuwali, *supra* note 7 (arguing that the Clause impedes justice and allows impunity by African leaders); see also Betty Waittherero, *Immunities Clause at the African Court of Justice and Human Rights is Outrageous*, DAILY NATION (Feb. 7, 2014), <http://mobile.nation.co.ke/blog/s/-Heads-of-state-Immunities-clause/-/1949942/2369696/-/format/xhtml/-/7lahgiz/-/index.html> (criticizing the granting of immunity as harming the fight against impunity).

82. See Constitutive Act of the African Union, Nov. 7, 2000, African Union Commission (codifying the framework under which the AU operates).

83. See Kuwali, *supra* note 7 (stating that the Immunity Clause contradicts the statutes of the ICC, and the International Criminal Tribunals for the Former Yugoslavia and Rwanda); see also Amnesty International Open Letter, *supra* note 80 (arguing that that the AU Constitutive provisions to protect human rights and reject impunity are violated by the Clause); Wangui, *supra* note 56 (stating that national laws in some AU Member States do not have immunity for their heads of state).

84. See AU Decision October, *supra* note 57 (citing to diplomatic immunity of officials and heads of state in foreign states).

them from criminal responsibility;<sup>85</sup> granting immunity to leaders from prosecution would, at minimum, violate these countries' obligations under the Rome Statute.<sup>86</sup>

Additional policy arguments strengthen the proposition that the immunity clause should be removed from the ACJHR Amended Protocol.<sup>87</sup> For example, one policy argument against the immunity clause has been that the ambiguous, broad description of "anybody acting or entitled to act in such capacity, or other senior state officials" within the clause may lead to immunity for any senior government official irrespective of the gravity of crimes he or she commits.<sup>88</sup> Another argument is that the immunity clause denies justice for victims of the serious crimes under the ACJHR's jurisdiction because governmental officials are never indicted for the harms they have caused.<sup>89</sup> Additionally, Amnesty International argues that the immunity clause creates separate and disparate rules for the prosecution of perpetrators of serious crimes in positions of power within African States.<sup>90</sup> Furthermore, Charles Jalloh, a law professor at Florida International University, argues that the immunity clause could incentivize African suspects of international crimes to gain positions of power to avoid proceedings against them, either democratically or through more violent means.<sup>91</sup> He also argues that the immunity clause may incentivize leaders already in power to use any means necessary to maintain their power.<sup>92</sup>

These arguments show that the clause does threaten the national and international legitimacy of African leaders and their governments, and should be removed. The following section seeks to further the arguments against the inclusion of an immunity clause in the ACJHR Amended Protocol.

### III. THE IMMUNITY CLAUSE SHOULD BE ELIMINATED

#### A. *The Clause Violates Customary International Law*

Customary international law (CIL) is a major source of international law.<sup>93</sup>

---

85. Rome Statute, art. 27., *supra* note 41.

86. *See Immunity of Heads of State and Government for International Crimes? The African Union Must Act with Coherence and Political courage*, THE INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (June 20, 2014), <https://www.fidh.org/en/15601-immunity-of-heads-of-state-and-government-for-international-crimes-the> (arguing that immunity for heads of state would violate the Constitutive Act of the African Union, commitments to the AU Peace and Security Council, Resolutions of the African Commission on Human and Peoples' Rights, the Rome Statute, and the Kenyan Constitution).

87. *See AU Summit Decision a Backward Step for International Justice*, AMNESTY INTERNATIONAL (July 1, 2014), <https://www.amnesty.org/en/latest/news/2014/07/au-summit-decision-backward-step-international-justice/> (detailing Amnesty International's policy arguments against a provision granting immunity to heads of state in the African Union).

88. Kuwali, *supra* note 7.

89. *Id.*

90. *Amnesty International Open Letter*, *supra* note 80.

91. Jalloh, *supra* note 77, at 59 (discussing the indictment of sitting heads of state).

92. *Id.*

93. *See* Statute of the International Court of Justice, art. 38, Jun. 26, 1945, 59 Stat. 1055 (holding that the International Court of Justice will rule in accordance with international rules,

While treaties only bind member states, CIL is binding for all states.<sup>94</sup> CIL is established by state practice and *opinio juris* (the belief that states act as they do because they feel they are legally obligated to do so).<sup>95</sup> The state practice for CIL must be widespread and uniformly used by nations around the world.<sup>96</sup> Evidence of state practice includes international conventions, judicial decisions, treaties, and what states actually do.<sup>97</sup> International treaties can contribute to the formation of CIL by either codifying existing rules or creating unprecedented rules that are then followed by many states.<sup>98</sup> Using the framework of forms of state practice and *opinio juris* by André da Rocha Ferriera and others,<sup>99</sup> this next section argues that CIL denies immunity for sitting state officials.

### **1. The Emergence of Customary International Law for State Official Immunity**

The principle of immunity for state officials developed from the concept of state sovereign immunity.<sup>100</sup> The concept of immunity for sovereign leaders developed from monarchic tradition which viewed leaders as personifications of the sovereign state and thus an extension of the state's sovereignty.<sup>101</sup> In the age of monarchs, heads of state had immunity for two reasons: first, they were a symbol of their state's sovereign independence and therefore had to have the same immunity as the state; second, they had diplomatic functions that they could not sufficiently perform without immunity.<sup>102</sup>

Initially, the immunity that these officials had was absolute under the doctrine of sovereign immunity.<sup>103</sup> However, because international commercial transactions

---

customs accepted by law, and general principles of law).

94. See Dan Terzian, *Personal Immunity and President Omar Al Bashir: An Analysis Under Customary International Law and Security Council Resolution 1593*, 16 UCLA J. INT'L. L. & FOREIGN AFF. 279, 283 (2011) (explaining that CIL binds all states regardless of whether that state has expressly accepted it).

95. See *id.* at 4 (describing that CIL's legitimacy originates from state usage and that usage originates from self-obligation).

96. *Id.*

97. *Id.* at 5.

98. RAMONA PEDRETTI, IMMUNITY OF HEADS OF STATE AND STATE OFFICIALS FOR INTERNATIONAL CRIMES 7 (2015).

99. André da Rocha Ferriera, et al., *Formation and Evidence of Customary International Law*, 1 MODEL U.N. J. 182, 187-189 (2013).

100. See Michael A Tunks, *Diplomats or Defendants? Defining the Future of Head-Of-State Immunity*, 52 DUKE L. J. 651, 652 (2002) (defining the origin of head-of-state immunity to hail from state sovereign immunity as the state leader is traditionally viewed as one in the same with the state itself).

101. See Emmanuel Yaw Benneh, *Sovereign Immunity and International Crimes*, 22 U. GHANA L. J. 112, 115 (2002-2004) (stating an argument that the creation of immunity for state leaders originated in a right reserved for kings).

102. See *id.* (arguing the immunity granted to heads of state traditionally was accepted for functional and symbolic reasons).

103. *Id.* at 655.

increased, the public and private commercial acts of officials became distinct.<sup>104</sup> This resulted in the formation of two types of immunities: functional and personal.<sup>105</sup>

Functional immunity protects all government officials indefinitely, but only for their official government acts.<sup>106</sup> Personal immunity, on the other hand, protects only high-ranking government officials for both official and unofficial acts.<sup>107</sup> In addition, personal immunities only protect these high-ranking officials while they are still in office.<sup>108</sup> Under international law, core crimes such as genocide, torture, and crimes against humanity were considered outside the official capacity of senior state officials, and therefore functional immunities could not protect these senior state officials from prosecution for these crimes.<sup>109</sup> Furthermore, given the limits of personal immunity, state officials could be tried for these crimes after they leave office.<sup>110</sup> Therefore, the remaining question is whether customary international law allows sitting state officials to be tried for genocide, torture and crimes against humanity.

## **2. The Current State of Customary International Law for State Official Immunity**

### ***a. International Courts and Tribunals Deny Immunity for Sitting State Officials***

International courts and tribunals have heard cases that address immunity for sitting state officials. The most prominent case on the issue of state official immunity is that of *Congo v. Belgium* (known as the “Arrest Warrant Decision”).<sup>111</sup> Though the *Congo v. Belgium* decision by the ICJ court found that senior state officials have immunity while in office, part of that decision and cases before international criminal tribunals have recognized that before international courts, sitting state officials do not have immunity against prosecution for core crimes.

The case involved a Belgian judge issuing an international arrest warrant for the Congolese Minister of Foreign Affairs, Abdulaye Yerodia Ndombasi, accusing him of crimes against humanity in 2000.<sup>112</sup> In a decision issued in 2002, the ICJ stated that under customary international law, there is no exception to the criminal

---

104. *Id.*

105. Terzian, *supra* note 94, at 286.

106. *Id.*

107. *Id.* at 287.

108. *Id.*

109. See Tunks, *supra* note 100, at 659–60 (stating that seeking accountability for cases such as torture and genocide does not infringe upon sovereign immunity).

110. Terzian, *supra* note 94, at 286–87. An example of such a case is the British House of Lord’s case against former Chilean dictator Augusto Pinochet, where the court denied Pinochet’s claim of immunity based on his acts of torture. Tunks, *supra* note 100, at 659.

111. Arrest Warrant of 11 April 2000 (Dem. Rep. Cong. v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14).

112. *Id.* at 6.

prosecution immunity granted to sitting foreign ministers.<sup>113</sup>

When examining head of state immunity, the ICJ court found that a sitting head of state's immunity is almost absolute.<sup>114</sup> However, the ICJ court found that there are specific circumstances where sitting state officials cannot escape criminal prosecution: (1) a head of state is not immune in his own country, (2) a head of state's home country can waive his immunity abroad, (3) a former head of state is not immune for acts committed before or after his tenure, and (4) a head of state has no immunity if he or she had been validly removed by certain international tribunals, such as the International Criminal Tribunal of the Former Yugoslavia (ICTY), the International Criminal Tribunal of Rwanda (ICTR), or the ICC.<sup>115</sup>

Though the Arrest Warrant decision found that state officials do have immunity, the case involved the immunity of foreign ministers and heads of state in foreign *domestic courts*.<sup>116</sup> This is made clear by the immunity exception that the court carves out for international tribunals.<sup>117</sup>

The Arrest Warrant decision therefore recognized the power of an international tribunal to eliminate head of state immunity, while also finding that a sitting head of state has almost absolute immunity domestically.<sup>118</sup> The ACJHR falls within this exception, because it is not a domestic court. It is a court with an international element and therefore is more like an international court.<sup>119</sup> The court was created by the AU, a regional organization, and applies law that is broader than any one state's domestic laws.<sup>120</sup> Thus, the Arrest Warrant decision adds little to the question of CIL for the ACJHR, except for its acknowledgement that an international tribunal can remove immunity.

Before and after the Arrest Warrant decision, international criminal tribunals have opened cases against sitting heads of state, such as before the ICTY in a case against Slobodan Milosevic.<sup>121</sup> Milosevic was the President of Serbia during the wars against Croatia, Slovenia, and Bosnia-Herzegovina.<sup>122</sup> Milosevic served as the

---

113. *Id.* at 4.

114. *Id.* at 25.

115. *Id.* at 25–26.

116. Compare Arrest Warrant, *supra* note 111 at 26 (“[A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.”) with *id.* at 130 (noting that the rarity of judicial decisions regarding domestic criminal prosecution of heads of state could be due to a number of factors).

117. *Id.*

118. *Id.*

119. See Ivan Jovanovic, *Immunity of Heads of State for International Crimes: Deflating Dictators' Lifebelt*, 3 ANNALS FAC. L. BELGRADE INT'L ED. 202, 223 (2009) (stating that an international court should be interpreted broadly such as any court with an international element).

120. See *id.* (explaining that when an international community, including a regional organization, sets up a court, it should be equated to an international court).

121. Prosecutor v. Milosevic, Case No. IT-99-37, Indictment, (Int'l Crim. Trib. for the Former Yugoslavia May 22, 1999).

122. *Milosevic Goes on Trial for War Crimes*, HISTORY (Feb. 12, 2002), <http://www.history.com/this-day-in-history/milosevic-goes-on-trial-for-war-crimes>.

Serbian President for two terms and was president of Yugoslavia in 1997.<sup>123</sup> An initial indictment was brought against Milosevic for crimes committed in Kosovo in May 1999, *before* he left office.<sup>124</sup> He lost the subsequent election in 2000, but refused to resign until he was forced to in April 2001.<sup>125</sup> Though Milosevic was no longer the president when his trial began, the situation that led to him losing his seat was beyond the power of the ICTY. At the time of his indictment, he was still in office and states did not object, which supports the proposition that under CIL, international tribunals can prosecute sitting heads of state.

Another example of the ICTY indicting a sitting head of state is the case of Radovan Karadzic, the founder of the Serbian Democratic Party in Bosnia and Herzegovina, and the president of the party until July 1996.<sup>126</sup> Karadzic also served as Chairman of the National Security Council and as eventual President of the then-called Serbian Republic of Bosnia and Herzegovina, also until July 1996.<sup>127</sup> During his time in office, Karadzic was responsible for the deaths of thousands of Bosniaks and Croats, as well as for other atrocities committed against civilians.<sup>128</sup>

In response, the ICTY issued two indictments against him: the first in November of 1995, and the second amended indictment before he left office in July of 1996.<sup>129</sup> Further, the ICTY issued an international arrest warrant for Karadzic on July 11, 1996,<sup>130</sup> before Karadzic had officially resigned from office.<sup>131</sup> This case further supports that within CIL, international criminal courts did not provide immunity for incumbent state officials.

Within the African context, the case against Charles Taylor in the Special Court for Sierra Leone (SCSL) further supports the argument that current CIL does not find immunity for core crimes committed by sitting heads of state.<sup>132</sup> Charles Taylor was the president of Liberia from 1997 to 2003.<sup>133</sup> During his presidency, he

---

123. *Id.*

124. *Kosovo, Croatia, and Bosnia: Slobodan Milosevic, Case Information Sheet*, INT'L CRIM. TRIBUNAL FOR YUGOSLAVIA, [http://www.icty.org/x/cases/slobodan\\_milosevic/cis/en/cis\\_milosevic\\_slobodan\\_en.pdf](http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf) (last visited Oct. 3, 2016).

125. *See Milosevic Goes on Trial for War Crimes*, *supra* note 122 (discussing the presidency and forced resignation of Slobodan Milosevic due to mass protest in September 2000).

126. *Radovan Karadzic Case – Key Information & Timeline*, UNITED NATIONS INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/cases/radovan-karadzic-trial-key-information> (last visited Oct. 3, 2016).

127. *Id.*

128. *Radovan Karadzic: Former Bosnian Serb Leader*, BBC NEWS (Mar. 24, 2016), <http://www.bbc.com/news/world-europe-19960285>.

129. *Radovan Karadzic Case – Key Information & Timeline*, *supra* note 126.

130. *Id.*

131. *See Jane Perlez, Top Bosnian Serb Agrees to Resign*, N.Y. TIMES (July 20, 1996), <http://www.nytimes.com/1996/07/20/world/top-bosnian-serb-agrees-to-resign.html?pagewanted=all> (stating that Karadzic agreed to resign on July 19, 1996).

132. *The Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-A, (Sept. 26, 2013), <http://www.internationalcrimesdatabase.org/Case/1107> (last visited Oct. 3, 2016) [hereinafter Taylor I].

133. *Ex-Liberia President Charles Taylor to stay in UK prison*, BBC NEWS, (Mar. 25, 2015).

supported the Revolutionary United Front (RUF) in Sierra Leone by providing the RUF with arms, money, and moral support.<sup>134</sup> As a result of his backing, the RUF was able to perform military actions in which 50,000 civilians were killed and terrorized.<sup>135</sup>

When the SCSL approved the original 17-count indictment in 2003 against Taylor, he was still the President of Liberia.<sup>136</sup> This case is particularly pertinent to immunity before the ACJHR, as this is a case that was opened against a sitting *African* head of state. Taylor's case lends strong supports to the argument that current CIL finds that sitting heads of state do not have immunity for core crimes before international courts.

Some scholars do not believe that the aforementioned international criminal tribunal cases of Milosovic, Karadzic, and Taylor support the argument that there is no immunity for sitting state officials under CIL.<sup>137</sup> For example, Mary Margaret Penrose argues that actual practice in international tribunals and courts displays that there is immunity for sitting heads of state.<sup>138</sup> Penrose states that though the statutes for these courts declare an individual's position is no defense to prosecution, international courts have only prosecuted state officials after they have left office.<sup>139</sup> While Penrose does acknowledge that there are cases where sitting heads of state were indicted, such as the cases against Slobodan Milosevic, Charles Taylor, and the recent indictment against Al-Bashir, she maintains that subsequent situations after indictments are issued against state officials are not always within the courts' control.<sup>140</sup> However, international courts do control when they begin cases, and the indictments against Milosevic, Karadzic and Taylor show that international courts have not hesitated to commence cases while state officials remain in office.

***b. States Are Party to International Bodies that Deny Immunity for Sitting State Officials***

States have demonstrated what they believe to be CIL on state official

---

134. Taylor I, *supra* note 132.

135. *Id.*; BBC NEWS; *supra* note 133.

136. *The Prosecutor v. Charles Ghankay Taylor*, RESIDUAL SPECIAL CT. FOR SIERRA LEONE, <http://www.rscsl.org/Taylor.html> (last visited Oct. 3, 2016) [hereinafter Taylor II].

137. *See, e.g., Advisory Report on the Immunity of Foreign State Officials*, Advisory Report No. 20, Advisory Committee on Issues of Public International Law (May 2011), [http://cms.webbeat.net/ContentSuite/upload/cav/doc/cavv-report-nr-20-immunity\\_foreign\\_officials.pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/cavv-report-nr-20-immunity_foreign_officials.pdf); Kaitlin R. O'Donnell, *Certain Criminal Proceedings in France (Republic of Congo v. France) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?*, 26 B.U. INT'L L.J. 375, 392 (2008); Paul J. Toner, *Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense*, 108 PENN. ST. L. REV. 899, 901 (2003-2004); Terzian, *supra* note 94, at 2; Phillip Wardle, *The Survival of Head of State Immunity at the International Criminal Court*, 18 AUSTL. INT'L L.J. 181, 183 (2011).

138. Penrose, *supra* note 8, at 125.

139. *Id.* at 88.

140. *See id.* at 110, 114 (noting that the ICTY indicted Milosevic but was unable to effectuate his arrest until he was politically defeated).

immunity in three key ways: 1) through the development of international tribunal statutes; 2) through state actions towards international courts; and 3) through state domestic treatment of core crimes.<sup>141</sup>

Since World War II, states have established international tribunal statutes that reinforce the belief that all individuals, including those in positions of power, should be held responsible for core crimes. This belief was first affirmed by the Nuremberg Tribunal in 1945.<sup>142</sup> After World War II, the Allied forces created the Nuremberg Tribunal to address the terrible acts performed by Axis powers during the War.<sup>143</sup> The Charter of the Tribunal (hereinafter called the Nuremberg Statute) included a provision that stated “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.”<sup>144</sup> This was the first time that an international legal body decided that lack of immunity was absolute for international crimes.<sup>145</sup>

Multilateral human rights treaties after Nuremberg further solidified the lack of immunity for state officials. The 1948 Genocide Convention, a key international instrument regarding acts of genocide, contained a provision that stated that individuals responsible for genocide “shall be punished whether they are constitutionally responsible rulers, public officials, or private individuals.”<sup>146</sup> The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity also stated that state leaders should be held accountable for international crimes.<sup>147</sup> Further, the Apartheid Convention stated that international criminal responsibility shall apply to all individuals, including representatives of states.<sup>148</sup>

Recent international criminal tribunals have shown their willingness to indict sitting heads of state. For example, after the Bosnian war, the United Nations (“U.N.”) Security Council established the ICTY.<sup>149</sup> The purpose of the ICTY was

---

141. André da Rocha Ferriera et al., *supra* note 99.

142. Penrose, *supra* note 8, at 102.

143. *Id.* Axis powers include Germany, Japan, Italy, Hungary, Romania, Slovakia, Bulgaria and Yugoslavia. AXIS POWERS, ENCYCLOPEDIA BRITANNICA, AXIS POWER (Feb. 4, 2016).

144. Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 82 U.N.T.S. 279, 288.

145. Zhou Lulu, *Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law*, STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW 48 (Morten Bergsmo & Ling Yan, eds.) (2012).

146. Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, Dec. 9, 1948, 278 U.N.T.S. 1951.

147. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. 2, Nov. 26, 1968, 754 U.N.T.S. 73.

148. International Convention on the Suppression and Punishment of the Crime of Apartheid, art. 3, Nov. 30, 1973, 244 U.N.T.S. 1976.

149. *International Criminal Tribunal for Yugoslavia*, GLOBAL POLICY FORUM <https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/international-criminal-tribunal-for-yugoslavia.html> (last visited Oct. 3, 2016). During the Bosnian War (1992–1995), many Bosnian Muslims were killed by the Bosnian Serb army in an act of “ethnic cleansing.” About twenty-six thousand Muslims were killed by war’s end.

to try those responsible for violations of core crimes in former Yugoslavia.<sup>150</sup> The Statute for the ICTY included a provision stating that “the official position of any accused person, whether as Head of State or Government or as a responsible Government Official, shall not relieve such person of criminal responsibility nor mitigate punishment.”<sup>151</sup> Notably, the ICTR includes an identical provision to that of the ICTY.<sup>152</sup> Both provisions reflected what states believed to be customary international law by eliminating immunity for state officials involved in international crimes.

The Rome Statute, which established the ICC in 1998, also reflects state views on eliminating personal immunity for sitting heads of state.<sup>153</sup> The ICC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>154</sup> The ICC was established by 120 states adopting the Rome Statute, which includes a “no immunity” provision against sitting heads of state.<sup>155</sup> With regard to immunity, Article 27 of the Statute provides:

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 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.<sup>156</sup>

However, there exists debate regarding whether immunity for state officials is still the rule under CIL. For example, in one scholarly article, author Dan Terzian states that international tribunals’ and courts’ statutes do not create sufficient state practice to remove personal immunity for sitting heads of state.<sup>157</sup> Terzian states that because the U.N. Security Council formed most of the international tribunals, such as the ICTY and the ICTR, their statutes and cases are practiced by an

---

JACQUELINE CHING, GENOCIDE AND THE BOSNIAN WAR, the Rosen Publishing Group, Inc., (2009).

150. *Id.*

151. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 2, U.N. Doc. S/25704 (May 25, 1993).

152. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 6 para. 2, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>.

153. *About the Court*, INT’L CRIMINAL CT., [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx) (last visited Oct. 3, 2016).

154. Rome Statute, *supra* note 41, art. 5.

155. *Id.*

156. Rome Statute, *supra* note 41, art. 27.

157. Terzian, *supra* note 94, at 2.

international organization and therefore cannot reflect the practice of individual states.<sup>158</sup> Terzian also argues that the Rome Statute does not indicate new customary international law.<sup>159</sup> He reasons that the Rome Statute is a treaty and that half of the world's most populous and most powerful countries, including India, China, Russia, Turkey and the United States, are not party to the treaty.<sup>160</sup> In addition, Terzian distinguishes the Rome Statutes from the Genocide Convention, which was meant to apply to all states and has greater acceptance than the Rome Statute.<sup>161</sup>

However, there are scholars that disagree with Terzian.<sup>162</sup> Professor Rahul Mohanty argues that the statutes of the ICTY, ICTR and ICC are evidence there is no immunity for sitting state officials under CIL.<sup>163</sup> He rejects the argument that the statutory provisions regarding immunity separate functional and personal immunity, because the language of the provisions and the language of the cases related to the provisions do not distinguish between personal and functional immunity.<sup>164</sup> Dapo Akande, Co-Director of the Oxford Martin Programme on Human Rights for Future Generations, counters the arguments that tribunals created by the U.N. Security Council are irrelevant to international law.<sup>165</sup> Rather, Akande argues that because these tribunals are under the UN, and all states are members of the UN, those provisions are binding on all states and therefore are relevant to customary international law.<sup>166</sup>

Furthermore, the Security Council tribunals received support from the UN General Assembly, which has nearly universal membership of states.<sup>167</sup> Further, the Rome Statute has 124 member states, and thirty-five of the fifty-four African states (which are under the jurisdiction of the ACJHR) are party to the Statute.<sup>168</sup> Thus, these statutes do reflect what states believe to be the law of sitting state official immunity under CIL.

States have also demonstrated a lack of support for personal immunity for sitting state officials through their participation in human rights treaties. One

---

158. *Id.* at 11–12; *see also* Tunks, *supra* note 100, at 662 (stating that Security Council has little influence over CIL).

159. *Id.* at 21.

160. *Id.* at 15.

161. *Id.* at 17.

162. Rahul Mohanty, *Head of State Immunity in International Courts in Prosecution for International Crimes: Immunity or Impunity?*, A38 J. INT'L L. 59, 62 (2015); *see also* Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L., 407, 417 (2004) (explaining provisions by statute are capable of removing immunity to practically all states).

163. Mohanty, *supra* note 162, at 62.

164. *Id.* at 68–69.

165. Akande, *supra* note 162, at 417.

166. *Id.*

167. *See What is the United Nations?*, UNA-UK, <https://www.una.org.uk/get-involved/learn-and-teach/overview-united-nations> (last visited Oct. 13, 2016) (stating that nearly every country in the world is a member of the UN).

168. INT'L CRIMINAL CT., *supra* note 149.

hundred and forty-seven states are party to the Genocide Convention, with the Philippines being the only state making a reservation regarding the Convention's provision on immunities.<sup>169</sup> Fifty-five states are party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and none have made reservations about immunities.<sup>170</sup> Lastly, the International Convention on the Suppression and Punishment of the Crime of Apartheid has 109 member states with no reservations regarding immunities.<sup>171</sup> The number of states that are party to these treaties, which deal with core crimes, and the lack of reservations regarding immunity of sitting state officials indicates that states accepted that sitting state officials could be prosecuted for these crimes.<sup>172</sup>

***c. States Have Accepted the Elimination of Immunity for Sitting State Officials in International Courts***

States' responses to international courts and tribunals also indicate their *opinion juris* of being bound to the law that allows prosecution of those responsible for violating core crimes, regardless of their positions in government. Though the Security Council created the ICTY and ICTR, the General Assembly expressed its support of the tribunals by passing resolutions to fund the tribunals.<sup>173</sup> The General Assembly also acknowledged the ICTY when assessing the state of human rights in the territory of the former Yugoslavia by stating that they welcome "the convening of the [ICTY]."<sup>174</sup> In creating these resolutions, states did not declare that they believed that the provisions removing immunity for state officials by these courts were not the law under CIL.<sup>175</sup>

Though the ICC is a body independent of the U.N., the creation of the ICC

---

169. Convention on the Prevention and Punishment of the Crime of Genocide, Dec.9, 1948, 278 U.N.T.S. 1951.

170. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73.

171. This Convention was initiated in opposition to South Africa's discriminatory racial policies, known as apartheid. *See* International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 244 U.N.T.S. 1976 (condemning apartheid in each observation and consideration).

172. *Id.*

173. *See* G.A. Res. 47/235, ¶ 5, 7, U.N. Doc. A/RES/47/235 (Sept. 14, 1993) (endorsing the authorization of the Secretary-General to enter into commitments to fund the ICTY and calling on member states to contribute to the ICTY); *see also* G.A. Res. 49/251, ¶ 2, U.N. Doc. A/RES/49/251 (Aug. 7, 1995) (emphasizing the importance of funding the ICTR so that it can fulfill its role fully and effectively). The U.N. General Assembly is one of the principal organizations in the U.N. where all member nations have equal representation. Functions and powers of the General Assembly, <http://www.un.org/en/ga/about/background.shtml> (last visited Oct. 3, 2016).

174. G.A. Res. 48/153, U.N. Doc. A/RES/48/153 (Feb. 7, 1994).

175. *See* G.A. Res. 47/235, *supra* note 173 (stating nothing about the immunity provision in the ICTY); *see also* G.A. Res. 49/251, *supra* note 173, ¶ 2 (stating no objection to the immunity provision in the ICTR); *see also* G.A. Res. 48/153, *supra* note 174 (stating no objection to the immunity provision in the ICTY).

began in the UN with movements by the General Assembly.<sup>176</sup> Before the final draft of the Rome Statute, the General Assembly convened the Ad Hoc Committee on Establishing an International Criminal Court, a Preparatory Committee on the Establishment of an International Criminal Court, and the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC.<sup>177</sup> The involvement of the General Assembly, a body with universal state membership, in the creation of the ICC indicates that states take prosecuting individuals for violations of core crimes seriously. Since the Rome Statute was completed, 124 states have become members of the ICC and have ratified the provisions of the Statute, including the immunity clause.<sup>178</sup>

Mohanty supports this proposition by stating that the indictments of Slobodan Milosevic and Charles Taylor by international tribunals show that states are willing to commence cases against sitting heads of state.<sup>179</sup> Additionally, he argues that states have not protested the indictments of these heads of state, and therefore have acquiesced to the practice of opening cases against state officials.<sup>180</sup> Professor Paola Gaeta also cites these cases in arguing that all immunity is removed for incumbent state officials before international courts.<sup>181</sup>

Transitional justice and rule of law expert Ivan Jovanovic adds support to the argument that states have accepted the elimination of immunity for sitting heads of state before international courts. He argues that the number of states that signed onto the Rome Statute, which also includes a provision removing immunity for all state officials, indicates that there was pre-existing *opinio juris* that sitting state officials should not have immunity for crimes under the ICC's jurisdiction.<sup>182</sup> Given the number of years since the ICTY, ICTR, and ICC were created and states' participation in these international courts, there is strong support for the argument that CIL removes functional and personal immunity for sitting state officials for core crimes.

---

176. See *History of the ICC*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=icchistory> (last visited Oct. 3, 2016) (outlining the efforts of the United Nations to establish the ICC).

177. See *Rome Statute of the International Criminal Court: Overview*, UNITED NATIONS OFFICE OF LEGAL AFFAIRS, (1998–99), <http://legal.un.org/icc/general/overview.htm> (outlining the history of the establishment of the ICC).

178. *Ratification of the Rome Statute*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=romeratification> (last visited Oct. 3, 2016).

179. See Mohanty, *supra* note 162, at 68 (proposing that Head of State immunity is not recognized by international courts).

180. See *id.* at 68 (arguing that due to the recent development of human rights, the propagation of international courts and their uniform rejection of Head of State immunity, widespread acquiescence of states, and lack of protests against trials of Heads of States are enough grounds to recognize that Heads of States do not enjoy immunity from international courts).

181. Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 J. INT'L CRIM. JUST. 315, 321 (2009) (arguing that international criminal courts act on behalf of the international community as a whole and thus their judicial activity cannot be considered an interference on sovereign authority).

182. Jovanovic, *supra* note 119.

*d. States' Domestic Laws Deny Immunity for Sitting State Officials*

The domestic practices of states also indicate that states are bound to eliminate immunity for sitting state officials as a matter of CIL. In 2001, an Austrian citizen brought a civil action against the Head of State of Liechtenstein, Prince Hans-Adam II. The Austrian Supreme Court held that heads of state do not have immunity for breaches of international core crimes.<sup>183</sup> In 2003, a Belgium court held that the sitting Director General of Israel's Ministry of National Defense could not claim immunity for charges of genocide, crimes against humanity or war crimes.<sup>184</sup>

African states' laws and cases also eliminate state official immunity for core crimes.<sup>185</sup> Niger, South Africa, Kenya, Uganda, and the Democratic Republic of Congo created laws that abrogated state official immunity if someone in such a position violates a core international crime.<sup>186</sup> In an advisory opinion, Djibouti stated that though state officials would normally be immune from state courts, there would be an exception to the immunity for war crimes.<sup>187</sup> Ethiopia, a country not party to the ICC, also found there was no head of state immunity for international core crimes.<sup>188</sup> The most recent decision on this issue came out of the Supreme Court of Appeal of South Africa.<sup>189</sup> The case before the Court of Appeal was whether South Africa should have handed over Al-Bashir to the ICC when he was in South Africa.<sup>190</sup> Though originally believing that South Africa was not bound to hand Al-Bashir over to the ICC, the Court of Appeal concluded, after examining the statutes and decisions of international courts,<sup>191</sup> that "all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes . . . or to South Africa cooperating with the ICC by way of arrest and surrender of persons charged with such crimes before the ICC . . ." <sup>192</sup> Thus, there are many decisions among African nations that hold that there is no immunity for sitting state officials.

Scholars have also stated that states' domestic cases actually support the proposition that sitting state officials have immunity from prosecution for core crimes. Kaitlin O'Donnell cites the Belgian case against Ariel Sharon, the French case against Qaddafi, and the Spanish case against Fidel Castro as examples where

---

183. Pedretti, *supra* note 98, at 149–50.

184. *See id.* at 168 (describing Belgium's decision regarding Maj. Gen. Amos Yaron).

185. *See generally* Pedretti, *supra* note 98, at 114, 124.

186. *Id.* at 114–125.

187. *Id.* at 172.

188. *Id.* at 173; *see Special Prosecutor v. Col Hailemariam*, Federal High Court of Ethiopia, 9 October 1995, Criminal File No. 1/87, I.L.D.C. 555 (ET 1995) at 19, 60, 73, 75 (finding that officials of the Derg, a military power that committed county-wide torture, physical, and mental injuries were not immune).

189. *Minister of Just. & Constitutional Dev. v. South Africa Litigation Ctr.* 2016 (867/15) ZASCA 17 (ICC) (S. Afr.), <http://www.saflii.org/za/cases/ZASCA/2016/17.pdf>.

190. *Id.* at 4.

191. *Id.* at 43–57.

192. *Id.* at 68, ¶ 103.

states determined that they could not try sitting heads of states because the heads of state had immunity.<sup>193</sup> Further, Michael Tunks states that no nation has actually passed judgment against a sitting head of state.<sup>194</sup>

However, the cases cited by these scholars are about immunity for state officials in foreign courts.<sup>195</sup> As the ACJHR is not a domestic court, state practice about trying state officials in foreign courts have little relevance to CIL governing the Court. Jovanovic's arguments also counter the arguments made by scholars who cite the French case against Qaddafi.<sup>196</sup> Jovanovic points out that the case dealt with terrorism, which is not a core crime.<sup>197</sup> He then concludes that the case implies that there *are* international crimes where removing immunity would not be against customary international law, such as those under the ICC's jurisdiction.<sup>198</sup> Jessica Needham explains that some commentators argue that the international nature of the crimes under the ICC's jurisdiction precludes the need for immunity.<sup>199</sup> Overall, the evidence indicates that according to state practice and *opinio juris*, there is no immunity under customary international law for sitting heads of state that violate core crimes.

## ***B. The Immunity Clause Undermines the Legitimacy of the Court and African States***

### **1. Domestic Repercussions of the Immunity Clause**

#### ***a. The Immunity Clause Will Lead to Negative Effects for Victims***

By giving immunity to heads of state and state officials until after their tenure, the Member States of the AU disregard their duty to victims of international crimes in their nations. Crime victims generally suffer physical and psychological trauma.<sup>200</sup> Victims of crimes can be fatigued and unable to sleep or eat.<sup>201</sup> The stress

---

193. O'Donnell, *supra* note 137, at 395.

194. Tunks, *supra* note 100, at 663 (“[I]t is significant that no nation has yet gone so far as to actually pass judgment against a sitting head of state.”).

195. See O'Donnell, *supra* note 137, at 395 (citing the case against Qaddafi in French court and the case against Sharon in Spanish court).

196. *Gadafi, France, Court of Appeal of Paris (Chambre d'accusation)*, 20/10/2000, 125 I.L.R. 490 (2004); see also *France Will Not Prosecute Gaddafi*, BBC NEWS (Mar. 13, 2001, 14:55 GMT), <http://news.bbc.co.uk/2/hi/europe/1218245.stm> (explaining that the court found that Gadafi enjoyed immunity).

197. See Jovanovic, *supra* note 119, at 211 (concluding that terrorism is not an international crime entailing a Head of State immunity exemption).

198. *Id.*

199. See Jessica Needham, *Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law*, 17 AUCKLAND U. L. REV. 219, 231-32 (2011) (noting that arguments in favor of disregarding personal immunity include promoting international courts' ability to combat immunity but adding that disregarding personal immunity is merely a recent and legally unsound development in international criminal law.).

200. *The Trauma of Victimization*, NAT'L CTR. FOR VICTIMS OF CRIME, <https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization> (last visited Oct. 3, 2016).

201. *Id.*

of being a victim, particularly if there has been no redress, can lead to psychological and physical issues for a lifetime.<sup>202</sup>

Victims need proper support in order to recover from trauma.<sup>203</sup> Recovery helps victims live better lives.<sup>204</sup> One form of healing can be found in the criminal justice system. The United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power states that victims are entitled to the mechanisms of justice and prompt redress for the harms against them.<sup>205</sup> The Ven Boven Principles that followed the Declaration outlined the duties that states owe to victims, and declared that every state has a duty to restore victims to their condition before the traumatizing event occurred – restoration of liberty, citizenship, family life, and so on.<sup>206</sup> Participation in trials gives victims of international crimes agency, empowerment, and closure by actually experiencing justice.<sup>207</sup> As one victim of atrocities in Uganda explained, “I feel my voice should be heard through-out the world because it is not going to help only me, but the whole clan.”<sup>208</sup>

If sitting heads of state and state officials go unpunished for crimes under the ACJHR’s jurisdiction, victims’ harms go unacknowledged.<sup>209</sup> Victims cannot receive the benefits of recovery that come with participating in a trial if there is no trial against their perpetrators, and the immunity clause eliminates the possibility of trial for alleged perpetrators of international crimes. Victims also learn about rule of law and their rights when they participate in trials against their perpetrators.<sup>210</sup> These victims are then more likely to assert their rights in the future if any other harm comes to them.<sup>211</sup> With the immunity clause, victims of crimes in

---

202. *See id.* (classifying the trauma associated with failure to receive proper intervention in the aftermath of a crime as “secondary” injuries).

203. *Id.*

204. *See* Jens Meierhenrich, *The Trauma of Genocide*, 9 J. OF GENOCIDE RESEARCH 549, 557 (Nov. 9, 2007) (describing the trauma to genocide victims and the importance of healing for victims’ futures).

205. G.A. Res. 40/34, annex, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985).

206. Michael Bachrach, *The Protection and Rights of Victims under International Criminal Law*, 34 INT’L L. 7, 10 (2000).

207. Stephen Lamony, *What are the Benefits and Difficulties of Victim Participation at the International Criminal Court (ICC)?*, HUMANITY UNITED (May 4, 2015), <https://humanityunited.org/what-are-the-benefits-and-difficulties-of-victim-participation-at-the-international-criminal-court-icc/>.

208. Misha Boutilier, *The International Criminal Court*, ULTRA VIRES (Jan. 28, 2016), <http://ultravires.ca/2016/01/victim-participation-at-the-international-criminal-court/>. This was uttered by a victim who participated in the pre-trial period of cases against members of the Lord’s Resistance Army (LRA) in Uganda. *Id.*

209. *See* Luke Moffett, *Realizing Justice for Victims Before the International Criminal Court*, INT’L CRIMES DATABASE, Brief 6, 3 (Sept. 2014) (providing that justice for victims and acknowledgment of their suffering affirms victim’s dignity and helps remedy harm).

210. Lamony, *supra* note 207.

211. *Id.*

African nations will believe that they do not have any rights to restitution and will not assert their rights by participating in other trials that attempt to hold perpetrators accountable.

Beyond physical and psychological trauma, victims of large-scale crimes, like those within the ACJHR's jurisdiction, can also suffer from cultural trauma.<sup>212</sup> Cultural trauma is defined as the mark left on a collective group after a horrific event that marks their consciousness and changes that collective's identity.<sup>213</sup> The group also sees the event as threatening its existence in society or violating fundamental cultural aspects.<sup>214</sup> Cultural trauma from intense persecution or violence makes groups feel more vulnerable and insecure.<sup>215</sup> Recovery from cultural trauma requires a context of a good society where people feel secure and capable.<sup>216</sup> Without such an environment, groups cannot recover and the societal structures that give people a sense of security and capability break down.<sup>217</sup> Thus, the immunity clause creates an environment where people's rights are denied, where the people do not feel safe and capable, and where they cannot recover from cultural trauma.

Further, the participation of victims in an international criminal system aids prosecutions and improves the legitimacy of such trials.<sup>218</sup> Victims aid international criminal tribunals by presenting their views and observations to the courts.<sup>219</sup> Given the newness of the ACJHR, the AU needs to present successful prosecutions to convince the world of the benefits of the ACJHR. With the immunity clause, victims will be unable to heal and will feel that they have no path to justice, and therefore might be unwilling to aid the Office of the Prosecutor as witnesses. The Court will therefore have difficulty presenting evidence against those that it chooses to prosecute. Given the negative effects that the immunity clause has on victims and how those can affect the Court's success, the clause should be removed.

### ***b. The Legitimacy of African Nations' Governments***

The immunity clause also undermines the legitimacy, and therefore the peace and stability, of African governments and their leaders. Though legitimacy is a contested concept, legitimacy for the purpose of this comment is defined sociologically, as a people's acceptance of institutions that claim to correspond to and promote values of society.<sup>220</sup> When a government and the institutions in its

---

212. Meierhenrich, *supra* note 204, at 553–54.

213. *Id.*

214. *Id.*

215. *See id.* at 557 (emphasizing the importance of healing for genocide victims).

216. *Id.* at 559–60.

217. *Id.* at 560.

218. *See* Moffett, *supra* note 209, at 1 (providing that an enhanced victim experience can improve victims' engagement as witnesses in aiding the prosecution).

219. *See* *Victims*, INT'L CRIM. COURT, [https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx) (last visited Oct. 3, 2016) (discussing the role victims play in the ICC).

220. *See* André Mbata B. Mangu, *State Legitimacy and Leadership Development in Africa*,

charge are seen as illegitimate, it can create frustration, anger, and possible aggression.<sup>221</sup> By giving immunity to heads of states and state officials, the AU governments present themselves as using their power to protect themselves from prosecution and from losing their positions of power. The ability of African states to develop is tied to their governments' legitimacy through the consent of the people.<sup>222</sup> With the immunity clause, the African people will doubt the legitimacy of their governments, which further stifles the political and economic growth of African nations.

The people of African nations already hold their leaders in low esteem.<sup>223</sup> The leaders promise much and do little.<sup>224</sup> A U.N. poll of 50,000 African families found that the most common complaint about African governments is that the politicians, police, and courts are corrupt, unaccountable and unreformed.<sup>225</sup> Most people in African nations believe that their governments work for the benefits of a few groups, rather than working for the benefit of all.<sup>226</sup> A Transparency International survey found that "[t]here is no [African] government which is rated positively on its anti-corruption efforts by a clear majority of its citizens."<sup>227</sup> Some African peoples particularly think that police and courts in their nations are the most corrupt bodies.<sup>228</sup> While some of these views of African leaders have proven

---

AFRICA GOVERNANCE FORUM 4, <http://www.afrimap.org/english/images/documents/AGFVII-Paper2-StateLegitimacy.pdf> (last visited Oct. 3, 2016) (defining legitimacy as the acceptance of governmental leadership by those who are governed). The sociological definition is used because fighting impunity and justice are values promoted by the AU in its Constitutive Act, and the ACJHR is meant to be an institution that corresponds and upholds those values. *See* Constitutive Act of the African Union, Nov. 7, 2000, African Union Commission art. 4(o) (listing the rejection of impunity as one of the core principles of the African Union).

221. Mangu, *supra* note 220.

222. *See id.* at 2 (asserting that state capacity is based on the legitimacy of state leaders chosen in free and fair elections who are receptive to the interests of the public).

223. *Id.*

224. *See id.* at 1 (discussing the failure of African leaders following the "first independence" to deliver on promises to develop Africa post colonialism).

225. *See Africans Let Down By Governments*, BBC NEWS (Oct. 13, 2004, 11:59 AM), <http://news.bbc.co.uk/2/hi/africa/3736956.stm> (discussing the results of a UN conducted poll of African families which found that the most common complaints about African governments were corruption; poor tax systems; run-down and unaccountable public services; weak parliaments; and unreformed courts).

226. *See Most Say Government Is Run for Benefit of a Few Groups*, PEW RESEARCH CTR. (Sept. 14, 2015), <http://www.pewglobal.org/2015/09/16/health-care-education-are-top-priorities-in-sub-saharan-africa/development-in-africa-report-06/> (graphing the opinion of Africans in eight African countries about the adequacy of their governments and finding that a majority of those surveyed in the seven of the eight countries polled believed their governments were run for the benefit of the few rather than the benefit of all).

227. *See People and Corruption: African Survey 2015- Global Corruption Barometer*, TRANSPARENCY INT'L 1, 3 (Dec. 1, 2015), [http://www.transparency.org/whatwedo/publication/people\\_and\\_corruption\\_africa\\_survey\\_2015](http://www.transparency.org/whatwedo/publication/people_and_corruption_africa_survey_2015) (finding that 58% of Africans believed corruption had risen during 2015).

228. *See id.* (finding that police and courts have the highest level of bribery in African countries).

themselves to be true,<sup>229</sup> even the perception of African leaders' corruption and self-preservation can erode the legitimacy of African governments and institutions, including the ACJHR.<sup>230</sup>

The immunity clause acts as an extension of African leaders' oppression, as these leaders can continue in their bad acts without any immediate accountability. As courts are seen as the most corrupt institutions in African nations,<sup>231</sup> a regional court that gives immunity to state officials would not seem any more legitimate. Despite the AU's arguments in favor of the immunity clause, the clause only looks like another result of the corruption of African leaders. In the eyes of African peoples, their leaders are once again talking publicly about fighting impunity, while doing little to actually hold each other accountable for acts of impunity.

If the immunity clause undermines the legitimacy of African leaders and their governments, it could undermine any political and economic progress that the states wish to make. For example, the state of Burundi achieved average annual growth of 4% between 2010 and 2014.<sup>232</sup> However, when President Pierre Nkurunziza announced that he was casting aside the constitution to run for third term in 2015, political violence ensued and the GDP dropped by 4.1%.<sup>233</sup> The immunity clause is another instance of African leaders' defiance of justice norms, and could lead to similar violence and economic downturn. The ACJHR can aid the legitimacy of African nations if those leaders are willing to hold people accountable for crimes that hurt the continent. However, the immunity clause shows that these leaders are unwilling to hold themselves equally accountable. It therefore negates that positive outcome, and should be removed for African nations to have the best chance at true growth.

Though the AU states that peace and stability are reasons for the immunity clause,<sup>234</sup> the immunity clause could actually foster more instability in African nations. Since groups feel more vulnerable and insecure after widespread crimes, they may be more inclined to respond to a perceived new threat with violence,<sup>235</sup>

---

229. See Oluwole Owoye and Nicole Bissessar, *Bad Governance and Corruption in Africa: Symptoms of Leadership and Institutional Failure* 1, 11 <http://www.ameppa.org/upload/Bad%20Governance.pdf> (finding that even where corrupt political leaders have left office voluntarily, they have handpicked their successors and continued to dictate policy behind the scenes).

230. See Obiora Okafor, *Is there a Legitimacy Deficit in International Legal Scholarship and Practice*, 13 INT'L INSIGHTS 91, 101 (arguing that the perceptions of everyday people profoundly influences the legitimacy and viability of international institutions).

231. *People and Corruption*, *supra* note 227.

232. *Burundi Economic Outlook*, AFR. DEV. BANK, <http://www.afdb.org/en/countries/east-africa/burundi/burundi-economic-outlook/> (last visited Oct. 14, 2016).

233. See *id.* (explaining that the political and social environment in Burundi led to a drop in economic growth); see also Emma Graham-Harrison, *The world looks away as blood flows in Burundi*, THE GUARDIAN (Apr. 10, 2016, 2:05 AM), <https://www.theguardian.com/world/2016/apr/10/burundi-ethnic-violence-refugees> (describing the political instability in the wake of President Nkurunziza announcing his run for a third term).

234. See AU Decision October, *supra* note 57 (stating that the immunity clause ensures peace and security in African nations).

235. See Meierhenrich, *supra* note 204 (describing the traumatic impact to genocide victims, including sometimes the tendency to use violence against perceived threats as a result of

maintaining the status quo of instability in African nations. If African peoples do not believe that their governments are working for them (since the immunity clause shields government officials who are possibly working against them), they will be willing to act aggressively, particularly in forms of political violence, against their governments.<sup>236</sup> Further instability in the nations could also undermine efforts to improve historically underdeveloped economies.<sup>237</sup> Since the immunity clause would further destabilize African nations, it should be removed.

## 1. International Repercussions of the Immunity Clause

### *c. The International Community's View of the African Criminal Court and African Nations*

The AU Member States claim that the ACJHR is an attempt to counter impunity in Africa and to provide African solutions to African problems.<sup>238</sup> However, the immunity clause makes it difficult for the international community to take those claims seriously.<sup>239</sup> By including the immunity clause, the AU gives the international community a reason to continue to hold negative views about African nations and leaders, and to transfer those negative views to the viability of the ACJHR. Given the international community's experience with international criminal trials,<sup>240</sup> particularly on behalf of the ICC, the AU needs the international community to believe that the ACJHR can succeed.

In the eyes of the international community, African leaders are seen as power hawks that are trying to hold on to their power for as long as possible.<sup>241</sup>

---

the past trauma).

236. See Ong'ayo, *supra* note 64, at 7 (explaining the use of political violence as a tool used by state-sponsored incumbents seeking to retain power after elections and opposition groups using militias and gangs to achieve their objectives).

237. A root cause of poor economic development in a resource-rich continent is due to colonialism and multinational companies putting profit over helping the local populace, and those effects are exacerbated by inefficient local government. Those negative influences resulted in any or all of the following impacts on local governments: 1) inability to provide public service, 2) inability to leverage better compensation or development from the outside entity, 3) facilitation of corruption within the limited government. *Id.* at 5–6.

238. See Draft Protocol, *supra* note 5, at 2 (reiterating the AU's "commitment to fighting impunity" and taking necessary steps to strengthen "the legal instruments of the principal organs of the African Union").

239. See Garth Abraham, *Africa's Evolving Continental Court Structures: At the Crossroads?*, S. AFR. INST. INT'L AFF., Occasional Paper 209, 15 (Jan. 2015) ("It is all too apparent that it is not the victims who complain of ICC bias against Africa; it is the threatened political elite.").

240. See INT'L CRIMINAL CT., *supra* note 153 (reflecting that since the ICC's establishment in 2002 it has issued twenty-nine arrest warrants, heard twenty-nine cases, and issued four verdicts).

241. See David Smith, *Barack Obama: Africa's Presidents-for-Life are Risk to Democratic Progress*, THE GUARDIAN (July 28, 2015, 9:15 AM), <http://www.theguardian.com/us-news/2015/jul/28/barack-obama-africas-presidents-for-life-are-a-risk-to-its-democratic-progress> (reporting United States President Obama's chastisement of African leaders for not practicing

Additionally, there is a belief that African leaders are squandering their nations' resources by misusing them and keeping the proceeds for themselves.<sup>242</sup> For example, The Scotland Yard has arrested African leaders for corruption and money laundering.<sup>243</sup> African leaders are also perceived as old and out of touch with their citizens, as they are generally much older than the African public.<sup>244</sup> Additionally, African leaders often have a reputation for using violence to undermine their younger opponents.<sup>245</sup> Their reluctance to relinquish power is evidenced by their hand-picking of successors or staying in office for so long that they are eventually overthrown by coups d'état.<sup>246</sup> Because such corrupt actions are crimes within the jurisdiction of the ACJHR, the immunity clause keeps these same leaders from being held accountable within the region.

The international community's negative views of African leaders expand into views about African peoples as well. Because of their leaders' inadequacies, African peoples are seen as living deep in poverty.<sup>247</sup> Africans are also seen as archaic in their views, especially about women and gender rights.<sup>248</sup> Out of that view of Africa's archaic state comes the belief that Africa is hopeless and unable to develop.<sup>249</sup> The African continent has gained a reputation as poor, corrupted, diseased, and war-ridden.<sup>250</sup> Though the immunity clause does not apply to the

term limits).

242. See ABEBE ZEGEYE & MAURICE VAMBE, *CLOSE TO THE SOURCES: ESSAYS ON CONTEMPORARY AFRICAN CULTURE, POLITICS AND ACADEMY* 17–18 (2011) (highlighting how various African authors wrote about their respective leaders' "economy of pleasure" in Cameroon, Sudan, and Zimbabwe).

243. See Lord Aikins Adusei, *What is Wrong with African Leaders?*, MODERN GHANA (Nov. 24, 2009, 10:20 PM), <https://www.modernghana.com/news/251029/1/what-is-wrong-with-african-leaders.html> ("According to the Africa Union (AU) around \$148 billion are stolen from the continent by its leaders and civil servants.").

244. See David E. Kiwuwa, *Africa is Young. Why are its Leaders so Old?*, CNN (Oct. 29, 2015, 10:35 AM), <http://www.cnn.com/2015/10/15/africa/africas-old-mens-club-op-ed-david-e-kiwuwa> (highlighting that Africa has the youngest population in the world, with a median age of nineteen and a half, yet 79%–85% of citizens in Angola, Uganda, and Zimbabwe were not alive when their respective heads of state came into power).

245. The oldest leaders get away with it because they are "seen as 'fathers of the nation' who led independence or liberation struggles, makes them irreproachable, irrespective of their shortcomings." *Id.*

246. See Owoye & Bissessar, *supra* note 229, at 11, 15 (explaining that current leaders are motivated to retain power in order to prevent their successors from investigating past misdeeds, however military coups have overthrown leaders in two-thirds of Africa's countries).

247. See Ian Mann, *Corrupt and Greedy Leaders Keep Africa Poor*, TIMES LIVE (Aug. 29, 2010), <http://www.timeslive.co.za/business/careers/2010/08/29/corrupt-and-greedy-leaders-keep-africa-poor> (noting how effective leaders have to be hands-on in economic development while also providing security, preventing political patronage, and avoiding populism).

248. See Smith, *supra* note 241 (quoting United States President Barack Obama) ("As a father, I believe that my two daughters ought to have every chance to pursue their dreams – and the same goes for girls here in Africa. We can't let old traditions stand in the way.").

249. Amy E. Harth, *Representations of Africa in the Western News Media: Reinforcing Myths and Stereotypes* 11, 18, <http://pol.illinoisstate.edu/downloads/conferences/2012/1BHarth.pdf> (last visited Oct. 3, 2016).

250. Adusei, *supra* note 243.

average African citizen, implementation of the immunity clause could maintain the negative belief that the African continent and its people are doomed to remain underdeveloped.<sup>251</sup> The immunity clause could perpetuate negative truths and stereotypes about Africans; this could prevent the international community from seeing the positive aspects of the ACJHR, and the progress it could make in facilitating Africa's commitment to counter impunity.

***d. The Immunity Clause Jeopardizes the ACJHR's Funding***

A key practical concern is that a negative perception by the international community of the ACJHR impacts the possibility of the ACJHR being funded. International core crimes are expensive to litigate because of their widespread, systematic nature.<sup>252</sup> In 2009, the cost of an international criminal trial was estimated at \$20 million.<sup>253</sup> Because of the additional crimes within its jurisdiction, the ACJHR's caseload will be even more expensive.<sup>254</sup> The ACJHR needs courtrooms, detention facilities, interpretation staff, legal staff, administrative staff, security systems, and computers to properly ensure fairness and justice during trials.<sup>255</sup> Given that the ACJHR also includes a Defense Office, it will need more funding than other similar courts would need.<sup>256</sup> The ACJHR also needs to fund community outreach in order to advertise its capabilities and services, protection of victims and witnesses, and the collection and preservation of evidence.<sup>257</sup>

Many international justice mechanisms need external funding to function,<sup>258</sup> and the ACJHR will be no different. The ICC is primarily funded by state parties, but also receives voluntary contributions from governments, international

---

251. See Harth, *supra* note 249, at 18 (“The Hopeless Myth evidences itself when Westerners, usually government leaders and media opinion-makers, decide that Africa is not worth their time, Africa is a lost cause, or Africa cannot be a valuable part of global decision-making.”).

252. See Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 HUM. RTS. BR. no. 3, 2008, at 6 (stating that the ICC's 2007 budget was \$146 million).

253. See Max Du Plessis, *Implications of the AU decision to Give the African Court Jurisdiction over International Crimes*, INST. FOR SECURITY STUD., ISS Paper 235, 1, 9 (June 2012) [hereinafter Du Plessis 235] (highlighting that the cost for one international crime trial was double the proposed funding for the African Court).

254. See *id.* at 6. (pointing out the potential overload of cases the ACJHR will face due to having jurisdiction over fifteen human rights crimes compared to the ICC's three).

255. See Skilbeck, *supra* note 252, at 8 (detailing the administrative, personnel, and infrastructure costs required to operate a court system); accord Du Plessis 235, *supra* note 253, at 9 (pointing out that the ICC in 2009 had a budget twenty-six times larger than the proposed African Court budget, and the African Court theoretically would be charged with prosecuting fifteen crimes to the ICC's three).

256. See Du Plessis 278, *supra* note 51, at 4 (explaining that the Draft Protocol mandates that the Defense Office be adequately funded to have equal status with the Prosecutor).

257. See Du Plessis 235, *supra* note 253, at 10 (questioning whether the same international partners who already contribute a significant amount of the AU's budget, will be willing to contribute even more to fund the new Court).

258. See Wangui, *supra* note 56 (“Western donors have funded a wide range of justice mechanisms both internationally—including the ICC—and at national level in Africa.”).

organizations, individuals, corporations, and other international entities.<sup>259</sup> In contrast, non-African donors fund more than half of the AU's budget.<sup>260</sup> Therefore, external donors will still be necessary to fund the ACJHR.<sup>261</sup> At first glance, Western donors would have a hard time arguing that they cannot finance the ACJHR since they have pushed African governments to have more mechanisms for legal accountability.<sup>262</sup> However, the immunity clause might give donors justification to not provide funding for the ACJHR.<sup>263</sup> Thus, without removing the immunity clause, the ACJHR and the benefits it might bring will never be realized.

## 2. Positive Aspects of the Court

It would be regrettable for the immunity clause to delegitimize the ACJHR because there are positive aspects of the Court. In terms of the structure of the ACJHR, the most positive aspect that makes the ACJHR unique is the creation of a Defense Office. This Defense Office is an organ of the ACJHR that gives adequate legal facilities to defense counsel and accused persons that need legal assistance.<sup>264</sup> This office also creates the position of a "principal defender" that has equal status with the Prosecutor and that represents those before the Court who cannot find representation.<sup>265</sup> Trying cases on the continent where they happen will also aid investigation and prosecution since the African Criminal Court will be close to victims, witnesses, and evidence, and will not require transport to The Hague.<sup>266</sup>

Beyond its structural benefits, the ACJHR also symbolizes justice and fairness for the African community.<sup>267</sup> The ACJHR reiterates the African continent's dedication to countering international crimes.<sup>268</sup> It also responds to the

---

259. See INT'L CRIM. CT., *supra* note 153 (reflecting a 2016 operating budget of 139.5 million euro).

260. *Wangui*, *supra* note 56. In 2014, the ICC had a \$166 million budget, compared to the AU's entire budget—including funds for the pre-existing African Court on Human and People's Rights—which was a little over \$300 million. *Id.*

261. See *id.* (explaining that the budget for the African Court on Human and People's Rights will not suffice due to the proposed Court's expanded jurisdiction).

262. *Id.*

263. See *id.* ("[T]he idea that presidents and other senior figures would be able to get away with murder under the ACJHR's rules is likely to put off many potential funders.").

264. Du Plessis 278, *supra* note 51, at 3.

265. See *id.* at 4 ("[H]istorically, defence counsel have been under-considered and under-capacitated as far as international criminal trials are concerned.").

266. See INT'L CRIMINAL CT., *supra* note 153 (reflecting that the ICC headquarters are in The Hague, Netherlands).

267. Mboneko Munyaga, *Munyaga: Africa Criminal Justice Court Needs Urgent Take-Off*, CITIZEN DIGITAL (Mar. 20, 2016), <https://citizentv.co.ke/news/munyaga-africa-criminal-justice-court-needs-urgent-take-off-119019> (Stating that the Draft Protocol's values should be emulated by other regions).

268. AU Decisions May 2013, *supra* note 55; Press Release, African Union, On the Decisions of Pre-trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan, AU Press Release No. 002/2012, at 3 (Jan. 9, 2012).

African peoples' call for justice while being sensitive to Africa's context, which a court external to the continent could not do.<sup>269</sup> The creation of an international criminal chamber shows the African people that their leaders are taking crimes that affect them more seriously, including crimes that are serious to the continent in ways that other nations might not recognize.<sup>270</sup> The ACJHR also presents the continent as more dedicated to countering crimes committed on its own soil. It could function as another way in which the African member states of the ICC are willing and able to try crimes that happen in their jurisdiction, since the ICC is meant to be a court of last resort.<sup>271</sup>

These concerns about the ACJHR are legitimate, such as the lack of thought put into the Draft Protocol and the concerns about whether African judges are properly equipped to preside over international criminal cases.<sup>272</sup> However, the creation and potential ratification of the ACJHR Draft Protocol could benefit African nations; yet the immunity clause compromises these benefits. The previous arguments show that if the immunity clause remains in the Draft Protocol, all benefits that the ACJHR could bring to the African continent will remain unrealized.

### ***C. The AU's Reasons for Including the Immunity Clause Can Be Addressed by Prosecutorial Discretion***

The practice of prosecutorial discretion is an established practice of criminal law, and has become a part of international criminal law.<sup>273</sup> Prosecutorial discretion gives a prosecutor the ability to choose what avenues to take in a criminal case—whether or not to file charges, what charges to bring, whether or not to proceed to trial, whether to accept a plea bargain, and when to pursue any of these paths.<sup>274</sup> The practice is necessary to manage scarce resources, keep dockets from being overburdened, accommodate particular circumstances, and ensure that the most egregious crimes are tried.<sup>275</sup>

---

269. See Abraham, *supra* note 239, at 11 (offering a counterargument to the massive financial and personnel requirements the ACJHR would bring).

270. Du Plessis 235, *supra* note 253, at 1.

271. See Rome Statute, *supra* note 41, art. 17(a), at 1012 (stating that a case is to be prosecuted in the State that has jurisdiction over it, unless that state is unable and unwilling to do so).

272. Du Plessis 278, *supra* note 51, at 2; Du Plessis 235, *supra* note 253, at 7.

273. See Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 177 (2005) (emphasizing the far-reaching consequences prosecutorial discretion has on societies that appeal to international courts for reconciliation and restoration of peace).

274. See *id.* at 178 (describing the use of discretion to ultimately decide if prosecution in the interest of justice jeopardizes ongoing efforts by the same individuals to bring peace).

275. See James A. Goldston, *More Candor about Criteria*, 8 J. INT'L CRIM. JUST. 383, 389 (2010) (explaining the need to ration scarce legal resources and prioritize which crimes to prosecute); see also Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. INT'L CRIM. JUST. 145, 145 (2005) (stressing that the criminal justice system would "grind to a halt" without it).

In considering what steps to take in a case, prosecutors will consider the nature and seriousness of the alleged offense, the military rank or governmental position of the suspect, the importance of the legal issues in the case, the possibility of arresting the suspect, and the overall impact the case will have on the prosecutor's resources.<sup>276</sup> In international criminal law, these considerations are critical to meet the goals of maintaining peace and achieving reconciliation.<sup>277</sup> In fact, the Rome Statute states that the prosecutor has to consider the possibility that an investigation would *not* be in the best interest of justice.<sup>278</sup> In using her discretion in the interest of justice, the prosecutor might also consider the political ramifications of an investigation and the political environment of the state of jurisdiction.<sup>279</sup>

There are limits that curb the power of the prosecutor in practicing her discretion. The prosecutor must act independently in deciding whether or not to pursue a case.<sup>280</sup> She must be entirely impartial and objective in her decisions.<sup>281</sup> Poor exercise of prosecutorial discretion may bring public disfavor upon the court.<sup>282</sup> Prosecutors also have to be non-discriminatory in their discretion.<sup>283</sup> With these limits, political and discriminatory interests do not undermine the benefits of prosecutorial discretion. The law cannot be entirely removed from the environment in which it acts.<sup>284</sup> Accordingly, prosecutorial discretion and its limits in international criminal law allow the law to work with the environment in pursuit of peace and justice.

In the ACHJR, the Prosecutor is responsible for investigation and prosecution,

---

276. Coté, *supra* note 273, at 168. These factors can weigh more severely case-by-case, and can be compounded with multiple suspects. *Id.*

277. *See id.* at 177 (using the International Criminal Tribunal for the Former Yugoslavia as an example of how the prosecutors wanted to bring the leaders of the Balkan crisis to justice, but could not because the same leaders were in the middle of peace negotiations).

278. *See* Rome Statute, *supra* note 41, art. 53, at 1029 (“[T]he Prosecutor shall consider whether: . . . (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”).

279. *See* Matthew R. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT'L CRIM. JUST. 71, 81 (2004) (stating that above the Prosecutor, the Security Council has final discretion over whether an investigation can proceed or be delayed if there is a threat to international peace and security).

280. *See* Draft Protocol, *supra* note 5, art. 22A, ¶ 6, at 12 (stating that the Prosecutor is a separate organ of the court and cannot receive instructions from any source); *see also* Côté, *supra* note 273, at 174 (emphasizing the close relation between prosecutorial discretion and prosecutorial independence).

281. *See* Goldston, *supra* note 275, at 388 (explaining that these are international standards that apply to all Prosecutors).

282. *See id.* at 390 (“If not exercised with care, it leaves the Court open to accusations of arbitrariness and unfairness.”).

283. *See* Coté, *supra* note 273, at 174 (describing the specific laws applied and persons accused).

284. *See* Goldston, *supra* note 275, at 387 (explaining that the Prosecutor's work is “grounded in law and evidence” but she must take note of the broader strategic and policy impacts, while keeping away from political bias and partisanship).

which implies that she has discretion to decide whether or not to investigate or prosecute.<sup>285</sup> The immunity clause undermines the benefits of the prosecutor practicing that discretion. Given the wide jurisdiction of the ACJHR, resources need careful management and cases need expedient action.<sup>286</sup> A prosecutor's discretion allows both interests to be served. Additionally, the immunity clause makes an assumption that not pursuing cases against sitting heads of state and state officials is always in the interest of justice.<sup>287</sup> However, that decision was made by political leaders and not by an independent and objective prosecutor who can weigh all considerations<sup>288</sup> on a case-by-case basis. While not investigating a sitting state official would be in the interest of justice for some cases that might not always be true in other cases.<sup>289</sup> Thus, the immunity clause does not allow enough flexibility for justice to truly be served. Further, the immunity clause also makes the prosecutor immediately discriminatory, as immunity is only granted to those in power.

Prosecutorial discretion also gives weight to the arguments made in favor of having the immunity clause, without the clause's negative effects. As stated earlier, the AU argues that the immunity clause is necessary to ensure peace and stability on the continent, that state officials focus on their duties, and that the constitutional institutions of African states are not disrupted.<sup>290</sup> Since prosecutors can take the governmental rank of the suspect into account when deciding whether to consider a case,<sup>291</sup> an ACJHR prosecutor can decide not to pursue a case for the sake of peace, stability, and continuity.<sup>292</sup> A prosecutor at home in Africa, more so than a prosecutor for an international tribunal abroad, will be able to properly weigh the interests of stability of the continent and pursuing a trial in pursuit of justice. The AU Assembly of States recognized for themselves the importance of balancing

---

285. See Draft Protocol, *supra* note 5, art. 22A, ¶ 6, at 12 (stating that the Prosecutor acts independent of the Court).

286. See Du Plessis 235, *supra* note 253, at 6 (pointing out that the ACJHR will have jurisdiction over fifteen crimes compared to the ICC's three).

287. See AU Decision October, *supra* note 57 (stating that investigations into the President and Deputy President of Kenya will distract them from fighting regional terrorism).

288. See Abraham, *supra* note 239, at 14 (“[The immunity clause] can only be construed as in the interests of those African leaders fearful of an end to a culture of impunity.”).

289. Prosecution may not be in the interest of justice where leaders and the public agree that restorative justice measures are more appropriate, for example.

290. See AU Decision October, *supra* note 57, ¶ 6, at 1 (“[P]roceedings initiated [by the ICC] against the President and the Deputy President of the Republic of Kenya will distract and prevent them from fulfilling their constitutional responsibilities, including national and regional security affairs.”).

291. See Côté, *supra* note 273, at 168 (listing rank and government position as two of multiple factors the Prosecutor has to weigh when deciding whether to proceed with an investigation).

292. See Draft Protocol, *supra* note 5, art. 46G ¶ 6, at 37 (stating that the Prosecutor would not be precluded from considering the same situation in light of new facts or evidence, which in this case would be a new found peace or stability).

peace and justice.<sup>293</sup> AU leaders should show that they take that balance seriously by allowing an independent prosecutor, rather than partisan political leaders, to decide which cases will strike that balance between peace and justice. With the immunity clause, many domestic and international repercussions will add to the instability on the African continent. Without the clause, those negative repercussions are removed, and an independent prosecutor can strike the proper balance on a case-by-case basis.

#### IV. CONCLUSION

There is no guarantee that enough AU states will ratify the Draft Protocol and create the ACJHR.<sup>294</sup> However, the Court could do much good for African peoples and nations, both domestically and internationally. The Court could finally give victims of crimes in African nations access to remedies that are external to the complexities of their domestic justice systems. It could deter citizens of African States from committing crimes that are both egregious and harmful to the African continent.<sup>295</sup> Further, the ACJHR could confirm the continent's commitment to justice and fighting impunity, which builds domestic and international trust in African governments.

The immunity clause undermines all of these benefits. Granting immunity to sitting state officials is contrary to international customary law for the core crimes under the ACJHR's jurisdiction.<sup>296</sup> It deprives victims of crimes within the jurisdiction of the court a way to receive redress for crimes committed against them. The clause delegitimizes African governments in the eyes of their citizens, which creates more instability on the continent. Additionally, the immunity clause confirms negative beliefs about African leaders and their nations, which complicates the financial prospects of the ACJHR being created. Lastly, the interests of peace and justice that the AU cites as reasons for the clause can be addressed by the mechanism of prosecutorial discretion.

The African continent is very complex, and its complexities have made its political and economic development difficult. The ACJHR is just as complex, but its goals could drive the economic and political development of African nations. Despite its arguments about peace and stability as justification for the immunity

---

293. Coalition for the International Criminal Court: Report on the 12th Session of the Assembly of States Parties to the Rome Statute, 6–7 (Nov. 2013). Twenty-nine States made statements at the Assembly in response to the Oct. 2013 AU Declaration against the ICC. While there was general consensus that action was needed to address the AU's concerns, many States said that, "the Rome Statute cannot be compromised, that the independence of the [ICC] as a judicial institution is paramount . . ." *Id.*

294. Wangui, *supra* note 56; *see also* Munyaga, *supra* note 267 (stating that the ACJHR has not yet been established).

295. *See* Munyaga, *supra* note 267 ("Tragedy is that atrocities occur on both sides, from government forces and the groups of insurgents in conflicts. It is not something that the people want to continue living with without a sense of hope for redress.").

296. *See* Du Plessis 278, *supra* note 51, at 5 ("As far as international criminal law is concerned, there is near universal acceptance of the principle that international crimes cannot be covered by [functional immunity], before international or domestic tribunals.").

clause, the AU could undermine all that the ACJHR could achieve by keeping the immunity clause. There is much to be gained by the creation of an ACJHR, and the immunity clause is not worth the cost.