



Statement regarding immunity for sitting officials before the expanded African Court of Justice and Human Rights

In June 2014, the African Union adopted a protocol at its 23rd Ordinary Session summit in Malabo, Equatorial Guinea to extend the jurisdiction of the African Court of Justice and Human Rights to cover individual criminal liability for serious crimes committed in violation of international law.¹

The protocol, however, also gives immunity to sitting heads of state and government, and to other senior officials based on their function, before the African Court.²

Human Rights Watch, other international organizations, and many African civil society organizations have sharply criticized the immunity provision as retrogressive and inconsistent with ensuring perpetrators are held to account. More than 140 organizations with a presence in 40 African countries issued a mass group declaration in August 2014 calling for African states to reject immunity before the African Court, which Human Rights Watch endorsed.³

¹ African Union, Decision on the Draft Legal Instruments, Assembly/AU/Dec.529(XXIII), Decisions, Declarations and Resolution of the Assembly of the Union, Twenty-Third Ordinary Session, June 26-27, 2014, [http://summits.au.int/en/sites/default/files/Assembly%20AU%20Dec%20517%20-%20545%20\(XXIII\)%20_E.pdf](http://summits.au.int/en/sites/default/files/Assembly%20AU%20Dec%20517%20-%20545%20(XXIII)%20_E.pdf) (accessed November 11, 2014); African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, http://www.au.int/en/sites/default/files/PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20AFRICAN%20COURT%20-%20EN_o.pdf (accessed November 11, 2014), art. 28A.

² Ibid., art. 46A *bis* ("No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office").

³ "Call for African States to Reject Immunity for Serious Crimes by African Civil Society Organisations and International Organisations with a Presence in Africa," August 25 2014, <http://www.hrw.org/news/2014/08/24/call-african-states-reject-immunity-serious-crimes-african-civil-society-organisatio>. See also "Joint Civil Society Letter on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights," May 12, 2014, <http://www.hrw.org/news/2014/05/12/joint-civil-society-letter-draft-protocol-amendments-protocol-statute-african-court>; "IBA and SALC express alarm at AU's endorsement of immunity for heads of state," International Bar Association, September

This statement offers additional information and analysis with respect to the immunity provision and the protocol more generally.

The protocol on the African Court's expansion, upon entering into force, will make the African Court the first regional court with criminal jurisdiction over genocide, war crimes and crimes against humanity.

Some activists, diplomats, and academics have queried the appropriateness of having regional courts with this authority and this is likely to be a debated issue for some time to come.

Human Rights Watch takes the view that as a matter of basic principle, increased opportunities for justice are positive, albeit so long as they allow for fair, credible, and impartial investigation and prosecution in accordance with international standards.⁴

The immunity provision of the protocol raises deep concerns for the African Court's ability to deliver impartial justice by blocking cases involving certain sitting officials. The immunity provision also represents a real step backward in international policy and practice with respect to holding perpetrators of serious crimes to account.

It would be difficult to argue that international law is an absolute bar to immunity of sitting heads of state and government and other high level officials before international courts. The most well-known case that deals with the issue is the Democratic Republic of the Congo *Arrest Warrant* case, often referred to as *Yerodia*, which was decided by the International Court of Justice. In that case, the judges indicated that immunity of sitting leaders is not a bar to prosecution before "certain international courts."⁵

7, 2014, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f0c41e45-693d-4712-98c8-3da28c2b949d> (accessed November 11, 2014).

⁴ See "Joint Letter to the Justice Ministers and Attorneys General of the African States Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights," May 3, 2012, <http://www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties-internat>.

⁵ International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, International Court of Justice Judgment, February 14, 2002, <http://www.icj-cij.org/docket/files/121/8126.pdf> (accessed November 11, 2014), para. 61.

At the same time, international and hybrid criminal tribunals have consistently provided that official capacity is irrelevant for the purposes of investigation and prosecution of serious crimes. This includes the first such court of its kind, the post-World War II Nuremberg Tribunal,⁶ the ad hoc tribunals—the International Criminal Tribunal for the Former Yugoslavia⁷ and the International Criminal Tribunal for Rwanda,⁸ the Special Court for Sierra Leone,⁹ and the Extraordinary African Chambers within the courts of Senegal.¹⁰

Indeed, to date no international or hybrid tribunal that provides individual criminal liability for serious crimes allows such immunity.

A number of international conventions stress the need to prosecute serious crimes.¹¹ Notably, the Convention on the Prevention and Punishment of the Crime of Genocide specifically states that individuals who are responsible for genocide: “shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”¹² The AU’s Constitutive Act also rejects impunity for serious crimes under article 4 of the act.¹³

⁶ Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”), August 8, 1945, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b39614> (accessed November 11, 2014), art. 7.

⁷ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, September 2009, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed November 11, 2014), art. 7(2).

⁸ Statute of the International Criminal Tribunal for Rwanda, January 2010, http://www.unict.org/sites/unict.org/files/legal-library/100131_Statute_en_fr_o.pdf (accessed November 11, 2014), 6(2).

⁹ Statute of the Special Court for Sierra Leone, January 16, 2002, <http://www.rscsl.org/Documents/scsl-statute.pdf> (accessed November 11, 2014), art. 6(2).

¹⁰ Statut des Chambres africaines extraordinaires au sein des juridictions senegalaises pour la poursuite des crimes internationaux commis au Tchad Durant la periode du 7 juin 1982 au 1er December 1990, Annex, Accord Entre le Gouvernement de la Republique du Senegal et l’Union Africaine sur la Creation de Chambres Africaines Extraordinaires au Sein des Juridictions Senegalaises, August 22, 2012, <http://www.chambresafriaines.org/pdf/Accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf> (accessed November 11, 2014), art. 10.

¹¹ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (accessed November 11, 2014); Convention on the Prevention and Punishment of the Crime of Genocide, Genocide Convention, Dec. 9, 1948, 78 U.N.T.S. 277, S. Exec. Doc. O, 81-1 (1949), <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf> (accessed November 11, 2014), art. iv; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, adopted August 12, 1949, 75 U.N.T.S. 31, entered into force October 1, 1950, <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=3F6C2B8B20272F58C12563CD0051A2BB> (accessed November 11, 2014), art. 49.

¹² Convention on the Prevention and Punishment of the Crime of Genocide, Genocide Convention, art. iv.

¹³ Constitutive Act of the African Union, July 11, 2000, http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf (accessed November 11, 2014), art. 4.

At the domestic level, immunity of sitting heads of state and government and of foreign ministers before foreign domestic courts has been a traditional principle of international law. Many states also allow immunity of sitting high-level officials before their own courts.

At the same time, a growing number of states reject immunity based on official capacity when it comes to serious crimes. This includes Benin,¹⁴ Burkina Faso,¹⁵ Kenya,¹⁶ the Democratic Republic of Congo,¹⁷ and South Africa.¹⁸

There are many gaps in the reach of justice to date that need to be addressed with robust effort from governments. Inserting impunity for certain perpetrators based on their position is contrary to this goal. Allowing immunity for certain officials with respect to trials on charges of serious crimes creates as a matter of law a two-tiered system of justice. This defies any hope of realizing the basic principle that no one should be above the law, and serves to further hamper access to justice.

The protocol will come into effect at such time that it has received 15 ratifications.¹⁹ This is expected to take a minimum of several years and may or may not come to pass. Notably, a protocol that precedes this one, which merged the African Court on Human and Peoples' Rights and the African Court of Justice in 2008, has yet to come into force due to lack of ratifications.²⁰

¹⁴ Constitution of the People's Republic of Benin, December 2, 1990, <http://www.refworld.org/docid/3ae6b57d4.html> (accessed November 11, 2014), arts. 73-74, 136-38.

¹⁵ Constitution of Burkina Faso, January 27, 1997, <http://www.refworld.org/country/...BFA..3ae6b4d920.o.html> (accessed November 11, 2014), art. 138; Implementing Legislation, Decree No. 2009-894/PRES Promulgating Law No. 052-2009/AN, 31 December 2009, http://iccdb.webfactional.com/documents/implementations/pdf/Burkina_Faso_Implementing_Legislation.pdf (accessed November 11, 2014), art. 7.

¹⁶ Constitution of Kenya, March 15, 2005, <https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> (accessed November 11, 2014), art. 143(4).

¹⁷ Constitution of the Democratic Republic of Congo, February 2006, http://www.congolegal.cd/IMG/pdf/ok_Constitution_de_la_RDC.pdf (accessed November 11, 2014), arts. 164-166.

¹⁸ South Africa, Implementation of the Rome Statute of the International Criminal Court Act, No. 27 of 2002, July 18, 2002, <http://www.justice.gov.za/legislation/acts/2002-027.pdf> (accessed November 11, 2014), ch. 2, sec. 4(2).

¹⁹ African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 11.

²⁰ African Union, Protocol on the Statute of the African Court of Justice and Human Rights, July 1, 2008, http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf (accessed November 11, 2014); African Court Coalition, "Ratification Status of the Protocol on the Statute of the African Court of Justice and Human Rights," http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-

The protocol provides that it may be amended on the basis of a state party's written request to the chairperson of the commission and a majority vote in the assembly of the African Union.²¹

AU member states should reject immunity for serious crimes before the African Court and any state that is considering ratifying the protocol should consider working to amend the statute to exclude immunity for serious crimes.

the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12 (last updated July 12, 2014) (accessed August 11, 2014) (noting that the protocol has received only five of the required fifteen ratifications).

²¹ African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 12.