

# Criminal Responsibility of Heads of State under the Rome Statute: A Perspective on the Rift between the AU and ICC

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## Abstract

Lately, there was a face-off between chieftains in Africa and the International Criminal Court (ICC) over the indictment sitting African heads of state. Former Sudanese leader Omar al Bashir and the President of Kenya and his Deputy were indicted by the ICC for crimes against humanity committed in their countries. Following their indictment, the African Union (AU) made a representation to the ICC to suspend their trials while their term in office subsisted. This request was turned down. A similar request was made to the Security Council and was also rejected. In response, the AU decided to stop any form of collaboration with the ICC. It argued that sitting heads of state enjoy immunity under customary international law. Against the backdrop of persistent gross human rights abuses in Africa and the inertia exhibited by the AU, this paper calls for continued cooperation of two institutions in the interest of the victims of these abuses and the progress of the continent.

**Keywords:** Criminal responsibility, heads of state, Rome Statute, human rights, impunity.

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## INTRODUCTION

For decades Africa has been plagued by conflicts. The continent had been in the news headlines for the wrong reasons. Stories emanating from Africa have always revolved around natural disasters, outbreak of diseases and conflicts with the attendant perils [1]. Africa has been plagued by conflicts since the beginning of the 20<sup>th</sup> century. Colonial domination and the liberation struggles left a legacy of violence, destruction and ethnic strife and antagonism [2].

In post independence Africa, the nature of conflicts and players changed. Since the 1990s, conflicts in Africa have been influenced by the following factors: rivalry among ethnic groups to dominate the state, drive for succession, religious fanaticism and intolerance; state failure; liberation struggles; border feuds; and the politicization of the military. The availability of mammoth quantity of small arms and light weapons exacerbated civil strife and violence across the continent [3]. Several violations have occurred in the course of these conflicts. Notably, there has not been any meaningful trial of key perpetrators, and very few individuals have been punished for those violations.

Hostilities in the 1990s have been dominated by new insurgent groups, religious extremists, Islamic

militants, rebel movements, warlords, terrorists, militias and mercenaries [3]. Problems created by violent groups are exacerbated by poor governance, official corruption, dictatorship, sit-tight syndrome and tenure elongation by African politicians [4]. Africa has always paraded strong rulers instead of strong institutions. The regimes of Idi Amin of Uganda and Jean Bokassa of Central African Republic are reminiscent of killing fields and lack of any value for human rights and values. Some of them like Hosni Mubarak of Egypt, Robert Mugabe of Zimbabwe, Ben Ali of Tunisia, Abdelaziz Bouteflika of Algeria and, most recently, Omar Al Bashir of Sudan, have been brought down by the peoples' power. A few of the veterans, such as those of Uganda, Cameroon and Equatorial Guinea are still hanging unto power at any cost, including the blood of their citizens. This is the story of Africa!

Human rights in Africa face a bleak future as they continue to deteriorate year by year. Amnesty International report on Africa for 2017/2018 rightly portrays the unfolding scenario. As stated in the report, "Africa's human rights landscape was shaped by violent crackdowns against peaceful protesters and concerted attacks on political opponents, human rights defenders and civil society organisations." The human rights defender also denounced the continuation of "The cycle of impunity for human rights violations and abuses

committed in conflicts – including crimes under international law [5].

Since the post World War II trials at Nuremberg, the Status of state officials is no longer relevant when horrifying international crimes are committed [6]. This position taken by international law has led to the prosecution or attempts to prosecute serving and former heads of state implicated in egregious international crimes in Africa. Some examples are the former President of Cote D'Ivoire, Laurent Gbagbo, President of Kenya, Uhuru Kenyatta, and his Vice; Ruto Williams, and the deposed President of Sudan, Omar al Bashir. They have at different times been indicted by the International Criminal Court for war crimes and crimes against humanity [7]. The prosecution, conviction and imprisonment of one-time President of Liberia, Charles Taylor, was another landmark achievement. Taylor's effort to have his indictment set aside on grounds of immunity, as sitting head of state, was rejected. Former President of defunct Yugoslavia, Slobodan Milosevic, was also prosecuted following this trend.

Debates and controversies have surfaced in Africa concerning exemption from prosecution for serving heads of state and high ranking government officials, such as senior military commanders, and prime ministers who have been implicated in or accused of war crimes, crimes against humanity and genocide. There have also been strong calls from some sections of the international community for these important state officials to be put on trial and made accountable for the monstrous crimes committed under their watch and supervision. This new attitude of international law is founded on "respect for human rights and concern for the plight of humanity" [8].

The African Union (AU) has been championing the crusade for immunity for sitting heads of state. While it may be expedient to ask for exemption for African heads of state implicated in horrendous international crimes, where does the AU stand with regard to its acclaimed fight against impunity and the atrocities perpetrated by some African heads of state? Are there mechanisms to hold such leaders accountable; and what are the possible alternatives to the ICC? This paper seeks answers to these questions.

### **The AU and the fight against impunity**

When African leaders adopted the AU Constitutive Act, they made commitments to combat impunity on the continent [9]. Human rights provisions were included in the Act [10]. Article 4(h) of the Constitutive Act recognizes "the right of the to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity". In the new dispensation, the AU has sought to uphold the principles of democracy, rule of law, good governance

[10] and has collectively condemned and rejected all acts of impunity inconsistent with the provisions of its Constitutive Act [9]. In a demonstration of its commitment to constitutionalism, the AU suspended Mauritania and Togo for unconstitutional changes in government [9]. It established and endowed the African Court of Justice with competence in human rights matters. The AU also supported and actively participated in the processes that gave birth to the ICC. The Rome Statute has been ratified by more than half of African countries [10].

### **Advent of the International Criminal Court**

The ICC was established to address war crimes, crimes against humanity, genocide and crimes of aggression. It deals directly with individuals, either as perpetrators, victims or witnesses. A unique provision in the Rome Statute is the extension of the doctrine of individual criminal responsibility to senior state officials. Article 27 (1) provides that the "Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as Head of State or Government, member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility..." Article 27(2) specifically states that immunities shall not prevent the Court from exercising its authority over the person. Arising from this provision the ICC assumed jurisdiction when the case of former President Omar al Bashir was referred to it by the UN Security Council (Resolution 1593). Likewise the ICC commenced investigation *proprio motu* against President Uhuru Kenyatta and his Deputy when Kenyan authorities failed or refused to prosecute them.

When the UN Security Council forwarded the case against Sudanese President, Omar al-Bashir the ICC, the Court preferred charges against him for orchestrating widespread massacre, rape and mass expulsion in Darfur resulting in over 200,000 deaths and about 2.5 million displaced people [11]. The former Chief Prosecutor of the ICC, Moren-Ocampo, described the killings as genocide [11].

The indictments and arrest warrants issued against a serving head of state was condemned by the AU as being a violation of customary international law. It was the contention of the AU that an incumbent head of state enjoys immunity and cannot be prosecuted in an international tribunal. This has triggered a showdown and squabbles between the AU and the ICC. The AU has strongly opposed the prosecution of sitting heads of state [12]. This has not changed anything as current international treaty law is determined to strip senior state officials of any form of immunity for international crimes.

### **The face-off between AU and ICC**

From the inception, the ICC has drawn its greatest support from Africa. In recent times, however, African leaders have become the main critic of the organization because, according to them, only individuals from Africa have been indicted and prosecuted by the Court. The human rights abuse in Darfur was horrendous and made headline news across the globe. The appalling events attracted the attention of UN Security Council and the matter was referred to the ICC in 2005. Consequently, the Prosecutor applied for a warrant of arrest against Mr. Bashir on 14 July, 2008.

The AU Peace and Security Council (PSC) issued a communiqué on 21 July, 2008 on the Prosecutor's request. The communiqué among others:

- Stressed the assurance of the AU to combat impunity as well as promote democracy, the rule of law and good governance;
- Denounced the human rights abuses in Darfur;
- Restated the importance of upholding accountability and bringing to justice persons responsible for serious breaches of human rights violations in Darfur, so as to ensure durable peace;
- Stated that "the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace;" and that the ICC arrest warrant may indicate double standards thereby amounting to an abuse of indictments against African leaders [13].

The PSC also approached the UN Security Council and requested that the actions taken by the ICC be put on hold in line with Article 16 of the Rome Statute. This request was turned down by the UN Security Council [6]. Concerns mounted that the UN Security Council showed disrespect for the AU.

In February 2009, a Summit of the AU Heads of State and Government approved the PSC communiqué. It also requested the AU Commission to "convene as early as possible, a meeting of African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, in particular, in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements." The Summit resolved, among others that:

- The abuse and misuse of indictments against African leaders have destabilizing effect that will negatively impact on the political, social, and economic development of states and their ability to conduct international relations.
- Member State of the AU shall not implement the warrants [9].

The AU Commission was also called to examine how the African Court on Human and Peoples' Rights could "try serious crimes of international concern".

The Assembly warned that it retained the right to initiate additional measures to safeguard the dignity, sovereignty and integrity of the continent. They argued that arrest would undermine the peace process [9]. This request was ignored by the Court. The Pre-Trial Chamber agreed to issue an arrest warrant against Al Bashir for war crimes and crimes against humanity on 4 March 2009 [14]. The decision of the Pre-Trial Chamber to issue an arrest warrant exacerbated these concerns. The AU accused the ICC of racism and through its Chairman expressed serious worry over perceived focus on Africans by the ICC [9]. All expressed deep concern over the indictment a sitting President. The relation the two institutions further deteriorated when the Kenyan President and his Deputy were added to the list of persons to be prosecuted [7].

### **From Criticisms to Opposition: Africa Leaders Withdraw Cooperation**

At the Assembly of the Heads of State and Government Summit of 3 July, 2009, it was resolved that African States should not offer any support in the arrest of Omar Al Bashir as ordered by the ICC. Stance was reaffirmed at the Summit of the AU held in Kampala, Uganda, the following year [15]. In an act of defiance, President Bashir visited some ICC States Parties – Chad, Kenya and Nigeria – since the warrants were issued without being arrested [6]. On 22 July 2010, he travelled to Chad; on 27 August 2010, he was in Kenya; and in July 2013 the Sudanese President visited Nigeria.

At the AU's 50-year anniversary Summit in May (2013) the Ethiopian Prime Minister Hailemariam Desalegn said: "The African leaders have to come to a consensus that the process the ICC is conducting in Africa has a flaw." He said further that "the intention was to avoid any kind of impunity, but now the process has degenerated into some kind of race-hunting" [16]. The AU convened an Extraordinary Session of the Assembly of Head of State on 12 October 2013 and established a contact group which will interface with the UN Security Council on matters between the AU and the ICC. Top on the agenda will be the indictment of the Sudanese and Kenyan presidents and, in particular, Kenya's application to delay the commencement of trial of its president in November, 2014 [16]. The Security Council, against expectations, immediately spurned this request. The ICC was viewed and presented as a new form of imperialism that should be opposed. According to Keppler [17]: "This reaction is perhaps unsurprising, as it draws from genuine historical geopolitical power imbalances and the legacy

of injustices committed during the colonial period for which there was no accountability.”

### **Withdrawal of membership**

The AU advocated mass withdrawal from membership of the Court. Some countries, such as Nigeria opposed the mass withdrawal [18]. In October, 2016 Burundi and South Africa responded to the call to withdraw from the ICC and officially informed the UN Secretary-General of their intention to quit the organization. The Gambia under the leadership of Yahaya Jammeh also announced it was leaving the ICC. However, the new administration in the Gambia led by Adama Barrow rescinded the decision taken by its predecessor and retained Gambia's membership in the judicial body. South Africa subsequently revoked its notice of withdrawal.

Human rights groups expressed worry about the announcement as this may be a pretext or may pave the way for clampdown on human rights activists. The call for mass withdrawal did not materialize [19]. Only Burundi formally left after serving the notice of withdrawal. The decision of Burundi was regarded an attempt on the part of their leaders to evade public perusal of the political violence that plagued the country following the third term bid of President Pierre Nkurunziza [20].

The ICC still commands respect in Africa notwithstanding the face-off with the ICC. Nigeria has announced that it will continue to support the ICC despite the reservations about the organization [21]. The government of Botswana stated that the country “cannot associate herself with any decision which calls upon her to disregard her obligation to the Criminal Court” (Keppler: 5); the country advocates collaboration with the ICC [22]. South Africa's ruling African National Congress supported the ICC in executing the arrest warrant for Omar al Bashir (Keppler: 5).

### **The conundrum over criminal responsibility of a head of state**

The green light to arrest President Bashir and prosecution of Kenyatta resulted in perceived conflict between practices of international customary law - as regards immunity of Heads of States and the irrelevance of such immunity within the Rome Statute. The question which therefore arises whether an indicted incumbent head of state such as the Sudanese president be arrested and prosecuted for alleged international crimes [23].

Under municipal law, it is not the business of international law how a head of state is treated within his domain. Usually, heads of state enjoy immunity while in office in civil and criminal matters under a municipal setting. The general rule is that a head of state is immune from criminal prosecution in foreign courts. A visiting head of state enjoys exemption from

prosecution and sanctity in relation to his/her property. The claim that a head of state is immune from prosecution in the court of a foreign state, especially in relation to authorised official acts performed while in office emanates from customary international law. This principle was reiterated by the International Court of Justice (ICJ) in the *Arrest Warrant case (D.R. Congo v Belgium*, 2002 ICJ 21, Feb. 14) wherein it remarked that “in international law it is firmly established that certain holders of high-ranking office in a state, such as the Head of State...enjoy immunities from jurisdiction in other states, both civil and criminal” (para. 51).

A former head of state would not be accorded immunity in a foreign court. In other words, he can be arrested and tried in a foreign court. In this instance, the *Pinochet case* is quite instructive. News media across the globe was awash with stories of the arrest in London of Augusto Pinochet, a senator and former president of Chile on 6 October, 1998 [24]. He was arrested based on an extradition request from Spain to answer for various international crimes perpetrated under his watch as president [25].

The question that followed was whether Pinochet could ask cite immunity and be exempted from the authority of English courts [26]. The English House of Lords held that as a former head of state of Chile, Pinochet was not entitled to immunity in a foreign court [24]. Lord Nicholls pointed out that “There can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity. The situation would have been different if he was a serving head of state.

### **Irrelevance of immunity under modern treaty law**

Under contemporary international law the acts or omissions of a head of state can be ascribed to the state if they are carried out officially [23]. If in the process international obligations are violated, the head of state is immune from personal liability (Planck,). Where however, the acts or omissions constitute war crimes, crimes against humanity or genocide, a head of state incumbent or former loses any immunity when charged before an international tribunal on the basis of the doctrine of individual criminal responsibility operates [27].

The 20<sup>th</sup> century witnessed an era of indictment of sitting incumbent and erstwhile heads of state for war crimes and crimes against humanity. The principle of individual criminal responsibility was recognized in post World War I era. The Treaty of Versailles 1919 provided for the trial of German Kaiser William II “for a supreme offence against international morality and sanctity of treaties” (Art. 227). The Charter of the International Military Tribunal 1945 Nuremberg prescribed in Article 7 that the status of head of state did not absolve an accused person from



responsibility or diminish sanctions. This sprang from the precedent set at Nuremberg.

The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) adopted in 1993 emulated the standard adopted at Nuremberg by ousting the immunity of an accused person on account of his official status. A practice emerged from the ICTY and International Criminal Tribunal for Rwanda (ICTR) that persons who perpetrated egregious crimes could be held responsible irrespective of rank or position. This principle applied as much as to military officers as to heads of state and governments and now appears to be firmly established as part of international customary law. This rendered a head of state criminally responsible for his actions and paved the way for the prosecution of Slobodan Milosevic, the President of the defunct Yugoslavia at the time of the conflict [26]. Similar provisions were embodied in the Statute of the ICTR, 1994 (Article 6). The Tribunals have laid the foundations for what is now the accepted norm for post-conflict development that leaders alleged to have committed war crimes will face justice. The Rome Statute of the ICC 1998 provides that it shall apply equally to all persons without any distinction based on official capacity (Article 27). The warrant of arrest issued by the ICC against the deposed President of Sudan, Omar Al Bashir was predicated on that provision.

#### **A developing norm in international law**

Current international law does not recognize immunities or amnesties for war crimes, crimes against humanity and genocide in a matter before an international tribunal. As noted by Pedretti [28]: “before international criminal tribunals the situation is different: As a matter of principle, both acting and former Heads of State cannot rely on immunity when charged with international crimes in those fora.” This developing norm in international law has manifested in the indictment of indictment and trial of serving and former heads of state and high-ranking government officials [26]. Mr. Charles Taylor, former president of Liberia was indicted for serious international crimes by the Special Court for Sierra Leone (SCSL) during the currency of his presidency. His plea of immunity and effort to set aside the indictment was spurned by the Court.

The former President of Cote D’Ivoire, Laurent Gbagbo, was arrested and handed over to the ICC in 2011 for crimes against humanity following the post election violence in that country. He was discharged and acquitted of the charges at the end of the trial. The ICC also indicted the former head of state of Libya, Muammar Gaddafi for crimes against humanity. The former Vice President of D.R. Congo, Jean Pierre Bemba, was tried and convicted by the ICC. The conviction was later quashed on appeal. William Ruto, Vice President of Kenya was arraigned at the ICC along

with President Uhuru Kenyatta, a move that caused a stir among African leaders. The Prime Minister of Rwanda at the time of the genocide, Jean Kambanda, was convicted and sentenced to life in prison by the ICTR, a UN tribunal for his role in the killings [29].

International criminal trials attended the civil war in the former Yugoslavia. One of the prominent persons indicted and prosecuted was President Slobodan Milosevic of the Federal Republic of Yugoslavia. He became the first sitting head of state to be incriminated and charged before an international tribunal. The human rights watchdog, Human Rights Watch [30] described the indictment and prosecution of Slobodan Milosevic as groundbreaking being the first erstwhile head of state to be arraigned for war crimes and serious breaches of IHL. It noted that “As the first former president brought before an international criminal tribunal, the trial of Milosevic marked the end of the era when being a head of state meant immunity from prosecution. Since then other former heads of state, including Saddam Hussein and Charles Taylor, have been brought to justice” [30]. The human rights watchdog expressed optimism that “With the establishment of the International Criminal Court, no government official, on the basis of his or her position, is beyond the law. The time when being a head of state meant immunity from prosecution is past” [30].

The former Bosnian Serb leader, Radovan Karadzic sought to take advantage of an ‘immunity agreement’ when he was arraigned at the ICTY for international crimes committed in the conflict. He alleged that at a meeting in Belgrade in July 1996 he reached an ‘immunity agreement’ with US diplomat Richard Holbrooke. The ICTY stated that “According to customary international law, there are some acts for which immunity from prosecution cannot be invoked before international tribunals” (para. 17). The Court held that it is “well established that any immunity agreement in respect of an accused indicted for genocide, war crimes and/or crimes against before an international tribunal would be invalid under international law” (para. 25). It was the view of the Tribunal that immunity did not apply to prosecution for international crimes before an international tribunal.

Closely related to immunity is the question of amnesty. Beneficiaries of amnesty who are implicated in war crimes, crimes against humanity, genocide and serious violation of IHL cannot take advantage of it under international law. This position was tested in the post war trials in Sierra Leone. The UN in collaboration with SL government established the Special Court for Sierra Leone (SCSL). The Lome Peace Accord of 7 July, 1999 was brought before the SCSL for enforcement. The Accord which sought to end the war granted “absolute and free pardon and reprieve to all combatants, and collaborators in respect of anything done by them in pursuit of their objectives” up to the

date of signing of the accord (Article IX). Another contention was the validity of Article 10 of the Court's Statute. Article 10 barred amnesty for international crimes defined in the Statute, namely, crimes against humanity violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violation of international humanitarian law. The SCSL was to determine whether it had jurisdiction to try the beneficiaries of the amnesty. The rebel leaders argued that the government of Sierra Leone was bound to observe the amnesty (*Prosecutor v Morris Kallon* SCSL-2004-15-AR72 E). The Special Court ruled that the blanket amnesty did not dispense with the possibility of punishing the perpetrators of international crimes and crimes against humanity. The Appeals Chamber ruled that Article 10 of the Court's Statute was valid.

### **African Solutions to African Problems**

Critics argue that ICC's work has interfered with efforts at peace in Africa. They argue further that Africa needs foreign assistance more than an international criminal investigation and prosecution. African leaders speak loudly of African solutions to African problems [23]. They manipulate popular thinking and play upon the fears of colonialism by proclaiming that the justice dispensed by the ICC is "white man's justice." This is a ploy to avoid international obligations which they signed on to; avoid criminal prosecution; and also avoid a fair solution to the problem of impunity in Africa.

### **The African Court of Human and Peoples' Rights**

For the African Union, the Enforcement of human rights has been an important item on its agenda [31]. In order to achieve this goal, Africa Heads of State signed a Protocol to establish the African Court of Human and Peoples' Rights (ACHPR) at the Organisation of African Unity (OAU) summit in Burkina Faso in 1998. The Protocol came into force in January, 2004 upon its ratification in by fifteen member States. This makes the Court the legal institution for the enforcement of human and peoples' rights Africa and complements the protective mandate of the African Commission on Human and People's.

The main reason for the setting up of the Court was to put in place an effective and independent African court which will strengthen the machinery of human rights protection in Africa. Individuals and non-governmental organizations are competent to bring cases before the Court. However, the Protocol places a limit on the ability of individuals and NGOs to initiate such action by providing that States shall accept the competence of the African Human Rights Court to receive cases (Article 34(6)).

Though the creation of the Court was described as a watershed and the beginning of human rights enforcement in Africa [31], its effectiveness had

been called into question. Several years after its establishment, the Court had not heard any case. The first case that came before the Court was between Michelot and the Republic of Senegal on 15 September, 2009. On 15 December, 2009, the Court delivered its judgment finding the application against Senegal inadmissible.

### **The Court of Justice of the African Union**

The African Union adopted a Protocol in 2003 to establish the African Court of Justice as its main judicial organ and vested it with power to settle disputes and interpret treaties. The Court had not effectively before it was proposed to be merged with the ACHPR.

### **African Court of Justice and Human Rights**

There was a move to merge the African Court on Human and Peoples' Rights with the Court of justice of the African Union into a single. At the African Union Summit of 1 July, 2008, in Sharm El Sheik, Egypt, the Heads of State and Government adopted a Protocol establishing the African Court of Justice and Human Rights. This makes the Court the main judicial arm of the African Union.

The Court has two chambers – one for general legal matters and the other for human rights matters. It reviews cases of war crimes, trafficking people and/or drugs, genocide, crimes against humanity, terrorism and piracy.

### **Trial of former Chadian president**

The former president of Chad was accused of gross human rights abuses and crimes against humanity. As president of Chad from 1982 to 1990, he unleashed terror and deaths upon the people. When he was deposed in 1990, he was provided safe haven in Senegal. However, the horrendous crime continued to hunt him just as his victims and human rights activists mounted pressure for justice and accountability.

In order to avert a possible trial in Belgium, the AU collaborated with the government of Senegal and Chad, with funding from the international community to establish an ad hoc international tribunal to try Hissen Habre.

An agreement was reached between the AU and Senegal which led to the creation of the Extraordinary African Chambers in 2013. The special court located in Senegal found Hissen Habre guilty of human rights abuses, including rape, sexual slavery and ordering the killing of 40,000 people during his presidency. The court sentenced him to life in prison making it the first time a court supported by the AU convicted a former head of state for human rights violations. The verdict was also confirmed by the Appeals Chamber of the special court [32]. The question analysts have asked is: what does the trial and

conviction of Hissen Habre portend for African justice? [33].

### **African Mechanisms to Combat Human Rights Violations: A Mirage**

The truth of the matter is that Africa has no reliable and functional mechanism for combating serious human rights violations. The so-called African Court of Justice and Human Rights is not working. It is a smoke screen to divert attention from the real debates about the state of human rights in Africa. Today Africa holds the worst record of gross human rights violations. Most countries in Africa are under the firm grip sit-tight dictators, who parade themselves as democrats. They perpetuate themselves in power at any cost, including the blood of innocent citizens. Long-term dictator, Omar Al Bashir, has been deposed and replaced by military dictatorship. The emergence of terrorist organisations in different parts of African, and the killings and destruction that trail their activities, depict a continent in crises and in search of redemption [23]. The AU has no mechanism to fight human rights violations or curbs impunity by African rulers. The African Court of Human and Peoples' Rights did not give any substantive judgment on rights violations before it was merged with the Court of Justice of the African Union.

At the Summit of the AU in February 2009, its Commission was urged to explore how the African Court on Human and Peoples' Rights could "try serious crimes of international concern" [9]. This imploration has not yielded any result. The trial of Hissen Habre was a one-off success story. It succeeded because of pressure from human rights groups and the initial attempts by Belgium to try him. It took a few more years before the Senegalese government and the AU put the Structures in place to effect his trial.

At the sub regional level, member states of Economic Community of West African States (ECOWAS), notably Nigeria, have refused to obey judgments of the ECOWAS Court on human rights violations. There are several ECOWAS Court judgments and rulings against the Nigerian government which have not been respected by a country which claims to be the giant of Africa. Decisions of human rights courts in Africa are meaningless and worthless as mechanisms to enforce them are non-existent.

## **CONCLUSION**

The AU needs to engage constructively with the ICC and establish the liaison office which it once rejected. This will enhance communication between the two institutions. African States must stand by the ideals and principles in the AU Constitutive Act, and commit themselves to the principles of democracy, human rights, the rule of law and good governance. The decision not to cooperate with the ICC contradicts the spirit of combating impunity; and lacks the commitment

and concerns relating to the plight of victims. Africa is an indispensable part of the ICC and victims of horrendous crimes in Africa have cause to appreciate its work. African States should make worthwhile suggestions to enhance the work of the Court and ensure the full realization of its mandate instead dissipating resources to weaken it.

The AU should not envision the ICC as an adversary and antagonist. In the absence of a credible African alternative, the ICC should be seen as vehicle to confront horrendous human rights abuses and a platform to fight impunity in the continent. Existing African human rights courts can be endowed with enlarged criminal jurisdiction to pursue high-profile perpetrators of international crimes and dismantle tyranny in the continent. The trial of heads of state by the ICC is a demonstration of the transformation in the international system. African leaders have argued that an American President cannot be arrested and arraigned before the ICC and that the Court is meant for weak and poor countries. This is a strong point to ponder on by the ICC but certainly not an excuse for the widespread human rights abuses ravaging Africa today. This transformation should, therefore, be made to apply universally.

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