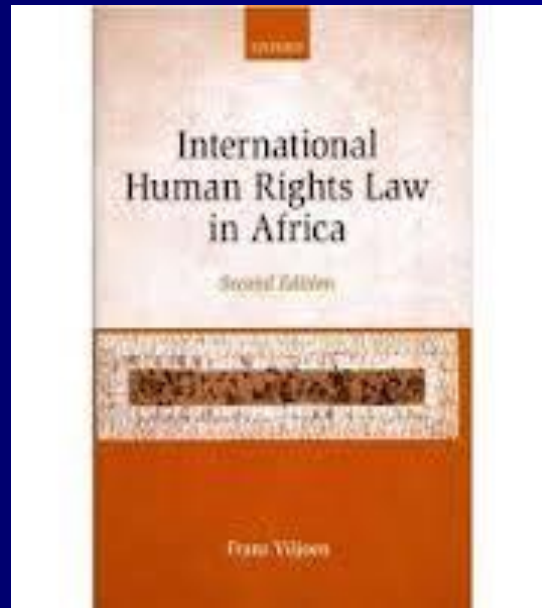


The African Human Rights System

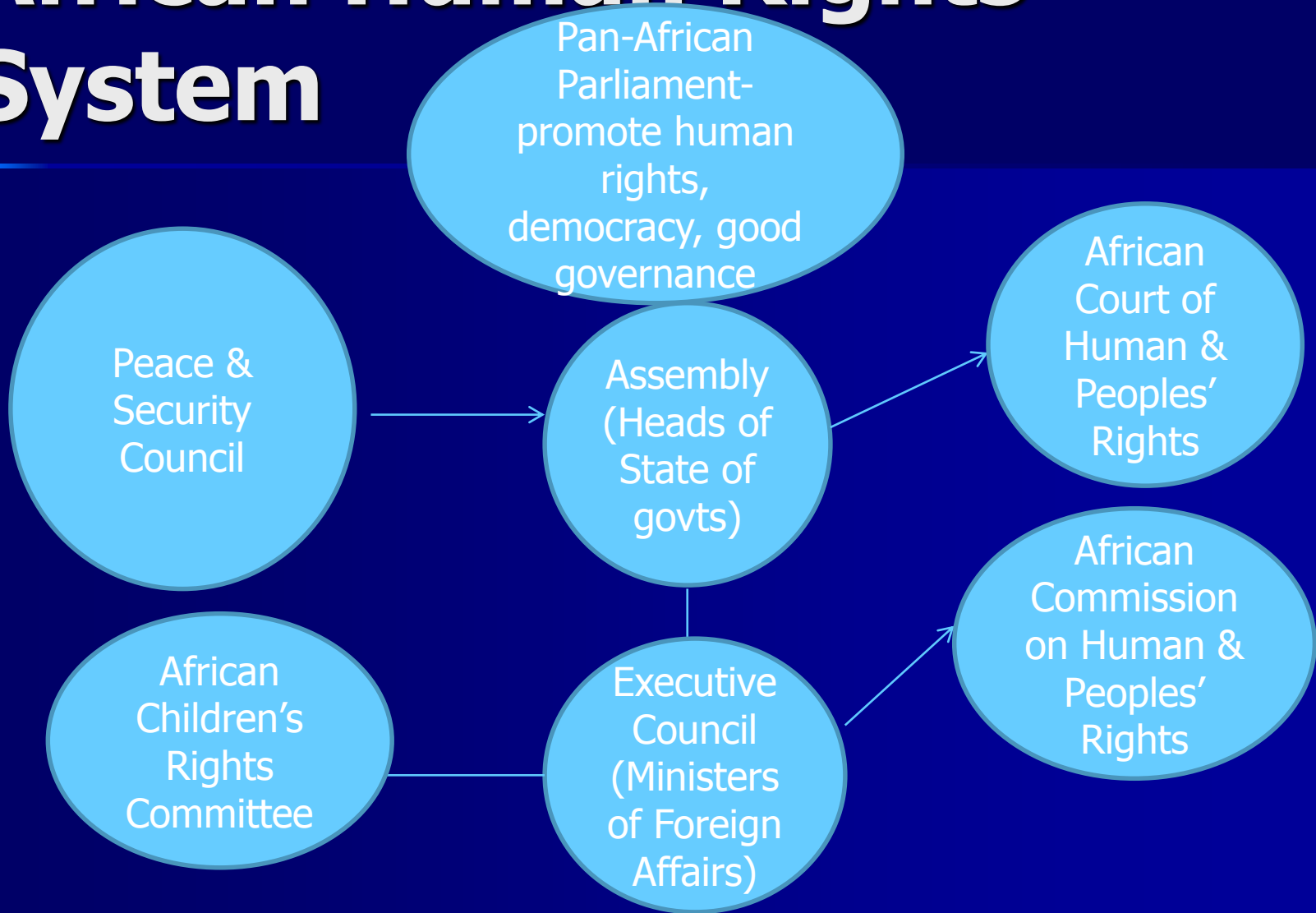
Cecilia M. Bailliet



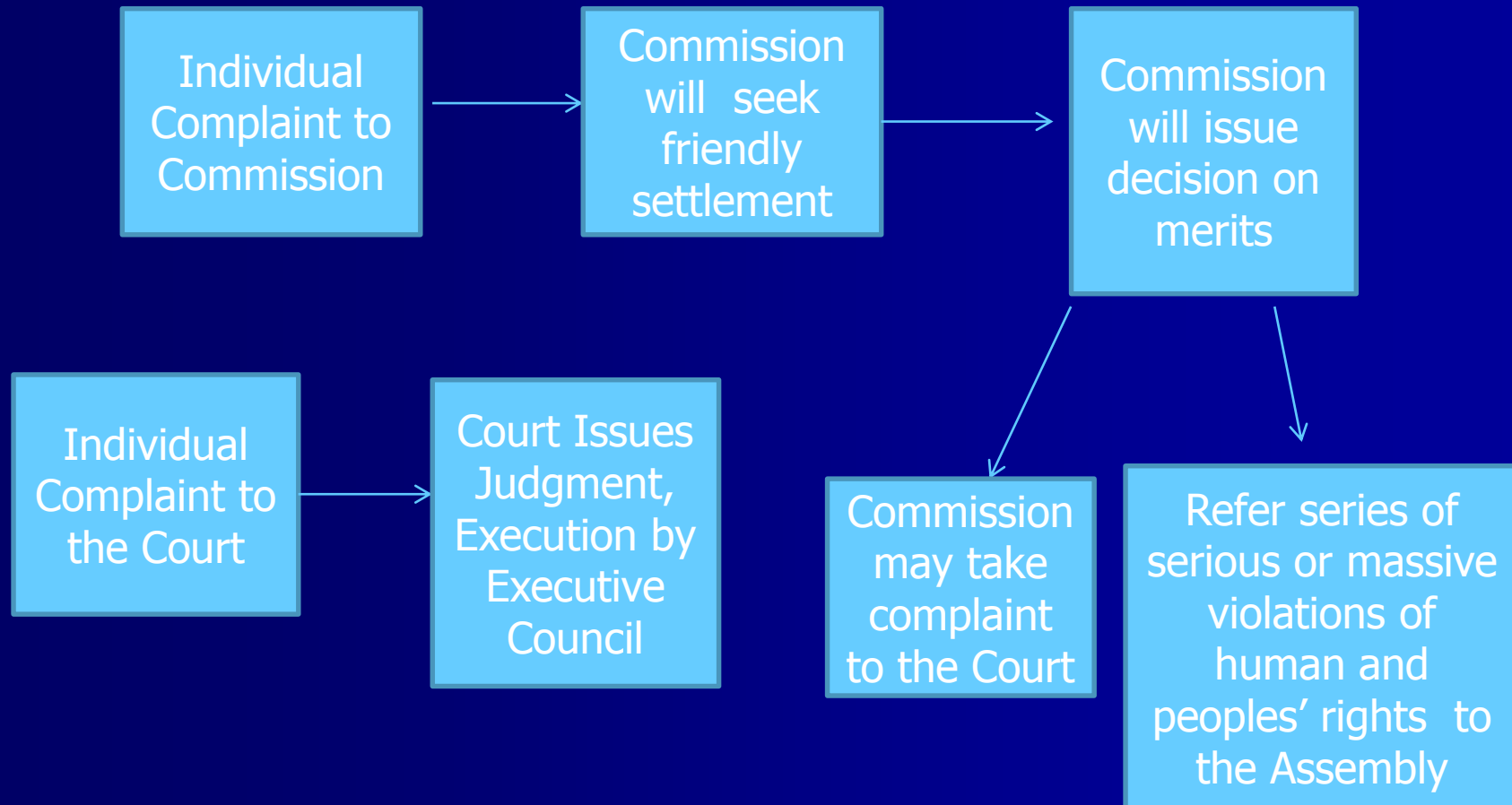
Frans Viljoen (Oxford 2012)



African Human Rights System



Individual Complaint Mechanisms



African Union Constitutive Act: Preamble

- To promote and protect Human and People's Rights,
- Consolidate Democratic Institutions and Culture,
- Ensure Good governance and the Rule of Law

African Union Constitutive Act: Objectives

- Promote Democratic Principles and Institutions, Popular Participation and Good Governance
- Promote and Protect Human and People's Rights in accordance with the African Charter on Human and People's Rights and other relevant instruments

African Union Constitutive Act: Objectives

- Promote Sustainable Development at the Economic, Social and Cultural Levels as well as the integration of African Economies

African Union Constitutive Act: Principles

- Sovereign Equality & Interdependence among Member States of the Union
- Respect of Borders Existing on achievement of independence
- Participation of the African Peoples in the Activities of the Union
- Establishment of a Common Defence Policy for the African Continent

African Union Constitutive Act: Principles

- Peaceful Resolution of Conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly
- Prohibition of the use of force or threat to use force among Member States of the Union
- Non-interference in the Internal Affairs of Another

African Union Constitutive Act: Principles

- The Right of the Union 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
- Peaceful co-existence of states and right to live in peace and security

African Union Constitutive Act Principles

- The Right of Member States to Request Intervention from the Union in order to restore peace and security
- Promotion of gender equality
- Respect for democratic principles, human rights, the rule of law and good governance

African Union Constitutive Act: Principles

- Promotion of Social Justice to ensure Balanced Economic Development
- Respect for the Sanctity of Human Life, Condemnation and Rejection of Impunity and Political Assassination, Acts of Terrorism and Subversive Activities
- Condemnation and Rejection of Unconstitutional Changes of Governments (Democracy Clause)

African Union Constitutive Act: Suspension

- Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

African Charter on Human Rights (Banjul Charter)

- Look at the African Charter: How are rights categorized?
- Civil & Political Rights, Social & Economic Rights.
- Second and Third generation rights are legally enforceable

African Commission

- Collective Rights, Environmental Rights, and Economic and Social Rights are essential elements of human rights in Africa
- States have a duty to respect, protect, fulfill and promote all rights

Concept of "People"

- 1) Entire People of one country
- 2) Group of People within a State who see themselves as distinct
- 3) Indigenous People
- ***Gambian Coup*** Case- Commission found 1994 coup to violate the Gambian people's right to freely determine their political status (Art. 20)
- ***Southern Cameroons*** case, Commission accepted Southern Cameroonianians as a people due to common history, linguistic tradition, territorial connection, political outlook, and self-identification
- ***Oganiland*** Case- Ogani people had right to freely dispose of their wealth and natural resources (Art. 21) violated by Nigeria's approval of oil company operations which destroyed resources.

Right to Development

- Centre for *Minority Rights Development* (Kenya) and another on behalf of the *Endorois Welfare Council v Kenya* (Endorois Case)
- Violations on matters of procedure and substance (outcome)
- Govt pursued ruby mining project, it did not consult the Council of Elders, nor did it consider that the community was illiterate, and it failed to provide suitable land for grazing to preserve their pastoral life.
- Community must be consulted in good faith, using culturally appropriate procedures, with objective of reaching an agreement
- Large scale development projects, states should obtain free, prior and informed consent, according to their customs and traditions- pursue impact study
- State must ensure mutually acceptable benefit sharing in exploited natural resources. State must improve capabilities and choices

Implied Rights Indivisibility between Civil and Political and Socio-Economic Rights

- ***Oganiland*** Case, Commission held that rights to shelter or housing, and right to food are implicit in the Charter. Nigerian govt destroyed houses and prevented people from rebuilding, combined effect of three corollary rights- right to property, health, and protection of the family- constitute right to shelter and housing. Commission also recognizes implied right to privacy- «The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be left alone and live in peace- whether under a roof or not.»

Economic & Social Rights

- Infringement of right to work (*Agnnette Pagnouille v. Cameroon*)
- State failure to provide medicine, water & electricity infringed on the right to health (*Union Interafricain des droits de l'homme v. Zaire*)
- State closure of university and secondary school infringed on the right to education (*Media Rights v. Nigeria*)
- Denial of right to speak language infringed on identity and right to culture (*Malawi African Association v. Mauritania*)
- Nigerian State accountable for state oil company's failure to protect Ogani people from acts harmful to the environment affecting right to health, housing, food, and right to environment (*The Social and Economic Rights Action Center & Center for Economic and Social Rights v. Nigeria*)

Clawback Clauses in the African Charter on Human Rights

- Article 10 Every individual shall have the right to free association provided that he abides by the law (right is subject to the dictates of municipal law)
- African Commission states that international human rights standards must always prevail over contradictory national law
- No derogation clause- ***Chad Massive Violations*** Case- Commission states that even a civil war cannot excuse violations of human rights.

African Charter on Human Rights, Limitations on Rights

- Article 27 (2) The Rights of the Charter shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Weighing Legitimacy of Limitation on Right

- Is state interest legitimate?
- Is the limitation strictly proportionate?
- Is the limitation absolutely necessary to obtain advantage?
- The limitation must never render the right illusory

African Charter on Human Rights

- Assigns duties to individuals vis-a-vis the state, other groups, and individuals
- Is it a statist instrument which sacrifices the interest of individuals?

Other Instruments

- African Charter on the Rights and Welfare of the Child (rights and duties of child vis-a-vis family, community and State) Supervisory Body: African Committee of Experts on the Rights and Welfare of the Child can receive communications
- Convention Governing Specific Aspects of Refugee Problems in Africa 1974

Af. Ch. Rights of the Child Article 31: Responsibility of the Child

- Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:
 - a. to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
 - b. to serve his national community by placing his physical and intellectual abilities at its service;
 - c. to preserve and strengthen social and national solidarity;
 - d. to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
 - e. to preserve and strengthen the independence and the integrity of his country;
 - f. to contribute to the best of his abilities at all times, and at all levels, to the promotion and achievement of African Unity.

AU Convention- IDPs

- Refrain from, prohibit and prevent arbitrary displacement of populations;
-
- Prevent political, social, cultural and economic exclusion and marginalisation, that are likely to cause displacement of populations or persons by virtue of their social identity, religion or political opinion;
-
- Respect and ensure respect for the principles of humanity and human dignity of internally displaced persons;
-
- Respect and ensure respect and protection of the human rights of internally displaced persons, including humane treatment, non-discrimination, equality and equal protection of law;
-
- Respect and ensure respect for international humanitarian law regarding the protection of internally displaced persons,;
-
-

AU Convention on IDPs

- Respect and ensure respect for the humanitarian and civilian character of the protection of and assistance to internally displaced persons, including ensuring that such persons do not engage in subversive activities;
- Ensure individual responsibility for acts of arbitrary displacement, in accordance with applicable domestic and international criminal law;
- Ensure the accountability of non-State actors concerned, including multinational companies and private military or security companies, for acts of arbitrary displacement or complicity in such acts;
- Ensure the accountability of non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement;
- Ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel;
- Promote self-reliance and sustainable livelihoods amongst internally displaced persons, provided that such measures shall not be used as a basis for neglecting the protection of and assistance to internally displaced persons, without prejudice to other means of assistance;
-

Protocol on the Rights of Women-

- No specific supervisory body. African Commission may receive State reports and African Court will be able to apply Protocol
- Look at Art 11 Protection of Women in Armed Conflict
- Arts 20 & 21 Widow's Rights

African Commission in Banjul, Gambia

- Public and Private Session
- NGO observers included
- Lack of resources and translation facilities
- Quasi Judicial Function:
 - Inter-State Complaints
 - Individual Complaints (Also Third Parties and NGOs)

African Commission on Human Rights

- Non-Confrontational Mechanism for Human Rights
- Seeks Amicable Resolution and Remedies for Victim
- Lack of transparency and timidity
- Issues provisional measures (but may result in withdrawal of communication Case of Interrights v. Nigeria, Woman convicted of adultery, alleged Sharia criminal justice system violated Charter)
- Non-binding decisions

Remedies

- Orders to Executive- release detainees, investigate and prosecute
- Orders to Legislature- annul laws, amend laws in conformance with Charter
- Orders calling for compensation to victims

African Charter on Human Rights

- Article 1 States have obligation to give effect to the rights, freedoms and duties in the Charters
- Article 62 States submit report every 2 years on legislative and other measures taken to give effect to the African Charter (Delays)

Art. 2 Non-Discrimination

- Article 2 Non-Discrimination
- Case against Rwanda 1989 targeted killings of Burundian refugees and Rwandans of Tutsi ethnic group;
- Cases by Congo against Burundi, Rwanda & Uganda held that killings, massacres, rapes and mutilations were directed against victims due to national origin,
- Cases against Angola and Zambia held that mass expulsions or deportations on basis of ethnicity violated Art. 2;
- Case against Guinea, President gave speech inciting soldiers and civilians to attack Sierra Leone refugees)

Serious & Massive Violations of Human Rights

- Article 58 of the African Charter on Human Rights, Case concerning serious and massive violations should go to OAU Assembly, but now African Commission reviews all claims and calls for remedy and follow up report by the state

Admissibility

- Ratione Materie (Korvah v. Liberia- Communication based on a lack of discipline in the Liberian Security Police, corruption, immorality of the Liberian people generally, and national security risk caused by American financial experts not considered human rights violations)
- Ratione Personae (Any individual or NGO, even from non-member country can file communication, does not have to be the victim)
- Ratione Temporis (Violation after entry into force of the Charter)
- Ratione Loci (Violation within territory or de facto control extraterritorially)
- Communication must not have already been settled in terms of international law (UN HRC)
- May not be based solely on media information.

Admissibility: Exhaustion of Domestic Remedies

- Unless excessive delay or ineffectiveness of system
- Exemption in cases of massive or serious violations (Free Legal Assistance Group v. Zaire) Widespread arrests, torture, extrajudicial executions, unfair trials, restriction of press, etc.
- Ousting of judiciary by military/executive decree
- Domestic Remedy not possible because victim has died or is in exile abroad (illogical for him to return)
- Indigence of complainant

Thematic Reporters & Working Group

- Rights of Women,
- Prisons & Detention,
- Human Rights Defenders
- Freedom of Expression
- Refugees & IDPs
- Working Group on Indigenous People

Other African Union Organs that may address Human Rights

- Court of Justice
- Pan African Parliament
- Peace & Security Council

African Court of Human Rights came into being 2006

- Interpret African Charter on Human Rights, Protocol and other human rights instruments ratified by the States Parties
- Contentious, Advisory, and Conciliatory Jurisdiction
- Art. 4 Protocol- Any AU Member State, AU organ, or NGO recognized by AU may request an advisory opinion

African Court of Human Rights

- Art. 34 of Protocol establishing Court, State must make declaration to give individuals standing before the Court (individual or NGO may file directly with the Court and bypass Commission- Only Burkina Faso) Most cases will be filed with the Commission which is to refer case to the Court

African Court of Human Rights: Lodging of Complaint

- African Commission of Human Rights: Unconditional right of access to the Court
- State Party which has lodged a complaint to the Commission
- State Party against which a complaint has been lodged in the Commission
- State Party whose citizen is a victim of human rights violation

African Court of Human Rights

- Court may enable individuals and NGOs with the observer status before the Commission to submit cases directly to the Court
- Court may give Advisory Opinions at the request of the AU or AU organ
- It may not review an issue if it is still being examined by the Commission
- Court has not yet decided case on merits

Malabo Protocol

- 1. Vest international criminal jurisdiction in a regional court
- 2. Explicitly includes the crime of rape within the statutory definition of the crime of genocide.[1]
- 3. Establish an independent and separate Defence Office (the Public Defender) as a fourth, separate, independent Organ of a permanent international judicial tribunal (and not a mere Department within the Registry of the Court)[2]
- 4. Expand the list of crimes within the jurisdiction of an international court beyond the four crimes that are, for instance, under the jurisdiction of the ICC (International Criminal Court), i.e. **genocide, war crimes, crimes against humanity and (potentially) the crime of aggression**. The Protocol provides for ten (10) additional crimes that are of serious concern to Africa (if not to others in the world), i.e. **Unconstitutional change of government; Piracy; Terrorism; Mercenarism; Corruption; Money laundering; Trafficking in persons; Trafficking in drugs; Trafficking in hazardous wastes, and Illicit exploitation of natural resources**.
- 5. Refine the definitions of war crimes to include genocidal rape and to include other elements from international humanitarian law[3].
- 6. Provide for corporate criminal liability (in addition to individual criminal responsibility) for serious crimes. The real tectonic shift lies in the fact that African countries have indeed accepted the existence of individual criminal responsibility and corporate criminal liability for crimes of mass atrocity and other crimes such as illicit exploitation of natural resources, drug trafficking, etc.

Immunity

- 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.”