

Protection of Refugees in Africa Through IHL

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Abstract

Africa plays a dual role in the refugee landscape: as both a source of cross-border displacement and a sanctuary for those fleeing persecution and armed conflict. To uphold refugee rights, nations have embraced the 1951 Refugee Convention and its 1967 Protocol, while also pioneering the 1969 African Refugee Convention. Though this regional framework broadens the definition of refugees, it falls short in addressing the unique vulnerabilities refugees face in armed conflict situations. Instead of amending the convention, fragmented regional instruments under International Humanitarian Law (IHL) have been introduced to fill these gaps. Despite these efforts, the absence of robust scholarly discourse on the role and relevance of these IHL instruments in protecting refugees during armed conflicts has hampered progress. This article offers a critical and comprehensive analysis of Africa's scattered IHL instruments, underscoring their potential for improving refugee protection. It exposes a glaring deficiency: the lack of a regional court with jurisdiction over war crimes committed against refugees, which has allowed perpetrators to evade justice and left refugees without recourse. The article calls for urgent action. African Union member states must either ratify the long-pending Malabo Protocol to establish a continental criminal court or fully cooperate with the International Criminal Court (ICC). Without these measures, impunity will persist, and the promise of justice for refugees will remain elusive. This analysis underscores the imperative for a unified, enforceable justice mechanism to ensure accountability, uphold refugee rights, and protect the dignity of those displaced by conflict.

Keywords: Refugee Protection, War Crimes, African IHL, Malabo Protocol, ICC

Introduction

Armed conflicts lead to significant casualties, not just among the conflicting parties but also innocent civilians including refugees.¹ To minimize the repercussions of such conflicts, warfare should be guided by a global set of rules and regulations.² The primary objective of these rules and regulations are to bolster the safeguarding of civilians who are not directly involved in the conflict, encompassing combatants who are injured, ill, stranded at the sea, or detained as prisoners of war.³ In order to achieve this objective, nations adopted the four Geneva Conventions in 1949, which were later followed by two additional protocols in 1977.⁴ Despite the fact that African states have ratified these instruments, the unfortunate reality is that armed conflicts continue to devastate the region. Furthermore, the severity and magnitude of war in Africa is consistently escalating.⁵ Even though various regional instruments in AU incorporate measures used to safeguard civilians during armed conflicts, there have been persistent concerns regarding AU's commitment in the prevention of

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1 Antonio Cassese, *International Law* (2nd edn, OUP 2005) 399.

2 Simon Chesterman, *Civilians in War: Project of the International Peace Academy* (Lynne Rienner Publishers 2001) 9.

3 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 78. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (3rd edn, CUP 2005) 3.

4 See Claude Pilloud and Others, *Commentary on the Additional Protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949* Charles Dana Gibson Collection Reading Committee (Martinus Nijhoff Publishers 1987) 20. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I) art 12. See Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 75 (Geneva Convention II) art 12. See Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III) art 13. See Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV) arts 4,44, 45,49 and 147. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) arts 51,73 and 75. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) art 4 and 17.

5 See Verisk Maplecroft, *Political Risk Outlook 2024* (Verisk Maplecroft 2024)11. See Eki Yemisi Omorogbe, 'The Crisis of International Criminal Law in Africa: A Regional Regime in Response?' (2019) 66 *Netherlands International Law Review* 287, 298.

grave breaches in the continent.⁶ The fragmented structure of African IHL is among the reasons behind this.

In contrast, the 1969 OAU Refugee Convention,⁷ which was adopted by the Organization of African Unity (OAU), serves as a complementary framework to the 1951 Refugee Convention and its 1967 Protocol, specifically addressing the unique circumstances found within Africa.⁸ By expanding the definition of a refugee, the OAU Convention takes into account situations such as foreign aggression, occupation, and events that severely disrupt public order. Essentially, the OAU Refugee Convention builds upon the principles established by the 1951 Convention and its Protocol, tailoring them to better suit the distinct challenges and experiences faced on the African continent.⁹ One of these challenges involves the crucial task of protecting refugees in situations of armed conflict within the countries hosting them.¹⁰ Consequently, this article employs the doctrinal research method to assess the existing legal frameworks for IHL in Africa, with a particular focus on refugee protection. The purpose of this assessment is to provide a reader with a thorough comprehension of the regional obligations in preventing the breach of IHL concerning the safeguarding of refugees during armed conflicts.

Legal Frameworks of IHL in Africa

It is apparent that a significant number of African states were under colonial rule at the time of the adoption of the 1949 Geneva Conventions and Additional Protocols. Nevertheless, this should not lead to the assumption that Africans did not contribute significantly to the Geneva

6 See Netsanet Belay, 'How the AU Failed Africans: From Sudan to DRC and Zimbabwe' (Al Jazeera, 9 February 2019) <https://www.aljazeera.com/opinions/2019/2/9/how-the-au-failed-africans-from-sudan-to-drc-and-zimbabwe> accessed on 20 February 2025.

7 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

8 See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. See Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

9 Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Rights of Refugees in International Law* (4th edn, OUP 2021) 16.

10 ISS, 'African Conflicts to Watch in 2022' (African Union Peace and Security Council Report, 17 December 2021). See UNHRC, 'Report of the Independent Fact-Finding Mission on Libya' (1 October 2021) UN Doc A/HRC/48/83. See UNMISS and UNHCHR, 'Report on Conflict-Related Sexual Violence in Northern Unity, South Sudan September-December 2018' (15 February 2019) based on UNSCR 2406 (2018). See UNMISS and UNHCHR, 'A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan, in July 2016' (January 2017) UNSCR 2252 (2015) and 2304 (2016).

Diplomatic conference focused on reaffirming and advancing international humanitarian law. African states have actively endorsed and acceded to global instruments of international humanitarian law.¹¹ The African Union, in particular, has played a crucial role in integrating these principles into regional instruments such as the 1969 OAU Refugee Convention, as well as the national legislations of its member states.¹² Now, let us examine how the issue of incorporating international humanitarian law is addressed in various AU instruments and its relevance for the protection of refugees.

In the preamble of the Constitutive Act, the African Union (AU) acknowledged the detrimental impact of armed conflicts on the socio-economic progress of the continent. The Assembly of heads of states holds the responsibility to provide guidance on the handling of armed conflicts, while article 4(h) of the Constitutive Act introduces the notion of intervention in instances of “grave breach”.¹³ The Regional Security Council (PSC) also has been granted authority by the protocol governing the establishment of the AU Peace and Security Council to oversee and address armed conflicts within the continent. As stated in article 7 of this protocol, the PSC is mandated to take “intervention” measures under the guidance of the AU in response to severe violations.¹⁴ In terms of politics, the African Union also demonstrates proactive leadership by spearheading the implementation of “Africa’s blueprint and master plan for transforming Africa, Agenda 2063”. This comprehensive strategy addresses various challenges faced by the continent, including matters pertaining of armed conflict.¹⁵

The instrument referred to as the “Kampala Convention” is a widely acknowledged agreement aimed at safeguarding and providing aid to internally displaced persons in Africa, and also specifically recognizes armed conflict as a primary factor leading to civilian displacement. As stated in Article 4 of this Convention, any deliberate displacement of civilians during armed conflict or the use of displacement as a tactic of warfare is strictly forbidden and regarded as a violation of International

11 See Vangah Wodie, ‘Africa and Humanitarian Law’ in Jacques Meurant (ed), *International Review of the Red Cross* (1986). See Mutoy Mubiala, ‘The African States and the Promotion of Humanitarian Principles’ (2010) 29(269) *International Review of the Red Cross* 93, 101.

12 African Union, ‘Human Rights Strategy for Africa’ (2011) para 38.

13 Constitutive Act of the African Union (adopted 7 November 2000, entered into force 26 May 2001) (AU Constitutive Act).

14 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003) (AUPSC).

15 AU, ‘Agenda 2063: The Africa We Want’ (African Union 2015).

Humanitarian Law. Moreover, Articles 2(e) and 9 of the convention delineate the responsibilities, obligations, and roles of armed groups, non-state actors, and other relevant parties, in addition to the state parties involved in the convention.¹⁶

Moreover, the Maputo Protocol, which is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, serves as a crucial instrument for safeguarding the human rights of women. It introduces the concept of IHL through its provisions outlined in Articles 11. These articles emphasize the obligation of states to uphold, respect, and ensure adherence to the principles and regulations of IHL, with a specific focus on the protection of women. Furthermore, Article 11(3) of the Maputo Protocol explicitly denounces any transgressions against women's rights that are safeguarded by IHL, categorizing such acts as war crimes.¹⁷

In Article 22 of the African Charter on the Rights and Welfare of the Child, it is stipulated that the state is required to take appropriate measures to ensure that the principles of IHL pertaining to children are observed and upheld. One of these principles is the prohibition of involving children directly in hostilities. However, the charter does not explicitly state a specific age at which children should be prohibited from participating in such activities. To address this issue, Article 22(1) refers to the obligation of respecting IHL rules in armed conflicts, which is further clarified in Article 38(2) of the UN Convention on the Rights of the Child and additional protocols I and II. These instruments establish the minimum age for direct participation in hostilities as fifteen years, thus resolving the ambiguity present in the African Charter.¹⁸

The African Committee of Experts has expressed their perspective on Article 22 of the Charter on the Rights and Welfare of the Child, asserting the crucial need for nations to criminalize war crimes, specifically the

16 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) (Kampala Convention). See Walter Kälin, 'African Union Convention on Protection and Assistance for Internally Displaced Persons in Africa' (Brookings, 23 October 2009).

17 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005) (Maputo Protocol).

18 African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) (ACRWC). See also API 1977, art 77(2); APII 1977, art 4(3)(c); Convention on the Rights of the Child 1989, art 38(2).

recruitment and utilization of children.¹⁹ Moreover, Article 17(d) of the Africa Youth Charter underscores the responsibility of states to condemn armed conflicts and prevent the involvement of young individuals in such conflicts, including their recruitment and exploitation as sexual slaves. Furthermore, Article 17(e) of the same charter imposes an obligation on states to adopt all necessary precautions and measures to safeguard the well-being of civilians and youth. Article 12 of the African protocol for persons with disabilities also emphasizes the duty of the state to implement appropriate measures to ensure the protection and safety of individuals with disabilities during armed conflicts.²⁰

Furthermore, the African Rights of Older Persons protocol, particularly article 14, imposes a duty on the state to safeguard elderly individuals during periods of conflict and ensure their access to priority rights.²¹ Several other legal instruments in Africa not only prioritize the protection of civilians from direct military attacks but also from indirect consequences. The African Nuclear Weapon Free Zone Treaty, also known as the “Pelindaba Treaty,” includes Article 11, which mandates that states refrain from participating in, supporting, or encouraging any actions aimed at launching an armed assault on nuclear installations.²²

The Revised African Convention on the Conservation of Nature and Natural Resources, specifically Article 15, imposes an obligation on states to implement practical measures aimed at protecting the environment from harm and restoring and rehabilitating areas that have suffered damage during armed conflicts.²³ In a similar vein, the Anti-Terrorism protocol categorically asserts that no act of terrorism can be justified under any circumstances.²⁴ However, the issue of employing terror as a tactic of warfare in armed conflicts remains unresolved within the framework of

19 African Committee of Experts on the Rights and Welfare of the Child, *General Comment on Article 22 of the ACRWC* (2022)27.

20 See African Youth Charter (adopted 2 July 2006, entered into force 8 August 2009) (AYC). See Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (adopted 29 January 2018) (Africa Disability Protocol).

21 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa (adopted 31 January 2016, entered into force 17 July 2020) (African Elder Protocol).

22 African Nuclear-Weapon-Free Zone Treaty (adopted 11 April 1996, entered into force 15 July 2009) (Pelindaba Treaty) art 11.

23 Revised African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2013, entered into force 23 July 2016) (Revised Algiers Convention) art XV.

24 Protocol to the OAU Convention on the Prevention and Combating of Terrorism (adopted 1 July 2006, entered into force 26 February 2014) (African Terrorism Convention) art 3.

this protocol. Nevertheless, a potential solution to this legal loophole may be found through a combined interpretation of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, which could deem the dissemination of terror among the civilian population as an unlawful act.

Similar to the Geneva Conventions, the 1951 Refugee Convention and its 1967 Protocol, along with the 1969 OAU Refugee Convention, the aforementioned provisions stated in diverse regional instruments lay down principles with the objective of safeguarding civilians, even in the midst of conflict situations. Given that individuals who seek refuge during armed conflicts face heightened vulnerabilities, it is crucial to prioritize their safety as an integral aspect of IHL, akin to the protection afforded to any other civilian.²⁵ Because the responsibility to safeguard refugees and asylum seekers in the midst of armed conflict rests upon the conflicting parties.²⁶

As readily deduced from the essence of Article 4 of the AU Constitutive Act and Article 7 of the PSC Protocol, targeting refugees by denying their civilian status and launching attacks against them is a severe violation that amounts to a grave breach, ultimately constituting a war crime. The deliberate relocation of refugees and asylum seekers from refugee camps during times of armed conflict, as well as the utilization of displacement as a strategy of warfare, is explicitly prohibited under Article 4 of the Kampala Convention. Specifically, it is imperative to shield refugee women and youth from any form of sexual exploitation or abuse, and to strictly forbid the involvement of children in direct hostilities.²⁷ Furthermore, when a refugee-hosting state finds itself in a situation of armed conflict, it is obligated to implement appropriate measures to ensure the protection and well-being of individuals with disabilities and elderly individuals.²⁸ In addition to the prohibition of directly attacking refugees and asylum seekers, parties involved in armed conflicts are obligated to abstain from engaging in, endorsing, or promoting any endeavors that seek to initiate an armed assault on nuclear facilities, thereby jeopardizing the

25 Mélanie Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (CUP 2012).

26 Maja Janmyr, *Protecting Civilians in Refugee Camps Unable and Unwilling States*, UNHCR and International Responsibility (Martinus Nijhoff Publishers 2014) 3 and 143.

27 Maputo Protocol 2003, arts 4(2)(e), 6(d), 14(2) and 22(2); ACRWC 1990, art 16 and 27; AYC 2006, art 16(2) and 23.

28 Africa Disability Protocol 2018, art 4 and 30; African Elder Protocol 2016, art 8.

safety of refugees and asylum seekers.²⁹ During times of armed conflict, it is essential for the parties involved to adopt precautionary measures in order to safeguard the environment, which is crucial for the well-being of refugees and asylum seekers.³⁰ Furthermore, once the armed conflict has ceased, it becomes the responsibility of states to implement practical measures that are specifically designed to protect the environment from any harm. Additionally, efforts should be made to restore and rehabilitate areas that have been adversely affected by the damages incurred during armed conflicts.³¹ Lastly, it is important to emphasize that under no circumstances can any act of terrorism against refugees and asylum seekers be justified, as stated in the Anti-Terrorism protocol.³²

Enforcement of IHL in Africa

Prior to delving into the implementation of African IHL in relation to refugees, it is crucial to acknowledge the distinctive nature of African IHL. Firstly, unlike the European Union's guidelines on promoting adherence to international humanitarian law, African IHL lacks a unified and comprehensive regional IHL document, with laws dispersed in a fragmented manner.³³ Secondly, in addition to this fragmented nature, Africa does not possess a regional court with jurisdiction over criminal matters related to war crimes.³⁴ The application of African IHL has faced various hindrances, encompassing deficiencies in its scope and failure to be incorporated into domestic legislation. Additionally, tackling grave violations that transpire during armed conflicts and ensuring state compliance with the regulations and principles of IHL presents yet another obstacle, which is the central concern of this particular section.³⁵ Individuals are fully accountable for their criminal actions, even if

29 Pelindaba Treaty 1996, arts 4,7 and 14.

30 Ibid, art 6 and 10. See Michael Bothe and Others, 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities' (2010) 92(879) *International Review of the RedCross* 569, 578. See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 35.

31 Revised Algiers Convention 2013, art XV(1)(d).

32 African Terrorism Convention 2006, arts 3,4 and 22.

33 Council of the European Union, 'EU Guidelines on Promoting Compliance with International Humanitarian Law' (2005, updated 2009).

34 Assembly of the Union, 'Progress Report of the Commission on the Implementation of the Decisions of the Assembly of the African Union on the International Criminal Court' (2014) Assembly/AU/13(XXII) 1.

35 Elizabeth Stubbins Bates, 'Towards Effective Military Training in International Humanitarian Law' (2014) 96(895/896) *International Review of the Red Cross* 795.

they are affiliated with the state, in cases where serious violations are perpetrated against civilians including refugees.³⁶ The commitment for the establishment of a regional court with the responsibility to address serious violations that amount to war crimes is trace back to 1998.³⁷

Before the establishment of the African Court of Justice (ACJ), which is the regional court equivalent to the International Court of Justice (ICJ) of the United Nations (UN), the Protocol to the African Charter on Human and Peoples' Rights was introduced in 1998. This protocol led to the creation of the African Court of Human and Peoples' Rights (ACHPR). Regrettably, the jurisdiction of the ACHPR is confined solely to the interpretation of the African Union Human and Peoples' Rights Charter and other pertinent human rights instruments, without any criminal adjudication mandate.³⁸ In 2008, a fresh proposal emerged to amalgamate the African Court of Justice (ACJ) and the ACHPR courts, thereby establishing the African Court of Justice and Human Rights (ACJHR).³⁹ Nevertheless, this protocol, similar to its predecessor, does not possess the power to prosecute grave breaches and remains unimplemented to this day.⁴⁰

In 2014, a new protocol called the "Malabo Protocol" was adopted to expand the jurisdiction of ACJHR.⁴¹ The main objective of this protocol is to empower the court to address war crimes, crimes against humanity, and other similar offenses.⁴² However, despite being signed by 15 out of the 55 countries, none of them have ratified the protocol.⁴³ This protocol is expected to have a positive impact on the enforcement of humanitarian

36 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 17 July 1998, entered into force 1 July 2002). See ILC, Responsibility of States for Internationally Wrongful Acts (Yearbook of the International Law Commission 2001) 30.

37 See Makau Mutua, 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21(2) Human Rights Quarterly 342. See Nsongurua J. Udombana, 'Toward the African Court on Human and Peoples' Rights: Better Late than never' (2000) 3 Yale Hum Rts & Dev LJ 45,78.

38 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004) art 3.

39 Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008, not yet in force) AU Doc Assembly/AU/13 (XI) art 1 and 2.

40 Ibid, art 28(annex).

41 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol, adopted 27 June 2014).

42 Ibid, art 14.

43 AU, 'Malabo Protocol Status List' (20 February 2025 <<https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>> accessed on 20 February 2025.

law, which has been greatly affected by conflicts and the lack of practical accountability. It specifically addresses legal gaps concerning the definition, scope, jurisdiction, and other issues related to IHL. Despite not having come into effect yet, this protocol has already encountered several contentious issues. For instance, Article 46A bis of the protocol provides an exemption for state leaders from prosecution during their time in office, as stated below.

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

Article 28E of the same protocol paradoxically includes an unconstitutional change of government as an international crime that falls under the jurisdiction of the ACJHR court.

African IHL has been unsuccessful in holding those responsible for war crimes to account, particularly when it comes to the leaders of states and governments.⁴⁴ This is due to several factors. Firstly, there is a lack of agreement between the AU and the ICC regarding the immunity of leaders.⁴⁵ The criticism directed towards the ICC centered on allegations of “targeting Africans” to the point where the court was labeled as an “International Caucasian Court”.⁴⁶ The disagreement reached peak when AU urged the ICC to drop charges against Al Bashir and Kenyatta, and called upon its member States not to cooperate with the ICC.⁴⁷ This notwithstanding that ICC states in Article 27 of its statute that “immunities

44 See African Union (Assembly of the Union) ‘Decision on the Progress Report of The Commission on The Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on The Rome Statute of The International Criminal Court (ICC)’ (AU Kampala, 27 July 2010) Assembly/AU/Dec.296(XV). See African Union (Assembly of the Union) ‘Decision on Africa’s Relationship with the International Criminal Court (ICC)’ (AU Addis Ababa, 12 October 2013) Ext/Assembly/AU/Dec.1(Oct.2013).

45 See Malabo Protocol 2003, art 46A bis; Rome Statute 1998, art 27.

46 See Siobhán O’Grady, ‘Gambia: The ICC Should Be Called the International Caucasian Court’ Foreign Policy (London, 26 October, 2016) <<https://foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/>> accessed 20 February 2025. See Torque Mude, ‘Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric’ (2017) 7 Open Journal of Political Science 178, 179-183.

47 See *Prosecutor v Omar Hassan Ahmad Al Bashir* (Second Decision on the Prosecution’s Application for a Warrant of Arrest) [2010] ICC-02/05-01/09-94. See *Prosecutor v Uhuru Muigai Kenyatta* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) [2012] ICC-01/09-02/11-382-Red.

shall not bar the Court from exercising its jurisdiction”

Secondly, the Malabo Protocol, which was designed to establish regional criminal jurisdiction over war criminals, has not been ratified by any African country since its adoption.⁴⁸ Similar to ICC, it is difficult to bring political leaders before Malabo court as long as the perpetrators are in power, despite the possibility of ratification.⁴⁹ Thirdly, the actions of African countries demonstrate a pattern of either withdrawal or lack of collaboration with the International Criminal Court. This approach entails neither cooperating with the ICC nor ratifying the Malabo Protocol. The factors mentioned above have led to a lack of justice for victims, despite the progressive inclusion of provisions in African IHL aimed at protecting civilians in general and refugees in particular.

Conclusion

The scattered nature of IHL provisions may go unnoticed, yet they nonetheless offer added protection for refugees in times of armed conflict. The implementation of IHL in the region is a source of controversies between the ICC and the AU. AU employed a strategic approach of establishing a regional criminal court. The implications of this proposed court with ICC remain uncertain. It was intended to have jurisdiction over criminal matters and ensure justice to all including refugees. However, the purpose of establishing this regional court has been unattainable for two primary reasons. To begin with, no state has ratified the protocol in the past ten years, and it is unlikely that any will do so in the foreseeable future. Secondly, even though the protocol is ratified, Article 46A *bis* would render the entire endeavor futile, as it exempts leaders of states from prosecution while they are in power.

To deal with these challenges, AU needs to introduce a comprehensive IHL instrument in general and refugee protection in particular. Furthermore, AU could opt to insist that its members ratify the Malabo protocol or cooperate with the ICC. If AU selects the former option, it must reassess the immunity clause and special protection to vulnerable sections of the society including refugees in the Malabo Protocol. Additionally, there is a necessity to amend and enhance the mandate of the regional Peace and Security Council to protect civilians and refer perpetrators to this regional court like is the case with the UN Security Council. Moreover, due to the

⁴⁸ AU (n 43).

⁴⁹ Malabo Protocol 2003, art 46A *bis*.

serious incidents of international refugee law and IHL violations in the region, AU and its member states should collaborate with ICRC, UNHCR and other relevant stake holders before and during armed conflicts.

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