

**AFRICA'S IMPERIAL PRESIDENTS:
IMMUNITY, IMPUNITY AND ACCOUNTABILITY***

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ABSTRACT

A fundamental tenet of modern constitutionalism is that nobody, regardless of his status is above the law. Extensive powers conferred on African presidents in the independence constitutions, reinforced by ineffective mechanisms of accountability and presidential immunities led to the phenomenon of “imperial” presidents who operated outside the law and regularly abused their powers. Constitutional reforms in the 1990s saw the introduction in many African countries of constitutions which for the first time provide some prospects for promoting constitutionalism and respect for the rule of law. This paper attempts to review the extent to which these reforms have addressed the issue of presidential absolutism and the abuses that go with it. It examines some of the factors that made African presidents to be so powerful that the conventional constitutional checks and balances could not restrain their excesses. It also reviews the attempts to limit impunity through immunity provisions. It concludes that unfortunately, the 1990 reforms did not adequately address the problem of presidential absolutism. A number of ways in which presidential accountability could be enhanced and the culture of impunity ended is suggested. Because it is argued that tyranny and authoritarianism is no longer simply a national but also an international problem, it is argued that the expanding reach of international justice is bound to make life difficult for present and future African dictators. It is thus clear that African leaders can no longer expect to easily get away with any abuses of powers, especially where these lead to the commission of international crimes against their people. The different measures, both national and international that are suggested to deal with the issue of presidential lawlessness and impunity may not eliminate these problems but nevertheless act as a deterrent by sending a clear message of the strong likelihood of punishment.

1. INTRODUCTION

In Africa, 2011 started with what came to be known as the Arab spring sweeping through northern Africa into other Arab countries in the Middle East. Widespread protests forced ruthless and long term dictators like Ben Ali of Tunisia, Hosni Mubarak of Egypt and Muammar Gaddafi of Libya out of power. Ben Ali was made to flee his country and is being prosecuted *in absentia*, Hosni Mubarak, in spite of his failing health, is being prosecuted for corruption and abuse of office. Meanwhile, Libya’s Gaddafi paid the ultimate price when he refused to voluntarily relinquish power and stubbornly tried to use the violence and brutality that had been the hallmark of his 42 years reign to hang on to power and lost his life in the process. In Morocco the monarchy survived after ceding more powers to constitutional oversight. In many respects, what was happening in northern Africa reflects what had happened in Sub-Saharan Africa in the early 1990s during the so-called third-wave¹ of democratisation. The overthrow of the three dictators

¹ Samuel Huntington coined the expression in, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, Norman, OK (1991), pp. 15-16. He defines a wave of democratization simply as a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly out-number transitions in the opposite direction during that period. He identifies two previous waves of democratization: a long, slow wave from 1828–1926, and a second wave from 1943–1962. Most writers consider the third wave to have started in the 1970s, although it only reached African shores in the late 1980s and early 1990s, in what Larry Diamond and others such as Julius Ihonvbere and Terisa Turner call “second liberation” or “second revolution”. See Larry Diamond, “Developing Democracy in Africa: African and International Perspectives”,

reinforced the determination of Africans to oust autocratic and incompetent regimes. Although as a direct consequence of the Arab spring, there were demonstrations and protests in some Sub Saharan African countries such as Cameroon, Senegal, Uganda, Malawi, Swaziland and Nigeria, these were easily suppressed by a reinvigorated leadership that had recovered from the 1990 surprises. Even then, in a historic first, Laurent Gbagbo, the former president of Côte d'Ivoire has become the first president to be arraigned before the International Criminal Court charged with crimes against humanity and other international crimes committed in his bid to hang on to power after losing presidential elections held in 2010.

The Arab spring marks another phase of the popular struggle for constitutionalism on the continent and is clearly in its early stages as is evident from the reversals in the attempted uprisings in Sub Saharan African states. In spite of this, it is becoming clear that the days when African leaders exercised and abused powers with almost absolute impunity are numbered.

A fundamental tenet of modern constitutionalism and an offshoot of its core principle of constitutional supremacy is that nobody, regardless of his status is above the law. In fact, constitutionalism proceeds from an assumption of human fallibility, the corrupting influence of power and the need to limit it. It treats all citizens and government officials from the highest to the lowest as creatures of the law who are bound to obey and act in accordance with the law. A concomitant of this is personal responsibility for any violations of the law. However, post-colonial Africa was characterised by leaders who had placed themselves above the law. The rapid changes made to post independence constitutions which resulted in the concentration and centralisation of power in one man, the president, and in one institution, the presidency was the root cause of the dictatorships that sprouted and flourished giving rise to political conflicts, repression, poverty and the numerous ills that have retarded the continent's development.

In spite of the progress made by constitutional craftsmen in the last two decades to design constitutions that promote constitutionalism by incorporating most of the core elements of modern constitutionalism such as separation of powers, judicial independence and bill of rights, recent studies have shown that the problem of presidential absolutism in Africa and the gross abuses that go with it remain a monumental challenge.² Many of the new or substantially revised constitutions adopted in the heat of the frantic attempts by states to display their democratic credentials appear to have merely paid lip service to separation of powers. Under many of these constitutions, especially those adopted by Francophone African states,³ overbearing and "imperial" presidents continue to reign and dominate the legislature as well as control the judiciary. This is often compounded by the absence of the traditional checks and balances or where these are present, they tend to be limited, too weak and ineffective. The problem of executive dominance is not only true of highly centralised and manifestly illiberal constitutions such as that of Cameroon and Eritrea but also under quite liberal constitutions such as those of

<http://democracy.stanford.edu/Seminar/DiamondAfrica.htm> ; see also Larry Diamond, "Is the third wave over?" *Journal of Democracy* (1996), pp. 20-21; Larry Diamond *et al* (eds.), *Consolidating the Third Wave of Democracies*, Baltimore, John Hopkins Press (1997); and Julius Ihonvbere & Terisa Turner, "Africa's Second Revolution in the 1990s," *Security Dialogue* (1993), pp. 349-352.

² See for example, Charles Manga Fombad, « Constitutional Reforms and Constitutionalism in Africa : Reflections on Some Current Challenges and Future Prospects, » *59(4) Buffalo Law Review* (2011), pp.1007-1107.

³ See André Cabanis and Michel Louis Martin, *Les Constitutions d'Afrique Francophone. Evolutions Récentes*, Edition Karthala, Paris (1999), p. 77.

Ghana, Namibia and South Africa. The imbalance in power among the three branches of government often means that the judiciary is not as independent as it should be and therefore cannot freely rule against the government, especially when dealing with delicate and sensitive issues such as disputes over closely contested elections, corruption and other forms of abuses of power. Executive lawlessness has become very common in countries such as Cameroon, Ethiopia, Eritrea, Nigeria, DR Congo and Zimbabwe.⁴ Executive dominance is often aggravated by the hegemonic influence of the dominant parties, which are often effectively controlled by the president and a small inner circle of cohorts. As a result, the one-party dominated parliaments merely rubber stamp laws put before them by the executive, in much the same way as was done by the pre-1990 one party parliaments.

The extensive abuse of presidential powers in Africa has also been facilitated by the general lack of effective constitutional measures of accountability and the numerous presidential immunities which enable leaders to escape from responsibility for their crimes.⁵ In fact, executive lawlessness, caused by the extensive powers conferred on presidents and the absence of effective checks on the exercise of these powers, is one of the major threats to modern Africa's slow and faltering steps towards entrenching a culture of constitutionalism. Bruce Baker, in a study of the fate of six former African tyrants is right, when he concludes that their treatment since the end of the Cold War which set off the process of democratic and constitutional reforms on the continent, has not seen a change and, that what has happened, "could at best be described as a change of gear: an extra notch or two of difficulty for past tyrants."⁶ Considering the continuous challenges to good governance and the rule of law in the last two decades, it is clear that many of the measures introduced in the post 1990 constitutions to make African leaders more accountable are failing. At the heart of this failure is the fact that by constitutional design or practice African Presidents still consider themselves above the law and this has been reinforced by the wide ranging immunities they have been granted from civil and criminal action. Although this paper argues that there is need to review and limit the nature and scope of presidential immunities, it will also be shown that even if these changes are not made, recent developments through the process of internationalisation of constitutional law principles clearly indicate that the prospects for present and future African tyrants is not rosy.

The paper will start by looking at some of the factors that have made African leaders so powerful that traditional checks and balances associated with modern constitutionalism have not been able

⁴ For example, John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth. An Eastern and Southern African Perspective*, Cambridge University Press, Cambridge (2004), at p.59 describes the situation after 1999 in Zimbabwe where the government incited so-called war veterans to invade and seize farms without due process of law and in doing so not only violated laws that it had passed through parliament but also ignored court orders and denigrated the judges who sought to assert the rule of law. As a result, the Zimbabwe Supreme Court in *Commercial Farmers' Union v Minister of Lands, Agriculture and Resettlement* (2001 (2) SA 925 (ZS) noted: "Wicked things have been done and continue to be done. They must be stopped. Common law crimes have been flouted by the Government. The activities of the past nine months must be condemned."

⁵ See John Hatchard, "Presidential Removal: Unzipping the Constitutional Provisions," 44 *Journal of African Law* (2000), p.1 *et seq*; and also see generally, John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth. An Eastern and Southern African Perspective*, *op. cit.* pp. 81-95. See also H Kwasi Prempeh "Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial presidency in Post-Authoritarian Africa" 35(4) *Hastings Constitutional Law Quarterly* 761.

⁶ "Twilight of Impunity for Africa's Presidential Criminals," 25(8) *Third World Quarterly* (2004), at p.1497.

to constrain their excesses. The next section will show how and why the timid measures designed to tame presidents combined with presidential immunities in recent constitutions have led to a culture of impunity for many serious abuses of powers. This will be followed by an examination of the different ways in which presidential accountability can be strengthened. Because tyranny and authoritarianism are no longer simply national but international problems, it will be shown that the rapidly expanding reach of international justice will make life more difficult for present and future African dictators. Nevertheless, since the limits of tyrants are set and defined by the level of tolerance of those who are directly and indirectly subjected to tyranny, the population must be ready to stand up for their rights, like the Arabs have been doing since the beginning of 2011.

2. THE PHENOMENON OF IMPERIAL PRESIDENTS

One of the most problematic legacies, inherited from the colonial powers which the 1990 reforms failed to deal with or in many instances, only did so symbolically is preventing the presidency from becoming too powerful, domineering and overbearing. Most constitutions, even in advanced democracies such as the US and France, make the president the sole repository of executive power to ensure that there is no confusion as to who bears ultimate responsibility for executive decisions. It is no surprise that some scholars have described the office as a “separate branch.”⁷ However, whilst in those advanced democracies, there are strong checks and balances reinforced by a history, culture, custom and tradition of constitutionalism and respect for the rule of law, which ensures that it does not overshadow and dominate the other branches of government, these inherent checks developed over centuries of practice are completely missing in Africa. With no history or long practice of constitutionalism to back the constitution, the written text remains the basis for any form of control that needs to be exercised to check the abuse of the enormous powers that these constitutions confer on presidents. The description of this as imperial⁸ powers is probably more accurate of the situation under these constitutions not only because of the scope of express and implicit powers but also the fact that African presidents often arrogate even more power to themselves. They rule and reign supreme directly or indirectly through other members of the executive branch and the ruling party which they control and sometimes even express disdain for the constitution.⁹ This is manifested in diverse ways both by the constitutional texts and the mode of governance. For example, most constitutions now provide for some form of separation of powers. The provisions dealing with this in the constitutions of Anglophone African countries allow for a partial intermixing of powers which to some extent is capable of limiting executive excesses. By contrast, the provisions in most

⁷ See Edward S. Corwin and Louis W. Koenig, *The Presidency Today* (New York University Press) 1956 at p.514.

⁸ The term “imperial presidency” is attributed to the seminal work of Arthur Schlesinger Jr titled, *The Imperial Presidency*, Boston, Houghton Mifflin (1973).

⁹ For example, Jacob Zuma in December 2006 declared that “the ANC is more important than even the constitution of the country,” in Zille, “The Retreat of Constitutionalism,” <http://www.polity.org.za/article/da-zille-the-retreat-of-constitutionalism-22072008-2008-07-22> It is no surprise therefore that as President, Jacob Zuma has had many of his decisions invalidated by the courts and in frustration more than anything else, is contemplating setting up a committee to “assess” the decisions of the Constitutional Court – another very dubious decision since it is not clear what the mandate of this committee will be, who its members will be and what decisions it will review and the effect its report will have. See, “Cabinet to Have Constitutional Court Decisions ‘Assessed’” <http://mg.co.za/article/2011-11-24-concourt-decisions-assessed-in-line-with-transformation/>

Francophone and Lusophone African constitutions have adopted the rather defective French Fifth Republic model.¹⁰ These provide for an overbearing president who dominates the legislature and controls the judiciary. A typical example of this appears under the Cameroon constitution where the purported separation of powers is purely symbolic.¹¹ Although the Gaullist model has been revised in many post 1990 Francophone and Lusophone African constitutions, the executive remains dominant.¹² In fact, the imperial president is a legacy of the inherited colonial legal order under which the all-powerful colonial governors combined the functions of legislature, executive and judiciary.

Before the 1990s, the judiciaries in Africa had been reduced into the handmaiden of the executive and were thus incapable of operating effectively either as guardians of the constitution, protectors of human rights or impartial enforcers of the rule of law. Recent constitutions now recognise and sometimes purport to protect the independence of the judiciary.¹³ As a result, there has been a progressive expansion of judicial power in Africa, very similar to that which has been noted in Eastern Europe since the breakdown of totalitarian communism and the disappearance of the Soviet Union.¹⁴ Judicial independence is at the heart of any credible constitutional system that is designed to promote and ensure respect for the law, especially by the most powerful person in the country, the president. The mechanism for appointing judges is therefore crucial. The emphasis is on an appointment process that is based on objective and transparent criteria and as free from political interference, especially from the president, as possible.¹⁵ Effective judicial independence in many African countries is often overshadowed by the powerful presence of the president intervening directly or indirectly in the appointment process. In Anglophone Africa, judges are appointed by the president and in most cases, this is based on the recommendations of a Judicial Service Commission. There is though some scope for presidential interference. It is in principle, less so under the South African constitution. Under section 174(3) of the South African constitution, the President, appoints the President and Deputy President of the Constitutional Court, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, but appoints the Chief Justice and Deputy Chief Justice after consulting the Judicial Service Commission. The other judges, including those of the Constitutional Court are also appointed by the President after consultations with the leaders of parties represented in the National Assembly following an elaborate procedure in which he is required to select the

¹⁰ See generally, Charles Manga Fombad, "Post 1990 constitutional reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism." in A.G. Nhema and P. T. Zeleza, *The Resolution of African conflicts*. OSSREA & James Currey, Oxford (2008), pp. 179-199.

¹¹ For example, article 37(2) of the Cameroon constitution states that "judicial power shall be independent of the executive and legislative powers," but then paragraph (3) proceeds to state that "the President of the Republic shall guarantee the independence of the judiciary," clearly indicating that the executive and judiciary are not co-equals.

¹² See *ibid.*

¹³ See further, Charles Manga Fombad, "A Preliminary Assessment of the Prospects for Judicial Independence in Post-1990 African Constitutions," *Public Law* (2007), pp. 233-257.

¹⁴ See C.Neal Tate & Torbjorn Vallinder (eds.), *The Global Expansion of Judicial Power*, New York, New York University Press (1995).

¹⁵ It must however be noted that judicial independence is a relative, and not an absolute concept. It does not refer to a single kind of relationship or something that a judicial system "has" or "does not have", but rather it may have "more of it" or "less of it". See The Asian Development Bank, Judicial Independence Project, "Judicial Independence Overview and Country-Level Summaries", available from www.abd.org/Documents/Events/2003/RETA5987/Final_Overview_Report.pdf (Last accessed 18-12-2011).

judges from a list of nominees submitted to him by the Judicial Service Commission.¹⁶ In Nigeria, the appointment of federal judges is also made by the President acting on the recommendations of the National Judicial Council but this is subject to confirmation by the Senate.¹⁷ In Botswana there is lesser scope for judicial independence because judges are appointed by the President acting on the advice of the Judicial Service Commission whose membership is dominated by presidential appointees,¹⁸ but more worrying is the fact that in appointing the Chief Justice, who is head of the judiciary and the President of the Court of Appeal, the highest court in the country, he acts alone.¹⁹ By contrast, the scope for judicial independence in Francophone and Lusophone Africa is quite limited because of the decisive role the president plays not only in the process of appointment but also in the promotion and disciplining of judges. The French model that has been widely copied in these countries has been significantly influenced by the Gallic obsessive fear of the threat of legal dictatorship through a “government of judges” that can be traced back to pre-revolutionary France. Under this model, the president is the guardian of the independence of the judiciary, clearly suggesting that the judiciary is not on the same par as the executive but rather below it. This conclusion is reinforced by the powers given to the president to appoint, promote, transfer, and dismiss judicial personnel, which effectively compromises their personal independence.²⁰ The very strong political interference in the process of judicial appointments, promotions, transfers and dismissals is often mildly disguised by provisions that require the president to act on the “advice” of, or receive the “opinion” of the Higher Judicial Council or similar bodies, which are bodies whose composition are essentially determined by him. He also determines when they meet, draws up the agenda and chairs the meetings.²¹ Because of this, such meetings usually take place merely to ratify decisions that have been tabled before them by the executive. Hence, in spite of constitutional provisions that require judges to act solely in accordance with the dictates of their conscience and to be guided only by the law,²² there is too much scope for political interference and manipulation of the judiciary for there to be any chance of either functional or personal independence.

Even where the executive-minded judges occasionally take decisions that do not favour the executives these are sometimes ignored to the detriment of impoverished litigants. Presidents usually take an oath to uphold and ensure that the constitution and laws of the land are faithfully executed. They often ignore unfavourable decisions or comply with them when it suits them. Poor compliance with court decisions is not only a problem of some notorious countries like Zimbabwe and Cameroon but also countries with good governance records such as South Africa²³ and Botswana. For example, in Botswana, the delay particularly in repealing provisions

¹⁶ See, Section 174 (4).

¹⁷ See, Sections 231-269 of the Nigerian Constitution.

¹⁸ See, Sections 96(2) and (3) and 100(2) of the Botswana Constitution as amended in 2002.

¹⁹ See, Sections 96(1) and 100(1) *ibid*.

²⁰ See for example, Article 37(3) of the Cameroon Constitution; Article 69 of the Constitution of Gabon; Article 89(1) of the Constitution of Mauritania; and Article 100 of the Constitution of Niger.

²¹ See for example, Article 37 (3) of the Cameroon Constitution; Articles 69-71 of the Constitution of Gabon; and Article 82 of the Constitution of Mauritania.

²² See for example, Article 37(2) of the Cameroon Constitution; and Article 90 of the Constitution of Mauritania.

²³ See, Malherbe and Van Eck, “State Non-compliance with Legal Duties: The Constitutional Court Finally Cracks the Whip,” *TSAR* (2009), p. 191, and Bulbulia, “Making the State Pay for its Misdeeds,” (2011) <http://www.lycomlawyer.com/Government/2731.htm> (last accessed 18-12-2011).

declared unconstitutional has left violations unremedied for several years until the government found it politically convenient to act. In the famous case of *Attorney-General v Dow*,²⁴ after the Court of Appeal declared certain provisions of the Citizenship Act unconstitutional, it took the Government several years to repeal the section. The same delay has been evident with respect to the amendment of other Acts whose provisions were declared unconstitutional by the courts.²⁵ The implications of these delays are not difficult to imagine; it usually means that a person or group of persons could be deprived of their fundamental rights for the length of time that it takes the Government to repeal the provision in an Act declared unconstitutional for violating the Bill of Rights. The problem of non-compliance is even more serious in some other countries. In Tanzania, Parliament nullified court judgments by amending the legislation.²⁶ In Swaziland, because the Government openly refused to comply with a number of decisions against it and the King,²⁷ culminating in the Prime Minister announcing on 28 November 2002 that the Government will not recognize the Appeal Court judgments as they sought to strip the King of his powers which he possesses since “time immemorial,” the six Court of Appeal justices resigned in protest and they resumed their functions a year later after the Government retracted the statement.²⁸

Constitutional design has also ensured dominance of the executive controlled by the president over the legislature. Executive dominance is often aggravated by the hegemonic influence of the dominant parties, which are usually effectively controlled and manipulated by the president and a small clique of his close supporters. As a result, the one-party dominated parliaments merely rubber stamp laws put before them by the executive, in much the same way as was the case under the one party regime of the recent past. Executive dominance of the law-making process is completed by the process of subsidiary legislation because of the absence of any meaningful parliamentary oversight. These anomalies are worst in the Francophone system where “executive legislation,” which is the main source of legislation, is usually outside the scope of judicial review for conformity to the constitution. It is no surprise that legislation, especially on electoral matters, deliberately designed to entrench the position of incumbent parties, have usually been approved with little resistance. The problem of weak and ineffective legislatures is particularly acute in Francophone and Lusophone African countries where the system of horizontal and vertical accountability is usually weak.

Limiting the frequent and arbitrary constitutional changes that were so common prior to the 1990s appears to have been on the minds of the constitutional reformers. Almost all African constitutions have now placed restrictions on the process of amending constitutions ostensibly to prevent presidents from making changes that will perpetuate their stay in power. A good number require that constitutional amendments should be approved in parliament by a special majority of

²⁴ [1992] BLR 119 at 154.

²⁵ See for example, *Kamanakao I & Others v Attorney-General & Another* [2001] 2 BLR 654.

²⁶ Whilst Parliament has a legitimate right to make legislation, it should not use its powers in such a manner that will bring the judiciary into repute by nullifying their decisions for no other reason than that they do not like the decision and not because they consider the law bad. See generally, Democratic Governance and Rights Unit (DGRU) (Linda Van De Vijver, ed.) *The Judicial Institution in Southern Africa. A Comparative Study of Common Law Jurisdiction*, Siber Inc, Cape Town (2006), at p. 199 hereinafter cited as DGRU Study.

²⁷ See *Zwane v Swaziland Government*; *Dlamini v Dlamini and Sikondze*; *Minister of Home Affairs et al v Fakudze et al*; and *Gwebu and Bhembe v Rex*, which are discussed in DGRU Study, *op. cit.* pp. 176-178.

²⁸ *Ibid.* pp. 178-180.

two-thirds or three quarters²⁹ or that failing such a majority, the proposed amendment be put to a referendum.³⁰ In some constitutions, amendments must not only get the approval of a special parliamentary majority but must also be submitted to a referendum.³¹ In spite of these constitutionally entrenched checks, one of the hallmarks of the 1990s constitutional rights revolution - constitutional provisions imposing term limits on the tenure of presidents - have rapidly and easily been removed in many countries facilitating the emergence life presidencies or “monarchies” such as in Cameroon, Equatorial Guinea, Togo, Gabon and Uganda.³² It is therefore an irony that in spite of two decades of democratisation Africa remains the least democratised region with some of the oldest and longest serving leaders in the world.³³

The exorbitant presidential powers that has provided the foundation for the “Big Man” syndrome that pervades the African political landscape is often reinforced by the attempts to shield African leaders from legal liability in constitutional immunities provisions. In some cases presidential accountability is further limited by impeachment provisions in the constitution. We shall now see how this further entrenches presidential dominance impunity.

3. PRESIDENTIAL IMMUNITIES IN AFRICAN CONSTITUTIONS

What appears to have made the extensive abuse of the excessive presidential powers in Africa possible is the wide ranging regime of presidential immunities which enables incompetent and corrupt leaders to get away with their crimes.³⁴ Do presidential immunities necessarily guarantee impunity? To answer this question, it will be necessary to examine the nature and scope of these immunities. But before looking at this it will be important to see whether there is a justification for their existence.

²⁹ See for example, Article 158 of the Angolan Constitution; Article 135 of the Constitution of Niger; and Article 116 of the Constitution of Gabon, which in addition, requires that proposals be put before the Constitutional Council for an opinion, although it is not clear what the purpose of such an opinion is. For example, will an adverse opinion mean that Parliament should not be allowed to discuss the proposal or that it should not be put to a referendum?

³⁰ See, article 116 of the constitution of Gabon; and article 135 of the Niger constitution.

³¹ See for example, section 89 of the Botswana constitution; article 178 of the constitution of the Republic of Congo; and article 118 of the constitution of Mali. Under article 99 of the constitution of Mauritania, the President may avoid the inconvenience of a referendum by ensuring that he obtains three-fifths votes of Parliament convened in congress.

³² See generally, Charles Manga Fombad and Nathaniel Inegbedion, “Presidential Term Limits and their Impact on Constitutionalism in Africa,” in Christina Murray and Charles Manga Fombad (eds.) *Fostering Constitutionalism in Africa*, Pretoria, PULP (2010), 1-29.

³³ The present record for longevity in power for some of the notorious “sit-tight” leaders is as follows: Teodoro Obiang Mbasago, 33 years in power, Jose Santos of Angola, 33 years, Robert Mugabe of Zimbabwe, 32 years, Paul Biya of Cameroon, 30 years, Yoweri Museveni, of Uganda, 26 years, Baise Campoare of Burkina Faso, 25 years, Mswati III of Swaziland, 25 years, Omar Bashir of Sudan, 22 years, Idriss Deby of Chad, 22 years and Isaias Afewerki of Eritrea, 19 years. As regards age, Robert Mugabe is 87 years old, Abdoulaye Wade of Senegal 84, Paul Biya, 78, Ellen Johnson Sirleaf of Liberia, 76, Bingu Wa Mtalika of Malawi 76 and Hifikepunye Pohamba of Namibia 75. The differences in age between the presidents in Africa and those of the developed world has been estimated at 25 years! See, “Ages of African Leaders”, <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=214951> and “African/World Leaders’ Ages Compared,” <http://groups.yahoo.com/group/africanvibes/message/8762>

³⁴ See John Hatchard, “Presidential Removal: Unzipping the Constitutional Provisions,” 44 *Journal of African Law* (2000), p.1 *et seq*; and also see generally, John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth. An Eastern and Southern African Perspective*, note 6 pp. 81-95.

3.1 The rationale for presidential immunities

The roles and special responsibilities and duties vested on the president as sole repository of executive power are enormous. Because of the huge and exacting nature of these responsibilities most constitutions have granted him immunity in absolute or qualified form to enable him discharge his duties with as much freedom as possible. The fear is that court proceedings are likely to distract his attention or embarrass and hamper him from concentrating on his responsibilities. The mere possibility of being sued could pose a serious distraction of the president's attention to his public duties. This is particularly important because executive power is usually vested in him alone or in those situations where he is required to use his own discretion. The risk of liability may make him reluctant to exercise his discretion for fear of attracting liability if things go wrong. Another justification is that the president in acting should be as free as possible from fears of any adverse consequences of his actions. The threat of liability could appreciably inhibit the fearless, vigorous and effective administration of government policies. This immunity is also intended to protect the dignity of the office of the president and not him personally. Presidents make decisions on matters that are far-reaching, sensitive and sometimes likely to arouse intense feelings. It is in the public interest for the president to act in a confident, skilful and decisive manner without the fear that a disgruntled citizen may sue him.

Historically, as a personification of the state, presidents were granted absolute immunity. The Common Law maxim of "the King can do no wrong," was received in many Anglophone countries.³⁵ In modern times, absolute immunity is difficult to justify. Whether or not the immunity succeeds to achieve the primary purpose of enabling the president to discharge his duties without the fear of potentially distracting proceedings and without placing him above the law will depend on the nature and scope of the immunity. We shall now examine the different approaches adopted under some African constitutions.

3.2 The nature and scope of presidential immunity and accountability provisions in African constitutions

In defining the extent to which presidents are immunised from civil and criminal proceedings, most of the immunity provisions in African constitutions specify the limits of their liability for acts and omissions committed either before or during their tenure. The nature and extent varies from country to country. The most significant general feature is that whilst most Anglophone African constitutions have separate provisions dealing with immunities and impeachment, Francophone African constitutions usually deal only with the issue of impeachment.³⁶ One may infer from this that beyond the circumstances of liability specified in the impeachment provisions, there is no other basis of liability but this is not very obvious from the general

³⁵ The basis for this rule was the wider principle that the King cannot against his will be made to submit to the jurisdiction of the King's courts. See Albert Dicey, *Introduction to the Study of the Law of the Constitution*, London, Macmillan & Co. Ltd (1945), at p. 527; and William Blackstone, *Commentaries on the Laws of England*, William Browne, ed .St. Paul, West Publishing (1897).

³⁶ A notable exception to the general pattern in Anglophone African constitutional practice is South Africa where the constitution only deals with presidential impeachment.

scheme of things. For convenience of analysis more than anything else, we shall discuss the nature and implications of the immunity provisions before looking at the impeachment provisions.

3.2.1 Absolute and Qualified Immunities

The first form of immunity arises in those situations where the president, or in this specific instance, the King, is granted absolute immunity from both civil and criminal proceedings. For example, section 50 (1) of the Lesotho constitution states:

“Whilst any person holds the office of King, he shall be entitled to immunity from suit and legal process in any civil cause in respect of all things done or omitted to be done by him in his private capacity and to immunity from criminal proceedings in respect of all things done or omitted to be done by him either in his official capacity or in his private capacity.”

Another instance of such absolute immunity appears under section 11 of the Swaziland constitution which states that, “the King and *iNgwenyama* shall be immune from – (a) suit or legal process in any cause in respect of all things done or omitted to be done by him.” Such absolute immunity is potentially unproblematic in the case of Lesotho where the King is a constitutional monarch and is thus not likely to engage in any activities that could incur liability. It is however a problem in Swaziland, where in spite of the existence of a constitution, the King remains an absolute monarch and the presidential immunity simply places him above the law.³⁷

The most common form is qualified immunity which is found in most Anglophone African constitutions and covers criminal liability. For example, section 41 (a) of the Botswana constitution states:

“Whilst any person holds or performs the functions of the office of President no criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official capacity or in his private capacity.”

This is rather too broad and would enable the president to get away with serious crimes committed whilst in office even crimes committed in order to prolong his stay in power and escape from prosecution.

Whilst recognising the importance of immunity from criminal prosecutions, certain constitutions have however qualified this form of immunity. For example, article 127(1) of the Angolan and article 43(1)(b) of the Equatorial Guinea constitutions exclude from such immunity, impeachable offences.³⁸ Qualifying immunity from criminal prosecutions in this way is very important in those constitutions which have no provisions providing for the impeachment of the president in the case of certain serious crimes. The recent Kenyan constitution in article 143(4) qualifies the immunity further by stating that it will not extend to a crime for which the president may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity.

³⁷ See generally, Charles Manga Fombad, “The Swaziland Constitution of 2005: Can Absolutism be Reconciled with Modern Constitutionalism?” 23 *SAJHR* (2007), pp. 93-115.

³⁸ Also see article 91(2) of the Malawi constitution.

Under some constitutions presidential immunity from prosecution is for life and may only be lifted by parliament if it considers this to be in “the public interest.”³⁹ An example of this is section 43(3) of the Zambian constitution.⁴⁰ Parliament had to intervene and lift former President Chiluba’s immunity before criminal proceedings were brought against him for corruption.⁴¹ Under article 133 of the Angolan constitution, a former president loses his immunity if he was removed from office. A variant of post-tenure immunity appears under article 57(6) of the Ghanaian constitution which only allows civil or criminal proceedings to be instituted against a former president for acts or omissions committed during his tenure if such proceedings are brought within three years after he ceases to be president. A rather odd approach is adopted in article 115 of the Burundian constitution which prohibits any prosecution of a former president if no proceedings were commenced against him when he was in office. This ignores the fact that some of these crimes may only become known after he leaves office.

In spite of the apparently clear terms in which presidential immunity from criminal proceedings is often expressed, the interpretation of such provisions has sometimes provoked controversy. For example, although section 308(1)(a) of the Nigerian constitution of 1999 states that no criminal proceedings shall be instituted or continued against the president and other specified officials, the Nigerian Supreme Court, in *Fawehinmi v Inspector General of Police*,⁴² held that this did not preclude the police from investigating a criminal complaint made against the president or any of the specified officials. It however made it clear that such an investigation did not extend to questioning the officials protected by the immunity provisions until they have left office. Although one may doubt the usefulness of any investigations which excludes questioning the officials until they leave office, for reasons that will shortly be explained, it is better than commencing an investigation only after they have left office.

As regards civil liability, although most immunity provisions restrict immunity from civil proceedings for official acts or omissions committed during the period when the president is in office, there are some differences in approach. For example, under article 43(2) of the Equatorial Guinea constitution, there is immunity from any civil action for an act or omission committed in an official capacity when the president leaves office. It is not clear here why the state cannot be sued. The Tanzanian constitution allows civil proceedings to be brought against the president for an act or omission committed in a private capacity before or after the president assumed office provided 30 days’ notice is given. This is quite unique but an important way of enhancing presidential accountability.

In spite of the desirability of protecting presidents from distracting and sometimes politically motivated vexatious actions, there are serious problems with immunities especially when it relates to crimes committed before they assumed office. First, there are too many serious question raised as to why a person who lives under the cloud of criminal prosecution should be

³⁹ A different approach is adopted by the Sudanese constitution which in article 45 empowers the National Assembly to strip the President of his immunity from criminal action.

⁴⁰ See article 69(3)(b) of the constitution of Gambia, and article 31(3)(b) of the constitution of Namibia.

⁴¹ A special session of Parliament lifted his immunity on 18 July 2002. See Taylor Scott. "Beyond Neopatrimonial Leadership: The Prosecution of Past Presidents in Africa" Paper presented at the annual meeting of the International Studies Association, Hilton Hawaiian Village, Honolulu, Hawaii, 5 March 2005(unpublished) and “ Court Blocks Chiluba Prosecution,” <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=4983>

⁴² [2002] FWLR (Pt. 108) 1355.

allowed to stand or stay in an office as important as that of president without clearing his name. Should the fact that such action is pending not be sufficient to cast doubt about his credibility to run such an office? Can a person over whom a cloud of suspicion for say, embezzlement or corruption really be expected to run a clean government? Would he not use his time in office either to cover up or prolong his stay in power to benefit from the immunity or even change the law to escape from liability? The record of mismanagement and embezzlement of African leaders is sufficiently bad to indicate that presidents who allegedly committed crimes before they assumed office are likely to continue. South Africa's President Jacob Zuma is a living example of what happens. He came to power when serious allegations of corruption against him were withdrawn by the National Prosecuting Authority under dubious circumstances. Today corruption and embezzlement of public funds by ministers and other highly placed public figures flourishes whilst the level of unemployment, poverty and poor service delivery protests have become the order of the day.⁴³ What better evidence can be provided to show that such persons should never be allowed to occupy the highest position in the state? The second problem is that such leaders may use their period in office to destroy the evidence or intimidate witnesses. Although in most cases, it is usually provided that where provision is made by any law limiting the time within which proceedings of any description may be brought against a former president, the period in office shall not be taken into account in calculating any period of time prescribed, this may not be of very much help. African leaders are well noted for prolonging their stay in office and the progressive removal of the term limits introduced in the 1990s suggests that the continent is steadily moving towards life presidencies which guarantee impunity. Even in those cases where the president retires, given the record of long tenures, by the time they leave office, it might be too late to bring an action. Witnesses might have died or their recollection of events may no longer be accurate and reliable. Investigations carried out during the president's term in office, as the Nigerian case of *Fawehinmi v Inspector General of Police* may help but will not entirely eliminate the complications of lapses of memory in post-tenure prosecutions.

Ultimately, whether or not the limited scope for accountability provided by these immunity provisions can be used to curb presidential excesses depends on the courts. Regardless of the facts, finding presidents liable for wrongful acts or omissions committed in office is not something that African judges will easily do, especially where this relates to a sensitive political issue. This is true not only for countries with a poor governance record. A recent court case in Botswana, a country that has gained an international reputation as Africa's leading example of a transparent and fully functioning multiparty liberal democracy and a relatively independent judiciary, is a sombre reminder that in the absence of water tight restrictions, African leaders will almost stop at nothing in their attempts to neutralise their opponents and cling on to power. In the case, *Gomolemo Motswaledi v Botswana Democratic Party, Seretse Khama, & Others*,⁴⁴ because of factional in-fighting within the ruling Botswana Democratic Party, the President of the Republic and also President of the party, in his capacity as the latter decided to suspend the appellant (the secretary general of the party) from the party. This effectively prevented the appellant from standing for parliamentary elections and even more significantly, it tilted the balance between the competing factions within the party in favour of the President's faction.

⁴³ See, "Our Greedy Government," <http://www.extraordinaire.co.za/search/our-greedy-government.php> which provides a comprehensive list of numerous corrupt activities that senior government officials and politicians have been involved in.

⁴⁴ See, Court of Appeal No. CACLB-053-2009.

When the applicant challenged the legality of the President's action, the latter successfully relied on section 41(1) of the Botswana constitution which states that no civil proceedings shall be instituted against the President with respect to anything done or omitted to be done in his private capacity. This is one of the frequent and numerous instances when presidential immunities are used in Africa to unfairly neutralise political opponents and violate the spirit of the constitution which all presidents take an oath to defend and protect. It is also one of the numerous instances when deferring legal action to when the president retires will make no sense.

The Botswana case shows that once the president's conduct comes within the scope of the immunity, whether it be absolute or qualified immunity, the president's motive is irrelevant; the immunity operates as a complete bar to the action. The effect of the immunity is therefore to override the president's permanent and fundamental duty as a citizen to act within the law. This certainly cannot be fair for a person who is the chief law enforcer and the protector of the constitution who is supposed to lead by example. This is particularly so when the President is, as in this case, was certainly acting in his personal capacity and was acting for his personal benefit rather than in the interest of the country. This was arguably an abuse of presidential powers. Unlike many other countries, the Botswana constitution does not provide for the impeachment of the president when he abuses powers. In those constitutions that have impeachment provisions, could abuses of the immunity provisions be checked by the impeachment provisions?

3.2.2 The nature, scope and effect of impeachment provisions

Impeachment proceedings potentially provide the most potent method of punishing abuse of office under modern African constitutions. This however depends on the nature and scope of crimes covered and the manner in which the proceedings are conducted. This is the only form of accountability for crimes committed in office by presidents provided for under most of the constitutions of Francophone Africa and the approach adopted is markedly different from that under Anglophone African constitutions.

Under most of the Francophone African constitutions, the only ground for impeaching the president is treason.⁴⁵ Others are more elaborate. For example, article 138 of the constitution of Burkina Faso includes any violations of the constitution and misappropriation whilst article 173 of the Chadian constitution includes threats, grave and systematic violation of human rights, misappropriation of public funds, corruption, drug trafficking, introduction of toxic waste, and disposing or storing this on national territory. Proceedings are usually conducted before either a Court of Impeachment or a High Court of Justice composed of members of parliament and judges of the Supreme Court.

Under other constitutions, mainly those of Anglophone Africa, many of the provisions on impeachment are very elaborate. Impeachable crimes include the following:

- i) Crimes of treason and espionage
- ii) Fraudulent conversion of public funds and any other dishonest acts prejudicial or inimical to the economy.
- iii) Wilful violation of the constitution, abuse of office, wilful violation of the oath of allegiance.

⁴⁵ See for example, article 53 of the Cameroon constitution and article 78 of the constitution of Gabon.

- iv) Any conduct that brings or is likely to bring ridicule to the office of president, or contempt and disrepute.
- v) Heinous crimes
- vi) Any acts which violate the democratic state, rule of law, state security or the regular functioning of the institutions of the state.⁴⁶

Some go even further. Article 143(1) of the Kenyan constitution provides for the impeachment of the president where there are “serious reasons for believing that” he has committed a crime under international law. Article 46(A)(2)(a) and (b) makes it an impeachable crime for the president to violate any law concerning the ethics of public leaders or contravene the conditions concerning the registration of political parties specified in article 20(2) of the constitution. Under article 46A(5) of the Tanzanian constitution and article 175 of the Chadian constitution the president is required to vacate his office immediately when allegations are made against him and the impeachment proceedings commence. In most cases, a special committee, usually of parliament is constituted to investigate the allegations and make recommendations to parliament. A supermajority vote of 2/3 in favour is required for the president to be impeached.

The scope of crimes for which the president may be impeached under many African constitutions should under any minimal standards of constitutional justice deal with all the abuses that are regularly taking place in Africa. Even the Ugandan constitution in article 107 lists most of the crimes indicated above as impeachable. Yet nothing has been done to the president who in the last few years has been accused of massive embezzlement, frequent violations of the constitution including the changing of the term limits provisions after bribing members of parliament, frequent rigging of elections and regular harassment of the opposition.⁴⁷ Why have these elaborate impeachment provisions failed to check the abuses of power that are a daily occurrence in Africa?

A number of factors have practically reduced the impeachment provisions into dead letters *ab initio*. A major problem is that the impeachment process in Africa as in most other countries in the world is a political more than a legal process. It has effectively been neutralised by Africa’s farcical democracy. Dependent as it is on the weight of parliamentary majorities, it is difficult to see how it can ever effectively work or pose a veritable threat to the abuse of office by Africa’s imperial presidents. Not only do the progressive institutionalisation of dominant parties render this impossible but even the term limits which should have ensured an alternation of power have rapidly been removed and opened the way for life presidents and impunity. But perhaps more challenging is the fact that even where term limits survive, they can at most only ensure that an old imperial president is replaced by a new one with the help of the powerful and deeply entrenched dominant parties and continues from where his predecessor ended. With the rare exceptions of Zambia and Malawi where the incoming presidents from the same parties as their successors tried to hold their predecessor accountable for their misdeeds in power, it is increasingly unlikely that future African leaders who come to power through electoral

⁴⁶ See article 129 of the Angolan constitution, article 41(6) of the constitution of Equatorial Guinea, article 67 of the constitution of Gambia, article 69(1) of the constitution of Ghana, article 145 of the Kenyan constitution and article 89(1) of the South African constitution.

⁴⁷ See for example, “Corruption Endemic in Uganda,” <http://www.guardian.co.uk/katine/2009/mar/13/corruption-endemic-in-uganda> and “Uganda: Oil Deals: MPs Boycott Museveni Meeting,” <http://fr.allafrica.com/comments/list/aans/post/post/id/201112060925.html>

manipulation of the emerging dominant parties will want to rock the boat by trying to prosecute their successors for crimes that they might have committed. The culture of “scratch my back, I scratch your back” is too deeply embedded for this to happen. It would appear from this that the present and future African strong men can continue to be as tyrannical, corrupt, repressive and incompetent as ever and can expect to get away with it. In spite of this apparently gloomy prospects, it is contended that the present accountability measures need to be strengthened but more importantly, the days of impunity are disappearing because of the expanding reach of international justice.

4. STRATEGIES FOR STRENGTHENING ACCOUNTABILITY AND ELIMINATING PRESIDENTIAL IMPUNITY FOR ABUSE OF POWERS

As Daniel Kaufmann has rightly pointed out, history has repeatedly shown that even those who come to power with good intentions soon become corrupt.⁴⁸ He notes that they take advantage of their position to enrich themselves and their family and friends. In order to accomplish this, they silence those who threaten their position and as one injustice leads to another and their friends fewer, they grow more paranoid and oppressive. They desperately cling to power for fear that if they lose control, they will not only lose their fortune and freedom but possibly their lives. There is therefore need to strengthen the accountability mechanisms before African leaders begin to think of entrench themselves once in power. Limiting the scope of presidential powers and immunities is now necessary. Failing this, there is the possibility of civil action to check presidential excesses. But perhaps the most potent weapon against corrupt and repressive leaders today is the expanding reach of certain international measures that may be taken against them. These various options will now be briefly considered.

4.1 Limiting the scope of presidential powers and immunities

Three particularly problematic aspects of presidential powers need to be re-examined in order to curb the pervasive abuse of powers that has continued under the post 1990 constitutional dispensations.

The first of these is the power of making appointments to certain positions. Specific criteria must be laid down to ensure that all presidential appointments especially for senior positions in the military, the public service and the judiciary are informed by clearly defined objective criteria based on experience, expertise and qualifications which limit the scope for partisan political considerations. In particular, there is need to ensure that commissions which make the necessary recommendations for appointments, such as the Higher Council of Magistracy (in Francophone countries) or the Judicial Service Commission (in Anglophone countries) are genuinely independent and its membership constituted in a manner that those appointed directly or indirectly by the Government should never make up more than one third of the membership. Thus, although the appointments are made by the Government, the appointment process must be such that merit rather than political considerations should be the decisive factor.

⁴⁸ Cited by Tesfaye Habisso, “The Problematic of Leadership Succession in Africa: Why do Leaders Cling to Power?,” <http://www.starafrika.com/en/news/orange-african-social-venture-prize/detail-news/view/the-problematic-of-leadership-succession-171878.html>

Second, there is need to fundamentally restructure the modern state to reduce the excessive concentration of powers that has led to “imperial” presidents operating from state capitals where too much power and decision-making has also been concentrated. To enhance the quality and practice of democracy and accountability as well as recognise cultural and ethnic diversity and also promote equal and equitable development, there is need in many countries for devolution or decentralisation of power in order to establish new centres of authority and policy-making. The need to enable people today to have a greater say in the running of their daily lives cannot be gainsaid but the exact form that the devolution should take will depend on the complexity of the society. For example, this requires more effective steps towards the decentralisation of powers through federal systems in certain complex multiethnic societies such as Nigeria, Ethiopia, Sudan, and South Africa. On the other hand, Francophone Africa will need to overcome the Gallic obsession with centralisation of powers especially to defuse regional tensions in countries such as Senegal, Cameroon⁴⁹ and DR Congo. What is actually needed is effective local government and not merely local administration which is what is provided for under many of the present unitary and highly centralised constitutional structures.

Third, term prolongations do not only threaten the budding seeds of democracy and constitutionalism but often drive presidents to extremes such as murdering political opponents who threaten their positions or siphoning state funds to buy political support. Presidential term limits was one of the major innovations in the post-1990 period and became a standard provision in most African constitutions have been amended in many constitutions.⁵⁰ It is submitted that the successful and effective constitutionalisation of two terms limits provisions, which is a crucial measure in strengthening Africa’s fragile democracy, requires the introduction of some protective measures and incentives that will accommodate the sometimes legitimate fears of incumbents to encourage rulers to retire gracefully. Term limit provisions should therefore guarantee former leaders a certain minimum level of personal protection, as well as benefits and privileges befitting their status and role as former presidents. One of these measures is protection against future politically motivated persecution, the risk of which may not necessarily come from opposition parties but as recent history shows, from the party of the former president.⁵¹ Furthermore, term-limit provisions need to be entrenched so as to make their amendment extremely difficult.

As regards immunity, the constitution should allow for presidential immunity with respect to both civil and criminal proceedings, but in order to ensure that this immunity does not become a licence for abuse of powers, the following should be exceptions:

⁴⁹ Charles Manga Fombad, “Cameroon’s Constitutional Conundrum: Reconciling Unity with Diversity”, in Kenyan Section of the International Commission of Jurists and Konrad Adenauer Stiftung, *Ethnicity, Human Rights and Constitutionalism in Africa*, Kenyan Section of the International Commission of Jurists, Nairobi (2008), pp.121-156.

⁵⁰ More recently, former president Mamadou Tandja of Niger tried but failed to pressurise Parliament to amend the constitution in order to secure a third term in office. He then proceeded to organise a referendum through which the term limit was removed. As a direct result of the political crisis that this provoked, he was overthrown in a military coup in February 2010. See, “Niger: Who needs presidential term limits.” <http://allafrica.com/stories/200908170007.html>

⁵¹ This is fully discussed in Charles Manga Fombad and Nathaniel Inegbedion, “Presidential Term Limits and their Impact on Constitutionalism in Africa,” *op. cit.*

- i) crimes or wrongs committed before the president assumed office. To reduce the risk of corrupt leadership, the presidential office should be reserved for those who have a clean record and not those who want to use the office to escape liability for their past misdeeds.
- ii) any private act that amounts to abuse of the official position for private ends as well as any act that violates the spirit of the constitution.⁵²
- iii) immunity should be limited only to those acts, whether private or official that are in bona fide exercise of the presidential duties. Courts should have the discretion to deny immunity where they come to the conclusion that the action will not materially affect the president's ability to defend his interests, nor significantly harm national interests or interfere with the proper discharge of his duties.

Even in the absence of such constitutional changes, there are possibilities of making presidents accountable through civil recovery action.

4.2 The civil recovery action

An important measure that could help to enhance accountability in Africa is the possibility of using the civil recovery action to recover funds illegally obtained through the misuse of presidential powers. It has the advantage that the action could be brought against funds located anywhere in the world and the case can be brought by any interested party and the action is not affected by the fact that the president is now deceased or has fled to a safe haven. Three key elements are usually associated with the civil recovery action *viz*, tracing of assets, freezing them and their forfeiture. The two best examples of the use of this procedure to recover funds involved the former Nigerian military dictator Sani Abacha and the former Zambian president, Frederick Chiluba.⁵³ This action has many advantages.⁵⁴ It focuses solely on recovering the benefits of the looting of state assets. Since there is no need for a conviction, the burden of proof is lower. The case can be heard in any country and not necessarily the home country of the president and thus the presidential immunities will not apply or even if they do apply, this does not prevent the action being brought against the family or associates of the president. The possibility of a civil recovery action neutralising the effects of presidential immunities that attempt to shield a president from accounting for illegally acquired wealth could serve as an effective deterrent to presidential corruption. The effectiveness of this process however depends on states worldwide being prepared to counter corruption and other abuses of powers. In this regard, the international stance against abuse of power is a manifestation of the expanding reach of regional and international justice that needs to be explored because of its potential to strengthen Africa's faltering move towards constitutional governance.

4.3 Accountability arising from the expanding reach of regional and international justice

⁵² If these standards were followed, the Botswana Court of Appeal would not have allowed the President of Botswana to use presidential immunity as a means to get rid of his political rivals in *Gomolemo Motswaledi v Botswana Democratic Party*, *op. cit.*

⁵³ For a discussion of both cases, see John Hatchard, "Strengthening Presidential Accountability: *Attorney-General of Zambia v Meer & Desai & Others*," 5 *Journal of Commonwealth Law and Legal Education* (2007), pp. 69-76.

⁵⁴ *Ibid.* at p.70.

For decades, the principle of sovereignty and non-interference in the domestic affairs of states enshrined in both the Charter of the United Nations and that of the Organisation of African Unity (OAU), enabled African leaders to get away with flagrant abuses of powers. However, from 1945, numerous international instruments both at regional and international level laid down minimum standards of human rights protection and have monitoring bodies to scrutinise national performance. Besides obligations voluntarily undertaken under international treaties, perhaps the most significant development today is the growing number of regional and international frameworks that are designed to put pressure on African leaders to conform to certain constitutional standards of governance. Democracy, good governance, respect for the rule of law and respect for human rights are no longer matters that are within the absolute discretion of states. Because of the increasing internationalisation of certain fundamental constitutional law principles at both regional and international level, African leaders who abuse their powers may well escape domestic accountability but will remain liable because of the obligations arising under the different regional and international instruments that the country has signed. The two main frameworks for countering presidential impunity, one at regional level and provided for by the African Union (AU) and the other at the international level, and provided for by the International Criminal Court processes will now briefly be discussed.

4.3.1 The African Union mechanism

In the 1960s and 1970s, the predecessor of the AU, the OAU was too busy trying to eradicate all forms of colonialism to bother about democracy and good governance. In fact, its Charter did not provide it with the powers to intervene and the organisation was impotent and therefore kept silent when civil wars ravaged member states. It did not show much concern over the frequent gross human rights violations by some of the continent's bloodiest dictators, such as Francisco Macias Nguema of Equatorial Guinea, Jean-Bedel Bokassa of the Central African Republic and Idi Dada Amin of Uganda. Unlike the Charter of the OAU, the preamble of the Constitutive Act of the AU emphasises the importance of democracy, human rights and the rule of law. Like its predecessor, the AU also reaffirms the principles of sovereignty and non-intervention as well as prohibiting the use of force or the threat of the use of force amongst member states but this is heavily qualified. The AU can now intervene in member states under article 4(h) of the Constitutive Act in respect of grave circumstances specifically defined as amounting to "war crimes, genocide and crimes against humanity." Under article 4(o), the AU rejects "impunity" and paragraph (p) states that it condemns and rejects "unconstitutional changes of governments."

With the above provisions there should be no excuse for the AU not acting and using military force if necessary when a leader seeks to prolong his stay by using military force that threatens the life of his people and possibly international security. It has however been very wary when dealing with violations by some of the big states. When there was a coup d'état in Anjouan, the organisation had no hesitation in ordering an invasion of the island under what was code-named "Operation Democracy in Comoros" on 25 March 2008. Although there had been similar coups in other countries both before and after 2008 the organisation has often done nothing more than threaten or impose ineffective sanctions against the coup plotters.

By adopting article 4(h) the AU became the first international organisation to formally recognise the concept that the international community has a responsibility to intervene in crisis situations

if the state is failing to protect its population. It was only during the 2005 World Summit that member states of the UN accepted this responsibility to protect (R2P) principle as a norm of international law.⁵⁵ Although aspects of this principle have been expressed in one form or another over the years,⁵⁶ the modern foundations for this principle appear to have been the Responsibility to Protect Report submitted by the International Commission on Intervention and State Sovereignty (ICSS), set up by the Canadian Government in September 2000. Based on the idea that sovereignty is not a privilege but a responsibility, it outlined the responsibilities which the international community has to prevent and halt four crimes: genocide, war crimes, crimes against humanity and ethnic cleansing. Critics have claimed that the R2P principle is an imposition of the West on developing countries, but as Edward Luck points out, the early endorsement of the principle in a less caveated version by the AU suggests otherwise.⁵⁷ The principle is considered to have at least three parts. First, the principle that the state has responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing (that is, mass atrocities). Second, the principle that if the state is unable to protect its population on its own, the international community has a responsibility to assist the state by building capacity. This could be done in several ways; such as by means of building early-warning capacities, mediating conflicts between political parties, strengthening the security sector, and mobilising standby forces. Finally, there is the principle that if the state manifestly fails to protect its citizens from mass atrocities and peaceful measures do not work, the international community has the responsibility to intervene, first diplomatically, then more coercively, and as a last resort, with military force. What is clearly emerging is that intervention for human protection purposes, including military intervention without a state's consent is legitimate in extreme cases when major harm to civilians is occurring or imminently apprehended and the state in question is unable or unwilling to end the harm or is itself the perpetrator of the harm.⁵⁸ This R2P principle must be seen as an attempt by international law to ensure accountability and good governance, protect human rights, promote social and economic development and ensure a fair distribution of resources within the state. Although the nature, scope, tools and emerging practice is still subject to debate, it is nevertheless clear that a president can no longer violate the human rights of his people on the scale that was done by Idi Amin, Jean-Bedel Bokassa and Marcias Nguema and expect the AU to ignore this. The fact that the AU has failed to act in spite of the repeated allegations of genocide in Darfur however reflect the challenges that the organisation faces in implementing its very progressive foundation document. In fact, the record of the AU so far in dealing with abuses by African leaders in

⁵⁵ See the 2005 World Summit Outcome Document adopted by the General Assembly, http://www.srhhivlinkages.org/uploads/docs/articles/worldsummitoutcome_2005_en.pdf In 2006, the Security Council in Resolution S/RES/1674 reaffirmed key paragraphs, 138 and 139 which attempt to define the scope of the responsibility to protect principle.

⁵⁶ See, these are cited by Edward C. Luck, "The Responsible Sovereign and the Responsibility to Protect," in Joachim W. Müller and Karl P. Sauvant (eds), *Annual Review of United Nations Affairs*, Oxford University Press, Oxford (2008).

⁵⁷ "The United Nations and the Responsibility to Protect"
http://www.humansecuritygateway.com/documents/TSF_theUNandR2P.pdf

⁵⁸ Further legal support for this form of intervention has been found to exist in a wide variety of other legal documents including the human rights provisions and chapter VII of the UN Charter, UDHR, the Genocide Convention, the Geneva Conventions and Additional Protocols on International Humanitarian law and the statute of the International Criminal Court. See further, "A New Approach: 'The Responsibility to Protect'"
http://www.idrc.ca/en/ev-28738-201-1-DO_TOPIC.html

circumstances that clearly appear to fall under article 4(h) is not good. In some of the crisis that have arisen and the organisation's response through a number of operations such as the African Mission Force in Burundi, the African Mission Force in Darfur; and its role in resolving the crisis in Cote d'Ivoire and Libya was less than forthright especially in the manner it reacted when the International Criminal Court issued an arrest warrant against Colonel Gaddafi. Nevertheless, the fact that the AU now has the powers to intervene in member states, especially where the abuse of powers by the leaders falls within the international crimes defined in article 4(h) of the Constitutive Act should act as deterrence against dictatorship.

4.3.2 Foreign Domestic and International courts processes

Since it is clear from the weak position of African judiciaries that, even without immunities, serving presidents will not be prosecuted in national courts for any crimes they commit, the possibility that they can be prosecuted abroad is crucial to putting pressure on them to avoid abusing their powers. There is in fact growing international determination to punish those leaders whose abuse of office amounts to international crimes.

As a general rule, international customary law accords serving presidents absolute immunity from any civil or criminal liability for public or private acts done while they are in office.⁵⁹ Where a president has committed what amounts to international crimes – genocide, crimes against humanity and war crimes there are two exceptions in relation to international tribunals and foreign domestic courts. A president may be tried in an international tribunal if the text of the treaty establishing the international tribunal so provides. A similar consideration applies to a foreign domestic court if the foreign domestic court has quasi universal or universal jurisdiction over such international crimes making it unlikely that a claim to absolute immunity will suffice. There are therefore two possible important international processes which can considerably help to limit impunity and promote good governance and respect for the rule of law in Africa.

The first of this is the ICC process. The Rome Statute of the ICC provides a good example of an international treaty that does not, in general, recognise the immunity of presidents. Its article 27 (1) states as follows:

“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

Article 27(2) further provides that “immunities or special procedural rules which may attach to the official capacity of a person, whether under a national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” It is therefore clear that the national

⁵⁹ See the ICJ in the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (February 14 2002) 41 ILM 536 (2002); the *Ghadaffi Case* (Cass. Crim. 2001) (Fr) 125 ILR 456; *R v Bow Street Stipendiary Magistrate ex parte Pinochet* (No. 3) [1999] 2 All ER 97; *Tachiona v Mugabe* 169 F. Supp.2d 259 (S.D.N.Y) 2001. See also Dapo Akande, “International Law Immunities and the International Criminal Court,” 98 *American Journal of International Law* (2004), p. 400; M.A Tunks “Diplomats or Defendants? Defining the Future of Head-of-State Immunity 52 (2002) *Duke Law Journal* 651.

immunities of African leaders will not avail them before the ICC should they be prosecuted for international crimes. However, as Akande notes, the removal of immunity vis-a vis the ICC by article 27 is not the end of the matter because the court does not have independent powers of arrest and must rely on states to arrest and surrender wanted persons.⁶⁰ The ICC process is designed to supplement and not supplant national legal systems and operates pursuant to the principle of complementarity. Thus, the ICC will not take jurisdiction where a country is genuinely “willing and able” to prosecute. Thirty three African countries out of 119 are state parties to the Rome Statute of the ICC and have therefore consented to its jurisdiction. Nevertheless, the relation between the ICC and the AU as well as a number of African countries has been soured because of the indictment of some African leaders. In 2011, during the 17th AU Summit, the organisation instructed African States to disregard the arrest warrant issued against President Gadhafi by the ICC much as it had done with respect to the ICC indictment of the Sudanese president, Omar Al Bashir for the international crimes he is alleged to have committed in Darfur.⁶¹ A number of African countries, such as Chad, Kenya, Djibouti and Malawi ignored the order and were referred by the ICC to the Security Council.⁶² It is however worth noting that state parties to the Rome Statute are under an obligation to implement it. Thus far, only Uganda⁶³ South Africa⁶⁴ Burkina Faso⁶⁵ Kenya⁶⁶ and Senegal⁶⁷ have domesticated the Statute thus enabling a framework that could try a foreign leader for international crimes. Other African States have amended their criminal laws to cover all or some of the international crimes provided for in the Rome Statute.⁶⁸ In many of these legislative provisions the constitutional immunity of presidents is of no consequence. For example section 27 of the International Crimes Act 2008 of Kenya and section 25(1) of the Ugandan International Criminal Court Act 2010. The legislation implementing the Rome Statute also confer universal jurisdiction on national courts empowering them to arrest serving leaders who are alleged to have committed international crimes.⁶⁹ Ultimately, the possibility of ICC proceedings for gross human rights violations remains a formidable threat that African politicians can no longer ignore. This is particularly important because the intervention of the ICC by operation of the complementarity principle only comes in when the national courts are unable or unwilling to prosecute alleged perpetrators of serious human rights violations, which will often be the case when dealing with a serving president from another state.

⁶⁰ *Ibid*, at p. 420.

⁶¹ See “African Union Members Agree to Ignore ICC Arrest Warrant Against Gadhafi,” <http://www.allvoices.com/contributed-news/9566298-african-union-members-agree-to-ignore-iccs-arrest-warrant-against-gadhafi-warrant/videos>

⁶² See, “International Criminal Court Refers African Countries to UN,” http://www.africanews.com/site/list_message/36573 but also see, “Kenyan Court Issues Arrest Order for Sudan’s Bashir,” <http://www.ibtimes.com/articles/257243/20111128/kenyan-court-issues-arrest-order-sudan-s.htm>

⁶³ See the International Criminal Court Act 2010

⁶⁴ See the Implementation of the Rome Statute of the International Criminal Court Act 2002.

⁶⁵ See Law 052-2009/AN of 31 December 2009 relating to the Determination of the Competence and Procedure in Implementing the Rome Statute of the International Criminal Court by Courts of Burkina Faso, Decree 2009-894/PRES 31 December 2009.

⁶⁶ See International Criminal Court Act 2008

⁶⁷ See Law No 2007-02 of February 2007

⁶⁸ See for example, the Penal Code 61-27 of 15 July 1961 of Niger was amended in 2003 by Law 2003-025 of 13 June 2003 to introduce crimes against humanity, genocide and war crimes; Arts 195 -198 Law 1/5 of 22 April 2009, amending the Penal Code of Burundi. to prosecute international crimes; the Criminal Code of Ethiopia 2005;

⁶⁹ See for example sections 17 & 18 of International Criminal Court Act of Uganda;

The second possibility is the use of the concept of universal jurisdiction which dispenses with the need to establish any territorial or physical link between the accused and the state asserting jurisdiction. The AU commissioned a study which formed the basis of the “Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States.”⁷⁰ The Commission in its decision noted that universal jurisdiction was a principle of international law which is recognised and incorporated in article 4(h) of the Constitutive Act of the AU. It however observed that the abuse and misuse of indictments against African leaders could have a destabilising effect and negatively impact on political, social and economic developments on the continent and therefore declared that warrants based on universal jurisdiction should not be executed against AU member states.⁷¹ Whilst it is clear that there is some potential for universal jurisdiction to be abused, it is not clear why the AU should want to intervene especially when universal jurisdiction is also based on treaties such as the Geneva Conventions (in respect of grave breaches of the laws of war), the Genocide Convention and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which some African Governments voluntarily ratified. The possibility of universal jurisdiction being used to indict African leaders was obviously the main reason for the AU taking this position. Although the prospects of this happening on a regular basis remains controversial, it can be said that the ICC process hangs like a sword of Damocles over human rights violations in Africa. Yet many African countries have ratified the Rome Treaty although they have been rather slow to domesticate it. Because the ICC clearly reflects the AU’s revulsion against impunity for gross violations of human rights the only reason why the latter is opposed to it must be the threat it poses to African dictators.

5. CONCLUSION

In the aftermath of the Arab Spring and its nascent African counterpart, it would appear that a realisation has set in that it will no longer be business as usual. While greater scope for holding African leaders accountable is now emerging, the impact of this on the standards of governance is yet to be felt. Although African leaders can no longer hide behind sovereignty, non-intervention or constitutional immunities to abuse the exorbitant powers that they often arrogate to themselves, more needs to be done to eliminate impunity for abuse of powers and enhance accountability.

Presidential immunities of a clearly defined and limited scope are necessary for the proper discharge of the onerous duties that are bestowed on leaders. This must however be carefully balanced with the need to ensure accountability. Presidents who usually swear an oath to defend and enforce the constitution must never be allowed, through either sloppy draftsmanship or the indolence of the citizenry to operate above the law. African leadership should no longer be associated with abuse of power and impunity.

⁷⁰ See Thirteenth Ordinary Session of the Executive Council, 24-28 June 2008, EX.CL/411(XIII).

⁷¹ See AU Assembly decision on the abuse of the principle of universal jurisdiction at [http://www.africa-union.org/root/ua/Conferences/2010/juillet/Summit_2010_b/doc/DECISIONS/Assembly%20AU%20Dec%20289-330%20\(XV\)%20_E.pdf](http://www.africa-union.org/root/ua/Conferences/2010/juillet/Summit_2010_b/doc/DECISIONS/Assembly%20AU%20Dec%20289-330%20(XV)%20_E.pdf)

Perhaps one of the most important ways of reinforcing and consolidating Africa's faltering progress towards liberal constitutional governance is the international systems that have now been put in place to combat impunity and strengthen or fill the gaps in domestic accountability mechanisms. In this regard, the AU democracy agenda now allows for the organisation to intervene where abuses are so flagrant that they amount to international crimes. There can no longer be any justification for the organisation turning a blind eye to the excesses that many African leaders are tempted to indulge in as a way of retaining power. Because of the continuous dominance of many "sit-tight" presidents, the AU's has not acted with the vigour and determination that its progressive framework allows, but continuous pressure from the international community and their willingness to intervene, as it did in Libya remains critical. In spite of the contradictory and sometimes confusing position taken both by the AU and individual African states with respect to the ICC, the latter remains a formidable tool to combat abuse of power and impunity in Africa. This is reinforced by the possibilities of the exercise of universal jurisdiction. All these measures and the many more that are being incrementally refined serve as warnings to present and future presidential incumbents that they will be accountable for their time in office and death, immunities or exile to "safe havens" will not prevent them or their family members and associates being held to account in one form or another. The potential use of all these measures may never eliminate presidential abuse of powers, especially in the form of corruption and violence against political opponents, it does send a strong message of the strong likelihood of punishment.