

Chapter 5

Immunity and prosecution of state officials for international crimes in selected African jurisdictions

5.1 Introduction

This chapter examines the state practice on the prosecution of former or serving state officials who commit international crimes. The discussion centres on the possibility of prosecuting state officials before foreign courts and domestic courts. It also analyses the relevant laws on the prosecution of international crimes at national level. The purpose of this chapter is to find out how prosecution of international crimes and immunity of state officials have been treated at national level and whether such practice is compatible with international law. The state practice is examined at political, legal and judicial levels. The examination takes the form of a review of the constitutional provisions and other specific laws on international crimes, or those which implement the Rome Statute at domestic level in selected states. The focus is mainly on Africa.¹ The study does not intend to discuss state practice elsewhere, unless there are African state officials involved in criminal prosecutions.² In the end, an evaluation of the practice at national level is presented.

A functional comparative approach on the subject of the immunity of state officials in different selected African states is adopted. The purpose is to study the single issue of immunity of state officials as it relates to prosecution of international crimes in Africa. Not all states have enacted laws that punish international crimes. In this regard, the chapter discusses the question of immunity of state officials in relation to international crimes in selected states, particularly Ethiopia, Kenya, Burkina Faso, Niger, South

¹ For a study on European state practice, see generally, WN Ferdinandusse (2005) *Direct application of international criminal law in national courts*, 1-322.

² For an extensive discussion on prosecution of persons under universal jurisdiction, see, L Reydams (2003) *Universal jurisdiction: International and municipal legal perspectives*, 1-258 (discussing state practice and case law in Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, Netherlands, Senegal, Spain, Switzerland, UK and USA). But, see also Ch 1 (background) in this study on the way African state officials have been indicted or prosecuted before European states.

Africa, Uganda, Senegal, Rwanda, Democratic Republic of the Congo (DRC), Congo and Burundi.

For the other African states that have not enacted laws punishing international crimes, the discussion is only followed to the extent of the constitutional general provisions on immunity of the state officials from prosecution. Before dealing with the above discussion, it is necessary to point out a general practice in African states regarding prosecution of state officials at national level.

5.2 The practice at African national level: A general observation

In this part, the study attempts to demonstrate how state officials are regarded in Africa. The purpose is to indicate how state officials are viewed and their status in their own or foreign states, and whether in normal circumstances one can talk of prosecuting serving state officials before national courts. From this, state practice may be observed, albeit in limited terms.

5.2.1 Prosecuting state officials before national courts

African state officials occupy an important position in their own states. They sometimes hold the positions of heads of state (or chiefs of state)³, Commander-in-Chief of the Armed Forces, and heads of governments.⁴ In reality, being the Commander-in-Chief of the Armed Forces in the state, it is common that members of the Armed Forces and the Police Forces are loyal to the president and other heads of government. In normal

³ In most constitutions of the civil law African states, one observes the use of 'Chief of State.' See for example, art 41 of the Constitution of Benin, 1990; art 29, Constitution of Mali, 1991; art 34, Constitution of Ivory Coast, 2000; art 58, Constitution of Togo; art 73, Constitution of Sao Tome and Principe, 1990; art 49, Constitution of Senegal, 2001 as amended in 2008; art 23, Constitution of Mauritania, 1991; arts 21-22, Constitution of the Central African Republic, 2004. However, in states like Libya, it is the Revolutionary Command Council which is the supreme authority. It appoints the President and Council of Ministers; *see* generally, arts 19 and 22 of the Constitution of Libya.

⁴ See, art 50, Constitution of Seychelles, 1992; sec 40, Constitution of Sierra Leone, 1991; art 21, Constitution of Djibouti, 1992; art 39(1), Constitution of Eritrea, 1997; sec 61, Constitution of The Gambia; art 27, Constitution of Namibia, 1990 as amended until 24 December 1998; art 65, Constitution of Guinea-Bissau, 1991.

circumstances, to talk about prosecuting state officials or enforcing court processes upon state officials at national level is a daunting task, and certainly impossible in some states. How realistic is it to prosecute or serve a summons to the sitting state official? Can the police officers enforce a domestic or international warrant of arrest on the serving state officials in office at national level? It is difficult. So far, it has been impossible, particularly with regards to the scenario of President Omar Al-Bashir of Sudan who is wanted by the ICC in respect of crimes committed in Darfur, Sudan.

In Africa, state officials, particularly heads of state (usually Presidents and Kings alike) are traditionally regarded as a symbol of the nation.⁵ They are a symbol of national unity especially considering the nature of multi-ethnic societies in Africa. Hence, any attempt to prosecute a sitting president is might lead to disintegration of the state unity, and may create anarchy and chaos within the state concerned. This would seem to be applicable in post-conflict African societies where there is still fragile peace.

Normally, states emerging from armed conflicts would not support an idea to prosecute a sitting president who, in most cases, is regarded as a key player in peace building and post-conflict reconstruction. It is almost impossible for example, to imagine prosecuting presidents when they are in office. For instance, how practical is it for the Director of Public Prosecutions or the Attorney General to initiate criminal proceedings against his or her employer, who is in most cases is the president? It would be difficult because such sitting presidents may influence the judiciary not to pursue cases against them. Also, such leaders are needed for peace processes in their own countries. Although this conclusion does not pre-empt the search for justice, it is argued that the search for justice must be pursued in a manner that cannot be detrimental to an equally important search for peace.⁶

In some African states, a president is highly regarded as the '*Father of the Nation.*' This was the case particularly in Tanzania during President Nyerere's era. By analogy, in most

⁵ See for example, art 19 of the Constitution of Morocco, 1996 which says that 'the King is the head of state and Supreme Representative of the Nation.' Art 23 thereof says that 'the King's person is inviolable and sacred.'

⁶ See, African Union, 'Communiqué on the 3 February 2010 Judgment of the International Criminal Court Appeals Chamber on Darfur', Addis Ababa, 4 February 2010, para 4.

African societies, a father is a highly respected person in the family. A father has the final say on any matter in the family. He may seek advice but is not bound by the views of the family members. He holds autonomous powers in decision making. However wrong he might be, normally, the father cannot be challenged openly. It is generally presumed that the father is right even though it is not always the case. The father is an infallible. In the same token, a state president or the King in an African state is somehow regarded as the father. The president or the King may not be open to legal proceedings. Consequently, prosecution of the president or the King would seem to be an exception.

No state practice exists in Africa where a sitting president or the King has ever been prosecuted whilst in office. However, some have been prosecuted before national courts in African states, but only after expiry of the office term. This trend is observed in Malawi and Zambia where former presidents were put on trial, but for domestic crimes.⁷ So far, no sitting president has ever been prosecuted in Africa for international crimes before national courts of his own country. The only close scenario would be that of Hissène Habré who was indicted in Senegal for crimes against humanity, particularly torture, committed in Chad. Another example is that of Mengistu Haile-Mariam who was prosecuted in his own country for genocide. These are the only two exceptions thus far in Africa. However, one must note that it is increasingly becoming universally accepted practice that sitting state officials have not been prosecuted in their own national courts.

In general, it is not easy to prosecute serving state presidents in Africa, let alone serve court processes upon such officials. The practice in Africa is that in most states, sitting presidents or Kings are legally protected from criminal prosecutions and court processes such as service of arrest warrants or summons to appear as witnesses or to produce evidence. This is so because in some African states, a president takes precedence over all persons in the country, as is the case in Uganda. Article 98(2) of the Constitution of Uganda, 1995 expressly accords the president with such a status.⁸ In most African states,

⁷ On prosecution of former presidents of Malawi and Zambia, see, PM Wald (2009) *Tyrants on trial: Keeping order in the courtroom*.

⁸ Art 98(2), Constitution of Uganda, 1995 provides: 'The President shall take precedence over all persons in Uganda, and in descending order, the Vice President, the Speaker and the Chief Justice shall take

it is generally observed that there are general constitutional provisions protecting state officials from prosecution, not necessarily from international crimes, but crimes generally. It is this generalisation of ‘crimes’ that one may infer immunity in relation to international crimes. Specific constitutional provisions on immunity from prosecution for crimes are therefore examined in a number of African states.⁹ However, it should be noted that in some states, the constitutions are silent on the immunity of presidents.¹⁰ In the circumstances, one may conclude that state officials in such countries may be prosecuted before national courts.

In Swaziland, the King is the head of state according to article 28(1) of its constitution. Under article 35*bis* of the Constitution of Swaziland, 1968, as amended in 1973, the King and *Ndlovukazi* are entitled to immunity ‘in respect of all things done or omitted to be done by him only in his official capacity and while performing such functions.’ Equally, while any person holds the office of the King, he is entitled 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 and to immunity from being summoned to appear as a witness in any civil or criminal proceedings.’¹¹ The constitution provides for total protection of the King from criminal proceedings in his domestic courts. It extends such protection to deny even subpoenas. In Lesotho, the King is a constitutional monarch and head of state, and whilst holding office, the King is immune from legal process in respect of all things done or omitted to be done in private capacity, and from criminal proceedings in respects of all acts performed in his official position, or in his private capacity.¹² Article 50(1) of the Constitution of Lesotho provides for functional and personal immunity of the King whilst in office.

precedence over all other persons in Uganda.’ See also art 27(2) of the Constitution of Zimbabwe which echoes that ‘the President shall take precedence over all other persons...’

⁹ These states include Tanzania, Zambia, Malawi, Liberia, Sierra Leone, Nigeria, Ghana, Uganda, Lesotho, Swaziland, Egypt, Morocco, Libya, Mali, Benin, Burkina Faso, Mozambique, Botswana, The Gambia, Central African Republic, Eritrea, Djibouti, Somalia, Guinea, Ivory Coast, Niger, Cameroon, Zimbabwe, Togo, Algeria, Tunisia, Mauritania, Seychelles, Madagascar, Comoro, Chad, Gabon, Equatorial Guinea, etc.

¹⁰ See, Constitutions of South Africa, 1996; Madagascar; Mali, 1991; Democratic Republic of Congo, 2005; Burkina Faso, 1991 as amended in 2002.

¹¹ See, art 35(1), Constitution of Swaziland, 1968, as amended in 1973.

¹² Sec 50(1), Constitution of Lesotho.

In Liberia, the President is immune from proceedings, judicial or otherwise, and from arrest, detention on account of any act done by him or her while being the President of Liberia, subject to the constitution and any other law. However, the President is not ‘immune from prosecution upon removal from office for the commission of any kind of any criminal act done while President.’¹³ It is apparent that once the president is impeached, he or she can be prosecuted for ‘any crime’ committed, perhaps including international crimes. In Ghana, immunity of state officials is referred to as ‘indemnity.’¹⁴ Section 34(1) of the First Schedule to the Constitution of Ghana provides for total indemnity to any state official either jointly or severally.

In some civil law African states like Burundi¹⁵ and Benin,¹⁶ the president is not criminally responsible for acts committed in the exercise of his functions, except in case of high treason. This position provides functional immunity for state officials. It should be noted that what is labelled ‘high treason’ in such states is different from the same offence in most common law states. High treason is characterised in such states as acts of overstay in power, breach of constitutional principles, violation of national interests, and grave danger to human rights, integrity of the territory, acts contrary to independence and national sovereignty.¹⁷ In Malawi, the constitution prohibits and punishes acts of genocide. In respect of genocide, the Constitution of Malawi, 1994, provides that ‘[a]cts of genocide are prohibited and shall be prevented and punished.’¹⁸ But, the constitution does not specify nor define acts of genocide. The same goes for the Penal Code of Malawi. It is imperative that the drafters of section 17 of the Constitution of Malawi had the events in Rwanda in their mind. In the absence of a constitutional definition of acts of genocide in Malawi, one must resort to the provisions of international criminal statutes punishing the crime of genocide. However, section 91(2) of the Constitution of Malawi upholds functional immunity of the President before any court, for official acts performed in his term of office, except when the president is charged with an offence or impeached.

¹³ Art 61, Constitution of Liberia, 1999.

¹⁴ Sec 34, First Schedule (Transitional Provisions), Constitution of Ghana, 1992.

¹⁵ Art 117, Constitution of Burundi, 2004.

¹⁶ Art 73, Constitution of Benin, 1990.

¹⁷ Art 87, Constitution of Congo, 2002.

¹⁸ Sec 17, Constitution of Malawi, 1994.

Section 91(1) provides an exception to the office of the president in that it shall not be immune to orders of the courts. It should be recalled that criminal proceedings on corruption were instituted in 2006 against Kamuzu Banda of Malawi, the former president of Malawi, and are still pending.

In Zambia, section 70 of the Penal Code of Zambia prohibits incitement to tribal war. The use of 'tribal war' could be read in line with the prohibition of genocide on the basis of ethnic groups as such. However, it is not clear whether the drafters of section 70 of the Penal Code of Zambia had intended to punish genocide in that form. Nevertheless, it is acceptable to suggest that punishing tribal war is like punishing genocide based on ethnic groups because a tribe qualifies as an ethnic group for the purposes of article II of the Genocide Convention. With regards to immunity of state officials, article 43(2) of the Constitution of Zambia protects a person holding the office of the president or performing the functions of the president from being held criminally responsible. However, upon ceasing to be president, and subject to the resolution by the National Assembly, a person who has held the office of the president may be prosecuted, in the interest of the state.¹⁹ The former president of Zambia, Frederick Chiluba was formally prosecuted for theft by public servant contrary to section 272 and 277 of the Penal Code of Zambia, and corruption but was acquitted by a Subordinate Court of the First Class the Resident Magistrate's Court at Lusaka.²⁰ From the judgment in the case against Chiluba, the acquittal resulted from the failure by the prosecution to prove the allegations beyond

¹⁹ Discussions are underway in Zambia to amend the immunity provision of the president. It should be recalled that the National Assembly of Zambia passed a resolution which removed immunity of former President Chiluba thereby rendering him open to criminal prosecution. As of 2010, there is a proposal to amend the immunity provision in the constitution. See for example the Draft Proposal by the NCC, whose article 120 reads:

'(2) A person holding the office of President or performing the functions of that office shall not be charged with any criminal offence or be amenable to the criminal jurisdiction of any court in respect of any act done or omitted to be done during that person's tenure of that office or, as the case may be, during that person's performance of the functions of that office.

(3) Subject to other provisions of this Article, a person who has held, but no longer holds, the office of President shall not be charged with a criminal offence or be amenable to the criminal jurisdiction of any court, in respect of any act done or omitted to be done by him in his personal capacity while he held office of President, unless the National Assembly has, by resolution under clause (9), determined that such proceedings would not be contrary to the interests of the State.'

²⁰ See, *The People v Chiluba, Mwenyakabwe and Chungu*, Case No. SSP/124/2004, In the Subordinate Court of the First Class for the Lusaka District Holden at Lusaka (Criminal Jurisdiction), (Before J Chinyama, Principal Resident Magistrate), 1-289, (17 August 2009).

reasonable doubt. However, there could be a possibility that the judgment of acquittal was influenced by the then president of Zambia, Levy Mwanawasa who apparently gave a speech to the public at the same time when the judgment in the case against Chiluba was being delivered in court. It seems that in his speech, President Mwanawasa alluded to the contents of the judgment and appealed to the Zambian people to accept the judgment of the court regardless of its outcome.²¹ After the Presidential speech ended, the judgment was delivered, and Chiluba was acquitted of the charges forthwith. Attempts to appeal the judgment proved futile.²² Despite the shortcomings of the judgment, it reflects at least the practice that in Zambia it is possible to prosecute a former president.

In Sudan, the President and First Vice President are immune from any legal proceedings, and are not supposed to be charged in any court of law during their term of office.²³ The only exception is that of high treason as per article 60(2) of the Constitution of Sudan. In the Interim Constitution of Southern Sudan, 2005, article 105 (1) provides that '[t]he President and Vice President of Southern Sudan shall be immune from any legal proceedings, and shall not be charged or sued in any court of law during their tenure of office.' This covers functional immunity of state officials. It is not clear whether after office term; such state officials may be prosecuted.

In Botswana, the president is immune from criminal proceedings 'in respect of anything done or omitted to be done by him either in his official capacity or in his private capacity.'²⁴ The emphasis is on functional immunity and personal immunity during service. It can be contended that the president may be prosecuted after the term of office. Indeed, this is the position stated by the High Court of Botswana at Lobatse. The sitting president of Botswana, Seretse Khama Ian Khama, was sued in a civil suit before the High Court of Botswana, a matter arising from his role as President of the Botswana Democratic Party and at the same time being the President and Head of State of

²¹ Information from Prof Michelo Hansungule, a Zambian, 15 September 2010.

²² See, Notice of Appeal against Acquittal, *The People v Chiluba, Mwenyakabwe and Chungu*, High Court of Zambia at Lusaka, 17 August 2009.

²³ Art 60(1), Interim National Constitution of Sudan, 2005.

²⁴ Sec 41(1), Constitution of Botswana, 1966 as amended in 2002.

Botswana.²⁵ The High Court interpreted section 41(1) of the Constitution of Botswana which grants immunity to the president in respect of all matters, civil and criminal, when the president is still in office. The High Court of Botswana concluded and held that section 41(1) gives immunity to the president, and as such, the president could not be sued even for civil matters arising from his role as president of the ruling party, who at the same time, is the president and head of state of Botswana.²⁶ Thus, the court dismissed with cost an application brought against the sitting president of Botswana.

In Tunisia, article 41 of the Constitution of Tunisia provides that, '[t]he President shall enjoy immunity before the courts during his stay in office. He shall also benefit from immunity after his term of office has ended with regard to acts performed on the occasion of the exercise of his functions.'²⁷ From this, functional immunity of the president extends from the time of service to retirement. In Seychelles, whilst the president is still in office, no criminal proceedings shall be instituted or continued against such person in respect of anything done or omitted to be done in official or personal capacity.²⁸ The Constitution of Sierra Leone, 1991, in its article 48(4) provides for immunity of the president in respect of the time and acts or functions of the office of the President. During this time, no criminal proceedings shall be instituted or continued against the president either in his personal or official capacity.²⁹ But, the president may be impeached under section 51 of the constitution. In Somalia, article 89(1) of the Constitution of Somalia, 1979, provides that ministers shall be liable for crimes resulting from the execution of their functions.

Egypt has a constitution that declares the president immune from criminal proceedings unless there is impeachment.³⁰ The same is for Eritrea and Mozambique.³¹ In The

²⁵ See, *Gomolemo Motswaledi v Botswana Democratic Party, Seretse Khama, President of Botswana Democratic Party N.O, and Chairman, Gaborone Central Branch Committee, Botswana Democratic Party*, High Court of Botswana at Lobatse, MAHLB-000486-09, Judgment (Before, Nganunu CJ, Lesetedi J, and Kirby, J), 11 September 2009.

²⁶ See paras, 11, 14-15, 20, 24, 28-30, 38-39, 40 and 45 of the judgment.

²⁷ Art 41, Constitution of Tunisia, 1959 as amended in 2008.

²⁸ Art 59(1), Constitution of Seychelles, 1992.

²⁹ Sec 48(4), Constitution of Sierra Leone, 1991.

³⁰ Art 85, Constitution of Egypt, 1971.

³¹ Art 43, Constitution of Eritrea, 1997; art 132, Constitution of Mozambique.

Gambia, the president is immune from criminal proceedings during office term.³² The Namibian Constitution, 1990 recognises immunity of the president from criminal proceedings whilst holding office or performing the functions of the president. No court may have jurisdiction to entertain criminal proceedings after a person is no longer a president for omission, commission perpetrated in his personal capacity whilst in office, unless the Parliament impeaches him.³³

5.2.2 Prosecuting state officials before foreign courts

The question of protection of state officials is extended to cover criminal prosecutions before foreign domestic courts. This is a major problem in the prosecution of international crimes. As at 2011, the International Law Commission is also considering the question of prosecution of state officials before national courts. This reflects that prosecution of state officials before national courts is still a contentious and new area international law which should be explored further in the future.

Like in other places, many African states have not rejected immunity of visiting foreign state officials. Although this aspect is largely a matter of diplomatic law, which falls outside the scope of this study, it is important to highlight the practice as it obtains in African states today. Normally, under international law states accord immunity to foreign state officials as a matter of comity or reciprocity and in order to maintain harmonious relations with other states. This seems to be the suggestions offered by Chad and Kenya when the two states hosted President Omar Al Bashir of Sudan in 2010. Immunity is granted to foreign state officials to enable the state representatives to function externally. States expect that others will treat ‘their state officials’ as they treat them in their own territories. Consequently, a substantial number of African states still recognise and uphold immunity of foreign state officials from prosecution, even for international crimes. This is particularly so with regards to those state officials who have been accused of committing international crimes either in their own states or in foreign states.

³² Sec 69, Constitution of the Gambia.

³³ Art 31(2)-(3), Constitution of Namibia, 1990 as amended in 1998.

The trend of upholding immunity of state officials is observed at individual state practice. Both Chad and Kenya upheld immunity of President Bashir of Sudan when he visited such states on official invitations. This is despite the warrant of arrest for Bashir issued by the ICC. Perhaps Kenya ignored its obligations under the Rome Statute because some of its state officials like Uhuru Kenyatta are allegedly implicated in the crimes against humanity committed in Kenya during the post-election violence.³⁴ So, to welcome President Bashir was like expecting the Kenyan officials could as well visit Sudan should the ICC proceed against them. Zimbabwe and Senegal have granted and recognised the *de facto* protection of former state officials who have allegedly committed international crimes. These states have granted asylum to Mengistu Haile-Mariam and Hissène Habré. This has been done mostly at political level under the guise of comity but not necessarily at the legal level.

It must be known that granting political asylum to a person accused of having committed international crimes falls within the sovereignty of a granting state and is at the discretion of that receiving sovereign state. No general law as such requires a state to extradite or surrender such a person without a specific extradition treaty. Ideally, the return of criminals is usually secured by extradition agreements between states.³⁵ However, the Convention against Torture creates the obligation to extradite and exercise universal jurisdiction over persons responsible for international crimes.³⁶

Nigeria had provided protection to Charles Taylor by guaranteeing him that he would be free from prosecution whilst in its territory. It later changed its position and surrendered him to the Special Court for Sierra Leone. Togo and Morocco had granted protection to the former state official of Zaire (now the Democratic Republic of Congo), Mobutu Sese

³⁴ The Kenyan Commission for Human Rights apparently published names of suspects of crimes against humanity in Kenya. It listed Raila Odinga and Uhuru Kenyatta, amongst other suspects.

³⁵ N Botha, 'The basis of extradition: The South African perspective' (1991-1992) 17 *South African Yearbook of International Law* 131-133; EM Wise 'Aut dedere aut iudicare: The duty to prosecute or extradite' in MC Bassiouni (1999) *International criminal law: Procedural and enforcement mechanisms*, 2nd edn, 17-18; JD Van der Vyver 'Universal jurisdiction in international criminal law' (1999) 24 *South African Yearbook of International Law*, 117.

³⁶ Arts 5 and 7, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984, UNTS, Vol 1465, No. I-24841, entered into force on 26 June 1987.

Seko. Saudi Arabia had provided protection to the former Ugandan state official, Iddi Amin Dada until his death in 2003. Portugal and Belgium had at different times provided protection to Jean-Pierre Bemba, albeit on his individual capacity, before being arrested by the Belgian authorities acting on an international warrant of arrest authorised by the ICC on 24 June 2008. Belgium surrendered him to the Registrar of the ICC on 3 July 2008. Having stated the general practice in Africa, it is necessary that the practice at individual specific national jurisdictions be presented as discussed below.

5.3 Selected African national jurisdictions

This part discusses the laws and practices on prosecution of international crimes in selected African jurisdictions. These jurisdictions are Ethiopia, South Africa, Senegal, Kenya, Congo, DRC, Rwanda, Burundi, Burkina Faso, Niger and Uganda. The selection of these countries is based on the laws punishing international crimes, particularly the laws implementing the Rome Statute, or national laws that although do not implement the Rome Statute, they proscribe and punish international crimes of genocide, war crimes and crimes against humanity.

5.3.1 Ethiopia

Ethiopia presents an interesting case study in Africa on the issues of immunity of state officials as well as domestic prosecution of international crimes. In fact, Ethiopia is the only single African state which has been able to prosecute and convict its own former state official, Mengistu Haile-Mariam, for genocide and crimes against humanity. Further, it is in Ethiopia where for the first time in Africa, immunity of a former state official was unsuccessfully pleaded before domestic courts. Furthermore, it is in Ethiopia where for the first time ‘political groups’ have been considered as protected groups in respect of genocide. Also, it is interesting to note that the Constitution of Ethiopia, 1995, regards genocide as a crime against humanity. These developments warrant an extensive discussion on the questions of immunity and international crimes in Ethiopia. After these remarks, we turn to examine the practice on the identified issues as discussed below.

In Ethiopia, there is a mixed state practice regarding prosecution and punishment of state officials accused of committing international crimes. As state practice forms an important and integral part in the inquiry on the practice on immunity and prosecution of international crimes, it is necessary that state comity and conduct be examined before dealing with legal and judicial developments. In 2009, Ethiopia invited and officially received, and recognised President Omar Al Bashir of Sudan despite the fact that he was wanted by the ICC for the crimes allegedly committed in Darfur, Sudan. By inviting and receiving Omar Al Bashir, Ethiopia recognised the immunity attaching to him as a serving state official of Sudan.

Although the ICC had requested all states parties to the Rome Statute to cooperate in respect of enforcing an international arrest warrant against President Omar Al Bashir, Ethiopia ignored such call and went ahead to honour President Omar Al Bashir thereby signifying its position that it does not recognise the warrant of arrest issued against him. Arguably, positive international law arising from the law of treaties does not impose an express obligation on Ethiopia to arrest President Omar Al Bashir following a warrant of arrest issued by the ICC. This is so because Ethiopia is not a state party to the Rome Statute, and therefore, considering article 34 of the Vienna Convention on the Law of Treaties, 1969, the Rome Statute does not create an obligation on Ethiopia unless Ethiopia expressly consents to be bound by the Rome Statute. However, it may as well be argued that since the crimes that President Omar Al Bashir is charged with are international crimes attracting universal jurisdiction by any state interested, and where Al-Bashir may be found in its territory, customary international law creates an obligation on all states, including Ethiopia, to arrest or prosecute Omar Al Bashir for the crimes charged with, provided that such crimes are recognised as such in the laws of Ethiopia.³⁷ At least this is the position in Ethiopia as at 2011.

However, the drastic change is observed in respect of Mengistu Haile-Mariam, former state official of Ethiopia. It will be recalled that after Mengistu fled to Zimbabwe, the authorities in Ethiopia instituted criminal charges against him in respect of genocide and

³⁷ See for example, arts 5 and 7 of the Convention against Torture, 1984 where such obligations exist.

crimes against humanity that were allegedly committed in Ethiopia during Mengistu's era. The fact that criminal charges were preferred against Mengistu, and that laws were enacted to facilitate the trial process, reflects the view that at the time, Ethiopian authorities did not recognise immunity of the former state official, Mengistu. It is now apt to observe that, for both the incumbent Ethiopian state official and serving foreign state officials who visit Ethiopia, immunity exists, both under comity and customary international relations between Ethiopia and other states, as in this case, Sudan. However, as regards former state officials, it is clear that immunity has no place in Ethiopia, as evidenced by the trial of Mengistu. This reflects the political or state practice in Ethiopia. The following part is on legal practice on the question of immunity and prosecution of international crimes in Ethiopia.

In terms of legal provisions, the Constitution of the Federal Democratic of Ethiopia, 1995³⁸ provides that the 'President of the Federal Democratic Republic of Ethiopia is the head of state'³⁹ while the Prime Minister is the head of the Federal Government.⁴⁰ As in most states, the constitution is the supreme law of the land in Ethiopia.⁴¹ Therefore, any law that contravenes the constitution has no effect. However, all international agreements, including treaties ratified by Ethiopia are an integral part of the law of the land.⁴² This reflects that such treaties must be construed in line with the constitution, and that once ratified, they become part of the laws in Ethiopia. Ethiopia is a state party to various international treaties that punish international crimes and outlaw the defence of immunity of state officials. Such treaties include for example, the *Genocide Convention* which Ethiopia ratified in 1949. However, Ethiopia is currently not a state party to the Rome Statute of the ICC, and therefore, not bound by obligations from the Rome Statute.

With regards to international crimes, the Constitution of Ethiopia, 1995, prohibits crimes against humanity as defined by international agreements ratified by Ethiopia and by other

³⁸ *Proclamation No.1/1995, A Proclamation to Pronounce the coming into effect of the Constitution of the Federal Democratic Republic of Ethiopia, Addis Ababa, 21 August 2005.*

³⁹ Art 69, Constitution of Ethiopia.

⁴⁰ Art 72(1).

⁴¹ Art 9(1).

⁴² Art 9(4).

laws of Ethiopia. Surprisingly, the Constitution of Ethiopia regards ‘genocide’ as a crime against humanity.⁴³ Crimes against humanity as expressed in the Constitution of Ethiopia, are not barred by statutes of limitation, and may not be commuted by amnesty or pardon of the legislature or any other organ.⁴⁴

Although there may be similarity between genocide and crimes against humanity, the classification preferred by the Constitution of Ethiopia is nevertheless confusing, especially considering the clear-cut definitions of genocide and crimes against humanity in international criminal law. Considering the *mens rea* of the two crimes, it is notable that for crimes against humanity, the law requires ‘the intent to commit the offence’ and ‘knowledge of the widespread or systematic’ commission of the crimes against humanity. In genocide, it is the special ‘intent to destroy, in whole or in part, a particular group, together with the intent to commit acts specified for genocide.’⁴⁵ This is not the position in the Constitution of Ethiopia as such.

Nevertheless, as the Constitution of Ethiopia regards the two crimes, there are certain ways in which genocide and crimes against humanity could be similar. But this does not mean that the two crimes are one and the same. They are different. Regarding their elements, the two crimes are heinous crimes that shock the conscience of mankind. In most cases, the two crimes are committed not in isolated circumstances, but as part of the larger context. They are often committed together. Even though they may not necessarily be committed by state officials, they are usually committed with tolerance or complicity of state leaders.⁴⁶ These crimes are well defined under article II of the Genocide Convention and articles 6 and 7 of the Rome Statute. So, there should not be confusion anymore.

⁴³ Art 28.

⁴⁴ Art 28(1) – (2).

⁴⁵ A Cassese (2008) *International criminal law*, 144-145(‘genocide and crimes against humanity’), but see, D Luban, ‘A theory of crimes against humanity’ (2004) 29 *Yale Journal of International Law* 85-167 (whereby Luban traces the origin of ‘crimes against humanity’).

⁴⁶ Cassese (2008) 144.

What is interesting in the Constitution of Ethiopia is the desire to award a severe punishment for crimes against humanity. Equally, such crimes do not have any procedural and jurisdictional objections such as ‘statute of limitation’ or ‘amnesty’ or ‘pardon’. It is here that the Constitution of Ethiopia envisages strict adherence to the international law obligations to prosecute and punish persons committing international crimes.

The Constitution of Ethiopia does not explicitly state whether the state officials enjoy any kind of immunity. However, from the provision of article 28(1) of the constitution, it is apparent that state officials may not enjoy immunity from prosecution, only if the phrase ‘statute of limitation’ can be interpreted to mean and include immunity from prosecution.

International crimes were for the first time defined under the Penal Code of the Empire of Ethiopia, 1957.⁴⁷ However, the 1957 Penal Code was repealed by the *Criminal Code of Ethiopia* which came into force on 9 May 2005. The current law is called the Criminal Code of Ethiopia, 2005. One has to note that the repealed law was called the Penal Code whereas the current one is the Criminal Code of Ethiopia. Although the Penal Code of Ethiopia was amended in 2004, the amendments did not substantially affect provisions on international crimes. However, a major change is the re-arrangement of the provisions in the Criminal Code while most of the contents remain largely the same, albeit with some changes. Equally notable in the Criminal Code of Ethiopia, 2005, is the fact that the current law only covers genocide, war crimes and other serious violations of international humanitarian law. Whereas the 1957 Penal Code of Ethiopia had addressed crimes against humanity and genocide in its article 281, crimes against humanity are not expressly addressed by the new law – the Criminal Code of Ethiopia, 2005. In this regard, one has to refer to the provision of article 28 of the Constitution of Ethiopia, 1995, and the 1957 Penal Code of Ethiopia for guidance on crimes against humanity.

⁴⁷ *Penal Code of the Empire of Ethiopia of 1957, Proclamation No.158 of 1957, Negarit Gazeta – Extraordinary Issue No.1 of 1957, Addis Ababa.*

The 2005 Criminal Code of Ethiopia defines and prohibits international crimes, and prescribes punishment for such crimes.⁴⁸ A general observation in all provisions dealing with international crimes is that such crimes attract punishment ranging from imprisonment for a term of three years to life imprisonment, or in exceptional or grave circumstances, death penalty. This is an indication that such crimes are regarded as serious international crimes in Ethiopia. The Criminal Code of Ethiopia defines genocide in its article 269 as follows:

- Whoever, in time of war or in time of peace, with intent to destroy, in whole or in part, a nation, nationality, ethnical, racial, national, colour, religious or political group, organises, orders or engages in:
- (a) killing, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever or causing them to disappear; or
 - (b) measures to prevent the propagation or continued survival of its members or their progeny; or
 - (c) the compulsory movement or dispersion of peoples or children or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to twenty-five years, or, in more serious cases, with life imprisonment or death.⁴⁹

The above provision on genocide was first included in article 281 of the 1957 Penal Code of Ethiopia. Article 281 of the 1957 Penal Code of Ethiopia was enacted after Ethiopia ratified the *Genocide Convention* in 1949. The above provision borrows heavily from the *Genocide Convention* albeit with some linguistic differences which gives more clear and elaborate acts of genocide, its *mens rea* and acts of aiding, abetting, ordering, or conspiracy to commit genocide.⁵⁰ The Criminal Code of Ethiopia, 2005, extends the list of protected groups for the purposes of genocide. Whereas international treaties on genocide⁵¹ only cover ‘a national, ethnical, racial or religious group, as such’, in addition to the aforementioned protected groups, the Criminal Code of Ethiopia covers ‘a nation, nationality, colour and political group’ as protected groups. The ‘political group’ perhaps

⁴⁸ See, arts 269-283 of the Criminal Code of Ethiopia, 2005 (dealing with genocide, war crimes and other serious violations of international humanitarian law). Note that these were previously addressed in *Part II, Book III, Title II, Chapter I* of the Penal Code of Ethiopia, 1957.

⁴⁹ Art 269, Criminal Code of Ethiopia, 2005. Note that genocide was defined in art 281 of the 1957 Penal Code of Ethiopia which has been repealed.

⁵⁰ See, arts II, III, IV, V and VI of the *Genocide Convention*, 1948.

⁵¹ See, art II, *Genocide Convention*, 1948; art 6 of the Rome Statute, 1998.

deals with opposition groups based on political affiliation. The inclusion of ‘a nation’ or ‘nationality’ as protected groups connotes the different administrative or regional structures forming the Federation in Ethiopia. The *actus reus* envisaged under article 269 paragraphs (a)–(c) of the Criminal Code of Ethiopia captures acts of genocide in paragraphs (a)–(e) in article II of the Genocide Convention.

The fact that the Ethiopian law has extended a list of protected groups for the purposes of the crime of genocide is to be noted with interest. It reflects advancement of national law over international law on genocide. Although the recognition of new groups may be doubted, it should not be discouraged as it furthers the protection of persons from genocide. It would have been a danger if the list of protected groups was limited to less than that which is covered under the Rome Statute or the Genocide Convention. Nevertheless, there is a likelihood of confusion as to the extent of the protected groups as such. For example, one wonders whether in fact there is any significant difference between ‘a nation or nationality’ and ‘a national group’ as such as used by the Ethiopian law for the purpose of genocide. These should be read and understood in the context of national group under the Genocide Convention. The Ethiopian law is progressive as it introduces ‘colour and political groups’ as one of the protected groups as such. However, one must understand that international law has not yet envisaged such categories of groups for the purposes of prosecution and punishment of persons for genocide.

War crimes and serious violations of international humanitarian law are punishable under the Criminal Code of Ethiopia, 2005. The law prohibits various acts of war crimes as stated in articles 270 through 283 of the Criminal Code of Ethiopia. Such acts were initially prohibited under article 282 paragraphs (a) – (h) of the Penal Code of Ethiopia of 1957. Under the new law, anyone who commits such crimes is punished with rigorous imprisonment from five years to life, or in cases of exceptional gravity, with death.

Interestingly, in its Criminal Code, Ethiopia considered ‘rape’ as a war crime,⁵² even before the United Nations Security Council came up with its own version of recognition

⁵² Art 270 (f), Criminal Code of Ethiopia, 2005.

of rape as a war crime in 2008.⁵³ That is a progressive sign of national law over international law. The Criminal Code of Ethiopia, 2005, emulates the standards described by international criminal law statutes and the provisions of article 3 common to the *Geneva Conventions*, 1949 and the *Additional Protocols*, 1977 relevant to the conduct and regulation of armed conflicts, and the description of war crimes. However, the Criminal Code of Ethiopia goes further to classify certain crimes that ideally would not be regarded as war crimes, especially such crimes as relating to ‘taxes or levies.’⁵⁴ These are not considered as war crimes in international law, particularly the standards under the Rome Statute.⁵⁵

The Criminal Code of Ethiopia provides detailed prohibitions and punishment for other types of war crimes. These relate to war crimes against the wounded, sick and shipwrecked persons, war crimes against prisoners and interrelated persons, pillage, piracy and looting, provocation and preparation or encouragement and conspiracy to commit war crimes, dereliction of duty towards the enemy combatants, use of illegal means of combat, breach of armistice or peace treaty, *franc tireurs* (hostile acts against the state army at the time of war), maltreatment of, or dereliction of duty towards, wounded, sick or prisoners’ of war, and denial of justice or fair trial to prisoners of war, wounded and sick persons.⁵⁶ Additionally, the Criminal Code of Ethiopia, 2005, prohibits and punishes the hostile acts against international humanitarian organizations such as the International Red Cross, or Red Crescent, the Red Lion or the Red Sun, and to persons representing such organizations or under the protection of such organizations.⁵⁷ Other war crimes under the Criminal Code include the hostile acts against the bearer of a flag of truce, and abuse of international emblems and insignia.⁵⁸

⁵³ See, UNSC Res 1820(2008), Adopted by the Security Council at its 5916th meeting, on 19 June 2008, S/RES/1820(2008). In para 4 of Resolution 1820(2008), the Security Council used the following language in recognizing rape as an international crime: ‘*The Security Council*...Notes that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide...’

⁵⁴ Art 270 (h).

⁵⁵ See for example, the definition of war crimes under art 8 of the Rome Statute.

⁵⁶ See, arts 270-280.

⁵⁷ Arts 281-282.

⁵⁸ Art 283.

Having dealt with international crimes, it is appropriate that we understand whether the Criminal Code of Ethiopia recognises the defence of the state officials immunity from prosecution, as justifiable and, or an excuse to punishment. The position is that, the defence of immunity of the state officials is not expressly recognised by law, under the constitution, save in article 4 of the Criminal Code of Ethiopia, 2005 which is a replica of article 4 of the 1957 Penal Code of Ethiopia.

Article 4 of the Criminal Code of Ethiopia provides for equality before the law. It echoes that criminal law applies to all persons without discrimination as regards persons. It lists grounds of discrimination. It further provides that, '[n]o difference in treatment of criminals may be made except as provided by this Code, which are derived from immunities sanctioned by public international law and constitutional law, or relate to the gravity of the crime or the degree of guilt...'⁵⁹

The interpretation of the proviso to article 4 of the Criminal Code of Ethiopia, 2005, is that, no immunity prevails for all persons regardless of their status or official position. The exception is that, immunity only exists for persons as deriving from international law and constitutional law. With regards to the gravity of crimes such as genocide or war crimes, it is to be understood that immunity cannot prevail because of the gravity of such crimes. Article 4 of the Criminal Code of Ethiopia, 2005, is likely to cause confusion in that it allows immunity as per constitutional law and international law. One obvious conclusion here is that customary international law recognises immunity of state officials before domestic courts. However, reference to public international law in article 4 of the Criminal Code of Ethiopia is intended to apply to diplomatic immunity. To argue otherwise or suggesting that international law recognises immunity of state officials for international crimes under articles 269 or 270 of the Criminal Code of Ethiopia would be to fallaciously assert that immunity applies to persons, including state officials, who commit such crimes.

⁵⁹ Art 4.

From the above, it can only be inferred that ‘a state official’ may be held responsible for an act of expressly ‘ordering’ the commission of an offence, and probably international crimes as envisaged in articles 269 through 283 of the Criminal Code of Ethiopia, 2005. There is no other provision in the Criminal Code of Ethiopia which is akin to the immunity of state officials than article 4 of the Criminal Code of Ethiopia.

After the discussion on the law on immunity and international crimes in Ethiopia, it is necessary to consider how courts have dealt with the question of immunity of state officials from prosecution for international crimes such as genocide and crimes against humanity.

5.3.1.1 Judicial interpretation

In terms of judicial setting and interpretation, in Ethiopia, international crimes fall under the jurisdiction of the Federal Courts.⁶⁰ Federal Courts means the Federal Supreme Court, the Federal High Court and the Federal First Instance Court.⁶¹ According to article 3 of the *Federal Courts Proclamation No. 25/1996*, international crimes can be regarded as crimes or cases arising under the constitution, Federal laws and international treaties. In Ethiopia, the Federal Courts have jurisdiction, among other things, over ‘offences against the law of nations.’⁶² Therefore, international crimes fall under this categorisation. The Federal Courts may apply international treaties and Federal laws.⁶³ Offences committed by state officials of the Federal Government are tried by the Federal Supreme Court, which has the exclusive first instance jurisdiction over offences for which officials of the government are held liable in connection with their official responsibility.⁶⁴ However, it appears that the Federal High Court has concurrent jurisdiction with the Federal Supreme Court over international crimes, or to use the words of the *Proclamation*, ‘offences

⁶⁰ Art 3, *Federal Courts Proclamation No.25/1996*, *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia*, Addis Ababa, 15 February 1996.

⁶¹ Art 2 (4).

⁶² Art 4(3).

⁶³ Art 6(a).

⁶⁴ Art 8(1).

against law of nations.’⁶⁵ The notable difference is that the Federal Supreme Court has an appellate jurisdiction over decisions of the Federal High Court rendered in its first instance jurisdiction.⁶⁶ The Federal Supreme Court has the power of cassation, in cases where there is fundamental error of law, over final decisions of the Federal High Court.⁶⁷

The Ethiopian courts have dealt with international crimes: genocide and crimes against humanity. This opportunity was presented by the case involving Mengistu Haile-Mariam, a former state official of Ethiopia.⁶⁸ History has it that Mengistu took power in Ethiopia in 1974 following a revolution.⁶⁹ After taking the government, Mengistu and his close allies formed a Council or *Derg* to govern Ethiopia. During the *Derg* rule, many people were killed in Ethiopia. For example, sixty former officials under Emperor Haileselassie were executed following the decision of the *Derg* Committee members. Haileselassie was later killed in prison. The *Derg* used state apparatus to suppress, kill and torture anti-revolutionaries or opposition leaders. The regime was also characterised by forced disappearance of people. Tiba writes that, about 12315 individuals were killed, 9546 were victims and at least 1500 suffered bodily injury and other forms of torture.⁷⁰

After the new government came into power in 1991, Mengistu was forced to flee to Zimbabwe where he resides to date. The Ethiopian authorities decided to prosecute all those responsible for massive human rights violations during the *Derg* regime under Mengistu. Charges were preferred against Mengistu and other state officials for genocide, crimes against humanity and war crimes. Mengistu Haile-Mariam was tried *in absentia* for genocide and incitement to commit genocide, and crimes against humanity committed

⁶⁵ Art 12(1).

⁶⁶ Art 9(1).

⁶⁷ Art 10.

⁶⁸ *Special Prosecutor v Col Haile-Mariam and 173 Others*, Preliminary Objections, Criminal File No.1/87, Decision of Meskerem 29, 1988 EC (GC); reported in Oxford Reports on International Law –ILDC 555(ET 1995), 9 October 1995.

⁶⁹ For a historical account of the events in Ethiopia and trials of the Red Terror members, see, JV Mayfield ‘The prosecution of war crimes and respect for human rights: Ethiopia’s balancing Act’ (1995) 9 *Emory International Law Review* 553-593.

⁷⁰ FK Tiba, ‘Prosecuting international crimes in domestic courts: The trial of Mengistu and other *Derg* members for genocide, torture and summary executions’ in CB Murungu and J Biegon (2011) *Prosecuting international crimes in Africa*, 163-183, 165.

in Ethiopia.⁷¹ Ethiopian authors argue that a large number of people had been charged with genocide, crimes against humanity and war crimes based on the 1957 Penal Code of Ethiopia.⁷² About 5119 suspects of such crimes were indicted.⁷³ Article 281 of the Penal Code of Ethiopia was used to prosecute and punish those suspects for crimes against humanity and genocide.

During trial *in absentia*, it was argued for Mengistu by way of preliminary objections⁷⁴ that the crimes that Mengistu and his *Derg* members were charged with were barred by time limitation. It was also argued that the Prosecutor had violated the rule on impartiality by acting as an investigator and prosecutor at the same time. In this regard, it was contended that only the Police could have investigated the matter. Further, the accused argued that the trial violated their right to fair trial, including speed trial under articles 9 and 10 of the Universal Declaration of Human Rights, 1948.

Furthermore, it was argued that the charge of genocide did not include basic legal and factual elements of the crime of genocide in that, genocide is only committed against specified groups in whole or in part. The accused argued that prosecution failed to show that these elements existed, and that he had included the political group as a protected group, something which is not specifically mentioned under article II of the Genocide Convention, 1948. Interestingly, the accused further challenged the trial in that it involved non-retrospectivity of the punishment and law contending that the Provisional Military Government's acts committed by the government could not be brought before the jurisdiction of the court, arguing that the court had no jurisdiction to entertain the case against the Provisional Military Government as it enjoyed immunity from legal proceedings. Even more concrete is the submission that the court in Ethiopia was not

⁷¹ *Special Prosecutor v Col Haile-Mariam and 173 Others*, Preliminary Objections, Criminal File No.1/87, Decision of Meskerem 29, 1988 EC (GC); reported in Oxford Reports on International Law –ILDC 555(ET 1995), 9 October 1995.

⁷² Tiba (2010).

⁷³ Tiba (2010).

⁷⁴ Information on the preliminary objections is in the original national language of Ethiopia. I am grateful to Mr Adem Abebe Kessie for his direct translation into English. I have largely relied on Adem's translation to understand the arguments on preliminary objections and the court's ruling. The court's ruling was provided by Dr Firew Kebede Tiba.

empowered to prosecute the accused for genocide because article VI of the Genocide Convention envisaged an international penal tribunal, such that, the accused should have been tried by a competent international tribunal.⁷⁵

In reply, the prosecutor argued that *Proclamation No. 22 of 1991/1992* established the Office of the Public Prosecutor and excluded statutory limitations in its article 7(2), and therefore conferred the Public Prosecutor with power to investigate and charge individuals who committed crimes. In short, all preliminary objections raised by accused persons were overruled by the court.⁷⁶ On the issue of political groups under article 281 of the 1957 Penal Code of Ethiopia, the court found that the Genocide Convention is part of international law and that international law is progressive. The court ruled that the Genocide Convention does not exclude a wider application or interpretation of its provisions for protection of rights. The court did so as a justification to include the political group as one of the protected groups for purposes of genocide. The court ruled that the wider application or interpretation does not conflict with international law.⁷⁷ In defining the political group, the court held that political group means individuals united based on similar political beliefs. The fact that the organisation is not registered does not mean or justify killing members of the political groups. The court further clarified that the group need not disappear as a whole. A few members of the group would make a part of the group provided there is intent to kill and destroy the group as such.⁷⁸

In its analysis, the court reasoned that Ethiopia has a duty to investigate and punish, as a member of the United Nations, all violations of human rights. It recalled that genocide is a crime in international law whether committed during the time of war or peace.⁷⁹ Hence, Ethiopia's duty was imposed by the Genocide Convention which it had ratified in 1949. Regarding the new government at the time, the court said, the transitional government is a recognised government and has power to discharge its international obligation. The

⁷⁵ *Special Prosecutor v Col Haile-Mariam and 173 Others*, Preliminary Objections, Criminal File No.1/87, Decision of Meskerem 29, 1988 EC (GC), 2-5 of the Ruling.

⁷⁶ See page 5 of the Ruling.

⁷⁷ Page 9 of the Ruling.

⁷⁸ See pages 9-10 of the Ruling.

⁷⁹ See page 11 of the Ruling.

court insisted that Ethiopia has gone beyond ratifying the Genocide Convention as it has included it in its domestic law, so, the transitional government has the duty to prosecute genocide. With regards to its impartiality, the court dismissed the objection saying it could not be challenged as the court, only judges could be challenged of impartiality. Further, regarding prosecution before impartial international penal tribunal, the court held that there is no practice to support this proposition under article VI of the Genocide Convention. It said that the crimes would be prosecuted regardless of time limitation. The accused had contended that only an international tribunal had jurisdiction to try the genocide charge but not the Ethiopian court.

It will be recalled that the accused persons had argued that the crimes they were charged with were committed by the government which was sovereign and therefore the government has immunity under international law.⁸⁰ Consequently, the accused argued that state officials were immune, and therefore that the court could not have jurisdiction to prosecute crimes committed by state officials. The court approached this issue with caution. It reasoned that article 281 of the 1957 Ethiopian Penal Code should be read together with the Genocide Convention. The court observed that Mengistu is residing in Zimbabwe, and made a ruling that Zimbabwe should extradite Mengistu back to Ethiopia so that he could attend and defend his own case. However, the court held rather surprisingly that if it is genocide, the trial will proceed in the absence of Mengistu. This, the court was allowing trial *in absentia*. It should be recalled that in Ethiopia, if a trial is conducted *in absentia*, and later the accused or convict returns to Ethiopia, there may be held a re-trial subject to that person's argument and justification for his absence.

Importantly, with regards to the immunity of state officials, the defence argued that in relation to Mengistu, criminal law should not apply to him because he was a head of state.⁸¹ The defence submitted that international law provides immunity for heads of state because the head of state makes laws which apply to citizens not on him. To the contrary, the prosecutor argued that this argument does not have any factual or moral

⁸⁰ Page 14 of the Ruling.

⁸¹ Page 18 of the Ruling.

basis. The Prosecutor's argument was based on the 1919 Versailles Treaty, and supported this position by analogy that there is no authority to suggest that criminal law adopted by a sovereign state cannot apply to a head of state. The prosecutor submitted that the fact that a person is a head of state does not only make him be punished, but also it plays an important role as an aggravating circumstance to punishing such leader. The prosecutor submitted that article 281 of the 1957 Penal Code of Ethiopia recognises genocide as a crime against humanity, and that article IV of the Genocide Convention removes immunity of a head of state, as such Mengistu could not be entitled to immunity. The prosecution's submission was based on article 7 of the Nuremberg Charter which outlaws immunity of state officials.⁸²

Furthermore, regarding immunity, the court invoked article 4 of the 1957 Penal Code of Ethiopia on equal application of the law to all without discrimination, and that no differences in treatment is allowed for offenders. The court said that there is no justification to assert immunity for Mengistu. The court emphatically stated the position that even if there was a law conferring immunity to state officials, such law would be inconsistent with international law itself.⁸³ The Federal High Court of Ethiopia sentenced Mengistu to capital punishment should he ever step in Ethiopia. Appeal process failed, and saw the decision of the High Court confirmed.⁸⁴

The trial of Mengistu has created a bad precedent in Ethiopia especially regarding the trials *in absentia*. It is a fact that both the trial and sentence against Mengistu were *in absentia*. Mengistu has been condemned to death *in absentia*. However, the law allows setting aside the conviction and sentence if Mengistu steps on Ethiopia and justifies his absence. An application to set aside the sentence and conviction can be made under articles 196 and 201(1) of the Criminal Procedure Code of Ethiopia. A trial *in absentia* violates human rights of the accused person from the trial stage to the sentencing stage.

⁸² Page 19 of the Ruling.

⁸³ Page 21 of the Ruling.

⁸⁴ For the decision on Mengistu, see generally, K Tronvoll, C Schaefer and GA Aneme 'Concluding the main Red Terror Trial: Special Prosecutor v Colonel Mengistu Hailemariam et al.' in K Tronvoll, Schaefer and Aneme (eds) *The Ethiopian Red Terror Trials: Transitional justice challenged* (2009) 136-152; FK Tiba 'The Mengistu genocide trial in Ethiopia' (2007) 5 *Journal of International Criminal Justice* 513-528.

No fair trial is furthered by trials *in absentia*. With specific reference to the Mengistu trial, one can assert that it might have been a result of victor's justice.

The trials *in absentia* are likely to be expedited to suit political interests. But it can be said that since Mengistu had absconded trial, then the issue of fairness becomes obsolete as he may be considered to have waived his right to be tried in his presence. Contemporary human rights law requires that all persons be tried in their presence, and be defended by legal representatives or counsel of their choice. Human rights treaties are many and clear on this aspect. Examples here include article 14(3) of the International Covenant on Civil and Political Rights, 1966, and article 6(1) of the European Convention on Human Rights. Further, article 63(1) of the Rome Statute requires an accused to be tried in his presence. Other international law statutes also reflect on this point. Article 20(4) of the Statute of the International Criminal Tribunal for Rwanda, and article 21 (4) (d) of the Statute of the International Criminal Tribunal for the former Yugoslavia also requires that an accused person be tried in his presence.

However, it may also be equally argued that in some instances, international law does not automatically do away with trials *in absentia*. The same is also observed in articles 160 and 161 of the Ethiopian Criminal Procedure Code, whereby a court may conduct a trial *in absentia* if the accused person does not appear before the court after he has been served with a summons to appear.

In the end, the position in Ethiopia can be summarised that, politically, the position is not clear because the Mengistu trial and Al-Bashir case present two differing positions at state level. Whereas the Mengistu trial signifies the political willingness to prosecute individuals for international crimes, the Al-Bashir case is an anti-thesis to that position. The laws in Ethiopia are very clear that international crimes are punishable in Ethiopia. But, the practice is not quite clear as such. It is not clear whether the serving state official of Ethiopia can be tried for these international crimes. Judicial precedents have set a position that a former Ethiopian state official can be prosecuted for international crimes, and that immunity will not come to play in whatsoever manner. However, one must note

that most of the persons prosecuted for international crimes in Ethiopia are members of the opposition groups against the current government. No government official has been tested by the law before the Ethiopian courts for international crimes.

5.3.2 South Africa

5.3.2.1 State practice

South Africa is another African state which presents an interesting case study on immunity and prosecution of international crimes at domestic level. The country has enacted a law which implements the Rome Statute at domestic level. It is in South Africa where apartheid was committed. The fact that apartheid – a crime against humanity – was committed and tolerated in South Africa at state level indicates that there is need to discuss the state practice in detail. Further, one must accept that South African courts have prosecuted a few former state officials of the apartheid regime. Particularly, the former Minister responsible for law and order, Adriaan Vlok, was prosecuted for his role during apartheid era. The prosecution of Adriaan Vlok is the only example of a case against a high profile state official. It is surprising that South Africa did not prosecute many state officials, including former president Pieter W Botha for their roles in inciting and tolerating apartheid.⁸⁵ It must also be noted with disappointment that, a constitutional challenge on amnesty law in South Africa failed before the Constitutional Court of South Africa. All these are important matters that need to be discussed in detail regarding prosecution of international crimes in South Africa. As indicated in the introduction to this chapter, the discussion involves state practice, judicial and legal frameworks as presented below.

At political level, the South African government has taken a rather contradictory position on whether a serving state official of a foreign state can be arrested or prosecuted before

⁸⁵ Former President PW Botha is believed to have publicly incited and tolerated apartheid. His speech in the Cabinet in August 1985 clearly went as far as to publicly incite not only the commission of apartheid but also what would constitute genocide. PW Botha incited the public to kill Black people, destroy the black race with poisonous chemical and biological weapons which could lead to slow deaths of black people. One of the methods he suggested was the poisoning of food and drinks intended for black people. He also encouraged nurses to kill black babies born in public hospitals with the purpose of exterminating the whole black race.

the South African courts. When President Omar Al Bashir of Sudan was indicted by the ICC, South Africa (under former President Thabo Mbeki) was one of the African state that expressed concerns that the arrest warrant came at a critical time and that, it could affect the peace processes in Darfur, Sudan. This remained the position of former President Mbeki until to date as is also reflected in the Mbeki report.⁸⁶ In essence, the condemnation of the arrest warrant had the potential effect that President Bashir should not have been indicted for crimes committed in Darfur, Sudan. Drastic changes were later noted in South Africa after the termination of Thabo Mbeki as president.

In 2009, President Jacob Zuma of South Africa declared that if President Omar Al-Bashir of Sudan stepped on South Africa, the authorities would arrest Omar Al Bashir thereby enforcing a warrant of arrest issued by the ICC. South Africa argued so based on the ground that it is a state party to the Rome Statute, and therefore that, it is bound to respect and cooperate with the ICC in matters relating to prosecution, investigation, arrest and surrender of suspects of international crimes to the ICC. That Omar Al Bashir could be arrested is something that can be possible because South Africa, apart from being a state party to the Rome Statute, it has enacted a law which implements the Rome Statute and criminalises the international crimes at national level.⁸⁷ As such, by arresting Omar Al Bashir, South Africa could be said to have enforced its own legislation requiring arrest and prosecution of persons who commit international crimes.⁸⁸

The foregoing is just one way on how South Africa has expressed its position regarding the prosecution of Omar Al Bashir. It must be known that despite the above stated position by President Zuma, South Africa is one of the member states of the African Union that adopted various decisions condemning the Prosecutor of the ICC for the indictment and arrest warrant issued against Omar Al Bashir. It is not clear as to what is the real political will of South Africa in respect of the arrest and prosecution of Omar Al Bashir. When the United Nations Security Council adopted resolution 1593 in 2005

⁸⁶ Report of the African Union High-Level Panel on Darfur, PSC/AHG/2(CCVII), Peace and Security Council, 207th Meeting at the Level of Heads of State and Government, 29 October 2009, Abuja, Nigeria. The High Panel on Darfur was headed by Thabo Mbeki.

⁸⁷ *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.*

⁸⁸ Sec 4(3) (c).

referring the Situation in Darfur to the Prosecutor of the ICC, South Africa was a member of the Security Council at the time. There is no clear position that can be asserted by South Africa regarding the prosecution of Omar Al Bashir.

The preceding indicates the South African position and practice regarding prosecution of foreign state officials. It is necessary to examine the position with regards to South African state officials before domestic courts in South Africa.⁸⁹ One must understand that – apartheid – a form of crimes against humanity was committed in South Africa. Although the South African Truth and Reconciliation Commission (TRC) had found former President Pieter Botha responsible for apartheid, no criminal prosecution was preferred against him.⁹⁰ The South African TRC cleared President De Klerk of apartheid crimes in South Africa.⁹¹

However, it is notable that in South Africa, the authorities attempted to prosecute former state officials responsible for apartheid. There are concerns that the former Minister responsible for law and order, Mr. Adriaan Vlok, was the only high profile state official who was prosecuted and sentenced to ten years imprisonment. However, Mr. Adriaan Vlok was released following a plea bargain in 2007.⁹² It seems that South African state authorities have been reluctant to prosecute former state officials for apartheid. This meant somehow that they were immune, at least based on amnesty law. However, one

⁸⁹ For discussions on possibilities of criminal prosecutions against South African state officials, see, N Boister and R Burchill ‘The implications of the Pinochet decision for the extradition or prosecution of former South African heads of state for crimes committed under apartheid’ (1999) 11 *African Journal of International and Comparative Law* 619-637.

⁹⁰ *The Truth and Reconciliation Commission Report of South Africa, Volume V* (1998) 349, para 114; 449, para 61.

⁹¹ The relevant part of the TRC Report discloses no liability for FW De Klerk. See, *South African TRC Report, Volume V* (1998) 225, para 105; 448, para 55.

⁹² See, *State v Johannes Velde van der Merwe, Adriaan Johannes Vlok, Christoffel Lodewikus Smith, Gert Jacobus Louis Hosea Otto and Hermanus Johannes van Staden*, Criminal Case No. 392/2007, High Court of South Africa at Pretoria. The original case is in Afrikaans language. I am particularly grateful to the court officials at the High Court of Pretoria for giving me access to this case, including photocopies of the case. The following are acknowledged: Leonatra Rossouw, Senior Registrar’s Clerk, Criminal Section; Diane Venter, Photocopy room; Anusha Chetty, Registrar, Criminal Section.

striking difference in the South African state practice is when President Nelson Mandela accepted to appear as a witness before a court despite his immunity as president.⁹³

5.3.2.2 Judicial practice

In early 2010, the National Prosecutions Authority (NPA) considered allegations involving some Israeli nationals (found in South Africa) who are suspected of having committed international crimes in Gaza, Palestine. However, there is no clear indication that the Israeli nationals could be prosecuted in South Africa for international crimes.⁹⁴

Regarding the practice at the South African courts, it is observed that the South African Constitutional Court has thwarted efforts to prosecute perpetrators of apartheid. A case⁹⁵ had been filed before the court to challenge the constitutionality of section 20(7) of the law that recognised amnesty for perpetrators of apartheid in that it violated international law as well the constitutional provision on judicial remedy for violations of human rights. The Constitutional Court stated that section 20(7) of the law that grants amnesty to perpetrators of the crime of apartheid is constitutional. The court seems to have ignored the customary international law imposing an obligation on states, including South Africa, to prosecute and punish persons responsible for international crimes.

5.3.2.3 Legal framework

The constitution of South Africa is silent on whether state officials may be prosecuted for international crimes. An examination of constitutional provisions does not reveal anything on the immunity accorded to the state officials. In this regard, it may be argued

⁹³ *South African Rugby Football Union and Others v President of the Republic of South Africa and Others*, 1998 (10) BCLR 1256 (T); See also, *President of the Republic of South Africa (first applicant), Minister of Sport and Recreation (second applicant), Director General of Sport and Recreation (third applicant) v South African Rugby Football Union (first respondent), Gauteng Lions Rugby Union (second respondent), Mpumalanga Rugby Union (third respondent), Dr Louis Luyt (fourth respondent)*, Constitutional Court of South Africa, Case CCT 16/98, Judgment of 2 December 1998, para 3 as per Chaskalson, P.

⁹⁴ Information from one official from the Department of Foreign Affairs, Pretoria.

⁹⁵ *The Azania Peoples Organisation (AZAPO) and 3 others v The President of the Republic of South Africa and 6 others*, Constitutional Court of South Africa, Case CCT 17/96, (Mohamed, DP), paras 8 *et seq.*

that the South African constitution renders the state officials amenable to prosecution and punishment for international crimes in the event that such persons are alleged to commit the crimes. International law treaties, including those punishing international crimes have a force of law in South Africa, subject to being domesticated into legislation through a resolution of the National Assembly.⁹⁶ Customary international law is part of the law in South Africa, provided it is not inconsistent with the constitution or an Act of Parliament.⁹⁷ South African courts are obliged to interpret and apply international law.⁹⁸

South Africa is a state party to the Genocide Convention and the Rome Statute of the ICC. South Africa enacted the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*. This is an Act to provide a framework for the effective implementation of the Rome Statute. It is also meant to ensure conformity by South Africa of its international obligations set out in the Rome Statute.⁹⁹ Further, the purpose was to provide for the crime of genocide, war crimes, and crimes against humanity, and to provide for the prosecution of such international crimes by South African courts for crimes committed in South Africa or abroad, and to allow cooperation between South Africa and the ICC.¹⁰⁰ The Act was assented to by the President of South Africa on 18 July 2002. It contains only forty sections and appends Schedule 1 on the ‘Crimes under the Rome Statute’. In addition, it contains an Annexure of the whole of the English text of the Rome Statute thereby incorporating it into the Act. The background of the Act was the fact that South Africa felt mindful of the fact that throughout history, millions of children, men and women have suffered as a result of international crimes (including apartheid), and that since South Africa had become one amongst the community of

⁹⁶ Sec 231, Constitution of South Africa, 1996.

⁹⁷ Sec 232.

⁹⁸ Sec 233.

⁹⁹ For commentaries on the Act, see generally, M du Plessis ‘International Criminal Courts, the International Criminal Court, and South Africa’s implementation of the Rome Statute’ in J Dugard (2005) *International law: A South African perspective*, 174-209; M du Plessis ‘South Africa’s implementation of the ICC Statute: An African example’ (2007) 5 *Journal of International Criminal Justice* 460; A Katz ‘An Act of transformation: The incorporation of the Rome Statute of the ICC into national law in South Africa’ (2003) 12(4) *African Security Review* 27; M du Plessis ‘Bringing the International Criminal Court home – the implementation of the Rome Statute of the International Criminal Court Act 2002’ (2003) 16 *South African Journal of Criminal Justice* 2.

¹⁰⁰ Sec 3 and the Preamble to the *Implementation of the Rome Statute of the International Criminal Court Act, Act No 27 of 2002*.

nations since 1994, it thus felt committed to prosecute persons who commit international crimes before its own courts, or where necessary to the ICC.¹⁰¹

The Act provides that in addition to the constitution or any other applicable law, a competent court hearing cases arising from the Act, must consider conventional international law, customary international law and foreign law.¹⁰² The High Court of South Africa is empowered to hear such cases.¹⁰³ The Act recognises the complementarity principle as per the Rome Statute, and whenever the national prosecution authority is unable or unwilling to prosecute, the ICC should take cases.¹⁰⁴

Section 4(3) of the Act confers South African courts with universal jurisdiction to prosecute and punish persons responsible for international crimes as recognised under the Act and the Rome Statute. It provides that any person who commits an international crime outside South Africa, is deemed to have committed that crime in the territory of South Africa if (a) that person is a South African citizen, or (b) that person is not a South African citizen but is ordinarily residing in South Africa, or (c) that person, after committing a crime, is present or found in South Africa, or (d) that person has committed the crime against a South African citizen, or against a person who is ordinarily resident in South Africa. The Act only envisages imprisonment for life as the severe punish punishment for the crimes.¹⁰⁵ Despite these many scenarios of prosecuting perpetrators of international crimes, it should be noted that South Africa has not prosecuted a Rwandan former military official who is currently in South Africa, who has allegedly been indicted by the authorities in France in respect of the 1994 genocide in Rwanda.

The Act now recognises ‘apartheid’ as one of the acts constituting crimes against humanity.¹⁰⁶ The Act also recognises all other forms of international crimes under the Rome Statute of the ICC. The Act removes immunity of state officials for international

¹⁰¹ See Preamble to *the Implementation of the Rome Statute of the International Criminal Court Act, Act No 27 of 2002*.

¹⁰² Sec 2.

¹⁰³ Sec 3(d).

¹⁰⁴ Sec 3(c)-(d).

¹⁰⁵ Sec 4(1).

¹⁰⁶ See Part 2, sec 1(j), Schedule 1 to the Act.

crimes, and does not recognise it as a mitigating factor in the punishment of such crimes.¹⁰⁷ It also rejects the defence of superior and command responsibility for international crimes. Institution of prosecutions before South African courts is subject to the consent of the National Director responsible for prosecutions.¹⁰⁸

The Act provides for immunities and privileges of the ICC within South Africa. The ICC may as well sit anywhere in South Africa, subject to a declaration by the President of South Africa.¹⁰⁹ Chapter 4 of the Act deals with state cooperation with the ICC in matters of investigation, arrest, surrender, witness protection, prosecution, taking evidence, serving sentences and other matters.

By way of conclusion, South Africa has a progressive law that rejects immunity of state officials in the prosecution and punishment of international crimes committed in South Africa or abroad. The law implementing the Rome Statute is compatible to that treaty with regards to prosecution and punishment of international crimes in South Africa. However, the law allows universal jurisdiction to be exercised by courts – something that the ICC does not have. The political practice on whether state officials are immune for international crimes is not certain and uniform. Judicial organs, particularly the Constitutional Court of South Africa has rendered a decision that was not favourable to the prosecution of apartheid crimes as part of crimes against humanity.

5.3.3 Senegal

5.3.3.1 Legislative efforts

Senegal was the first African state to ratify the Rome Statute in 1999.¹¹⁰ Despite its monist nature in the law of treaties, Senegal has enacted a law to implement the Rome

¹⁰⁷ Sec 4(2).

¹⁰⁸ Sec 5.

¹⁰⁹ Secs 6-7.

¹¹⁰ Senegal signed the Rome Statute on 18 July 1998 and ratified it on 2 February 1999.

Statute.¹¹¹ In addition, Senegal has amended its constitution to authorise its courts to try international crimes in Senegal, including crimes committed outside the territory of Senegal, and also in the past.¹¹² The Constitution of Senegal provides that:

All infringements of liberty and deliberate interferences with the exercise of a freedom shall be punished in accordance with Statute.

Nobody may be sentenced except by virtue of a Statute which entered into force before the act was committed.

*However, the provisions of the preceding paragraph shall not exclude the prosecution, trial and sentencing of a person for acts which at the time they were committed were deemed to be criminal acts in accordance with the rules of international law on genocide, crimes against humanity and war crimes.*¹¹³

The constitution ensures the right to defence as an absolute one at all stages and levels of the proceedings. Paragraph 3 (as italicised above) of article 9 of the Constitution of Senegal was inserted by the *Constitutional Act No. 2008-33 of 7 August 2008*. This amendment paved a way for the prosecution of the former President of Chad, Hissène Habré, who resides in Senegal, for serious human rights violations committed in Chad during his time in office as president between 1982 and 1990.¹¹⁴

Article 9 of the Constitution of Senegal, which is a result of the amendment of August 2008 permits Senegalese courts to prosecute and punish individuals for crimes committed in the past, and outside Senegal. Such crimes are ‘genocide, crimes against humanity and war crimes.’ This allows retrospective application of the law to crimes committed in the past. This law also confers Senegalese courts with universal jurisdiction to try individuals

¹¹¹ For details on Senegalese legal framework on international crimes, see generally, M Niang ‘The Senegalese legal framework for the prosecution of international crimes’ (2009) 7 *Journal of International Criminal Justice* 1047-1062.

¹¹² See, CS Igwe, ‘The ICC’s favourite customer: Africa and international criminal law’ (2008) XL *The Comparative and International Law Journal of Southern Africa* 294-323, 314; J Pejic, ‘Accountability for international crimes: From conjecture to reality’ (March, 2002) 84 (845) *International Review of the Red Cross*, 24-25; M Inazumi (2005), *Universal jurisdiction in modern international law: Expansion of national jurisdiction for prosecuting serious crimes under international law*, 90-91.

¹¹³ Art 9, Constitution of Senegal of 22 January 2001, as amended to the Act of the Constitutional Council of 21 October 2008, (emphasis in italics is mine).

¹¹⁴ Note that a Chadian court sentenced Hissène Habré in August 2008 *in absentia* for alleged treason in Chad. At the time of both trial and sentence *in absentia*, Habré remained in Senegal.

who commit international crimes. This is a clear way for Senegal to try Habré for acts of crimes against humanity and torture committed in Chad. This fear was also expressed by one Chadian national, Michelot Yogogombaye who instituted a case against Senegal before the African Court on Human and Peoples' Rights.¹¹⁵ A discussion on the Senegalese laws implementing or supporting the Rome Statute is necessary at this point. This is done below followed by the state and judicial practices in Senegal.

*Law No. 2007-02 of 12 February 2007 Modifying the Penal Code*¹¹⁶ is the one that prohibits and punishes international crimes as recognised by the Rome Statute. The law was adopted by a Plenary Session of the Senegalese National Assembly on 31 January 2007. The object of the amendment contained in this law¹¹⁷ is to adapt Senegalese legislation to the rules and norms of the Rome Statute of the International Criminal Court after the ratification of the Rome Statute. By recognising prosecution of genocide, war crimes, crimes against humanity, Senegal respects the principle of complementarity principle. The incorporation of the Rome Statute presented an opportunity to Senegal to integrate rules and customs of international humanitarian law as reflected in the Rome Statute and Geneva Conventions, 1949 and their Additional Protocols, 1977.

By adopting international rules, Senegal is in a position to prosecute the three international crimes defined in the Rome Statute. The technique of literally transposing the crimes was adopted to affirm the *jus cogens* character of the crimes: genocide; crimes against humanity and war crimes.

¹¹⁵ *In the Matter of Michelot Yogogombaye v The Republic of Senegal*, Application No. 001/2008, African Court on Human and Peoples' Rights, Judgment, 15 December 2009, para 20. However, the case did not go to merits, as the court ruled on the preliminary objections raised by Senegal on the ground that Senegal had not made a declaration under article 34(6) allowing individuals to bring cases before the African Court on Human and Peoples' Rights pursuant to article 5(3) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights. For more discussion on this case, see generally, CB Murungu 'Judgment in the first case before the African Court on Human and Peoples' Rights: A missed opportunity or mockery of international law in Africa?' (2010) 3(1) *Journal of African and International Law* 187-229.

¹¹⁶ Law No. 2007-02 of 12 February 2007 Modifying the Penal Code, *Official Journal of the Republic of Senegal*, 10 March 2007, 2377-2380, Signed by Macky Sall for President Abdoulaye Wade.

¹¹⁷ Preamble to Law No. 2007-02 of 12 February 2007 Modifying the Penal Code, *Official Journal of the Republic of Senegal*, 10 March 2007, 2377-2380.

The substantive crimes covered by this law are provided in articles 431-1 to 431-3 (genocide, crimes against humanity and war crimes). Genocide¹¹⁸ is defined in line with the Genocide Convention and the Rome Statute. However, critics have argued that although article 431-1 mentions the four protected groups as listed in the Rome Statute, it further provides that the protected groups can be ‘determined by any other criteria.’¹¹⁹ Consequently, it seems that the Senegalese law, like the Ethiopian law, envisages a higher standard than that in the Rome Statute or the Genocide Convention.

Further, the Senegalese law has notable incompatibilities with international law instruments on genocide. In article 431-1(2), the Senegalese law talks about ‘*morale*’ harm rather than mental harm (*mentale*). A reading of this provision would suggest that the law distinguishes between ‘bodily’ and ‘mental’ harm as the word ‘*morale*’ may be synonymous with mental harm contained in the Genocide Convention.¹²⁰ It is observed that the law omits the word ‘physical’ in its article 431-1(3) which refers to the ‘conditions calculated to bring about the destruction of the group.’¹²¹ It should be noted, there could be a difference between destruction of the group and the ‘physical’ destruction of members of the group as such. Another notable divergence with the Genocide Convention is the fact that the Senegalese law does not criminalise forms of criminal responsibility such as conspiracy to commit genocide as is reflected in article III of the Genocide Convention. However, since Senegal is a state party to the Genocide Convention,¹²² it follows that article III of the Genocide could be applied to fill this gap.¹²³

Crimes against humanity and war crimes are defined in the Senegalese law as in the Rome Statute.¹²⁴ Further, the law also prohibits and punishes other serious violations of international humanitarian law.¹²⁵ As in the genocide aspect, there are also inequalities

¹¹⁸ Art 431-1, Law No. 2007-02 of 12 February 2007 modifying the Penal Code (Senegal).

¹¹⁹ Niang (2009) 1049.

¹²⁰ Niang (2009) 1050.

¹²¹ Niang (2009) 1050.

¹²² Senegal became a state party to the Genocide Convention on 4 August 1983.

¹²³ Niang (2009) 1050.

¹²⁴ Arts 431-2 & 431-3, Law No. 2007-02 of February 2007 Modifying the Penal Code (Senegal).

¹²⁵ Art 431-5, Law No. 2007-02 of 12 February 2007 Modifying the Penal Code (Senegal).

insofar as crimes against humanity and war crimes are concerned. Academic commentaries on the Senegalese law suggest that '[a]rticle 431-2 omits without any explanation some specific crimes envisaged in Article 7(1) (d) and (e) of the [Rome Statute].'¹²⁶ Niang observes that 'the definition of terms provided in Article 7(2) (a) to (h) of the [Rome Statute] has also not been reproduced in Article 431-2.'¹²⁷ Still, article 431-2(4) of the Senegalese law omits mentioning 'forcible transfer of population' even though it mentions 'deportion'.¹²⁸ Probably a gross incompatibility is the fact that article 431-2 of the Senegalese fails to mention 'persecution' as defined and mentioned in article 7(1) (h) of the Rome Statute. The provision only refers to 'causing of bodily or mental harm based on political, racial, national, ethnic, cultural, religious or sexist motives' as material elements for crimes against humanity.¹²⁹ Finally, there is little inference to the discriminatory intent in the Senegalese law for purposes of crimes against humanity.

As for war crimes, these are defined in article 431-3 of the Senegalese law to reflect the contents in article 8 of the Rome Statute. Niang points that the law fails to mention in the categories 'protected, civilians under enemy control protected by [Geneva Convention IV].'¹³⁰ In addition, the contents of article 8(2) (b) (xxv) of the Rome Statute 'on the use of starvation of civilians as a weapon of war, and the war crime of forced pregnancy referred to in Article 8(2) (b) (xxii) of the Statute'¹³¹ are missing in the Senegalese law. Despite these criticisms, the Senegalese law punishes enlistment or conscription of children under the age of 18 years for military purposes. The international crimes covered under articles 431-1 to 431-5 of the law (genocide, crimes against humanity and war crimes) are punishable by life imprisonment with hard labour if they result in death. In all other cases, the punishment is between ten and thirty years with hard labour.¹³² One notable pre-condition for life imprisonment is the resultant death after commission of an international crime.

¹²⁶ Niang (2009) 1051.

¹²⁷ Niang (2009) 1051.

¹²⁸ Niang (2009) 1051.

¹²⁹ Niang (2009) 1051.

¹³⁰ Niang (2009) 1052.

¹³¹ Niang (2009) 1052.

¹³² Art 431-6, Law No. 2007-02 of 12 February 2007 Modifying the Penal Code (Senegal).

All individuals who commit international crimes covered under the law can be prosecuted and condemned if at the moment or place of commission, the crime was recognised as a criminal offence in accordance with general principles of law recognised by all nations whether or not it constituted a crime at that particular time and place.¹³³ Article 431-6 of this law recognises retrospectivity of the crimes and punishment as such, and may create universal jurisdiction for Senegalese courts. The question here is whether article 431-6 of the Senegalese law is compatible with international law as found in treaties on human rights and international criminal statutes, particularly articles 22, 23 and 24 of the Rome Statute. Besides, one wonders whether article 431-6 of the Senegalese law is compatible with article 7(2) of the African Charter on Human and Peoples' Rights (the African Charter) to which Senegal is a state party. The Court of Justice of the Economic Community of West African States (ECOWAS) has held that the Senegalese law violates article 7(2) of the African Charter which prohibits retroactive application of the laws in respect of crimes committed in the past.¹³⁴ The ruling of the ECOWAS court in the Habré case is rather disregarding the customary duty imposed on states to ensure that perpetrators of international crimes are prosecuted. In fact, the ECOWAS court ruling creates tension between the duty to prosecute and non-retroactive application of laws. It is argued that the duty to prosecute individuals responsible for international crimes should prevail over the rule on non-retroactive application of the laws because states have a right to prosecute and punish persons responsible for international crimes.

The reading of article 7(2) of the African Charter suggests that the principles of *nullum crimen sine lege*, *nulla poena sine lege* and non-retroactivity *ratione personae* must be respected at all times. These principles create obligations on states not to enact laws punishing past crimes, and that there is no penalty for un-recognised crime, subject of course, to recognition of the conduct as criminal under international law independently of the Rome Statute. In principle, international law does not allow states to enact criminal law that have retrospective effect on individuals. However, it can equally be argued that

¹³³ Art 431-6, Law No. 2007-02 of 12 February 2007 Modifying the Penal Code (Senegal).

¹³⁴ *Hissein Habré c. République du Sénégal*, (ECW/CCJ/JUD/06/10), Judgment of 18 November 2010, for commentary on this ruling, see V Spiga 'Non-retroactivity of criminal law: A new chapter in the Hissein Habré saga' (2011) *Journal of International Criminal Justice* 1-19, advance access, doi: 10.1093/jicj/mqq081 (accessed 15 February 2011).

‘there is no settled position both in national and international context that non-retroactivity of criminal law is prohibited as such.’¹³⁵

Customary international law does not prohibit states from enacting laws to punish international crimes of the past. Instead, it requires that perpetrators of international crimes such as genocide, crimes against humanity and war crimes must be held criminally responsible. This is largely a question of the duty to prosecute and punish international crimes. Legal authorities support the fact that states can enact laws to punish persons who commit international crimes. One finds a vivid example from the Supreme Court of Israel dismissing an appeal by Adolf Eichmann both as to conviction and sentence, and thereby affirming the judgment of the District Court of Jerusalem in *Eichmann’s* case. The court stated that:

[T]he principle of *nullum crimen sine lege, nulla poena sine lege*, insofar as it negates penal legislation with retroactive effect, has not yet become a rule of customary international law: “There is no rule of general customary international law forbidding the enactment of norms with retrospective force, so called *ex post facto*” [...] “There is clearly no principle of international law embodying the maxim against retroactivity of criminal law.”[...]It is true that in many countries the above-mentioned principle has been embodied in the constitution of the state or in its criminal code, because of the considerable moral value inherent in it, and in such countries the court may not depart from it by one iota...¹³⁶

Based on the preceding precedent, it is therefore an acceptable position that by enacting a law meant to prosecute and punish crimes committed in the past, Senegal would not necessarily violate international law as such ‘because of the high demand for prosecution

¹³⁵ CB Murungu ‘Judgment in the first case before the African Court on Human and Peoples’ Rights: A missed opportunity or a mockery of international law in Africa?’ (2010) 3(1) *Journal of African and International Law* 187-229.

¹³⁶ *The Attorney General of Israel v Adolf Eichmann*, Records of Proceedings in the Supreme Court of Israel, Appeal Session 7, Judgment, 29 May 1962, (Judges: Yitzchak Olshak, President; Shimon Agranat, Deputy President; Moshe Silberg, Justice; Alfred Witkon, Justice and; Yoel Sussman, Justice), para 8 (quoting: H Kelsen (1944), *Peace through Law* 87 and J Stone, (1959), *Legal controls of international conflict* 369).

and punishment of persons who commit international crimes vis-à-vis the rule prohibiting retroactivity of criminal law for international crimes.’¹³⁷

Regarding immunity of state officials, it is apparent that Senegal has not adopted or incorporated article 27 of the Rome Statute rejecting immunity of state officials for acts committed on official or private capacity. The law implementing the Rome Statute in Senegal is therefore silent on the question of immunity. This position is also shared by Senegalese authors on the question of immunity.¹³⁸ In the absence of immunity provisions in the implementing legislation in Senegal, it follows that since Senegal has ratified the Rome Statute, it is expected that the provisions of article 27 of the Rome Statute will be applicable in Senegal because Senegal has made commitment to the treaty establishing the ICC.

Alternatively, one has to recognise the position stated in the constitution with regards to immunity of state officials. The Constitution of Senegal provides for the immunity regime for the President, Prime Minister and other members of the government for official acts committed whilst in office.¹³⁹ The President enjoys immunity for acts committed during his official functions as long as they were recognised as crimes at the time of their commission, except for high treason. The High Court of Justice has jurisdiction over state officials for crimes, subject to impeachment procedures.¹⁴⁰

It seems there is no immunity for former foreign state officials (as opposed to former or serving Senegalese state officials), at least from the experience in the Hissène Habré who is currently subject to criminal proceedings in Senegal after the constitution and penal laws were amended in 2008. But, one may want to know whether, after the amendments to the Criminal Procedure, Penal Code and Constitution of Senegal, Habré can still be entitled to immunity under article 101 of the Constitution of Senegal which expressly recognises immunity for state officials in all crimes except the crime of high treason. The position becomes problematic given the fact that even the law that implements the Rome

¹³⁷ Murungu (2010) 187-229.

¹³⁸ Niang (2009)1055-1056.

¹³⁹ Art 101, Constitution of Senegal, 2001 as amended until 2008.

¹⁴⁰ Art 101.

Statute is silent on whether an individual may enjoy immunity for international crimes such as genocide, crimes against humanity and war crimes. Would it be assumed that since the constitution and the implementing law on the Rome Statute do not outlaw immunity, then Hissène Habré may claim immunity for all official acts committed during his time in office whilst in Chad between 1982 and 1990? One way to approach this question is by arguing that since Habré is alleged to have committed crimes against humanity, particularly acts of torture, there is little, if any, support to show that immunity may be claimed for such grave crimes. The other way would be to argue that since there is no express removal of immunity under the laws of Senegal for international crimes, Habré may still claim immunity based on official functions. But, this would not be a convincing argument, and is bound to fail because customary international law and international treaties do not recognise immunity for such serious crimes as genocide, crimes against humanity and war crimes.

In addition to the amendments to the Penal Code, Senegal also amended its Criminal Procedure Code to create a relationship between Senegal and the International Criminal Court. The prime principle of the Rome Statute on the creation of the ICC is its complementarity with national jurisdictions. In this regard, the new law was deemed necessary to facilitate the full and entire cooperation of Senegal in investigation and prosecution of international crimes in the Penal Code. *Law No.2007-05 of 12 February 2007 Modifying the Criminal Procedure Code on the Implementation of the Rome Statute of the International Criminal Court* sets the procedure to prosecute persons who commit international crimes recognised under the Rome Statute.¹⁴¹ The cooperation with the ICC rests with the Dakar Court of Appeal. The amendment to the Criminal Procedure Code emphasises that international crimes are imprescriptible.

Law No.2007-05 of 12 February 2007 Modifying the Criminal Procedure Code on the Implementation of the Rome Statute of the International Criminal Court expressly recognises and confers Senegalese courts with universal jurisdiction. Article 2 of this law

¹⁴¹ Law No.2007-05 of 12 February 2007 Modifying the Criminal Procedure Code on the Implementation of the Rome Statute of the International Criminal Court, *Official Journal of the Republic of Senegal*, 10 March 2007, 2384-2386, Signed by Macky Sall, Prime Minister, for President Abdoulaye Wade.

amends article 669 of the Criminal Procedure Code to allow courts of Senegal to exercise universal jurisdiction. The law provides that any person who commits a crime contained in the Rome Statute can be tried in accordance with Senegalese law if that person is found in Senegalese territory or if the victim resides in Senegal if the government obtains extradition for that person.¹⁴² The key element for the exercise of universal jurisdiction by the courts of Senegal is the presence of an accused and victims within the territory of Senegal, subject to extradition proceedings. Hence, any foreigner who commits an international crime and subsequently finds his or her way into Senegal is amenable to prosecution before the Senegalese courts acting on universal jurisdiction.

The amendment also echoes on the complementarity principle. With regards to state cooperation with the ICC, the *Procureur General* of the Appeals Court of Dakar may refer a case to the ICC in a situation where many crimes that are within the jurisdiction of the ICC appear to have been committed and requests the ICC to investigate a situation in order to determine whether one or many of the identified persons could be charged with international crimes.¹⁴³ The law provides that the ICC enjoys immunity and privileges in exercise of its functions in Senegal.

5.3.3.2 State and judicial practices

State practice in Senegal reflects that despite its clear obligations under the Convention against Torture (CAT), and despite having the laws punishing international crimes; Senegal has nevertheless not yet prosecuted Hissène Habré for international crimes, nor extradited him to another state prepared to try him. Criminal proceedings that were instituted in the Senegalese courts in 2005 were terminated after the Senegalese Court of Appeal at Dakar ruled that Senegal did not have jurisdiction to try crimes that were

¹⁴² Art 2, Law No.2007-05 of 12 February 2007 Modifying the Criminal Procedure Code on the Implementation of the Rome Statute of the International Criminal Court, *Official Journal of the Republic of Senegal*, 10 March 2007, 2384-2386.

¹⁴³ Art 677-19, Law No.2007-05 of 12 February 2007.

committed in Chad, far outside its territory.¹⁴⁴ Further, the Criminal Chamber of the Senegalese Court of Appeal ruled in respect of the case against Habré that the immunity of state official had protected Habré from being tried by courts in Senegal.¹⁴⁵

It is notable that Senegal has not respected Belgium's request for extradition of Habré – who is charged with crimes against humanity and torture before national courts of Belgium, in connection with such crimes he is alleged to have committed in Chad during his presidency from 1982 to 1990.¹⁴⁶ By failing to fulfil its obligations under the Convention against Torture and customary international law requiring it to prosecute or punish individuals who commit torture, Senegal is in breach of its international obligation towards Belgium and other states generally with interest to try Habré for torture as an international crime. The Committee against Torture (CAT) concluded that by failing to prosecute Habré, Senegal had breached its obligations arising from the Convention against Torture.¹⁴⁷

Faced with extradition request for Habré to be prosecuted, and despite being a state party to the Convention against Torture, Senegalese authorities had in 2006 approached the African Union (AU) regarding Belgium's extradition request. Senegal simply wanted to know whether it should have extradited Habré to Belgium or the African Union would have an alternative to try him in Africa. At its meeting at Banjul, the Gambia, in July 2006, the AU took a decision mandating the Republic of Senegal to 'prosecute and ensure that Habré is tried, on behalf of Africa, by a competent Senegalese Court with

¹⁴⁴ *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Request for the Indication of Provisional Measures, Order of 28 May 2009, ICJ General List No.144, para 3.

¹⁴⁵ *Belgium v Senegal*, Request for the Indication of Provisional Measures, para 5.

¹⁴⁶ On Hissène Habré case, see, R Brody 'An update on the case concerning Hissène Habré' (2002) Vol. 14, No1. *Interights Bulletin*, 12-13; Ferdinandusse (2005) 43-46; N Kameldy 'The Trial of Hissène Habré in Senegal: International law made in Africa?' in Murungu and Biegon (2010) (forthcoming chapter on file with the author).

¹⁴⁷ See, Communication No.181/2001, *Suleymane Guengueng et al v Senegal*, Decision of the Committee against Torture under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Thirty-sixth session, CAT/C/36/D/181/2001, 19 May 2006. The Committee found Senegal in violation of articles 5(2) and 7 of the Convention against Torture because Senegal had failed to prosecute Hissène Habré or prosecute him to Belgium to face criminal prosecution.

guarantees of fair trial.’¹⁴⁸ The African Union decided and mandated Senegal to try Habré before its own territory, and doing so in the interest of the African Union. This process triggered Belgium to institute legal proceedings before the International Court of Justice (ICJ) against Senegal on the basis of Senegal’s obligations under customary international law and the Convention against Torture, 1984.¹⁴⁹ This case is still on going before the ICJ and is likely to be decided in future.

In the final analysis, Senegal has demonstrated the willingness to prosecute persons who commit international crimes not only in its territory but also outside its territory. This is manifested by enactment of laws relevant to the prosecution and punishment of international crimes. This is reflected in the amendments to the constitution, the Penal Code and the Criminal Procedure Code of Senegal. Importantly, Senegalese courts have been conferred with universal jurisdiction to effectively prosecute and punish such persons who commit international crimes recognised by the Rome Statute. The courts of Senegal have been allowed to proceed with crimes committed in the past, and outside the territory of Senegal. However, one must note that the laws implementing the Rome Statute in Senegal are silent on whether a sitting or former state official can be prosecuted for international crimes. This is a major incompatibility with article 27 of the Rome Statute. The constitution, however, appears to recognise that official acts of the serving president can not be questioned, except in high treason cases.

Many incompatibilities are observed in the Senegalese law implementing the Rome Statute as noted above in respect of genocide, crimes against humanity and war crimes. There is therefore need for amendments to the Senegalese law implementing the Rome Statute to expressly provide for non-recognition of the immunities attaching to state officials in respect of international crimes as covered by the Rome Statute.

¹⁴⁸ See, Decision Assembly/ AU/Dec.127 (VII), (Doc. Assembly/AU/3 (VII)).

¹⁴⁹ *Belgium v Senegal*, Request for the Indication of Provisional Measures, para 6; *In the Matter of Michelot Yogogombaye v The Republic of Senegal*, Application No. 001/2008, African Court on Human and Peoples’ Rights, Judgment, 15 December 2009, para 20.

5.3.4 Kenya

In terms of state practice, at least from executive or administrative level, one observes that the Kenyan authorities are reluctant to support prosecution of state officials responsible for international crimes. This fact is based on a few incidents in Kenya: formal invitation of President Omar Al Bashir; non-approval of the *Special Tribunal for Kenya Bill* of 2009 and; calls for withdraw from the Rome Statute after the Prosecutor of the ICC filed an application for the issuance of the summonses to appear for Kenyan state officials.

Regarding Omar Al Bashir, it must be recalled that in August 2010, Kenyan authorities formally invited President Omar Al Bashir to attend a ceremony of the adoption of a new Kenyan constitution held on 27 August 2010. President Omar Al Bashir received formal recognition and official reception in Kenya. The Kenyan authorities did not arrest President Bashir despite the warrant of arrest for him issued by the ICC. This is a clear breach of Kenya's obligations under the Rome Statute, to which is a state party, and sections 8 and 18 of the International Crimes Act, 2008 (a law implementing the Rome Statute in Kenya) which allows universal jurisdiction over any person found in the territory of Kenya, and who has been indicted by the ICC for crimes within the competence of the ICC. Kenya's act of inviting and receiving President Omar Al Bashir, who is wanted by the ICC, was condemned by the ICC.¹⁵⁰ But, Kenya is not the only African state to have chosen not to arrest President Omar Al Bashir. Before the invitation of President Omar Al Bashir by Kenya, Chad which is also a state party to the Rome Statute, had invited and officially hosted President Omar Al Bashir. So, the Kenyan incident was a continuation of contempt by African states towards the arrest warrant issued by the ICC for Omar Al Bashir.

Further to the above, it must be noted that the Kenyan authorities did not heed to a call by civil society organisations to prosecute perpetrators of the crimes against humanity

¹⁵⁰ See, 'Court worry at Omar al-Bashir's Kenya trip' available at <<http://www.bbc.co.uk/news/world-africa-11117662>> (accessed on 30 August 2010).

committed in Kenya during the post election violence in 2007 and 2008. The Parliament of Kenya did not approve the Bill which would have resulted into a law to prosecute and punish all individuals, including state officials responsible for crimes against humanity committed during the post-election violence in Kenya between 27 December and 2008. One has to recall that immediately after the rigged elections in December 2007, Kenya turned into violence.¹⁵¹ State machinery and individuals committed human rights violations. In its report, the Commission of Inquiry into Post-Election Violence (CIPEV)¹⁵² documented all such violations and recommended for establishment of the Special Tribunal for Kenya to prosecute those responsible for such human rights violations.¹⁵³ The Waki Commission Report had recommended for local and international judges to serve in that Special Tribunal for Kenya, and that a law was to be enacted creating such a tribunal. The Waki Commission Report had also made a recommendation that should the Special Tribunal for Kenya fail to be established, the list of suspects who bear the greatest responsibility for crimes against humanity in Kenya should be submitted to the Prosecutor of the ICC.¹⁵⁴ In the circumstances, it was expected that the Prosecutor of the ICC would investigate and prosecute the responsible persons for such crimes.

After the Kenyan government failed to establish the Special Tribunal for Kenya due to non-approval of the Bill calling for the establishment of such tribunal, it was clear that the Kenyan state authorities were simply unwilling to prosecute and punish the perpetrators of crimes against humanity committed in Kenya during the post-elections violence. This triggered the Prosecutor of the ICC to file an application for approval by the Pre-Trial Chamber of the ICC to commence investigation and where possible, to prosecute responsible individuals, including state officials for such crimes. Following the approval of commencement of investigation, the Prosecutor commenced his investigation

¹⁵¹ For literature on the Kenyan post-election violence, see generally, W Kaguongo and G Musila (eds.), *Addressing impunity and options for justice in Kenya: Mechanisms, issues and debates*, Judiciary Watch Report, The Kenyan Section of the International Commission of Jurists: Nairobi, (2009)1-328.

¹⁵² The Commission of Inquiry into Post-Election Violence (CIPEV) was led by Justice Phillip Waki and was mandated to investigate the violence in Kenya and recommend ways to address impunity. The Commission's report is referred to as 'the Waki Report'. The Waki report contains facts on the cause of the violence, violations and impunity and responsible state officials, all contained in 529 pages.

¹⁵³ See the Waki Report, Part V, (recommendations), 472-475, paras 1-13.

¹⁵⁴ The Waki Report, recommendation 5, at 484.

under article 15 of the Rome Statute. The Prosecutor then filed an application on 15 December 2010 before Pre-Trial Chamber II of the ICC to issue summonses to appear for six persons from Kenya, including state officials.¹⁵⁵ As a reaction to the request by the Prosecutor of the ICC, the Parliament of Kenya passed a motion seeking to allow Kenya to withdraw from the Rome Statute of the ICC.¹⁵⁶ The motion was introduced by Issac Ruto, a member of parliament. The Kenyan authorities argued that they wanted the six suspects to be prosecuted before national courts in Kenya in respect of crimes against humanity. It is for this reason that Kenya approached the African Union in order to request a deferral of investigations and prosecutions in respect of the six Kenyans suspected of crimes against humanity.

However, Kenya must know that conducting national prosecutions is not a ground for the UN Security Council to defer investigations or prosecutions. A deferral under the Rome Statute is only possible in exceptional cases in order to maintain and restore international peace and security. Kenya has not yet convinced the international community that the investigations and prosecutions of the six Kenyans by the ICC are likely to affect international peace and security.

Kenya's act of passing a motion to withdraw from the Rome Statute was criticised by civil society organisations in East Africa. For example, the East Africa Law Society condemned the Kenyan authorities as intending to defeat the course of justice for crimes against humanity with the intent to delay or frustrate the investigation and prosecution processes regarding crimes against humanity committed in Kenya.¹⁵⁷ It called upon the

¹⁵⁵ Situation in the Republic of Kenya, Public Reducted Version of Document ICC-01/09-30-Conf-Exp, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09, 15 December 2010, 1-79; Situation in the Republic of Kenya, Public Reducted Version of Document ICC-01/09-31-Conf-Exp, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09, 15 December 2010, 1-80.

¹⁵⁶ 'Kenyan parliament passes motion to withdraw country from ICC', 23 December 2010, available at <<http://www.afriqueavenir.org/en/2010/12/23/kenyan-parliament-passes-motion-to-withdraw-country-from-icc>> (accessed on 16 February 2011).

¹⁵⁷ 'Statement on the Pending Indictment of 6 Kenyans by the International Criminal Court for alleged Complicity in Crimes Against Humanity arising out of the 2007 Post Election Violence' Signed by Dr Wilbert Kapinga, President of the East Africa Law Society, 21 January 2011, 1- 4. See also, Civil Society

Kenyan government to cooperate with the ICC in the prosecution of the six individuals whom the Prosecutor of the ICC sought the summonses to appear.

It is argued that Kenya's intention to withdraw from the Rome Statute under article 127 may not affect the current investigation or expected prosecutions against Kenyan individuals responsible for international crimes. Withdrawal from the Rome Statute does not retrospectively invalidate the ongoing prosecution or investigations in respect of Kenyans. It would seem that such withdrawal may have the effect of protecting perpetrators of crimes against humanity. The Kenyan government is obliged to cooperate with the ICC under article 86 of the Rome Statute and the International Crimes Act, 2008, which implements the Rome Statute into Kenyan domestic law. Under this law, Kenya is obliged to recognise and abide by the obligations arising from the Rome Statute, in particular, to cooperate with the ICC in the investigation and prosecution of individuals responsible for international crimes within the jurisdiction of the ICC.

The preceding represents the Kenyan state practice at political level. The following part will address the legal and judicial practices in Kenya. Several laws are examined here, particularly those dealing with punishment of international crimes. In addition, the Kenyan court decision on the role of the ICC in Kenya is highlighted.

On 4 August 2010 a constitutional referendum was held for Kenyans to vote for or against the proposed new constitution of 6 May 2010. The majority voted for the constitution. This new Constitution of Kenya was adopted on 29 August 2010. Under the new constitution, the executive comprises the President and Deputy President.¹⁵⁸ Article 131(1) of the Constitution of Kenya, 2010, provides that the President is the head of state and government. Under the Constitution of Kenya, 2010, 'the general rules of international law form part of the law of Kenya'.¹⁵⁹ Further, the Constitution of Kenya, 2010 provides that '[a]ny treaty or convention ratified by Kenya shall form part of the

Statement on Kenya and the International Criminal Court, 25 January 2011 (51 organisations issued a statement condemning Kenya and reminding it of its international obligations under the Rome Statute).

¹⁵⁸ Art 130(1), the Constitution of Kenya, 2010, published by the Attorney-General in accordance with section 34 of the Constitution of Kenya Review Act, 2008 (No. 9 of 2008).

¹⁵⁹ Art 2(5) of the Constitution of Kenya, 2010.

law of Kenya...'¹⁶⁰ Hence, international treaties prohibiting and punishing international crimes such as the Genocide Convention, 1948, the Geneva Conventions I-IV, 1949 and their Additional Protocols, 1977, and the Rome Statute, 1998 form part of the law of Kenya. Given this position, it is argued that, by passing a motion to allow Kenya to withdraw from the Rome Statute, Kenya breached its international and national obligations arising from the Rome Statute, the International Crimes Act, 2008, and the Constitution of Kenya, 2010. Prior to this new development, customary international law formed the basis of exercise of jurisdiction over international crimes.¹⁶¹

With regards to immunity from criminal proceedings, the President is protected from criminal charges during the tenure of office. The same extends to civil proceedings during the President's tenure of office.¹⁶² Article 143 of the Constitution of Kenya, 2010 recognises immunity of the President from criminal proceedings. However, immunity of the President does not extend to a crime which the President may be prosecuted under any treaty to which Kenya is a state party 'and which prohibits such immunity.'¹⁶³ Hence, immunity of state officials from prosecution for international crimes is not recognised. Immunity is outlawed for international crimes recognised by Kenya through its international treaty obligations.

Kenya is a state party to the Genocide Convention and the Rome Statute that punish international crimes. Regarding grave breaches of the Geneva Conventions, these are punishable in Kenya under the *Geneva Conventions Act, 1968*.¹⁶⁴ Kenya has enacted the *International Crimes Act, 2008*.¹⁶⁵ This Act recognises and punishes all such international crimes under the Rome Statute. It incorporates the whole of the Rome Statute as a schedule to the Act. The Act came into force on 1 January 2009 after the

¹⁶⁰ Art 2(6) of the Constitution of Kenya, 2010.

¹⁶¹ See, The African Union-European Union Expert Report on the Principle of Universal Jurisdiction, Council of the European Union, Brussels, 16 April 2009, 8672/1/09, para 15.

¹⁶² Art 143(1)-(2), Constitution of Kenya, 2010.

¹⁶³ Art 143(4), Constitution of Kenya, 2010. Note that in the 2009 draft constitution, immunity was addressed under article 68(4).

¹⁶⁴ *The Geneva Conventions Act, 1968*. International crimes particularly war crimes attract universal jurisdiction in Kenya under this Act, see sec 3(1) of the Act.

¹⁶⁵ *The International Crimes Act*, (No.16 of 2008).

proclamation of the law in the Government Gazette by the Minister of State for Provincial Administration and Internal Security. Such proclamation was made in exercise of the powers conferred on the Minister by section 1 of the Act.¹⁶⁶

The issue of immunity of state officials is addressed under section 27 of the International Crimes Act, 2008. Section 27 of the Act provides that:

27. (1) The existence of any immunity or procedural rule attaching to the official capacity of any person shall not constitute a ground for –
- (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC;
 - (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another state under this Act; or
 - (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.
- (2) Subsection (1) shall have effect subject to sections 62 and 115, but notwithstanding any other enactment or rule of law.

From the above, the Act does not recognise immunity of state officials but at least in respect of request for the surrender of any individual or any other assistance to the ICC. Section 27(2) imposes conditions under section 62 of the Act as envisaged under article 98 of the Rome Statute where it must require state consent or waiver of immunity for the transfer to take place. Nevertheless, it is the ICC which has to make a determination before anything proceeds in terms of article 27(2) and 62 of the International Crimes Act, 2008. This is meant to avoid unnecessary conflict between articles 27 and 98 of the Rome Statute as reflected in sections 27 and 62 of the International Crimes Act, 2008. The reference to section 115 as stated in section 27(2) of the Act is to avoid any possible conflict in terms of competing requests envisaged under article 98(1) of the Rome Statute. Here again, the Act says that it is the ICC which has to make a determination before anything may proceed regarding transfer.

However, section 27 of the Act is not very clear on whether the Kenyan state officials may be prosecuted before domestic courts in Kenya. One may thus conclude that section

¹⁶⁶ The commencement of the Act was on 1 January 2009, but the proclamation was published on 22 May 2009, by Prof George Saitoti, the Minister.

27 of the Act seems incompatible with article 27 of the Rome Statute insofar as prosecution and punishment are concerned. Section 27 of the Act only talks about transfer to the ICC. Nevertheless, the Act is clear that the ICC may sit in Kenya and conduct trials there. Perhaps it is on this way that a Kenyan state official may be prosecuted by the ICC in accordance with the Act.

In section 27 of the Act, procedural hurdles appear to be recognised because there is a proviso in section 27 which recognises constitutional protection accorded to the state officials in Kenya. In this regard, it seems that Kenyan state officials may only be transferred and surrendered to be prosecuted by the ICC but not the Kenyan courts even for international crimes.¹⁶⁷ Perhaps this problem is resolved by the provision of article 143(4) of the Constitution of Kenya, 2010. As noted above, article 143(4) does not recognise immunity for international crimes as sanctioned by treaties to which Kenya is a state party, or as is recognised by customary international law. Here again, one must seek authority and support from article 2(5) of the Constitution of Kenya, 2010 which recognises rules of international law to apply to and bind Kenya.

An analysis of the *International Crimes Act* reveals that the Act acknowledges that the Rome Statute has the force of law in Kenya in several aspects relating to requests by the ICC to Kenya, conduct of investigation, enforcement of sentences in Kenya, bringing and determination of proceedings before the ICC, application of laws governing the ICC, and general principles of criminal law.¹⁶⁸ The Act binds the Kenyan government.¹⁶⁹ The purpose of the *International Crimes Act* is to make provision for the punishment of international crimes, especially genocide, crimes against humanity and war crimes. The second purpose of the Act is to enable Kenya to cooperate with the ICC in its functions.¹⁷⁰

¹⁶⁷ A Okuta, 'National legislation for prosecution of international crimes in Kenya' (2009) 7 *Journal of International Criminal Justice* 1063-1076, 1073.

¹⁶⁸ Sec 4, International Crimes Act, 2008.

¹⁶⁹ Sec 3.

¹⁷⁰ See, long title of the Act.

The International Crimes Act grants Kenyan courts with jurisdiction to deal with genocide, crimes against humanity and war crimes. The Act does not define such crimes but simply refers to the definitions contained in the Rome Statute for such international crimes.¹⁷¹ It applies the general principles of law as contained in the Rome Statute.¹⁷² The Act confers the Kenyan High Court with universal jurisdiction over international crimes of genocide, crimes against humanity and war crimes and other serious violations of humanitarian law. The preconditions for such exercise of universal jurisdiction are mentioned in the Act as follows: the crime must have been committed in Kenya; at the time of the commission of the crime, the person was a Kenyan citizen, or a citizen of a state that was engaged in armed conflict against Kenya, the victims must be Kenyan citizens, or citizens of allies to Kenya during an armed conflict; after the commission of the crime, a person must be within the territory of Kenya.¹⁷³ So, the emphasis is largely on nationality link and territoriality. But, it must be noted that Kenya failed to apply universal jurisdiction over President Bashir of Sudan who had visited Kenya on 30 August 2010 at the official invitation by the Kenyan authorities. If indeed Kenya were to respect its obligations arising from sections 8 and 18 above of the International Crimes Act, it should have arrested and prosecuted President Omar Al Bashir because he was in the Kenyan territory. Further, given the uncontested fact that Kenya has enacted the law which implements the Rome Statute thereby providing for cooperation with the ICC in respect of arrest and surrender of persons accused of international crimes, it was a testing moment for Kenya to arrest Omar Al Bashir. Had Kenyan authorities arrested Omar Al Bashir, it would have been an act of fulfilling Kenya's obligations arising from article 2(5) of the Constitution of Kenya, 2010; the Rome Statute; customary international law as well as from the International Crimes Act. Failure to do so, as it did, amounts to breach of Kenya's international law obligations.

The International Crimes Act provides a wide range of cooperation between the ICC and Kenya as reflected in Part 9 of the Rome Statute, especially articles 86 through 93. This cooperation involves issues of provisional arrest, arrest and surrender to the ICC,

¹⁷¹ Sec 6.

¹⁷² Sec 7.

¹⁷³ Secs 8 & 18.

identification of persons, taking of evidence and testimony, investigation or prosecution, facilitating voluntary appearance, service of court documents, examination of places or sites, search and seizure, protection of victims and witnesses, and any other kind of assistance.¹⁷⁴

Overall, the enactment of the International Crimes Act, 2008 in Kenya is a progressive gesture on the development of international criminal justice in Kenya. Principles of international criminal justice have been incorporated into the Kenyan legal system, and importantly, Kenyan courts are empowered to punish international crimes at national setting. Could the Act be applied to prosecute persons responsible for the 2007 post-election violence in Kenya? Although the human rights violated in Kenya at the time fall within crimes against humanity, a crime within the purview of the Act itself, it might be argued that the crimes were committed long before the Act came into existence, so to use the Act would be tantamount to leaning on retrospective application of law and punishment. The events took place in 2007 and early 2008, the Act came into force in January 2009. It would certainly violate some rights for the suspects or accused persons. However, there is no customary international law that prohibits states from punishing perpetrators of international crimes committed in the past whilst taking into consideration the fact that international crimes impose obligations to prosecute and punish the perpetrators thereof.

The Kenyan court has been able to deliver an important ruling that the International Crimes Act and the Constitution of Kenya impose obligations on Kenya to respect the provisions of the Rome Statute. In a *Constitutional Reference 12 of 2010*, the High Court of Kenya ruled that based on article 2(5) and (6) of the Constitution of Kenya, 2010, the Rome Statute forms part of the law of Kenya, and that the ICC has jurisdiction over individuals charged with international crimes committed in Kenya.¹⁷⁵ Therefore, provisions of the Rome Statute have the force of law in Kenya.

¹⁷⁴ Secs 19-20.

¹⁷⁵ See, *Joseph Kimani Gathungu (Applicant) v The Attorney General, the International Criminal Court, Kituo cha Sheria, Centre for Justice for Victims of Crimes against Humanity, Law Society of Kenya, Independent Medico-Legalunit, Kenya Section, International Commission of Jurists(Respondents)*, Ruling,

In conclusion, one observes that there is no clear and consistent state practice regarding issues of prosecution of state officials and immunity. However, Kenyan laws make it clear that immunity does not shield anyone from prosecution for international crimes within the jurisdiction of international courts as well as Kenyan courts. This is implied in articles 2(5) and (6) of the Constitution of Kenya, and article 27 of the International Crimes Act, 2008. This position is further echoed by the High Court's ruling in *Gathungu* case decided on 23 November 2010.

5.3.5 Congo

With regards to state practice, the Republic of Congo does not seem to support the position that its serving state officials be prosecuted for international crimes in a foreign court. A good example here is when the state officials of Congo were indicted in France in connection with crimes against humanity.¹⁷⁶ Congo protested and instituted a legal proceeding against France on the basis of breach of international rules on state sovereignty, the immunity and inviolability of its serving state officials.¹⁷⁷ After this observation, one needs to understand the legal framework outlawing immunity of state officials in Congo.

Congo, which is a state party to the Rome Statute, has a strong constitutional provision on the punishment of international crimes and rejection of immunity of state officials. Interestingly, the Constitution of Congo, 2002, proscribes international crimes in more express terms. It provides that '[w]ar crimes, crimes against humanity, the crime of genocide are punished within the conditions determined by the law...'¹⁷⁸ This provision is very clear on the prohibition and punishment of international crimes in Congo. It also provides that statutes of limitation cannot apply to the prosecution of persons responsible for such crimes.

High Court of Kenya, at Mombasa, Constitutional Reference 12 of 2010, 23 November 2010 (Judge JB Ojwang), [2010] eKLR, 1-18.

¹⁷⁶ See, *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, Request for the Indication of a Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, para 10.

¹⁷⁷ *Republic of the Congo v France*, Request for the Indication of a Provisional Measure, p.102. Congo successfully challenged France on the issue of immunity and state sovereignty.

¹⁷⁸ Art 10, Constitution of Congo, 2002.

Whereas article 56 of the constitution recognises the president as the head of state, article 88 of the constitution provides that the former president of Congo, ‘with the exception of those convicted of forfeiture, high treason, economic crimes, war crimes, genocide and all other crimes against humanity, benefit from the advantages of a protection under conditions determined by the law.’¹⁷⁹ This provision expressly rejects immunity or any advantages to former presidents in respect of international crimes committed by such officials. The same is the position regarding the serving president. The sitting president is not protected under article 87 of the Constitution of Congo, except in cases of high treason. The position is that ‘[t]he personal responsibility of the President of the Republic cannot be invoked except in case of high treason.’¹⁸⁰ Article 87 of the Constitution of Congo is very progressive in some way. However, it goes on to provide that the President cannot be impeached except by the National Assembly. From this, it is the position in Congo that, although the President can be prosecuted for international crimes where he is not entitled to raise the defence of immunity or official capacity, the prosecution is only possible once the National Assembly has impeached the president by a majority vote of two-thirds of its members.

In conclusion, whereas Congo protested against French court’s indictment of Congolese state officials, the laws in Congo provide that immunity is not generally accepted for a former state official who commit international crimes. Congo strictly protects the serving state officials than former state officials when it comes to criminal proceedings. In the end, Congo does not accept its state officials being prosecuted before foreign national courts – even for international crimes.

5.3.6 The Democratic Republic of the Congo (DRC)

The DRC is a state party to the Rome Statute of the ICC.¹⁸¹ In terms of state practice on prosecution of international crimes, the DRC has signified its commitment to do so. For instance, it is a state party to the Rome Statute, and above all, has referred the situation in

¹⁷⁹ Art 88.

¹⁸⁰ Art 87.

¹⁸¹ The DRC signed the Rome Statute on 8 September 2000 and ratified it on 11 April 2002.

DRC to the Prosecutor of the ICC. The Government of the DRC referred the Congolese situation to the Prosecutor of the ICC on 3 March 2004. President Joseph Kabila signed a letter of referral of the Situation in the DRC to the Prosecutor of the ICC.¹⁸² The act of referring the situation in the DRC to the Prosecutor of the ICC has an implication that the DRC is prepared to accept the decisions of the ICC, including authorisation or confirmation of charges that may involve state officials of the DRC. However, there is a concern that the DRC has since withdrawn its cooperation with the ICC, albeit not expressly but *de facto*. For example, the DRC has failed to arrest and surrender Jean Bosco Ntaganda who is wanted by the ICC for crimes against humanity and war crimes committed in the DRC.¹⁸³ Further, the fact that the DRC has participated in the decisions of the African Union condemning the ICC¹⁸⁴ after the indictment of the Sudanese President, Omar Al Bashir, without reservations, proves that the DRC is no longer supporting the ICC based on the fact that there is a serious issue of immunity of state officials involved in the cases or likely cases before the ICC in respect of the DRC.

The above represents state practice, it follows that one has to discuss legal framework in the DRC. Currently, the DRC has not yet passed a law to implement the Rome Statute. There is a Bill on the cooperation with the ICC. This Bill has not yet been signed into law. One should understand the danger of discussing a Bill which may have changes before becoming a law. But there is need to reflect on the current developments in DRC. In fact, DRC has had two drafts of the Bill before the on-going process to enact a law. As

¹⁸² Letter of Referral from President Joseph Kabila to Prosecutor of the ICC, ICC-01/04-01/06-32-US-Exp-AnxAII 12-03-2006 1/1UM, 3 March 2004. The text is reprinted in GM Musila (2009) *Between rhetoric and action: The politics, processes and practice of the ICC's work in the DRC*, 79-80, Appendix 1.

¹⁸³ The Situation in the DRC has led to a number of cases, see, Situation in the Democratic Republic of Congo, *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Warrant of Arrest for Thomas Lubanga Dyilo, Pre-Trial Chamber I, 10 February 2006, p.1-5; *Prosecutor v Bosco Ntaganda*, Case No. ICC-01/04-01/06, Warrant of Arrest, Pre-Trial Chamber I, 22 August 2006, 1-5; *Prosecutor v Germain Katanga*, Case No. ICC-02/04-01/07, Urgent Warrant of Arrest for Germain Katanga, Pre-Trial Chamber I, 2 July 2007, 1-7; *Prosecutor v Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/07, Warrant of Arrest for Mathieu Ngudjolo Chui, 6 July 2007, 1-8.

¹⁸⁴ See, Communiqué of the 175th meeting of the Peace and Security Council of the African Union, 5 March 2009, PSC/PR/Comm (CLXXV), Addis Ababa, Ethiopia; PSC/PR/Comm (CXLII) Rev 1., Adopted at its 142nd meeting held on 21 July 2008, at Addis Ababa, Ethiopia; See also, Decision Assembly/AU/Dec.221(XII), adopted by the Assembly of the AU at its 12th Ordinary Session held in Addis Ababa, Ethiopia from 1 to 3 February 2009; Decision on the Application by the ICC Prosecutor for the indictment of the President of the Republic of Sudan, Assembly/AU/Dec.221 (XII), adopted on 3 July 2009, Sirte, Libya.

at 2010, there is a Bill which is still in its initial processes.¹⁸⁵ It has been noted that the current Bill differs substantially from those of 2001, 2002 and 2005 ‘because it does not contain death penalty for genocide, crimes against humanity and war crimes, and because it is more in line with the Rome Statute.’¹⁸⁶

It is notable that efforts are underway to enact a law on the implementation of the Rome Statute. In March 2009, Parliamentarians for Global Action organised an important parliamentary seminar in order to ensure timely and prioritisation of the Bill.¹⁸⁷ According to the Parliamentarians for Global Action, ‘the Bill was tabled for the parliamentary session beginning on 15 September 2009’ but it was then moved to the next session which took place on 15 March 2010. At present, civil society organisations have managed to lobby for the Bill, and have obtained ‘endorsement for the adoption of the legislation by the Speaker of the Lower House, the Minister of Justice, top Members of Parliament from majority and opposition, as well as Madame Jaynet Kabila.’¹⁸⁸

Because the current draft Bill on the implementation of the Rome Statute is not publicly available, it is prudent to consider the previous drafts of the Bill that were tabled before the parliament of the DRC. The rationale here is to indicate how DRC has attempted to enact a law on international crimes and its efforts to reject immunity of state officials for such crimes as such. This is discussed below.

As noted above, the DRC has had two draft Bills on the implementation of the Rome Statute. The first Bill was drafted in 2001 and the second Bill was drafted on 2 October 2002. In this part, all two draft Bills are considered. In 2001, the DRC prepared an

¹⁸⁵ Efforts to obtain a new Bill have proved futile. However, reports indicate that in March 2008, a Comprehensive Draft International Criminal Court Legislation was drafted and deposited to the Parliament by two members, Prof Emmanuel Nyabirungu Mwene Sunga and Hon Crispin Mutumbe, see, Parliamentarians for Global Action, ‘*Conference on Implementing Legislation of the Rome Statute of the International Criminal Court in African Indian Ocean Countries*’, 25-26 February 2010, National Assembly of the Union of Comoros, Moroni, 2-3.

¹⁸⁶ Parliamentarians for Global Action, ‘*Conference on implementing legislation of the Rome Statute of the International Criminal Court in African Indian Ocean countries*’, 25-26 February 2010, National Assembly of the Union of Comoros, Moroni, p.2-3.

¹⁸⁷ Parliamentarians for Global Action (2010) 3.

¹⁸⁸ Parliamentarians for Global Action (2010) 3.

Implementation of the Statute of the International Criminal Court, Draft Legislation, 2001. This was aimed at integrating the norms of the Rome Statute into the Congolese law following ratification of the Rome Statute on 30 March 2002. It also required judicial cooperation between the ICC and the Congolese institutions. Prosecution and punishment of international crimes recognised under the Rome Statute is another aspect that the draft law was meant to address.

Regarding immunity, article 9 of the 2001 Draft Legislation provides that the law ‘applies to all in like manner, with no distinctions made based on official capacity.’ It expressly states that the ‘immunities or rules of special procedures associated with persons of official capacity, by virtue of internal or international law, do not prevent the judge from exercising his or her competence with regards to the person in question.’¹⁸⁹

In October 2002, the DRC drafted a new Bill to replace the draft Bill of 2001. It is called *Draft Law Implementing the Rome Statute of the International Criminal Court, Draft 2 of October 2002*.¹⁹⁰ This draft Bill has not yet been promulgated into law. Its purpose is to prosecute and punish those crimes addressed by the Rome Statute, and to regulate judicial cooperation with the ICC.¹⁹¹ The Bill provides that a person may be held liable for his conduct which constitutes a violation at the moment it is carried out. Under article 15 of the Bill, an order to commit genocide or a crime against humanity is illegal. Genocide is prohibited and punishable under article 19 of the Bill. The envisaged punishment for genocide is penal servitude for life. It defines genocide as it is defined in the Rome Statute. Crimes against humanity are defined and punishable under articles 20 and 21 of the Bill with servitude for five to twenty years. War crimes and other serious violations of the laws and customs applicable in international armed conflicts are defined and punished under article 22 of the Bill. These are defined in the same way as in article 8 of the Rome

¹⁸⁹ Art 9, *Implementation of the Statute of the International Criminal Court, Draft Legislation, Draft 1 of 2001*. This draft law is annexed in GM Musila (2009) 91-113, Appendix 3.

¹⁹⁰ *Draft Law Implementing the Rome Statute of the International Criminal Court, Draft 2 of October 2002*, Modified by the convocation organised by the Ministry of Justice of the Democratic Republic of the Congo on 21 to 23 October 2002 in Kinshasa and on 24 and 25 October 2002 in Lubumbashi. This draft law is also annexed in Musila (2009) 114-141, Appendix 4.

¹⁹¹ Art 1, *Draft Law Implementing the Rome Statute of the International Criminal Court, Draft 2 of October 2002*,

Statute. Such grave breaches of the Geneva Conventions are punishable by servitude for life. Only the High Court has the jurisdiction *ratione materiae* for all persons charged with international crimes, regardless of the capacity of such perpetrators.

Article 5 of the draft Bill rejects retrospectivity application of the law and punishment. It is envisaged that criminal responsibility is individual.¹⁹² Article 12 of the Bill provides defences to criminal responsibility. The fact that a crime is committed on orders from a government, a public authority, or a military or civilian superior does not exempt the person who has committed it, unless the order was illegal and did not know that the order itself was illegal.¹⁹³

Article 10 of this draft Bill states that the law shall apply equally to all persons with no distinction based on official position. In particular, the official capacity as the head of state or government, a member of a government or parliament, an elected representative or official of a state shall in no case exempt a person from criminal responsibility in the eyes of this law, nor shall it constitute in itself a ground for reduction of sentence. The provision provides further that those ‘immunities or those special procedural rules that may attach to the official capacity of a person, pursuant to the law or under international shall not bar the jurisdictions from exercising their competent jurisdiction over that person.’¹⁹⁴

Judicial cooperation with the ICC is ensured under the Bill in terms of investigation and prosecutions of international crimes falling within the jurisdiction of national courts and the ICC.¹⁹⁵ The ICC enjoys immunity and privileges within the territory of the DRC in exercising its functions. Article 35 of the Bill provides that the requests addressed by the ICC should be directed to the Supreme Public Prosecutor’s Office. The Attorney General of the Republic of the DRC has to fulfil the requests, and the Congolese authorities are to

¹⁹² Art 6.

¹⁹³ Arts 14 and 16.

¹⁹⁴ Art 10.

¹⁹⁵ Arts 33-34.

comply with such requests.¹⁹⁶ Pursuant to article 53 of the Bill, DRC agrees to receive persons sentenced by the ICC.

The Bill recognises the complementarity principle as enshrined under articles 1 and 17 of the Rome Statute. Congolese courts have priority to take cognisance of the crimes covered by the law. The ICC shall only intervene as an alternative.¹⁹⁷

Apart from legal efforts, the DRC has made commitment to cooperate with the ICC in respect of prosecution of individuals charged with international crimes. On 6 October 2004, the DRC entered into judicial cooperation agreement with the ICC.¹⁹⁸ Such agreement is pursuant to the provision of article 54(3) of the Rome Statute. Through this agreement, the DRC is committed to cooperate with the office of the Prosecutor of the ICC and to support the activities of the court. The main purpose of this agreement is to facilitate cooperation between the DRC and the Office of the Prosecutor within the framework of general cooperation provided by the Rome Statute in respect of the conduct of investigations and prosecutions conducted by the Prosecutor, and for smooth cooperation within the territory of the DRC.¹⁹⁹ Under the agreement, the Attorney-General of the DRC is the focal person to communicate with the Prosecutor of the ICC. The language of communication is French.²⁰⁰ The DRC is obliged to provide any information requested by the Prosecutor of the ICC. That information must be deemed necessary for the proceedings before the ICC.²⁰¹ Further, the agreement requires DRC to provide cooperation for all investigations conducted in the territory of the DRC. In case there are ongoing national investigations, the DRC is obliged to notify the ICC.²⁰²

¹⁹⁶ Arts 36-37.

¹⁹⁷ Art 40.

¹⁹⁸ Judicial Cooperation Agreement between the Democratic Republic of the Congo and the Office of Prosecutor of the International Criminal Court, 6 October 2004, signed at Kinshasa by the Deputy Prosecutor of the ICC and the DRC Minister of Justice.

¹⁹⁹ Part 1, paras 1-5 (general principles).

²⁰⁰ Para 10.

²⁰¹ Para 14.

²⁰² Paras 35-37.

Conclusively, the DRC is still in the process of enacting a law on the implementation of the Rome Statute. The draft Bills studied thus far do not mention universal jurisdiction. Interestingly, the draft Bills impose obligations on the DRC to cooperate with the ICC. Further, immunity of state officials is not recognised under the draft Bills. Once the Bill is enacted into law, there will be no immunity of state officials for international crimes within the jurisdiction of the ICC and national courts of the DRC. If that happens, it will be a great development on prosecution and punishment of perpetrators of international crimes. At present, it is not clear whether state authorities in the DRC would accept to be prosecuted before national courts or the ICC in respect of alleged international crimes in DRC.

5.3.7 Rwanda

The discussion on Rwanda's practice on the question of immunity must be in three aspects: political or executive level; legal and judicial levels. In terms of political practices, it must be recalled that Rwanda does not accept that its serving state officials be prosecuted outside Rwanda even for international crimes. The justification for this assertion is based on the way Rwanda responded in 2008 to the indictment of Rose Kabuye, a senior state official in the Government of Rwanda by the French authorities on charges of genocide.²⁰³ Kabuye had been allegedly involved in the planning of genocide in Rwanda in 1994. It will be recalled that Rose Kabuye is a senior state official close to President Paul Kagame. Whilst in a private visit in Germany, Kabuye was arrested by the German authorities acting on an arrest warrant issued by a court in Paris, France. Immediately after her arrest, Kabuye was extradited to France to face charges there. The German authorities failed to prosecute her because of the provisions of sections 18, 19 and 20 of the *German Judiciary Act* which grant immunity to diplomatic missions and state officials on official invitation in Germany.²⁰⁴

²⁰³ For details on Rose Kabuye, see CB Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) *Journal of International Criminal Justice* (forthcoming).

²⁰⁴ See, Amnesty International, *Germany: End impunity through universal jurisdiction*, (Amnesty International Publications, No Safe Haven Series, No.3, 2008), 70.

Criminal proceedings in France were terminated by a court in Paris, and the Rwandan official was fortunately released. The prosecution of this Rwandan state official in France resulted in a diplomatic row between Rwanda and France. Rwanda terminated diplomatic ties with France, even though it later restored the same in 2009. The protest reflected that Rwanda did not want its state official to be prosecuted for genocide before a court in Paris. The issue of prosecution of perpetrators of genocide is still in the back-burner. In 2010, a French team of investigators visited Rwanda with a view to investigate the crime of genocide. One must also recall that in September 2010, a team of the United Nations investigators released a report that accused Rwandan Tutsi state officials and military commanders of committing genocide against the Hutus in the Democratic Republic of the Congo (DRC).²⁰⁵ Rwanda has opposed the report on genocide in DRC.²⁰⁶ Such opposition could be just a bare denial without any substantiation or justification by the Rwandan authorities.²⁰⁷

The state practice on upholding immunity of state officials before foreign national courts is further observed in Rwanda. When a French judge, Jean-Louise Bruguiere indicted nine Rwandan state and military officials in 2007 in connection with their alleged roles in the 1994 genocide in Rwanda, Rwanda reacted by conducting an inquiry and suggesting that former French senior state officials had also played roles in the genocide. The Rwandan authorities commissioned an Independent Commission to investigate on the role played by France and its senior officials in the 1994 genocide in Rwanda. On 5 August 2008 the Government of Rwanda released a report which accused France for its

²⁰⁵ See, 'UN Report accuses Rwanda of possible genocide in DRC' *Mail & Guardian* (South Africa), 27 August 2010; 'UN DR Congo 'genocide' Draft Report- Key Excerpts', paras 512-518 and 1139, available at <<http://www.bbc.co.uk/news/world-africa-11111578>> (accessed on 27 August 2010).

²⁰⁶ See, 'Paul Kagame denies UN Rwanda genocide allegations' available at <<http://www.bbc.co.uk/news/world-africa-11339194>> (accessed on 17 September 2010); United Nations Office of the High Commissioner for Human Rights, 'Democratic Republic of the Congo 1993-2003', Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, 1 October 2010, 1-566.

²⁰⁷ After the UN released an official report incriminating the Rwandan government with genocide in DRC, Rwanda commenced a campaign of denial of genocide in DRC by holding public conferences. For example, on 5 October 2010, the Embassy of Rwanda in Pretoria, South Africa responded to the UN Report by holding a public conference at University of Pretoria to officially dismiss the findings of the report. His HE Ignatius Kamali Karegesa and Dr Charles Mironko aired their oppositions to the UN report on genocide. I participated in the conference and observed the proceedings, which of course, were marred by the Congolese nationals opposing the Rwandan denial of genocide in the DRC.

role in the genocide in Rwanda. The report concluded that the French authorities were aware of the preparations for the genocide and assisted the ethnic Hutu militia perpetrators. It accused French troops of direct involvement in the killings and listed thirty three senior French Military and political leaders to be prosecuted. Such leaders include the late former President of France, Francois Mitterrand and the then Prime Minister, Edouard Balladur. Others were Allain Juppe, the foreign minister at that time, and Dominique de Villepin. After releasing the report, Rwanda urged the authorities to prosecute the accused French political leaders and military officials.²⁰⁸ In an attempt to restore diplomatic relations, the French President, Nicolas Sarkozy visited Rwanda in 2010.

Yet, another aspect which shows unwillingness to heed to the calls for non-recognition of immunity of state officials in Rwanda is the way President Kagame has not accepted to testify before the International Criminal Tribunal for Rwanda (ICTR) for his role in the 1994 genocide in Rwanda. This is reflected in the case law of the ICTR. In *Prosecutor v Karemera, Ntirumpatse and Nzirorera*,²⁰⁹ the Rwandan authorities did not cooperate with the defence for Mr Nzirorera regarding the issue of subpoena to testify before the ICTR and Kagame's involvement in the genocide. It would seem that the authorities in Rwanda did not bother with such requests for cooperation on the ground of immunity of serving state President Kagame. Further, Rwanda's President Kagame has recently been supportive of non-cooperation with the ICC over the arrest warrant issued against Omar Al Bashir claiming that the court represents the western influence on Africa.

The three examples given above indicate the way Rwanda has not accepted the prosecution or subpoena to its serving state officials before foreign courts and even

²⁰⁸ For more details on the French involvement in the genocide in Rwanda, see, 'France accused in Rwanda genocide', BBC News, 5 August 2008, available at <<http://news.bbc.co.uk/2/hi/africa/7542418.stm>> (accessed on 6 August 2008); see also, Martin Plaut 'Rwanda report raises issue of motive', BBC News, 5 August 2008, available at <<http://news.bbc.co.uk/2/hi/africa/7544267.stm>> (accessed on 6 August 2008).

²⁰⁹ *Prosecutor v Edouard Karemera, Mathieu Ntirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame*, Trial Chamber III, 19 February 2008 (Before Dennis CM Byron, Presiding; Gberdao Gustave Kam and Vagn Joensen), para 3, quoting Joseph Nzirorera's Motion for Subpoena to President Paul Kagame, filed on 28 January 2008.

international courts respectively. It is now appropriate to discuss the legal and judicial practices in Rwanda on the question of immunity of state officials and their prosecution for international crimes.

The Constitution of Rwanda recognises immunity of the President for acts committed whilst in office. Article 115 of the Constitution of Rwanda provides that ‘[a]n Organic law determines the benefits accorded to the President of the Republic [of Rwanda] and to former heads of state.’ However, the president is not entitled to immunity when he commits high treason or violates the constitution. As such, the president may not benefit from legal protection because, once he commits such acts, he ceases to exercise his functions. That is what the constitution provides in article 115. Due to the genocide in Rwanda, the Preamble to the Constitution of Rwanda condemns genocide.²¹⁰ Article 9 of the Constitution of Rwanda specifies fundamental principles. One of such principles is the fight against the ideology of genocide and all its manifestations.²¹¹ Further, the constitution condemns international crimes in strong terms. It provides that ‘[t]he crime of genocide, crimes against humanity and war crimes are imprescriptible. Revisionism, negationism and trivialization of genocide are punishable by the law.’²¹² Hence, according to article 13 of the constitution, statutes of limitation do not apply for these crimes. Rwanda has established the National Commission for the fight against genocide, which is founded on article 179 of the Constitution of Rwanda.

Rwanda is not a state party to the Rome Statute. As such, Rwanda may not support the ICC with regards to prosecution of international crimes because it has no express treaty obligations to do so. This does not mean that Rwanda is not under international law obligation to prosecute persons responsible for international crimes recognised even in the Rome Statute. Customary international law duty to prosecute and punish perpetrators of international crimes is clear on this point. This emanates also from the Genocide Convention itself.

²¹⁰ Paras 1 and 2, Preamble to the Constitution of Rwanda, 2003.

²¹¹ Art 9(1), Constitution of Rwanda, 2003.

²¹² Art 13, Constitution of Rwanda, 2003.

However, Rwanda is a state party to the *Great Lakes Protocol on the Prosecution and Punishment of the Genocide, Crimes against Humanity, War Crimes and All forms of Discrimination* of 2006. This Protocol does not recognize immunity of state officials as a defence or a mitigating factor in the punishment of persons who commit international crimes. The Protocol is enforceable in Rwanda because it does not require a separate enforcement mechanism from the Great Lakes Region's Pact on Peace and Security of 2006. Despite the call under this Protocol requiring member states to ratify the Rome Statute, Rwanda is not yet a state party to the Rome Statute. However, Rwanda is a state party to the Genocide Convention, and has enacted a law to punish genocide and other international crimes.

Two different laws apply to different judicial systems in Rwanda. One system of justice in Rwanda is that which is addressed by the local courts called *Gacaca* courts,²¹³ and the other one is a normal or conventional judicial system. I will examine the conventional judicial system before dealing with the *Gacaca* courts. The *Gacaca* courts are established by a specific law²¹⁴ and they deal with international crimes. Articles 151 and 152 of the Constitution of Rwanda establish the *Gacaca* courts. These courts are 'charged with the trial and judgment of cases against persons accused of the crime of genocide and crimes against humanity which were committed between 1 October 1990 and 31 December 1994, with the exception of cases whose competence is vested in other courts.'²¹⁵

In Rwanda, *Law No.33 Bis/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes* provides that 'the official status of an accused at the time of committing a crime shall not exempt him or her criminal liability and shall not be a reason to benefit from mitigating circumstances' and that 'the fact that the accused has acted upon the order of the Government or of his or her superior authority shall not

²¹³ On the *Gacaca* courts in Rwanda, see generally, P Clark 'The rules (and politics) of engagement: The *Gacaca* courts and post-genocide justice, healing and reconciliation in Rwanda' in P Clark and ZD Kaufman (eds.), (2008) *After genocide: Transitional justice, post-conflict reconstruction and reconstruction in Rwanda and beyond*, Ch 15, 297-320.

²¹⁴ I am indebted to Mr Christian Garuka Nsabimana from Rwanda who provided me with electronic copies of the relevant laws on international crimes in Rwanda.

²¹⁵ Art 152, Constitution of Rwanda, 2003.

exempt him or her from his or her criminal liability where, the order could lead to perpetration of one of the crimes punishable under this law.²¹⁶

Law No.33Bis/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes was promulgated on 6 September 2003, and published on 1 November 2003 in the Official Gazette of the Republic of Rwanda.²¹⁷ This is the current law in Rwanda regarding the prosecution and punishment of international crimes before courts in Rwanda. The specific crimes covered by this law are genocide, crimes against humanity, and war crimes.²¹⁸ The law defines genocide in terms of article II of the Genocide Convention.²¹⁹ Although the initial punishment for the crime of genocide was death penalty as indicated in article 3 of the Law No.33Bis/2003 above, Rwanda has abolished death penalty for all crimes. It is apparent that the only possible punishment is the long term imprisonment sentence.²²⁰ Crimes against humanity are defined and punishable under this law particularly under articles 5, 6 and 7 of the Law No.33Bis/2003. War crimes are also defined and punishable under this law.²²¹ The punishment is between seven and twenty years imprisonment.

The law also punishes other serious international humanitarian law breaches, such as attacks on humanitarian organisations.²²² Article 20 of this law provides that legal proceedings as well as penalties pronounced for the crime of genocide, crimes against humanity and war crimes are imprescriptible (meaning that they cannot be limited by any statute of limitation). This is a prevailing law in Rwanda and all previous legal provisions contrary to this law are abrogated.

²¹⁶ Art18 of the *Law No.33 Bis/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes*.

²¹⁷ Law No.33Bis/2003 can be accessed on the website link to the Laws and Codes of Rwanda, at <http://www.amategeko.net/display_rubrique.php?Information_ID=1191&Parent_ID=30692296&type=public&Langue_ID=An> (accessed on 4 June 2010).

²¹⁸ Art 1, Law No.33Bis/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes.

²¹⁹ Art 2, Law No.33Bis/2003.

²²⁰ Art 4, Law No.33Bis/2003.

²²¹ Arts 8-13, Law No.33Bis/2003.

²²² Arts 14-16, Law No.33Bis/2003.

With regards to the traditional justice system in Rwanda, there is a law that establishes the *Gacaca* courts for the purpose of prosecuting persons responsible for genocide, crimes against humanity and other international crimes committed in Rwanda. The *Gacaca* courts are established by *Organic Law No.16 of 19 June 2004 Establishing the Organisation, Competence and Functioning of the Gacaca courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, committed between October 1, 1990 and December 31, 1994.*²²³ This law has been modified and complemented by *Organic Law No. 28/2006 of 27 June 2006,*²²⁴ and again modified and complemented by *Organic Law No. 10/2007 of 1 March 2007*²²⁵ and also *Organic Law No.13/2008 of 19 May 2008.*²²⁶ All these amendments have been incorporated into the law itself and are contained as one document.

The main focus of the Organic Laws establishing the *Gacaca* courts is the punishment of genocide and crimes against humanity, or other crimes recognised under the Penal Code of Rwanda.²²⁷ The *Gacaca* courts are set and divided into the *Gacaca* Cell Court, *Gacaca* Sector Court and an Appeal Court.²²⁸ The *Gacaca* Cell Court is composed of the General Assembly, a Seat for the *Gacaca* Court and the Coordination Committee.²²⁹ The *Gacaca* Sector Court and Appeal Court are made of the Sector General Assembly, a Seat of the *Gacaca* Court and a Coordination Committee.

The composition, functions, duties, and qualification of members of these courts are provided for under articles 6 through 38 of the *Organic Law No.16/2004*. The *Gacaca* courts have competence similar to those of the ordinary courts in Rwanda, and deal with

²²³ *Organic Law No.16 of 19 June 2004 Establishing the Organisation, Competence and Functioning of the Gacaca courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, committed between October 1, 1990 and December 31, 1994, Official Gazette of the Republic of Rwanda, Special Number, of 19 June 1994.*

²²⁴ *Organic Law No. 28/2006 of 27 June 2006, Official Gazette, Special Number of 12 July 2006.*

²²⁵ *Organic Law No. 10/2007 of 1 March 2007, Official Gazette, No.5 of 1 March 2007.*

²²⁶ *Organic Law No.13/2008 of 19 May 2008, Official Gazette, No. 11 of 1 June 2008.*

²²⁷ Arts 1 & 2, *Organic Law No.16 of 19 June 2004 Establishing the Organisation, Competence and Functioning of the Gacaca courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, committed between October 1, 1990 and December 31, 1994, Official Gazette of the Republic of Rwanda, Special Number, of 19 June 1994.*

²²⁸ Arts 3 & 4, *Organic Law No.16/2004.*

²²⁹ Art 5, *Organic Law No.16/2004.*

all matters relating to trials, including summoning witnesses, conducting investigation, and may summon the Public Prosecution to give information.²³⁰ The jurisdiction *ratione materiae* of each of the Gacaca courts is addressed in articles 41 through 43 of the *Organic Law No.16/2004*. The jurisdiction *ratione loci* of each Gacaca court are provided for under articles 44 and 45 of the *Organic Law No.16/2004*. The relationship between the Gacaca courts and other institutions in Rwanda is provided for under articles 46 through 50 of the *Organic Law No.16/2004*.

The Gacaca courts have jurisdiction over persons who committed or were accomplices to the commission of crimes as planners or organisers of genocide and crimes against humanity. Such persons may have been at the national leadership level, prefecture, army, public administration, political parties, religious denominations, gendarmerie, and militia groups. Such persons planned, ordered or executed orders or otherwise participated in the commission of genocide and crimes against humanity.²³¹ The jurisdiction also extends to notorious murders and persons of the low level category who also committed international crimes in Rwanda.

Interestingly, even Gacaca courts have jurisdiction over all persons including serving state officials. The Gacaca courts have managed to bring before courts serving state officials, including Governors and Minister of Defence in respect of the genocide charges against such officials. Article 52 of the *Organic Law No. 16/2004* provides that ‘the person in the position of authority at the level of the Sector and Cell, at the time of genocide, are classified in the category corresponding to offences they have committed, but their positions of leadership exposes them to the most severe penalty within the same category.’ This is a provision that does not recognise official position as a defence to punishment or prosecution of individuals for genocide and crimes against humanity in Rwanda. Superior and command responsibility is addressed by article 53 of the law. Matters of hearing and judgment of the Gacaca courts are provided for under article 64 through article 70 of the law. Penalties for persons are dealt with under articles 72 to 80

²³⁰ Art 39, Organic Law No.16/2004.

²³¹ Art 51, Organic Law No 16/2004.

of the *Organic Law No 16/2004*. Questions of appeal, review, objections are covered under articles 85 to 93 of the law. The law does not allow time limitation for the prosecution and punishment of genocide and crimes against humanity.²³² Genocide cases referred to the normal courts and military courts may also be tried by the *Gacaca* courts.²³³

The preceding represents the way Rwanda is prosecuting international crimes in its territory. Since their establishment, the Gacaca courts have handed down many judgments, but the problem is that there are no proper records to crystallise this point. To emphasise, immunity may not be claimed in Rwanda insofar as the prosecution and punishment of international crimes is concerned. It is noted that article 18 of the Organic Law No.33Bis/2003 and article 52 of the Organic Law No.16/2004 do not recognise immunity of state officials before courts in Rwanda. It seems though that immunity of state officials before foreign courts is still recognised at least though Rwanda's state practice to date.

5.3.8 Burundi

Burundi is a state party to the Rome Statute, the Convention against Torture and the Genocide Convention. Burundi is also a state party to the Great Lakes Protocol on the Prosecution and Punishment of Genocide, Crimes against Humanity, War Crimes and All forms of Discrimination of 2006. Article 12 of this Protocol outlaws the immunity of state officials especially as international crimes are concerned. The protocol has a force of law in Burundi by virtue of the monist nature of Burundi. Surprisingly, Burundi has signed a Bilateral Immunity Agreement (BIA) with the United States of America regarding immunities under article 98(1) of the Rome Statute.

²³² Arts 97-99, Organic Law No. 16/2004.

²³³ Art 100, Organic Law No.16/2004.

In Burundi, the Parliament enacted Law No. 1/5 of 22 April 2009, amending the *Penal Code* of Burundi.²³⁴ This is now the new Penal Code of Burundi. It was adopted in line with Law No.1/004 of 8 May 2003 on the repression of the crime of genocide, crimes against humanity and war crimes; Law No.1/11 of 30 August 2003 incorporating the Rome Statute of the International Criminal Court into Burundian law; and Law No.1/47 of 31 December 1992 on the ratification of the Convention against Torture.

The Penal Code creates universal jurisdiction over crimes committed in and outside the territory of Burundi. Such crimes include genocide, war crimes, crimes against humanity, torture and acts of terrorism.²³⁵ Hence, the Penal Code of Burundi outlaws these international crimes. It defines and criminalises such crimes, integrating them as defined by international conventions into domestic law of Burundi. Genocide is defined and punished under article 195 of the Penal Code of Burundi. Articles 196 and 197 of the Penal Code define and prohibit crimes against humanity, while war crimes are defined and punishable under article 198. All such crimes are punishable by life sentences.²³⁶ Public incitement to commit genocide, crimes against humanity and war crimes is also punishable by life imprisonment.²³⁷ Acts of torture, inhuman or degrading treatment as recognised under the Convention against torture, are punishable under articles 204, 205, 206, 207 and 208 of the Penal Code. All these international crimes are defined under the Penal Code of Burundi replicating the contents of the definitions of the crimes under the Rome Statute and the Convention against Torture.

As far as constitutional immunity provisions are concerned, the President of Burundi is not responsible for acts performed in the exercise of his functions.²³⁸ However, the president may only be held responsible after impeachment by the National Assembly by a two-third majority vote.²³⁹

²³⁴ Law No. 1/5 of 22 April 2009, amending the *Penal Code* of Burundi.

²³⁵ Art 10, Law No.1/5 of 22 April 2009, amending the Penal Code of Burundi.

²³⁶ See, arts 200 and 201, Law No.1/5 of 22 April 2009, amending the Penal Code of Burundi.

²³⁷ Art 202, Law No.1/5 of 22 April 2009, amending the Penal Code of Burundi.

²³⁸ Art 117, Constitution of Burundi, 2004.

²³⁹ Art 118 of the Constitution of Burundi empowers the President to dissolve the parliament if the parliament initiates impeachment proceedings against the president.

5.3.9 Burkina Faso

In terms of immunity of state officials, one must know that the Constitution of Burkina Faso of 1999 as amended in 2002 is silent on whether the president may be prosecuted. Short of express provision, it is apparent that the common law (as known in civil law legal system as opposed to common law legal system) would protect the serving president from prosecution. Apart from the examination of the constitution, it is also important to consider other specific laws in Burkina Faso.

Burkina Faso is a state party to the Rome Statute. It has implemented the Rome Statute by enacting a law conferring national courts with competence to prosecute and punish international crimes in Burkina Faso. The National Assembly of Burkina Faso adopted *Law No. 052-2009/AN of 3 December 2009 relating to the Determination of the Competence and Procedure of Implementing the Rome Statute of the International Criminal Court by Courts of Burkina Faso*. This law was promulgated on 31 December 2009 by President Blaise Compaore.²⁴⁰ The law has fifty six articles on various matters regarding prosecution and punishment of international crimes in Burkina Faso.

The object and purpose of the law are covered in article 1 of the law. The first object of the law is to prosecute and punish international crimes, namely those recognised under the Rome Statute, the Geneva Conventions and their Additional Protocols relative to international humanitarian law. The second purpose relates to the organisation of judicial cooperation with the ICC. The third object of the law is to repress violations of administration of justice.

Under the law in Burkina Faso, national jurisdictions have the primary competence over crimes covered by this law. The ICC intervention is only subsidiary to the national courts

²⁴⁰ *Law No. 052-2009/AN of 3 December 2009 relating to the Determination of the Competence and Procedure of Implementing the Rome Statute of the International Criminal Court by Courts of Burkina Faso*, Promulgated on 31 December, at Ouagadougou, by Decree No. 2009-894/PRES. The decree was published in the Official Journal of Burkina Faso on 31 December 2009. I am indebted to Bruno Menzan for his kind assistance in interpretation of all provisions of this Law. He read and translated into English while I did the typing.

of Burkina Faso and is exercised according to the conditions set in the Rome Statute. However, the ICC can sit in the territory of Burkina Faso.²⁴¹ Basically, article 2 of the law talks about complementarity principle as recognised in the Rome Statute²⁴² whereby the primary duty to punish international crimes lies with national courts.

Law No. 052-2009/AN of 3 December 2009 confers jurisdiction to national courts of Burkina Faso over natural persons with regards to the crimes recognised under the law. The law provides for individual criminal responsibility for natural persons. Without prejudice to the Penal Code of Burkina Faso, natural persons are criminally responsible and punished for the crimes under Law No.052-2009/AN of 3 December 2009.²⁴³ Individual criminal responsibility arises from acts of commission, planning, ordering, inciting directly or indirectly, encouraging, aiding or abetting, complicity or participation in the planning or commission of the crimes. The above acts must have been manifested with intent to further the commission of the crimes.

The criminal responsibility of minors with regards to the crimes under the law is dealt with by the ordinary (common) law.²⁴⁴ If a person has already been prosecuted and punished by the ICC, the courts in Burkina Faso cannot prosecute such persons for the same crimes committed.²⁴⁵ This principle is aimed at avoiding double jeopardy. The law allows only strict interpretation of its provisions. It does not allow analogous interpretation, and in case of ambiguity, it provides that the interpretation most favourable to the accused person should be applied.²⁴⁶

International crimes, particularly genocide, crimes against humanity and war crimes are the ones punishable by Law No. 052-2009 of 3 December 2009. Article 16 defines

²⁴¹ Art 2, Law No. 052-2009/AN of 3 December 2009 relating to the Determination of the Competence and Procedure of Implementing the Rome Statute of the International Criminal Court by Courts of Burkina Faso.

²⁴² Art 1 and 17 of the Rome Statute, and the Preamble to the Rome Statute.

²⁴³ Art 3, Law No. 052-2009/AN of 3 December 2009.

²⁴⁴ Art 4.

²⁴⁵ Art 5.

²⁴⁶ Art 6.

genocide and lists the five acts of genocide.²⁴⁷ This article is more progressive than what the Genocide Convention or the Rome Statute provides regarding genocide. The Law punishes acts of genocide if they are committed with intent to destroy protected groups as such, in ‘an arbitrary manner or criteria’. It should be noted that the international instruments on genocide do not include the ‘arbitrary criteria’ for the commission of genocide. The law of Burkina Faso should be credited for its advancement in the strict prohibition of genocide. Article 12 of the law prohibits orders to commit genocide and crimes against humanity.

Crimes against humanity are defined and punished under article 17 of Law No.052-2009 of 3 December 2009. These crimes are defined in the same way as in article 7 of the Rome Statute. Article 18 of the law defines elements of crimes against humanity.²⁴⁸ War crimes and other serious violations of laws and customs applicable to international armed conflicts under international humanitarian law are dealt with under article 19 of the law.²⁴⁹ Article 8 of the law provides that, for a person to be held criminally responsible, there must be material elements of the crimes committed. The emphasis is on the intention and knowledge of the perpetrator.

National courts of Burkina Faso have universal jurisdiction under the law to prosecute persons responsible for international crimes irrespective of where the crimes are committed and the nationality of the victims. The main condition is that a perpetrator must be in the territory of Burkina Faso.²⁵⁰ However, the condition of territoriality does not apply to nationals of Burkina Faso. The provision on universal jurisdiction presents a progressive development for national laws to close impunity gaps.

Insofar as immunity of state officials is concerned, the law in Burkina Faso provides that:

The present law applies to all in an equal manner without any distinction based on official capacity. In particular, the official capacity of the head of state or head of government, member of government or of a parliament,

²⁴⁷ Art 16.

²⁴⁸ Art 18(1)-(10).

²⁴⁹ Art 19 (1) (a)-(h).

²⁵⁰ Art 15.

elected representative or agent of the state does not in any case exonerate criminal responsibility in the present law and does not in itself constitute a motive for the reduction or mitigation of the punishment [*translation*].²⁵¹

From the provision of article 7 above, it is clear that the law is compatible with article 27 of the Rome Statute. Further, it is notable that immunity does not only deal with prosecution, but extends to issues of arrest and transfer to the ICC. In this regard, article 39 of the law provides that all persons arrested are supposed to be transferred to the ICC without any distinction based on official capacity. It is important to note that the crimes covered under the law in Burkina Faso are imprescriptible, and are not susceptible neither to amnesty nor pardon.²⁵²

Regarding cooperation with the ICC, the law imposes an express obligation on Burkina Faso to cooperate fully with the ICC in the investigation and prosecution of crimes in conformity with the Rome Statute, procedures provided by law and other national laws.²⁵³ In compliance with article 72 of the Rome Statute, a request from the ICC can only be rejected on grounds of national security.²⁵⁴

In conclusion, it is generally observed that the law that implements the Rome Statute in Burkina Faso is compatible with international law, and confers courts with universal jurisdiction beyond the Rome Statute itself. This is a good and progressive law for positive complementarity. It is very strong on immunities of state officials.

5.3.10 Niger

The Constitution of Niger of 1999²⁵⁵ does not contain an express provision on immunity of the president. However, article 42 of the constitution recognises that the president may be prosecuted only after impeachment. Niger is a state party to the Rome Statute. In 2003

²⁵¹ Art 7, Law No.052-2009 of 3 December 2009. I am indebted to Tem Fuh Mbuh from Cameroon for his assistance in translating the provision of article 7 for me.

²⁵² Art 14, Law No.052-2009 of 3 December 2009.

²⁵³ Art 29, Law No.052-2009 of 3 December 2009.

²⁵⁴ Art 34, Law No.052-2009 of 3 December 2009.

²⁵⁵ Constitution of Niger, of 18 July 1999, Promulgated by Decree No. 99-320/PCRN of 9 August 1999.

Niger amended its Penal Code, *Law No.61-27 of 15 July 1961* on the institution of Penal Code. The amendments were made possible by *Law No. 2003-025 of 13 June 2003*. Amongst many areas covered by the amendment law are the international humanitarian law breaches. Such include crimes against humanity, genocide and war crimes. These crimes are inserted in the Penal Code respectively.²⁵⁶ So, in Niger, the incorporation of the relevant provisions of the Rome Statute on genocide, crimes against humanity and war crimes is reflected in the Penal Code.

The law defines genocide in the same manner as the Rome Statute does, as also in the way the law in Burkina Faso provides. The punishment for genocide is death penalty.²⁵⁷ This shows how Niger considers genocide as a most serious crime. However, this position though strict with the aim of deterrence, it nevertheless contravenes international standards on the crime of genocide. This is so because international treaties on genocide only envisage life imprisonment or long term imprisonment, as is the case under the Rome Statute.

The law does not define crimes against humanity but it mentions acts constituting crimes against humanity. The punishment for crimes against humanity is death penalty.²⁵⁸ War crimes are defined in the law as grave breaches of the Geneva Conventions of 12 August 1949 and the Additional Protocols I and II to the Geneva Conventions, 1977.²⁵⁹ War crimes are punishable by death or life imprisonment depending on the number of persons killed.

In Niger, the law imposes criminal responsibility for anyone who commits international crimes. The perpetrator or co-perpetrator cannot benefit from the defence of act of the state, legitimate authority, or legislative deliberations.²⁶⁰ The issue of immunity of state officials is addressed in *article 208.7* of the law. It provides that, the immunity attached

²⁵⁶ See, arts 208.1, 208.2 and 208.3, Law No. 2003-025 of 13 June 2003 (amending the Penal Code, Law No.61-27 of 15 July 1961).

²⁵⁷ Art 208.1, Law No. 2003-025 of 13 June 2003.

²⁵⁸ Art 208.2, Law No. 2003-025 of 13 June 2003.

²⁵⁹ Art 208.3 (1-21), Law No. 2003-025 of 13 June 2003.

²⁶⁰ Art 208.6, Law No. 2003-025 of 13 June 2003.

to the official capacity of a person cannot prevent or bar the application of the provisions of this law. The courts of Niger are competent to prosecute crimes described in the law irrespective of the place of commission. There is no necessary link with nationality principle for the courts to apply the law, not even the complaint from the family or official authority of the state where the crime was committed.

Conclusively, Niger has a good law on the punishment of international crimes. This law confers national courts with universal jurisdiction to prosecute and punish international crimes. The penalty for international crimes is severe: capital punishment for genocide, crimes against humanity and war crimes. Immunity is not a bar to criminal prosecution and punishment for international crimes. The law in Niger goes further to outlaw the defences of act of state or public authority. It creates individual criminal responsibility for persons who commit international crimes.

5.3.11 Uganda

In terms of state practice, Uganda has demonstrated that it does not respect the immunity of a foreign serving state official from arrest and prosecution for international crimes. When an arrest warrant for Bashir was unsealed and circulated to all states by the ICC, Uganda was one of the few African states which declared publicly that if President Bashir of Sudan steps on Uganda, the Ugandan authorities will arrest him. That was a response by Uganda to its international obligations arising from the Rome Statute to which Uganda is a state party. It remains to be seen whether Uganda would effect its position should Bashir visit Uganda. Whereas Uganda signalled that it could arrest Bashir of Sudan following the warrant of arrest issued by the ICC, President Museveni later invited President Bashir of Sudan to attend the African Union meeting to adopt the Convention on Internally Displaced Persons, which was adopted in Kampala in November 2009.

Uganda is currently on a good track in terms of legal framework and judicial practice on the prosecution of international crimes and rejection of immunity of state officials. For

example, Uganda has established a War Crimes Division of the High Court²⁶¹ housed at the High Court Headquarters in Kampala, to prosecute and punish individuals responsible for international crimes committed in the long protracted armed conflict in Uganda. The court may sit anywhere under article 138(2) of the Ugandan constitution. There is no statutory instrument creating the War Crimes Division of the High Court, but it is a product of the directive issued by the Principal Judge of the High Court of Uganda. The court is now in its initial stages and has not yet prosecuted individuals.

Nevertheless, the War Crimes Division of the High Court was established in response to the Juba Agreement on Accountability and Reconciliation and the Annex thereto.²⁶² This agreement was signed between the Government of Uganda and the Lord's Resistance Army (LRA) on 29 June 2007 at Juba, Sudan. Article 7 of the Annexure to the Juba Agreement called for the establishment of a special division of the High Court of Uganda to try individuals who are responsible for serious international crimes during the armed conflict in northern Uganda. To this effect, article 9 of the Annexure to the Juba Agreement envisaged the enactment of a law for that purpose to provide the constitution of the court, the law to be applied and rules of procedure.

Article 14 of the Annexure to the Juba Agreement targets only prosecutions of individuals who planned or carried out widespread, systematic or serious attacks directed against civilians, or who committed war crimes punishable under the Geneva Conventions. Uganda has the Geneva Conventions Act which regulates the conduct and prosecution of war crimes committed by members of the armed forces. One must also note that the War Crimes Division of the High Court of Uganda is intended to cater for the complementarity principle as recognised by the Rome Statute in its articles 1 and 17. Following the establishment of the War Crimes Division of the High Court of Uganda, the Director of Public Prosecutions formed a team of six senior State Attorneys. An outreach strategy was launched in 2009. It is expected that the court will play a meaningful role in the prosecution of international crimes in Uganda.

²⁶¹ For more on the court, see, L Tweyanze, Registrar, War Crimes Division, High Court of Uganda in his article, 'The War Crimes Division of the High Court of Uganda'.

²⁶² Clause 4, Juba Agreement on Accountability and Reconciliation and the Annex thereto, 29 June 2007.

Uganda has also gone a step further by respecting its obligations under the Rome Statute. A few days before the Review Conference on the Rome Statute of the International Criminal Court, the Ugandan parliament enacted the *International Criminal Court Act, 2010* (Act No. 11 of 2010)²⁶³ which was assented to by the President on 25 May 2010. This is '[a]n Act to give effect to the Rome Statute of the International Criminal Court; to provide for offences under the law of Uganda corresponding to offences within the jurisdiction of that court, and for connected matters.'²⁶⁴ The Act commenced on 26 June 2010. It incorporates the Rome Statute as schedule 1 to the Act. Section 1 on the application of the Act states that parts III, IV, V and VI of the Act 'apply to any requests made by the ICC regardless of whether the acts under investigation or subject to prosecution are alleged to have been committed before the coming into force of this Act.' This entails that the Act has a retrospective effect on crimes committed in Uganda even before the enactment of the Act itself. Arguably, this provision, although very useful to holding persons responsible for international crimes committed in Uganda, is nevertheless contrary to the purpose of the Rome Statute which does not allow retrospective application as to the punishment of crimes and law.

The purpose of the International Criminal Court Act²⁶⁵ is to give the Rome Statute a force of law in Uganda, to implement obligations assumed by Uganda under the Rome Statute, to make provision in Uganda's law for the punishment of the international crimes of genocide, crimes against humanity and war crimes. Additionally, the law is intended to enable Uganda to assist and cooperate with the ICC in the performance of its functions including investigation and prosecution of persons accused of having committed international crimes under the Rome Statute. The Act is also intended to provide for the arrest and surrender to the ICC of persons alleged to have committed international crimes under the Rome Statute. Further, the law is intended to enable the Ugandan courts to try,

²⁶³ The International Criminal Court Act, 2010 (Act No 11 of 2010), Acts Supplement No.6 to the Ugandan Gazette No.39, 25 June 2010.

²⁶⁴ The International Criminal Court Act, 2010, long title.

²⁶⁵ Sec 2, International Criminal Court Act, 2010.

convict and sentence persons who have committed international crimes under the Rome statute, and also to enforce any sentence imposed or order made by the ICC.²⁶⁶

The crimes within the purview of the Act are defined to mean and include genocide, crimes against humanity, war crimes and the crime of aggression.²⁶⁷ These crimes are defined further under sections 7, 8 and 9 of the Act. The Act further defines an international crime to mean, in relation to the ICC, a crime in respect of which the ICC has jurisdiction under article 5 of the Rome Statute. The Act has the force of law in respect of requests by the ICC to Uganda for assistance, conduct of investigation by the Prosecutor of the ICC, bringing and determination of proceedings before the ICC, enforcement in Uganda of sentences of imprisonment or other measures imposed by the ICC, and making of requests by Uganda to the ICC for assistance.²⁶⁸

Requests for assistance by the ICC relate to many areas: provisional arrest surrender to the ICC of persons wanted by the ICC, identification of persons, taking of evidence, production of evidence, questioning of suspects, service of documents, and facilitating voluntary appearance of persons as witnesses or experts before the ICC.²⁶⁹

The Act imposes a punishment of imprisonment for life to any person who commits such international crimes within Uganda or elsewhere.²⁷⁰ By imposing a sentence to any person responsible for such crimes committed either in Uganda or elsewhere, the Act calls for application of universal jurisdiction over international crimes.

In order for the courts of Uganda to exercise universal jurisdiction over persons for crimes committed outside the territory of Uganda, the Act provides that ‘proceedings may be brought against a person if the person is a citizen or permanent resident of Uganda; the person is employed by Uganda in a civilian or military capacity; the person has committed the offence against a citizen or permanent resident of Uganda; or, the

²⁶⁶ Sec 2 (a) – (i).

²⁶⁷ Sec 3(1), (interpretation clause).

²⁶⁸ Sec 4.

²⁶⁹ Sec 20.

²⁷⁰ Secs 7, 8 and 9.

person is, after the commission of the offence, present in Uganda.’²⁷¹ Hence, the Act imposes conditions of nationality link, territoriality and passive personality. However, in order to exercise jurisdiction over international crimes, it is necessary that the Director of Public Prosecutions gives consent.²⁷²

With regards to official capacity of persons, the Act specifically provides that the existence of any immunity or special procedural rule attaching to the official capacity of any person is not a ground for refusing or postponing the execution of a request for surrender or other assistance made by the ICC.²⁷³ The Act also provides that such immunity is not a ground for holding that a person is ineligible for arrest or surrender to the ICC under this Act. Further, the Act does not recognise immunity as a bar for holding that a person is not obliged to provide the assistance sought in a request by the ICC. Hence, it follows that the Act actually recognises no immunity from prosecution as well as the question of subpoenas that may be issued by courts and the ICC over Ugandans, including state officials of Uganda. This flows from the ‘assistance’ and ‘cooperation’ provisions of the Act.

However, the application of section 25(1) which rejects immunity shall only apply subject to section 24(6) which relates to the responses to be sent to the ICC. Under section 24(6) of the Act, it is clear that ‘if the Minister is of the opinion that the circumstances set out in article 98 of the [Rome Statute] apply to a request for provisional arrest, arrest and surrender or other assistance, he or she shall consult with the ICC and request a determination as to whether article 98 applies.’ This provision governs issues of waiver of diplomatic and state immunity under the Rome Statute. It does not in any way relate to immunity of state officials which apparently is already outlawed by section 25(1) of the Act. Even if the provision of section 24(6) were to apply, it is obvious that the ICC will determine its competence over any person who is supposed to be arrested and surrendered by Uganda to the ICC. Hence, the reading of section 25(1) and 25(2) of the Act suggests that there is no immunity for any person wanted by the ICC. Equally,

²⁷¹ Sec 18.

²⁷² Sec 17.

²⁷³ Sec 25(1).

there is no immunity under the same provisions for any person charged with international crimes in Uganda, under the Act.

What would be the position of article 98 of the Constitution of Uganda which grants immunity to the president vis-à-vis the provision of section 25(1) of the Act which rejects immunity of any person charged with international crimes? Although the constitution is the supreme law of Uganda, it cannot supersede international treaties to which Uganda is a state party and has gone a step further by enacting a domestic law that recognises and incorporates international treaties, such as the Rome Statute. It is imperative that, there will be no question of immunity if the President of Uganda is indicted by the ICC or a domestic court in Uganda on the basis of section 25(1) of the International Criminal Court Act, 2010 as well as article 27 of the Rome Statute, provided the person is charged with international crimes.

The Act has given more power and discretion to the Minister responsible for Justice and the Director of Public Prosecutions. A question would arise as to whether the Director of Public Prosecutions may give consent for the president to be tried under this Act for international crimes, or whether the Minister may issue a certificate for the arrest and surrender of the president to the ICC to be tried for international crimes.

Uganda has gone a milestone in enacting a good law that will in the future be applicable to prosecution and punishment of persons responsible for international crimes committed in Uganda or outside the territory of Uganda. This is a commendable effort by Uganda. It is also a good gesture by referring the situation in Uganda to the ICC. However, there could be concerns that those referred to the ICC are only rebel leaders, but not Ugandan members of the armed forces or government officials who might as well be responsible for the same international crimes as those committed by the rebels in northern Uganda.

5.4 Conclusion

The study has examined the law and practices on immunity of state officials, in relation to the prosecution of international crimes in Africa. The practice is reflected in political, judicial and legal aspects. State practice has been studied because it can represent a continued practice which might form custom on the prosecution of international crimes.

Africa is steadily moving towards prosecuting and punishing persons responsible for international crimes. The study on selected African jurisdictions verifies that in all such states, immunity of state officials is no longer an accepted defence from prosecution and punishment of individuals who commit international crimes. Apart from prosecution, the Ugandan law goes as far as to deny immunity for anyone who is supposed to assist the ICC in terms of testifying and adducing documents to be used as evidence in court during trial. This indicates that a person cannot benefit from immunity if such person has been subpoenaed by the ICC to testify or submit documents to be used as evidence.

It is concluded that some African states have begun, albeit reluctantly, to assert universal jurisdiction over international crimes through the laws implementing the Rome Statute. Consequently, it is expected that any person who commits international crimes will be prosecuted regardless of the official status or otherwise. Although Senegal does not have a clear position on the removal of immunity in its law implementing the Rome Statute, it is implied that since Senegal has subscribed to the Rome Statute, no immunity will bar prosecution and punishment of state officials who are charged with international crimes.

States such as Senegal, Burkina Faso, Kenya, Uganda, Niger and South Africa represent model progressive development on the application of the principle of universal jurisdiction in Africa and rejection of immunity of state officials. This should be emulated by other African states because the laws in such states have the effect of closing impunity gaps. However, the absolute universal jurisdiction would create problems in the application of the law. It would have been better if such laws in Senegal, Burkina Faso and Niger required and emphasised on territoriality and nationality links as is the case for

Uganda, Kenya and South Africa. It is generally observed that in most of the jurisdictions studied here, universal jurisdiction for international crimes is allowed. However, the only concern on incompatibility with international standards, especially the Rome Statute is that some of the laws, particularly those of Senegal, Burkina Faso, Uganda and Niger still provide for retroactive application of the law and punishment for international crimes, contrary to what the Rome Statute provides. It seems that such laws violate the principle of *nulla poena sine lege* as prohibited under the Rome Statute. However, one must not underestimate the relevance of closing impunity gaps for international crimes. Hence, it is equally argued that such laws are progressive in that they provide more than what the Rome Statute requires. This is a good indication that no person can escape from criminal responsibility for international crimes regardless of the period of commission of crimes.

The Senegalese law providing for retroactive application has been the subject of legal proceedings before the Court of Justice of the Economic Community of West African States (ECOWAS). The ECOWAS Court ruled on 18 November 2010 that by enacting laws with retroactive effect over Hissène Habré, Senegal violated article 8 of the Universal Declaration of Human Rights, 1948, article 7(2) of the African Charter on Human and Peoples' Rights, 1981, and article 3(4) of the International Covenant on Civil and Political Rights, 1966, to which Senegal is a state party.²⁷⁴ The position given by the ECOWAS Court has an effect of enforcing human rights of individuals for crimes committed in the past and when such crimes were not punishable by law. Nevertheless, if this position is strictly followed, there could be a possibility of impunity for past crimes. One is tempted to follow the position stated by the Israel courts in the *Eichmann case* that customary international law does not prohibit states from punishing individuals responsible for international crimes even if such crimes were committed previously, where there was no law proscribing such crimes.²⁷⁵

²⁷⁴ See, Arrêt CEDEAO/ECOWAS Ruling: *Habré c. République du Sénégal*, 18 November 2010, paras 1-62. *Affaire Hissein Habré c/République du Sénégal*, Role General No. ECW/CCJ/APP/07/08, Arrêt No. ECW/CCJ/JUD/06/10 du 18 Novembre 2010, La Court de Justice de la Communauté Economique des Etats de l'Afrique de l'Ouest (CEDEAO), Siégeant à Abuja, au Nigeria, ce jeudi 18 Novembre 2010.

²⁷⁵ *Attorney General of Israel v Adolf Eichmann*, Records of Proceedings in the Supreme Court of Israel, Appeal Session 7, Judgment, 29 May 1962, para 8.

The study observes that DRC is still in the process of enacting a law on the punishment of international crimes, and also implementing the Rome Statute. However, an initial study of the different drafts of the Bills on the implementation of the Rome Statute suggests that immunity will not be recognised as a defence for a person charged with international crimes. Unlike the DRC, Uganda has a progressive law on the prosecution of international crimes. It is observed that, immunity or official capacity of an individual is not a ground for refusal to cooperate with the ICC, nor is it a ground for prosecution for a person.

It is appropriate to recommend that for those African states that have not yet enacted laws on international crimes, they should do so in line with the Rome Statute, so that they can be able to use the positive complementarity principle enshrined under the Rome Statute. African states such as Senegal and Burkina Faso have enacted laws that, although punishing international crimes, are still applying absolute universal jurisdiction without emphasising on the nationality and territoriality links. Hence, there is need for reforms to exercise universal jurisdiction based on territoriality and nationality principles.